REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 206 OF 2020

KATIBA INSTITUTE ……PETITIONER
VERSUS
PRESIDENT OF REPUBLIC OF KENYA……1ST RESPONDENT
PAUL KIHARA KARIUKI ATTORNEY GENERAL……2ND RESPONDENT
CHIEF JUSTICE OF THE REPUBLIC OF KENYA……3RD RESPONDENT
AND
JUDICIAL SERVICE COMMISSION……1ST INTERESTED PARTY
KENYA HUMAN RIGHTS COMMISSION……2ND INTERESTED PARTY
KENYA JUDGES AND MAGISTRATES ASSOCIATION……3RD INTERESTED PARTY
KENYA SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ KENYA)……4TH INTERESTED PARTY

JUDGMENT

INTRODUCTION AND BACKGROUND

1. These proceedings arose from the decision made by the High Court in Petition 369 of 2019, *Adrian Kamotho Njenga vs. Attorney General, Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR (Achode PJ, JA Makau & Mwita JJ), in which the court issued the following declaratory orders:

> *"(a) a declaration be and is hereby issued that the President is constitutionally bound by the recommendation made by the 1st Interested Party in accordance with Article 166(1) as read with Article 172(1)(a) of the Constitution on the persons to be appointed as Judges;*
> *(b) a declaration be and is hereby issued that the President's failure to appoint the persons recommended for appointment as Judges violates the Constitution and the Judicial Service Act;*
> *(c) a declaration be and is hereby issued that the continued delay to appoint the persons recommended as judges of the respective*

court is a violation of Articles 2(1), 3(1), 10, 73(1)(a), 131(2)(a), 166(1), 172(1)(a) and 249(2) of the Constitution; and
(d) Costs to the Petitioner."

2. Katiba Institute, the petitioner, then commenced these proceedings through a petition dated 19th June 2020, and filed herein on 22nd June 2020, seeking the following orders:
    (a) An order of prohibition stopping the President of the Republic of Kenya, the 1st respondent, his agents or anyone whatsoever from appointing, gazetting or swearing in a partial list of the 41 nominees, contrary to the recommendation of the Judicial Service Commission, the 1st interested party, on 23rd July and 13th August 2019;
    (b) An order of prohibition stopping the Chief Justice, the 3rd respondent, and the 1st interested party, their agents or anyone whatsoever, from assigning duties to Judges appointed from a partial list of 41 nominees contrary to the recommendation of the 1st interested party on 23rd July and 13th August 2019;
    (c) An order of *mandamus* compelling the 1st respondent to appoint all 41 persons recommended for appointment as Judges by the 1st interested party on 23rd July and 13th August 2019 within 7 days of the order;
    (d) A declaration issuing that, if the 1st respondent defaults on order (c) above, all 41 persons recommended for appointment as Judges by the 1st interested party on 23rd July and 13th August 2019, be deemed duly appointed as Judges to the respective Superior Court for which they were recommended;
    (e) If order (d) above comes into force, the court does issue an order of *mandamus* compelling the 3rd respondent and the 1st interested party to swear into office immediately the 41 persons nominated as Judges by the 1st interested party on 23rd July and 13th August 2019;
    (f) A declaration does issue that the insistence by the 1st respondent that he has powers to appoint only some of

the nominees recommended by the 1st interested party as Judges is unlawful, unconstitutional and an affront to the independence of the 1st interested party and Judicial independence;

(g) A declaration does issue that Paul Kihara Kariuki, the Attorney General, 2nd respondent, having grossly violated Article 10, 73, 75 and 156(6) of the Constitution, is incompetent and unfit to hold office as Attorney General of the Republic of Kenya; and

(h) Costs of this action against the 1st and 2nd respondents personally.

3. The petition was supported by an affidavit sworn by Christine Nkonge, the Executive Director of the petitioner, annexing a copy of a press release by the Attorney General, the judgment of this court delivered on 6th February 2020 in *Adrian Kamotho Njenga vs Attorney General, Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR (Achode PJ, JA Makau & Mwita JJ), and an extract of a newspaper report by Annette Wambulwa, a court reporter. The petition was filed simultaneously with an application for interlocutory orders, which in due course was abandoned.

4. In response, Kenya Human Rights Commission, the 2nd interested party, filed a replying affidavit, sworn by George Kegoro, its Executive Director, on 23rd July 2020, in which it was deposed that, by a statement dated 20th February 2020, the 2nd interested party had raised concern over delay in appointment of the nominated Judges by the 1st respondent, who had allegedly raised objections over the integrity of a number of the nominees. It was also deposed that the 1st interested party had institutionalised a process of vetting candidates for appointment as Judges, involving investigative arms of government, who then became, for that purpose, agents of the 1st interested party, and that there was no place for a vetting process outside that which the 1st interested party had requested or authorised, and thus the 1st respondent could not purport to institute its own vetting process independent of the 1st interested party.

5. It was deposed further that in *Adrian Kamotho Njenga vs Attorney General, Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR (Achode PJ, JA Makau & Mwita JJ) the court issued orders which were still effective which had to be obeyed and complied with, and thus the 1st respondent had violated, with impunity, the Constitution as well as the rights of the citizens of Kenya, especially the right to access to justice. It was lastly deposed that the current Constitution had sought to remedy the problem of lack of independence of the Judiciary by enacting Article 161, and that in addition the 1st, 2nd and 3rd respondents were obligated under the international principles of independence of judges, lawyers and prosecutors, to guarantee the independence of the Judiciary as enshrined in the Constitution, and that this court has jurisdiction to hear and adjudicate this petition, as it is this court's cardinal duty to protect and enforce the Constitution.

6. The 2nd respondent, on his part, filed a response, through an replying affidavit, sworn by Allan Kamau, a State Counsel, on 18th January 2021, in which it was deposed that this petition having been instituted in furtherance to *Adrian Kamotho Njenga vs Attorney General, Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR (Achode PJ, JA Makau & Mwita JJ), the 2nd respondent being aggrieved by that decision had filed an appeal at the Court of Appeal, being Civil Appeal No 286 of 2020. It was deposed further that Christine Nkonge, who swore the supporting affidavit to the petition, was neither an employee nor Secretary of the 1st interested party, and, therefore, she could not depose to matters relating to proceedings of the 1st interested party, without disclosing the source of her information. It was further deposed that the 2nd respondent had raised a preliminary objection on the jurisdiction of the court, to declare the 2nd respondent incompetent and unfit to hold office, but the court did not deal with the issue in its ruling. It was lastly, deposed that currently there are four pending cases in the courts on the same subject matter, that is Nairobi Civil Appeal No 286 of 2020 Attorney General vs. Adrian Kamotho & Others, Nairobi Constitutional Petition No 369 of 2019 Adrian Kamotho Njenga vs Attorney General & Others, Nairobi Constitutional Petition No 246 of 2020 Adrian Kamotho Njenga vs. Attorney General & Others, and the present case Nairobi Constitutional Petition No 206 of 2020 Katiba Institute vs. Attorney General & Others.

7. The 1st and 2nd respondents took out preliminary objections founded on notices dated 13th July 2020 and 16th July 2020, on jurisdiction, which we dealt with in the ruling delivered on 17th December 2020, dismissing both objections.

8. On 3rd June 2021, the 1st respondent gazetted thirty-four of the nominees for appointment, leaving out six of the nominees, one having died. On the same date, the petitioner filed an application, under certificate of urgency, in which it sought order of prohibition, stopping the 1st and 3rd respondents, or their agents, from swearing in the partial list of forty nominees, contrary to the recommendation of the 1st interested party of 2019 and the orders of the court of February 2020. It was also further sought that the 3rd respondent and the 1st interested party, or their agents, be stopped from assigning duties to Judges sworn in from the partial list of forty, contrary to the recommendations of the 1st interested party and the orders of this court. The said application was abandoned on 9th June 2021, to expedite the hearing of the main petition.

9. Two other applications were filed by Kituo Cha Sheria, one dated 8th June 2021, to be joined as interested party, which we dismissed on merit; and another dated 13th July 2021, for admission as *amicus curiae*, which we dismissed because it came in too late in the day. The Kenya National Commission on Human Rights filed an application, dated 6th July 2021, seeking to be joined as interested party. The application was not pursued, and we deemed it as abandoned.

10. On 22nd February 2021, the 1st respondent filed a Notice of Motion, of even date, seeking the following orders:
    (a) This honourable court do certify this application as urgent on the grounds set out in the certificate of urgency filed herewith and that service be dispensed with in the first instance;
    (b) The honourable court be pleased to stay the proceedings in this petition pending the hearing and determination of this application *inter-partes*;
    (c) This honourable court be pleased to stay the proceedings in this petition pending the hearing and determination of the 1st respondent's application/applicants intended appeal in the Court of Appeal;

(d) In the alternative, this honourable court be pleased to stay proceedings in this petition pending the hearing and determination of Civil Appeal No 286 of 2020 (Attorney General vs Adrian Njenga & 3 Others); and

(e) The costs of the application be provided for.

11. The 3rd respondent and the 1st interested party filed their grounds of opposition, to the petition on 21st June 2021, dated 14th June 2021.

12. This court directed, on 24th May 2021, that the application, dated 22nd February 2021, be determined within the petition, and that the two be disposed of by way of written submissions, to be highlighted. The parties complied with filing of written submissions, and the application and the petition were argued on 26th July 2021, at the time all the nominees, save for seven, had been appointed. This judgment, therefore, is in respect to the said application and the petition herein, in respect of the appointment of the remaining surviving six nominees by the 1st respondent.

ANALYSIS AND DETERMINATION

13. After considering the matters raised in the petition, the application dated 22nd February 2021 and the submissions of the parties, we have identified the following issues for determination:

a) Whether this court should stay these proceedings, to await decision of the Court of Appeal, as requested by the 1st respondent in the application, dated 22nd February 2021;

b) Whether the 1st respondent disobeyed this court's orders, seeing that the said orders were merely declaratory;

c) Whether the court should make orders deeming the six remaining nominees as duly appointed Judges of the respective courts without them being formally appointed and sworn by the 1st respondent;

d) Whether the court can order the 3rd respondent and 1st interested party to swear in and assign to the six nominees, after being deemed as appointed as Judges, duties without them being sworn in by the 1st respondent;

e) Whether this court can sanction the 2nd respondent for his advice or conduct as requested; and
f) Whether this court should order personal payment of costs by the 1st and 2nd respondents.

14. We shall consider each of the issues in turn, and we shall recite and analyse the submissions made by the parties within the issues.

Whether this court should stay these proceedings, to await decision of the Court of Appeal, as requested by the 1st respondent in the application, dated 22nd February 2021

15. The application seeks two principal prayers: stay of the proceedings in this petition pending the hearing and determination of the 1st respondent's intended appeal at the Court of Appeal, and in the alternative, stay of proceedings in this petition, pending the hearing and determination of Civil Appeal No. 286 of 2020, the Honourable the Attorney General vs. Adrian Kamotho Njenga & 3 others, arising from *Adrian Kamotho Njenga vs Attorney General, Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR (Achode PJ, JA Makau & Mwita JJ).

16. The grounds on the face of the application, in summary, are that the 1st respondent was aggrieved by the decision of the court, in the ruling of 17th December 2020, declining to strike out his name from the proceedings, despite our finding that there was a misjoinder with respect to him, and proceedings to direct him to file written submissions. He avers that he had filed notices of appeal, and had an arguable appeal on points of law and jurisdiction. It is further averred that the Civil Appeal No. 286 of 2020, The Honourable the Attorney General vs. Adrian Kamotho Njenga & 3 others, raised arguable grounds and had good prospects of success. It is argued that the Court of Appeal, being superior to the High Court was seized of the appeal, on issues similar to those that are before us, a decision in favour of the respondents at the Court of Appeal would render the proceedings herein nugatory, something likely to subject this court to unnecessary embarrassment and mortification. It was stated that the Deputy Registrar of the Court of Appeal had since given directions on the filing of written submissions, and the matter was likely to be listed for hearing before a bench of three Judges of that court

at any time. It was urged that good order and acknowledgment of the hierarchy of courts required the High Court to stay its proceedings to await the outcome of the proceedings at the Court of Appeal.

17. Although the Motion expressed itself to have been supported by the affidavit of Charles W. Gatonye, SC, the affidavit, that was lodged simultaneously with the Motion, was that of Allan Kamau, a State Counsel in the office of the 2nd respondent, sworn on 22nd February 2021. The said affidavit does no more that regurgitate the grounds listed on the face of Motion. Indeed, the averments in that affidavit are but a replica of the said grounds, and we need not recite them in this ruling. The only thing of significance in that affidavit are the annexures to it. There is a Notice of intended Appeal, dated 22nd December 2020, by the 1st respondent, to the ruling of 17th December 2020; a second Notice of Appeal, dated 6th February 2020, by the 2nd respondent, in respect of the judgment in *Adrian Kamotho Njenga vs Attorney General, Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR (Achode PJ, JA Makau & Mwita JJ); a draft Memorandum of Appeal by the 1st respondent to the ruling of this court of 17th December 2020; a Memorandum of Appeal, dated 18th August 2020, that the 2nd respondent lodged at the Court of Appeal in Civil Appeal No. 286 of 2020 (The Honourable the Attorney General vs. Adrian Kamotho Njenga & 3 others), from the decision of the High Court in *Adrian Kamotho Njenga vs Attorney General, Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR (Achode PJ, JA Makau & Mwita JJ). Then there is the email correspondence from the office of the Registrar of the Court of Appeal communicating directions with respect to filing of written submissions for disposal of the subject appeal.

18. The petitioner reacted to the application, by the 1st respondent for stay of execution, by filing grounds of opposition, dated 2nd June 2021. It is argued that the question of stay pending appeal was raised previously, was heard and was determined, and, therefore, it was *res judicata*. It is also argued that the application was a dilatory tactic. It is submitted that the 1st respondent was seeking a discretionary order, while he had refused to file responses and submissions to the main petition. Finally, it is argued that public interest militated against delaying the disposal of the petition.

19. None of the other parties took a position on the application, dated 22nd February 2021, for they did not file any response.

20. The 1st respondent subsequently filed written submissions on that application, dated 24th February 2021, essentially stating that there was an appeal pending and intended appeals, which were *prima facie* arguable, had merit and good chances of success, and which justified, in his view, stay of the proceedings herein. He cites the decisions in *Global Tours & travels Limited* Nairobi HC Winding Up Cause No. 43 of 2000 (Ringera J)(unreported) and *Kenya Power & Lighting Company Limited vs. Esther Wanjiru Wokabi* [2019] eKLR (Githua J), to argue that the draft memorandum of appeal, with respect to the decision of this court of 17th December 2020 and the memorandum of appeal filed in Civil Appeal No. 286 of 2020 (The Honourable the Attorney General vs. Adrian Kamotho Njenga & 3 others), present material demonstrating that the appeals raise arguable points of law and jurisprudence, which were well-founded on the Constitution and legal precedents, and had good prospects of success. It is submitted that this court should down its tools to obviate engaging in a mere academic exercise. It is also argued that the court ought to consider the possibility of exposing itself to embarrassment, by conducting proceedings parallel to those by the Court of Appeal, as conflicting decisions would affront the dignity of judicial processes. *Elias Mwangi Mugwe vs. Public Procurement Administrative Review Board, Kenya Revenue Authority, Trademark East Africa, Attorney General, Webb Fontaine Group FZ – LLZ & Bull Sas Ltd* [2016] eKLR (Odunga J), was cited, where the court stayed the proceedings before it for the sake of preserving the dignity of the judicial process, in view of pending proceedings. *Law Society of Kenya vs. Attorney General & another* [2019] eKLR *(*Maraga CJ&P), Ibrahim, Wanjala, Njoki & Lenaola, SCJJ*)*, was cited, with respect to hierarchy of the courts, and the subordinate court staying its proceedings where the higher court is seized of a similar or related matter.

21. The application was argued on 26th July 2021. Mr Waweru Gatonye stated that the 1st respondent had since filed an appeal at the Court of Appeal, being Civil Appeal No. E221 of 2021, against the ruling of 17th December 2020. He said that the said appeal had been certified urgent, and parties had been directed to file written submissions, and the Court of Appeal could pronounce itself on the matter at any time. He argued that

there could be conflict with decisions of this court and the Court of Appeal, and that that could lead to embarrassment to both courts.

22. On his part, Mr. Bitta, for the 2nd respondent, supported stay of proceedings. Mr. Ochiel for the petitioner, opposed the application for stay. He took the view that whatever the Court of Appeal would decide on the matters before it, the High Court would, no doubt, comply. The other parties did not express themselves, one way or another, on the matter.

23. The 1st respondent sought stay on the basis of pendency of appellate proceedings. There are two aspects to it. One, is with respect to an appeal by the 1st respondent himself to the Court of Appeal, with respect to orders that touched on his joinder as a party to these proceedings; and, two, the appeal filed by the 2nd respondent in Civil Appeal No. 286 of 2020 (The Honourable the Attorney General vs. Adrian Kamotho Njenga & 3 others) arising from the decision in *Adrian Kamotho Njenga vs Attorney General, Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR (Achode PJ, JA Makau & Mwita JJ). We shall address the two in turn.

24. Initially, the 1st respondent only had notices of appeal to show of his effort to move the appellate court, and appeared to rely more on the pendency of the appeal by the 2nd respondent in Civil Appeal No. 286 of 2020 (The Honourable the Attorney General vs. Adrian Kamotho Njenga & 3 others), but later he indicated that he had since filed his own appeal, being Civil Appeal No. E221 of 2021. That was initially communicated through a letter by his advocate, Mr. Waweru Gatonye, dated 22nd July 2021, addressed to the petitioner, and copied to the court. Mr Waweru Gatonye also adverted to it in court on 26th July 2021 when he argued his stay application. A copy of the memorandum of appeal that was lodged in the appeal in Civil Appeal No. E221 of 2021 was not placed before us, and, therefore, we cannot tell immediately the nature of grounds advanced in the appeal. We can only presume that they are the same as those set out in the draft memorandum of appeal attached to the affidavit of Allan Kamau, sworn on 22nd February 2021, in support of the stay application. The issues raised in that draft memorandum of appeal turn largely on the question of the immunity of the 1st respondent from civil proceedings arising from actions done by him in official capacity, and his joinder as a party to the proceedings. The only other issue raised is that the court had

failed to take cognisance of the pendency of the appeal in Civil Appeal No. 286 of 2020 (The Honourable the Attorney General vs. Adrian Kamotho Njenga & 3 others).

25. The question then that we have to grapple with, with respect to pendency of Civil Appeal No. E221 of 2021, is whether we should stay proceedings herein to await the outcome of those appellate proceedings. The principal complaint by the 1st respondent in his appeal, if it is based on the grounds in the draft memorandum of appeal, is the question of his immunity and misjoinder in the instant proceedings. The petition before us does not turn on the immunity of the 1st respondent, that arose as a preliminary issue, which we disposed of, by holding that there was a misjoinder with respect to him. That question is now not before us. His complaint now appears to be that we should have gone further and ordered his removal as a party to the proceedings. Declaring that there was misjoinder, so far as he was concerned, was, in our view, sufficient. It was left open to him to either exit the proceedings, or stay on as a nominal party, if he so wished. He did not exit, and has stayed on, and he appears keen on participating in the proceedings, as shall become clear in the following paragraphs. The issue of his joinder is no longer before us. The third issue raised is that we have not taken cognisance of the pendency of the appeal in Civil Appeal No. 286 of 2020 (The Honourable the Attorney General vs. Adrian Kamotho Njenga & 3 others). Having found on 17th December 2020 that there was a misjoinder of the 1st respondent, the 1st respondent ideally should have exited the proceedings, and left the 2nd respondent to represent him. But since the orders sought in the petition are against him, his presence in the proceedings does not in any way prejudice him.

26. Even if the issues of immunity and misjoinder were before us, the decision in *David Ndii & others vs. Attorney General & others* (2021) eKLR (J. Ngugi, Odunga, Ngaah, Mwita & Matheka JJ), took a position similar to ours of 17th December 2020, but even went further than us and stated that the 1st respondent was not immune to litigation, where there were allegations of violation of the Constitution by him. On appeal, the Court of Appeal in *David Ndii & others vs. Attorney General & others* (2021) eKLR (J. Ngugi, Odunga, Ngaah, Mwita & Matheka JJ) and *Independent Electoral & Boundaries Commission & 4 others vs. David Ndii & 82 others; Kenya Human Rights Commission & 4 others (Amicus Curiae)* [2021] eKLR

(Musinga P, Nambuye, Okwengu, Kiage, Gatembu, Sichale & Tuiyott JJA), affirmed that position, and said that the 1st respondent does not enjoy absolute immunity against civil proceedings during tenure of office and neither is he is above the law, he is subject to the Constitution; and, if he, in execution of his constitutional functions, violates the Constitution, he can be sued in his governmental or official capacity through the 2nd respondent, and that such proceedings are usually instituted by way judicial review or a constitutional petition. See also *Kenya Human Rights Commission & another vs. Attorney General & 6 others* [2019] eKLR (Musinga, Gatembu & Murgor JJA). That would then mean that the two issues, in our view, if raised on appeal, have little chances of success, in terms of the Court of Appeal arriving at a contrary decision.

27. The alternative prayer for stay, is pegged on the pendency of Civil Appeal No. 286 of 2020 (The Honourable the Attorney General vs. Adrian Kamotho Njenga & 3 others), and the 1st respondent is saying that that appeal, which arose from a suit, apart from the instant one, and to which the 1st respondent was not party, should be basis for stay of the instant proceedings. Our response to this prayer, is related to what we have already said above. Our ruling of 17th December 2020 arose from complaints by the 1st respondent, that he had wrongly been made a party to the instant proceedings, for he enjoyed immunity and should not have been sued, and we granted that plea, by finding that there was misjoinder, and that effectively should have caused him to exit the proceedings. We find it curious that the 1st respondent is still making applications, where he is still advancing a substantive case instead of leaving it entirely to the 2nd respondent, who he is arguing is the correct and proper party to advance his case. He is either a party who is wrongly joined to these proceedings, and who should be out, or he is an active party who is aggressively filing applications, inviting the court to stay the instant proceedings, so that an appeal that has been filed by another party, arising from proceedings in which he was not even a party, can be heard and determined. He cannot approbate and reprobate at the same time.

28. Having found that the matter before us was not *res judicata Adrian Kamotho Njenga vs Attorney General, Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR (Achode PJ, JA Makau & Mwita JJ) at the High Court, the issues raised in Civil Appeal No. 286 of 2020 (The Honourable the Attorney General vs. Adrian Kamotho Njenga & 3 others)

cannot affect the substantive orders sought in the instant petition. The orders made in *Adrian Kamotho Njenga vs Attorney General, Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR (Achode PJ, JA Makau & Mwita JJ) were declarations on appointment, while the issues raised in the instant petition are in respect of partial appointment, what the petitioner calls "sherry picking," and generally about enforcement of the decision in *Adrian Kamotho Njenga vs Attorney General, Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR (Achode PJ, JA Makau & Mwita JJ).

29. Looking at the matter globally, we are of the persuasion that there is no merit in the Motion, dated 22nd February 2021, and we hereby decline the plea by the 1st respondent to stay these proceedings on account of the reasons given in his application.

Whether the 1st respondent disobeyed the orders in *Adrian Kamotho Njenga vs Attorney General, Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR (Achode PJ, JA Makau & Mwita JJ), seeing that the said orders were merely declaratory

30. In the petition, the petitioner does not specifically plead disobedience of the orders of the court by the 1st respondent, but of refusal to appoint all the nominees that the 1st interested party had recommended. It is pleaded that the 1st respondent refused to gazette all the nominees, despite a court order, and that no appeal had been proffered against the order, there was no stay of execution obtained, but nevertheless, the filing of a notice of appeal by the 2nd respondent amounted to a ploy to delay the appointment process, and was in contempt of court, a constitutional violation and neglect of duty. It is averred that the refusal or failure to comply with the judgment undermined the authority of the court, denied the nominees rights to court's justice and fair trial guarantees, and was a continuing violation of the Constitution. The said averments are echoed in the Motion, dated 19th June 2020.

31. In its written submissions, the petitioner argues that the 1st respondent cannot lawfully refuse to appoint all the nominees recommended by the 1st interested party, and cites *Adrian Kamotho Njenga vs. Attorney General, Judicial Service Commission & 2 others*

(Interested Parties) [2020] eKLR (Achode PJ, Makau & Mwita JJ), where the court declared that the 1st respondent was constitutionally bound by the recommendations made by the 1st interested party in accordance with Articles 166(1) and 172(1)(a) of the Constitution, the failure violated the Constitution and the Judicial Service Act, No. 1 of 2011, and the continued delay in making the appointments amounted to violation of Articles 2(1), 3(1), 10, 73(1)(a), 131(2)(a), 166(1), 172(1)(a) and 249(2) of the Constitution. It is submitted that the 1st respondent was constitutionally duty-bound to appoint the nominees in accordance with the declarations made by the court, and that his failure to do so amounted to disobedience of the orders, which did not bode well for rule of law in the country, for it set a bad example to the general populace, and could encourage a culture of disobedience of court orders.

32. The 1st respondent has not replied to the petition, neither has he filed written submissions on the petition, which is understandable, given that the court had previously ruled that he had been mis-joined to the matter and was a wrong party, although the court did not go on to remove him from the proceedings.

33. The 2nd respondent filed a further affidavit, sworn by Allan Kamau, on 23rd July 2021, bringing to the attention of the court a decision made by the Supreme Court, in *Kenya Vision 2030 Delivery Board vs. Commission on Administrative Justice & 2 others* [2021] eKLR (Mwilu Ag CJ & Ag P, Ibrahim, Wanjala, Njoki & Lenaola SCJJ), on recommendations by independent commissions, like the 1st interested party, to public bodies, like the 1st respondent.

34. In his written submissions, the 2nd respondent submits that the petition is based on an erroneous factual premise of the nature and orders made in *Adrian Kamotho Njenga vs. Attorney General, Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR (Achode PJ, Makau & Mwita JJ). It is argued that the orders made did not direct the 1st respondent to take or not take action, but were declaratory orders. It is also submitted that there was a false premise that the 2nd respondent had not appealed against those declaratory orders in *Adrian Kamotho Njenga vs. Attorney General, Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR (Achode PJ, Makau & Mwita JJ), for he lodged Nairobi Court of Appeal Civil Appeal No. 286 of 2020. It is

submitted that the act of filing appeal against the orders in *Adrian Kamotho Njenga vs. Attorney General, Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR (Achode PJ, Makau & Mwita JJ) did not amount to contempt of court.

35. The reaction by the 3rd respondent and the 1st interested party took the form of grounds of opposition, dated 14th June 2021, in which they have not responded to the issues raised concerning the refusal or failure to comply with or disobedience, by the 1st respondent, of the court orders made in *Adrian Kamotho Njenga vs. Attorney General, Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR (Achode PJ, Makau & Mwita JJ).

36. During the highlighting of the written submissions filed by the parties, the petitioner submitted that the 1st respondent was bound by Article 166(1) of the Constitution, to appoint Judges, in accordance with recommendations by the 1st interested party. It was submitted that the court, in *Adrian Kamotho Njenga vs. Attorney General, Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR (Achode PJ, Makau & Mwita JJ), had, in the judgment of 6th February 2020, stated that the 1st respondent had no mandate to vary the recommendations made by the 1st interested party, and he had become bound constitutionally by the recommendations of the 1st interested party to make all the appointments. It was submitted that the 1st respondent initially refused to appoint all the forty-one nominees, he then made appointments, leaving out the surviving six nominees. It was submitted that that conduct was unconstitutional. Etienne Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights," [1994] *10 SAJHR* 31, was cited, for the proposition that the Constitution creates a "culture of justification," where every exercise of power has to be justified on reasons. It was submitted that the 1st respondent had not given any reasons for his refusal to make the appointments. It was further submitted that the conduct by the 1st respondent was not new, and the decision, in *Law Society of Kenya vs. Attorney General & another vs. Mohamed Abdullahi Warsame & another (Interested Parties)* [2019] eKLR (Mwita J), was cited, concerning the decision by the 1st respondent not to appoint Warsame JA, who had been elected representative of the Court of Appeal to the 1st interested party. In that case the High Court held that the 1st respondent was a product of the Constitution and the law, and that he was a servant

of the law, and that he was bound by the Constitution and the law, and in the end the court made orders that enabled Warsame JA to assume his position at the 1st interested party. It also cited the decision by the Court of Appeal of Samoa, in *Attorney General vs. Latu* [2021] WSCA 6 (Perese CJ, Tuatagaloa & Warren JJ), with regard to refusal to swear Speaker of Parliament and of newly elected Members of Parliament in that country, and the court declared that the Head of State, in that country, had no power which was above or over the Constitution, to refuse to do what the Constitution mandated him to.

37. It was submitted that the doctrine of rule of law was about accountability under the law, it bound the 1st respondent, and the law included decisions of the court, and, therefore, it was about obedience of decisions of the court. The petitioner further submitted that, in *Kalpana Rawal & 2 others vs. Judicial Service Commission & 2 others* [2016] eKLR (Mutunga CJ&P, Ibrahim, Ojwang, Wanjala & Njoki SCJJ), the Supreme Court had declared that Article 10 of the Constitution was a peremptory constitutional injunction, which applied to every exercise of constitutional mandate. Ron Fuller, *Internal Morality of the Law*, 1964, was cited, for the proposition that failure of confluence between the announced decisions and their demonstration in action resulted in a bad system in law. It was emphasised that there was reciprocity as between the citizens and the government on obedience of the law, and when government failed to obey the law, then citizens were not obliged to obey the law. The petitioner went on to argue that the refusal by the 1st respondent to appoint the judges was tyrannical and inconsistent with the rule of law. John Locke, *Second Treatise of Government*, was quoted on tyranny, where it was defined as the employment of power for private advantage. It was submitted that the conduct of disobeying court orders stood to be rebuked, and that it was in public interest to send out a message that court orders cannot be ignored, and that, because of the status of the 1st respondent, he has an obligation to obey court orders. It was submitted that the 1st respondent had led in defying court orders and the Constitution. It was asserted that the former President of South Africa, Jacob Zuma, was serving a jail term for disobeying the law, and that no one was above the law, nor above the Constitution. See *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State vs. Zuma & others* (CCT 52/210 [2021] ZACC 18 (29th June 2021) (Khampepe

Ad CJ, Jafta, Madlanga, Majiedt, Mhlantla, Theron, Tshiqi JJ, Pillay & Tlaletsi Ag JJ). It was argued that the refusal by the 1st respondent to make the appointments was unconstitutional, and the court must declare so. It was contrary to the rule of law, and was, instead, more akin to rule by men. See the *Miguna vs. Fred Matiang'i, Cabinet Secretary Ministry of Interior and Coordination of National Government & 8 others* [2018] eKLR (Odunga J). The court was urged to speak for the Constitution and declare the unconstitutionality, where it has occurred.

38. On the issue of disobedience of court orders, the 1st respondent argued that the orders sought to be enforced were declaratory, and that there could be no disobedience of such orders by the 1st respondent.

39. The 2nd respondent argued that an interpretation by the High Court was not final, for there is a constitutional right to seek review of the interpretation, at the Court of Appeal and the Supreme Court, by virtue of Articles 163 and 164 of the Constitution. It was asserted that invocation of that constitutional right cannot be contempt of court or disobedience of the order of the court. It was argued that the 1st respondent was not satisfied with the outcome at the High Court, and he had approached the Court of Appeal for review. It was submitted that the High Court had been made aware of the appeal. It was argued that the High Court had not given injunctive orders against the 1st and 2nd respondents, for the orders made were declaratory, premised on the interpretation by the High Court, and, therefore, the question of disobedience of an interpretative decision of the High Court did not arise. It was asserted that it would be contradictory for the High Court to find that the declarations were final, and the 1st respondent had disobeyed those orders. It was argued that *Law Society of Kenya vs. Attorney General & another vs. Mohamed Abdullahi Warsame & another (Interested Parties)* [2019] eKLR (Mwita J) was distinguished in *Adrian Kamotho Njenga vs. Attorney General, Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR (Achode PJ, Makau & Mwita JJ), where a distinction was drawn between re-appointment of commissioners to the 1st interested party and appointment of Judges. *Kenya Vision 2030 Delivery Board vs. Commission on Administrative Justice & 2 others* [2021] eKLR (Mwilu Ag CJ & Ag P, Ibrahim, Wanjala, Njoki & Lenaola SCJJ) was cited to make the point that the recommendations of independent constitutional commissions, like the 1st interested party, were not binding on public bodies, like the 1st

respondent. It was submitted that whatever the Supreme Court states in any decision becomes the law, by dint of Article 163(7) of the Constitution, and it should bind all the courts subordinate to it. It was argued that in view of that decision, this court should hold back its decision on the petition to await outcome of the appeal at the Court of Appeal.

40. The other parties did not make any submissions on the matter of disobedience of the orders of the court in *Adrian Kamotho Njenga vs. Attorney General, Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR (Achode PJ, Makau & Mwita JJ) by the 1st respondent.

41. What we then have to consider is whether the orders made, in *Adrian Kamotho Njenga vs. Attorney General, Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR (Achode PJ, Makau & Mwita JJ), are capable of disobedience, being declaratory, and whether, if we find them to be capable of being disobeyed, the 1st respondent had disobeyed them.

42. The nearest definition of what amounts to a declaratory judgment or order that we got with respect to civil proceedings is in *Johana Nyokwoyo Buti vs. Walter Rasugu Omariba (suing through his attorney Beutah Onsomu Rasugu & 2 others)* [2011] eKLR (Omolo, Githinji & Aganyanya JJA), where the court said as follows:

> *"A declaration or declaratory judgment is an order of the court which merely declares what the rights of the parties to the proceedings are and which has no coercive force – that is, it does not require anyone to do anything. It is available both in private and public law save in judicial review jurisdiction at the moment. The rule gives general power to the courts to give a declaratory judgment at the instance of a party interested in the subject matter regardless of whether or not the interested party had a cause of action in the subject matter."*

43. We take the view that there can be general declarations, which require no action, like in *Johana Nyokwoyo Buti vs. Walter Rasugu Omariba (suing through his attorney Beutah Onsomu Rasugu & 2 others)* [2011] eKLR (Omolo, Githinji & Aganyanya JJA, where the declaration

was that a decision of a tribunal was unlawful because it had been made without jurisdiction, which meant that no action was required. But there can be specific declarations, which require action to be taken by a party to which it is directed, such as in declaratory suits in subrogation cases.

44. What is obedience and disobedience of a judgment or order? In ordinary everyday language, obedience, as defined in the *Concise Oxford English Dictionary*, Twelfth Edition, Oxford University Press, 2011, refers to compliance with an order or law or submission to the authority of another. Disobedience, therefore, would be the failure or refusal to be obedient to an order or law, or to comply with such order or law, or to submit to some authority. *Black's Law Dictionary*, Tenth Edition, Thomson Reuters, 2014, defines obedience as compliance with a law, command, or authority. Disobedience would be the converse, the refusal to do what one is commanded to do, or to disregard or ignore authority or commands of an authority, or the refusal to obey a rule or law, or to break such rule or law.

45. Is a declaratory judgment or order capable of being disobeyed? Obedience of a judgment or order may depend, largely, on its enforceability. It was observed, in *Chief RA Okoya and Ors vs. S Santilli and ors* (SC 200/1989) [1990] 82 (23rd March 1990) (Nnamani, Uwais, Karibi-Whyte, Kawu and Agbaje JJSC), that whereas an executory judgment declares respective rights of parties, and then proceeds to order the defendant to act in a particular way, by either paying damages, or refraining from interfering with the rights of the plaintiff, and that such rights are enforceable by execution, if disobeyed; declaratory judgments merely proclaim existence of a legal relationship, and do not contain any order which may be enforced against the defendant. Of course, right correlates to duty, and the position stated in the above matter includes declaration of duties and obligations.

46. Declaratory orders are popularly made with respect to proceedings against government or its agencies or officials, on the presumption of the high improbability that a government officer would not set himself in defiance of a judgment or order of the court, in the belief that the defendant or government agency or official is a responsible authority, and it is thought inconceivable that the declaratory order would not result in the plaintiff obtaining his rights. Put simply, it is assumed that

the government or its agencies or officials are responsible authorities, and it is hoped that they would abide by or obey the declaratory judgment or order. Of course, government agencies, entities and officials often treat such declaratory judgments or orders with contempt and disdain, thereby forfeiting their right to be regarded as responsible authority, and when that happens a suit to enforce the declaratory order becomes necessary. See *Webster vs. Southwark London Borough Council* [1983] QBD 698 (Forbes J) and *Chief RA Okoya and Ors vs. S Santilli and ors* (SC 200/1989) [1990] 82 (23rd March 1990) (Nnamani, Uwais, Karibi-Whyte, Kawu and Agbaje JJSC).

47. The declaratory judgment or order declares the rights and duties of the parties, so that the rights of the claimant are declared as against the government or its agency or official, and the corresponding duty of the government or its agencies or officials is equally declared, with respect to giving the claimant those declared rights or actualizing them. The presumption then would be that a responsible government or its agency or official would harken to the declaratory judgment or order by giving the claimant his right, through discharging the duty or obligation pronounced or declared by the court, as burdening the government or its agency or official. In the declaratory order, the court informs government or its agency or official what the law says on the subject-matter, with regard to rights of some party, and points out the duties of the government or its agency or official with respect to the same. The order may not be specific, in terms of being couched in language that directs the government or its agency or official to do or refrain from doing a specific thing, but is it is usually plain enough on what is expected of the government or its agency or official. The failure or refusal or disregard by government or its agencies or officials, to harken to a declaratory judgment or order, is a defiance or disobedience of the declaratory judgment or order, as it would amount to refusal to do or refrain from doing that which the court had declared to be right or wrong. The answer, therefore, to the question whether a declaratory judgment or order can be disobeyed, is in the affirmative.

48. Both the petitioner and the 2nd respondent, during submissions made reference to contempt of court. In our understanding, the petitioner was using contempt of court interchangeably with disobedience of the declaratory orders. The 2nd respondent, on the other hand, used the term

to mean the same thing. The issue of contempt of court orders is not before us. It is not one of the prayers sought in the petition, and we shall leave it at that.

49. The definition in *Johana Nyokwoyo Buti vs. Walter Rasugu Omariba (suing through his attorney Beutah Onsomu Rasugu & 2 others)* [2011] eKLR (Omolo, Githinji & Aganyanya JJA) was given pre-2010 Constitution, and dwelt on declarations in general civil cases, and not constitutional petitions. The Constitution 2010, at Article 23(3)(a), now provides declaration as a relief in constitutional petitions. Declaratory reliefs, as provided for in the Constitution, are not just about rights, but are inclusive of declaration of duties and obligations. Most of the litigants who move the court under Article 22 claim that their rights have been violated, which allegation would mean that they claim a failure to perfume duties by those against whom the petition is brought.

50. The orders, that are the subject of these proceedings, and that were made in *Adrian Kamotho Njenga vs. Attorney General, Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR (Achode PJ, Makau & Mwita JJ), are declaratory in nature, save for the order on costs. The said orders state as follows:

> *"(a) a declaration be and is hereby issued that the President is constitutionally bound by the recommendation made by the 1st Interested Party in accordance with Article 166(1) as read with Article 172(1)(a) of the Constitution on the persons to be appointed as Judges;*
> *(b) a declaration be and is hereby issued that the President's failure to appoint the persons recommended for appointment as Judges violates the Constitution and the Judicial Service Act;*
> *(c) a declaration be and is hereby issued that the continued delay to appoint the persons recommended as judges of the respective court is a violation of Articles 2(1), 3(1), 10, 73(1)(a), 131(2)(a), 166(1), 172(1)(a) and 249(2) of the Constitution; and*
> *(d) Costs to the Petitioner."*

51. The above were declarations of rights and duties, which were not general, but specific, issued as a relief under Article 23(3)(a) of the Constitution, which required the 1st respondent to take action, within

fourteen days, in line with 1st interested party's recommendations, according to *Law Society of Kenya vs. Attorney General & 2 others* [2016] eKLR (Mwongo PJ, W Korir, M. Ngugi, Odunga and Onguto JJ), which, therefore, created a constitutional mandatory duty upon the 1st respondent, to act, as provided for under Article 131, as read together with Article 166(1)(b), of the Constitution. Our understanding of Article 23(3)(a) is that declaratory orders make clear both rights and duties of parties, and where duties are declared or made clear then there is an obligation to act upon the order. A declaratory order is intended to make clear to the parties what their constitutional rights and duties are, if they were unclear before, once the constitutional or statutory duties or obligations are made clear, by the declaratory order, there would be an expectation that the bearer acts. Whereas declaration of a right may require no action thereafter, the declaration of duty shall require that the bearer of the duty to discharge the same, or to refrain or stop from so acting, if he was acting wrongly or in abuse of the duty.

52. So, are the declaratory orders made, in *Adrian Kamotho Njenga vs. Attorney General, Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR (Achode PJ, Makau & Mwita JJ), capable of being disobeyed? We have found and held that declaratory orders are, generally, capable of being disobeyed, to the extent that some compliance is expected with respect to some of them, and to the extent the party against whom they are directed has ignored or disregarded or failed to do what the orders expect him to do or refrain from doing. The orders made in *Adrian Kamotho Njenga vs. Attorney General, Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR (Achode PJ, Makau & Mwita JJ) are no exception. The court made three declarations in the matter. We shall examine each one of them in turn.

53. The first declaration is that the 1st respondent was constitutionally bound by the recommendation, by the 1st interested party, under Article 166(1) and 172(1)(a) of the Constitution, on the persons recommended for appointment as Judges. This order is about right of access to justice by the citizens, for which the recommendations were made, with a corresponding duty on the part of the 1st respondent to facilitate the right by making the appointments. At the secondary level, the order declares a right in favour of the persons recommended for appointment by the 1st interested party. The recommendation by the 1st interested party granted

them a right to that appointment. The duty to appoint is imposed by Article 166(1)(b) of the Constitution, and it arises automatically upon a recommendation for appointment being made by the 1st interested party, as was made clear in *Law Society of Kenya vs. Attorney General & 2 others* [2016] eKLR (Mwongo PJ, W Korir, M. Ngugi, Odunga and Onguto JJ). At the same time, the right to be appointed accrues, under the Constitution, once the recommendation is made by the 1st interested party. The declaration made clear what the constitutional obligations of the 1st respondent are as regards the appointments. The declaration merely restated the constitutional obligations, as the court, in *Law Society of Kenya vs. Attorney General & 2 others* [2016] eKLR (Mwongo PJ, W Korir, M. Ngugi, Odunga and Onguto JJ), had already made clear the position. The 1st respondent, as a responsible authority, by dint of his position, and the oath that he took under Article 131(2) of the Constitution, upon ascending to that office, to uphold the Constitution, is expected to abide by the declaration, and act in accordance with what the Constitution commands him, under Article 166(1) as read with Article 172(1)(a). It is a constitutional command, the court merely restated what the Constitution says on the subject. So, if the 1st respondent fails or omits or decides to ignore or disregard, or, to use the language in *Webster vs. Southwark London Borough Council* [1983] QBD 698 (Forbes J), refuse to abide by what the Constitution says, as declared by the court, there would be disobedience of the said declaratory order.

54. The second order declares that the failure, by the 1st respondent, to appoint the persons recommended for appointment as Judges, violated the Constitution and the Judicial Service Act. This was a declaration with respect to discharge of a constitutional and statutory duty by the 1st respondent, and it merely restates the 1st respondent's duty accruing from the provisions of Articles 166(1) and 172(1)(a) of the Constitution, and that that failure to comply with the said provisions amounted to a violation of the Constitution. There is a duty on the part of the 1st respondent to respect, uphold and safeguard the Constitution, under Article 131(2)(a). By violating the Constitution, in refusing to make the appointment as envisaged, would mean that the 1st respondent would not be upholding the Constitution that he had sworn, upon ascension into office, to protect and respect. The declaratory order serves as a reminder to him, and an injunction, that he should obey and respect the Constitution, and do duty as required of him by it. Failure to act upon this

declaration being made, would mean that the violation continues, and that would amount to a continued disobedience of the Constitution, and by extension, the declaratory orders made by the court.

55. The last declaration is that the continued delay to appoint the persons recommended by the 1st interested party, for appointment as Judges, was a violation of Articles 2(1), 3(1), 10, 73(1)(a), 131(2)(a), 166(1), 172(1)(a) and 249(2) of the Constitution. Like the second declaration, it merely states a violation, that by continuing to defy the Constitution and statute, by delaying the appointments, the 1st respondent was violating other provisions of the Constitution. We reiterate that the 1st respondent, and, indeed, no one else, is above the Constitution and the law. (See *David Ndii & others vs. Attorney General & others* (2021) eKLR (J. Ngugi, Odunga, Ngaah, Mwita & Matheka JJ) and *Independent Electoral & Boundaries Commission & 4 others vs. David Ndii & 82 others; Kenya Human Rights Commission & 4 others (Amicus Curiae)* [2021] eKLR (Musinga P, Nambuye, Okwengu, Kiage, Gatembu, Sichale & Tuiyott JJA)). The office the 1st respondent holds is a creation of the Constitution, and he is himself subject to that Constitution, a continued violation of numerous provisions of the Constitution, would suggest disobedience of the constitutional demands, as captured in the declaration that reminds the 1st respondent of his obligations under the Constitution.

56. Has the 1st respondent disobeyed or failed to obey the orders made in *Adrian Kamotho Njenga vs. Attorney General, Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR (Achode PJ, Makau & Mwita JJ)? At the time of filing the petition, none of the nominees recommended for appointment had been sworn in by the 1st respondent, contrary to the first declaration, which meant that he was still under a duty under the Constitution to make the appointments. There was, therefore, disobedience of that order. At the time we heard the petition, on 26th july 2021, the 1st respondent had just appointed and sworn in thirty-four of the nominees, leaving six out. The fact that the six still await formal appointment by the 1st respondent, would mean that the 1st respondent has not fully complied with the Constitution, as required of him by the declaratory judgment. The delay continues, and, therefore, the disobedience is subsisting.

57. The declarations, in *Adrian Kamotho Njenga vs. Attorney General, Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR (Achode PJ, Makau & Mwita JJ), are not new. Similar declarations had been made by High Court, in *Law Society of Kenya vs. Attorney General & 2 others* [2016] eKLR (Mwongo PJ, W Korir, M. Ngugi, Odunga and Onguto JJ), to the effect that upon submission, by the 1st interested party to the 1st respondent, of names of persons to be appointed Judges, the 1st respondent was under a mandatory constitutional duty to appoint, swear-in and gazette the said persons as Judges without unreasonable delay, and that a refusal to do so was unconstitutional. That bench held that the appointment ought to be made within fourteen days. That determination was not appealed against. It declared the law on the duty on the part of the 1st respondent, with respect to Judicial appointments, which the court, in *Adrian Kamotho Njenga vs. Attorney General, Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR (Achode PJ, Makau & Mwita JJ), similarly declared. The existence of the decision in *Law Society of Kenya vs. Attorney General & 2 others* [2016] eKLR (Mwongo PJ, W Korir, M. Ngugi, Odunga and Onguto JJ), since 2016, would mean that the 1st respondent was aware of his obligation under the Constitution, with respect to appointment of Judges, when the second decision, in *Adrian Kamotho Njenga vs. Attorney General, Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR (Achode PJ, Makau & Mwita JJ), was being made.

58. We reiterate *Webster vs. Southwark London Borough Council* [1983] QBD 698 (Forbes J), and state that the 1st respondent disobeyed or failed to abide by the declaratory orders in *Adrian Kamotho Njenga vs. Attorney General , Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR (Achode PJ, Makau & Mwita JJ), and the remedy available, in the face of such disobedience, is the enforcement cause herein, going by *Chief RA Okoya and Ors vs. S Santilli and ors* (SC 200/1989) [1990] 82 (23rd March 1990) (Nnamani, Uwais, Karibi-Whyte, Kawu and Agbaje JJSC).

Whether the court should make orders deeming the six remaining nominees as duly appointed Judges of the respective courts without them being formally appointed and sworn by the 1st respondent

59. On whether this court should issue orders deeming the six nominees as appointed without being sworn in by the 1st respondent, the

petitioner has submitted that the 1st respondent cannot lawfully refuse or choose not to appoint Judges where the 1st interested party has recommended and the court has ordered him to make the appointments. It cites the decision in *Council of Governors & 47 Others vs. Attorney General & 3 Others (Interested Parties) Katiba Institute & 2 Others (Amicus Curiae)* [2020] eKLR (Maraga CJ&P, Ibrahim, Wanjala, Njoki & Lenaola SCJJ)**,** where the it was stated:

> *"All State organs and State officers must understand that the law comprises not only the provisions of the Constitution and Acts of Parliament but also decisions of Superior Courts. It is trite that until set aside, court decisions have to be obeyed by all and sundry: court orders are part of the law of this country and must be obeyed by all."*

60. The petitioner submits also that the national values and principles of governance, listed in Article 10 of the Constitution, bind all State organs, as well as everyone who applies or interprets the Constitution or any law or performs any public duty. They cite the case of *Kalpana H. Rawal & 2 others vs. Judicial Service Commission & 2 others* [2016] eKLR (Mutunga CJ&P, Ibrahim, Ojwang, Wanjala, Njoki SSJJ), for the contention that the Supreme Court affirmed the status of Article 10 of the Constitution as being a peremptory constitutional injunction. The petitioner further submits that the refusal by the 1st respondent to appoint the six nominees on undisclosed adverse reports strips all meaning of the transparency requirements under Articles 10 and 73 of the Constitution, and violates the rule of law. Accordingly, the petitioner contends that the conduct of the 1st respondent is not only arbitrary and capricious, but also dangerous to the Kenyan legal system as a country governed by the rule of law as opposed to the "rule of man." Relying on Lon Fuller, *The Morality of the Law*, Yale University, 1964, 39, the petitioner submits that the 1st respondent's conduct is a classic case of "failure of congruence between the rules as announced and their actual administration." According to Fuller, the task of preventing a discrepancy between the law, as declared and as actually administered, is entrusted in the Judiciary.

61. The petitioner also submits that the 1st respondent's impunity is the kind of tyranny that John Locke cautioned against, in his *Second Treatise of Government*, Jonathan Bennett, 2017, 65, when he said:

> "Tyranny is the exercise of power to which nobody can have a right. That is what happens when someone employs the power he has in his hands, not for the good of those who are under it but for his own private individual advantage. It is what happens when a governor, however entitled to govern, is guided not by the law but by his own wants, and his commands and actions are directed not to preserving his subjects' properties but to satisfying his own ambition, revenge, covetousness or any other irregular passion."

62. The petitioner submits that the refusal by the 1st respondent to make the appointments has the purpose and effect of extending his appointment powers beyond constitutional limits with an adverse impact on judicial independence. It contends that the conduct by the 1st respondent has created an unconstitutional state of affairs and that the final orders of the court should be targeted at eliminating this state of affairs through effective measures aimed at the cessation of continuing violations.

63. The 2nd interested party did not file any written submissions, but relied on its response to the preliminary objections raised by the 1st and 2nd respondents, and a further affidavit sworn by its Executive Director, George Kegoro, and supported the case by the petitioner. The 3rd interested party did not participate in the proceedings. The 4th interested party did not file written submissions.

64. The 1st respondent did not file any written submissions on this subject, but made oral submissions, where he adopted and the submissions by the 2nd respondent. The 2nd respondent filed written submissions, which were highlighted in court, the gist of which was that the provisions of the Constitution that deal with the procedure for appointment of State officers, more so Judges, who constitute an arm of government, must be strictly construed. He contended that the appointment of Judges outside the express provisions of the Constitution would result in questions of legitimacy in addition to undermining the adjudication of disputes. The 2nd respondent also contends that issuing declarations to enforce other declaratory orders as sought by the petitioner was absurd and untenable in law. He further submits that this court was erroneously being asked to issue orders which had already

been declined in the *Adrian Kamotho Njenga vs. Attorney General, Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR (Achode PJ, Makau & Mwita JJ) from which the present case arose.

65. Further the 2nd respondent submits that it would be a violation of the doctrine of separation of powers, for this court to use judicial craft, by giving declaratory orders, whose effect was to appoint persons into office where the Constitution has expressly conferred that power to another State organ. The 2nd respondent relies on *James Gacheru Kariuki & 69 others vs. William Kabogo Gitau & 104 others* [2019] eKLR (Meoli J), where the court stated that:

> *"43. In Mumo Matemu's case the Court of Appeal had this to say:*
>
> *"It was the contention of the appellant that the standard of review must be deferential given that appointments are committed to the other organs of government. In view of our constitutional design and the institutional competences attendant to it, it seems to us that this view cannot and has not been seriously contended in principle by any of the respondents. Deference is multi-directional, and we are prepared to hold that in the same way the other branches are to defer to the jurisdiction of the courts, the courts must also defer to the other branches where the constitutional design so ordains. We hold that the standard of judicial review of appointments to State or Public Office should therefore be generally deferential, although courts will not hesitate to be searching where the circumstances of the case demand a heightened scrutiny provided that the courts do not purport to sit in appeal over the opinion of the other branches …"*
>
> *44. The Court of Appeal in emphasizing the centrality of the doctrine of separation of powers in our constitutional design observed that:*
>
> *"We further reiterate that whereas the centrality of the Ethics and Anti-Corruption Commission as a vessel for enforcement of provisions on leadership and integrity under Chapter 6 of the Constitution warrants the heightened scrutiny of the legality of appointments thereto, that is neither a license for a court to constitute itself into a vetting body nor an ordination to substitute the Legislature's decision for its own choice. To do so would undermine the principle of separation of powers. It would*

also strain judicial competence and authority. Similarly, although the courts are expositors of what the law is, they cannot prescribe for the other branches of the government the manner of enforcement of Chapter 6 of the Constitution, where the function is vested elsewhere under our constitutional design."

45. Suffice to state that, there is an established democratic system and structure of government with in -built checks and balances, not only at the county government level, but also at the national government level. This court cannot to purport to take over what are clearly tasks designated to different organs of state, as sought by the Petitioners in this case, without doing violence to the national values and principles of governance espoused under Article 10(2) (a) and (c) of the Constitution. Worse, unwarranted interference with the functions of county governments would run counter to the objects of devolution and principles of devolved governments in Articles 174 and 175 of the Constitution, and in extreme cases be tantamount to the supplanting of the sovereign power of the people espoused in Article 1 of the Constitution."

66. Again, relying on Article 134(1)(2)(a) of the Constitution, 2010, the 2nd respondent submits that the Constitution vests power of appointment of Judges exclusively upon the 1st respondent, and contends that it was so exclusive that not even a person exercising Presidential powers during temporary incumbency is allowed to appoint a Judge.

67. The 3rd respondent and 1st interested party relied on grounds of opposition to oppose the petition, in the following terms:

(a) The petition is bad in law, fatally defective and an abuse of the process of this court;

(b) The petition has been overtaken by events and the orders being sought as against the 3rd respondent and 1st interested party cannot obtain;

(c) The 3rd respondent and the 1st interested party are *functus officio*;

(d) The 3rd respondent and 1st interested party have no powers under the Constitution or the law stop any Judge

of a Superior Court or a judicial officer from performing his or her judicial functions; and

(e) The petition has no merits.

68. The 3rd respondent and 1st interested party did not file written submissions, but orally adopted the above grounds of opposition, and highlighted that they did not have constitutional mandate to swear in Judges or to stop those appointed from taking office.

69. The powers and functions of the 1st respondent and the 1st interested party, with regard to appointment of Judges, is provided for under Article 166(1) of the Constitution, which states as follows:

> *"166(1) The President shall appoint*
>
> *a) The Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and*
>
> *b) All other Judges, in accordance with the recommendation of the Judicial Service Commission."*

70. It follows, in our view, that in appointing the Chief Justice and Deputy Chief Justice, the function of 1st respondent is to receive the recommendations of the 1st interested party, and the approval of the National Assembly, and appoint the nominees as such. As for other Judges, the 1st respondent is only to receive the recommendation of the 1st interested party, and appoint the nominees as such. In our view, the 1st respondent has no powers to look anywhere outside that to check on the suitability of the nominee to be so appointed. In this regard, we echo what was said in *Adrian Kamotho Njenga vs Attorney General, Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR (Achode PJ, JA Makau & Mwita JJ), that:

> *"We entirely agree with the above proposition of the law, that once the 1st interested party makes recommendations, the President has no other option but to formalise the appointments. He cannot change the list, review it or reject some names. He cannot even decide who to appoint and who not to appoint. He must appoint the persons as recommended and forwarded to him by the 1st interested party."*

71. Now that the 1st respondent has not appointed the six nominated Judges as required by the Constitution, can they be presumed as appointed without them being appointed formally by the 1st respondent? We have on this issue been referred to the case of *Law Society of Kenya vs Attorney General; Mohamed Abdulahi Warsame & Another (Interested Parties)* [2019] eKLR (Mwita J), where the 1st respondent failed to appoint an elected member to the 1st interested party, and the High Court issued orders enabling him to take up his position at the Commission. We note that the constitutional provisions for appointment of Commissioners of the 1st interested party are as follows:

> *"71(1) There is established the Judicial Service Commission.*
>
> *(2) The Commission shall consist of -*
>
> *(a) the Chief Justice, who shall be the chairman of the commission;*
>
> *(b) one Supreme Court judge elected by the judges of the Supreme Court*
>
> *(c) one Court of Appeal judge elected by the judges of the Court of Appeal*
>
> *(d) one High Court judge and one magistrate, one a woman and one a man, elected by the members of the association of judges and magistrates;*
>
> *(e) the Attorney General;*
>
> *(f) two advocates one a woman and one a man, each of whom has at least fifteen years' experience, elected by the members of the statutory body responsible for the professional regulation of advocates;*
>
> *(g) one person nominated by the Public Service Commission; and*
>
> *(h) one woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the of the National Assembly."*

72. It is clear to us, from the above, that the constitutional involvement of the 1st respondent with regard to appointment of Commissioners to the 1st interested party, only relates to the one woman and one man, who represent the public. It does not appear to us, that under the Constitution, the 1st respondent has any constitutional function in the appointment of Commissioners to the 1st interested party, except for the two

Commissioners representing the public, therefore, the instant case is distinguishable from *Law Society of Kenya vs Attorney General; Mohamed Abdulahi Warsame & Another (Interested Parties)* [2019] eKLR (Mwita J).

73. In view of what the court said in *Adrian Kamotho Njenga vs Attorney General, Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR (Achode PJ, JA Makau & Mwita JJ), as set in paragraph 70 of this judgment, we are of the view that the six nominees could be quite properly deemed to be duly appointed as Judges, as the 1st respondent has no choice but to appoint them. The position, that the 1st respondent has no choice in the matter, was declared and confirmed with finality in *Law Society of Kenya vs. Attorney General & 2 others* [2016] eKLR (Mwongo PJ, W Korir, M. Ngugi, Odunga and Onguto JJ), in the following terms:

> *"71. It is our view that the President having taken part in the nomination process through his said appointees, once the Commission nominates the persons to be appointed as Judges, the President's role is then limited to appointment, swearing in and gazettement of the said persons as Judges … He cannot therefore purport to "process," "vet," "approve," or "disapprove" the said nominees. At that stage the issue of consultation with the Chief Justice, also a member of the Judicial Service Commission, does not arise.*
>
> *72. In our view, once the nomination process is finalised, subject to paragraph 16 of the First Schedule to the Act, the Commission and the president have no other role to play in the matter apart from putting in place formalities of appointing the nominees as Judges … In our view, the only way in which the names presented to the President can be reconsidered, and if so by the Commission itself is pursuant to paragraph 16 of the First Schedule to the Judicial Service Act, 2011, which provides that:*
>
> > *"The Commission shall not reconsider its nominees after the names are submitted to the President except in the case of death, incapacity, or withdrawal of a nominee."*
>
> *73 …*
>
> *74 We therefore disabuse the respondents of the notion that the President has extra-judicial discretion to decision whether or not to appoint the persons nominated for a appointment as Judges of the High Court. Such a trajectory if, upheld would, in our view,*

negate the constitutional interpretation principles decreed in Article 259 which enjoins to interpret the Constitution in a manner that promoted its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance."

74. The 1st respondent under Article 131(1)(a) of the Constitution, is the Head of State and Government. Under 131(1)(b), he executes his role as head of government with the assistance of the Deputy President and Cabinet Secretaries. He combines two offices, as Head of State and Head of Government. He is the first among equals in the three arms of government, being Executive, Parliament and Judiciary; which, in our view, means that he is a nominal or titular head of all three. However, whereas he is the executive head of the Executive, he has no executive function at all in Parliament and the Judiciary.

75. As Head of State, the roles of the 1st respondent are limited, in the sense that they are ceremonial, formal or nominal. With respect to Parliament, it is limited, under Article 126(1)(b), to calling for its first sitting through notification in the *Kenya Gazette*, to be held not more than 30 days after the elections. He addresses Parliament on designated dates. For Judiciary, the role is limited to formal appointment of Judges, under Article 166(1), and appointment of tribunals for removal of Judges from office, under Article 168, and nothing more. The list of nominees for appointment is forwarded to the 1st respondent in his capacity as Head of State, and, therefore, his formal or nominal or ceremonial function, with respect to it, is limited to making the appointments without any additions or subtractions.

76. For comparative purposes, we have considered the practice in Commonwealth and Common Law jurisdictions. In Uganda, Judges are appointed by the President on recommendation of the Judicial Service Commission and approval by Parliament. In Tanzania, High Court Judges are appointed by the President after consultation with the Judicial Service Commission, while those of the Court of Appeal are appointed by the President after consultation with the Chief Justice, according to Articles 109 and 118(3) of the Constitution of Tanzania. In South Africa, Judges are appointed by the President on the binding advice of the Judicial Service Commission. In the United Kingdom, Judges are

appointed by the Judicial Appointments Commission through a competitive process. In the United States, the names of potential nominees, for federal Judges, are recommended by Senators to the President, the President then makes nominations from the list sent to him, after which the names of the nominated persons are returned to the Senate for confirmation. The Senate Judiciary Committee conducts confirmation hearings for each nominee, and whoever is confirmed gets automatically appointed, and goes on for swearing.

77. The Kenyan Constitution is progressive, and is on the same footing with those of Nigeria, South Africa, United Kingdom and the United States of America, where the process of nominating Judges is done competitively, by an independent body, and the role of Head of State is a mere formality, as underscored in *Law Society of Kenya vs. Attorney General & 2 others* [2016] eKLR (Mwongo PJ, W Korir, M. Ngugi, Odunga and Onguto JJ), where the court stated:

> *"76. We agree with the Commission that save for the limited circumstances provided for in paragraph 16 of the Fifth Schedule to the Act, the role of the President in the process of appointment of the Judges of the High Court is purely facilitative as the Head of State and must be in accordance with the recommendations of the Judicial Service Commission.*
>
> *77. We reiterate that by coming up with this system of the appointment of Judges, the people of the Republic of Kenya wanted a clear break from the old system in which the appointment of Judges of the Superior Courts was in substance a prerogative of the President with the Judicial Service Commission playing merely a formal role."*

78. The critical concern here, of course, is what should happen after or where the bearer of a constitutional duty fails to act as required of him by the Constitution and the law. The Kenyan Constitution, as drafted does not appear, on the face of it, to contemplate such a scenario, that a responsible authority would not act, at the time when it is required to, for if that had been envisaged, then a provision would have been inserted in the Constitution to remedy that. Such is, for example, where an appointment is not made within the timelines, then something should follow, either the same could be deemed, or would lapse or something of that character. In absence of such a provision, then recourse can only be

to court by way of a constitutional petition or judicial review, like has been done in this case. All this would have, perhaps, been avoided, had there been a clear follow up provision in the Constitution or legislation.

79. The 1st and 2nd respondents have cited *Kenya Vision 2030 Delivery Board vs. Commission on Administrative Justice & 2 others* [2021] eKLR (Mwilu Ag CJ & Ag P, Ibrahim, Wanjala, Njoki & Lenaola SCJJ), to make the case that the power to appoint Judges vests exclusively in the 1st respondent by virtue of Article 134(2)(a), and cannot be exercised by anyone else. In *Kenya Vision 2030 Delivery Board vs. Commission on Administrative Justice & 2 others* [2021] eKLR (Mwilu Ag CJ & Ag P, Ibrahim, Wanjala, Njoki & Lenaola SCJJ), the Supreme Court was considering whether recommendations made by the Commission on Administration of Justice were binding on public bodies, and went on to state that the court could not dictate the manner in which the public bodies could implement the recommendation, except where there was gross abuse of discretion, manifest injustice or palpable excess authority equivalent to denial of a settled right, among others. That decision was limited, in our view, to recommendations arising from complaints raised with the Commission on Administration of Justice, with regard to handling of matters in the wider justice sector, and how public authorities are to handle recommendations made by that Commission, or similar Commissions, arising from such complaints. The recommendations referred to in that case are not of the nature contemplated in Article 161(1)(b) of the Constitution, and, therefore, the said decision is clearly distinguishable.

80. The situation that faces us is fairly novel, what do you do when the 1st respondent, as Head of State, fails, for whatever reasons and under whatever circumstances, to discharge a constitutional duty, which, under the Constitution vests solely in him. Our attention has been drawn to a decision of the Court of Appeal of Samoa, in *Attorney General vs. Latu* [2021] WSCA 6 (Perese CJ, Tuatagaloa & Warren JJ), with respect to failure by the Head of State of Samoa to convene the first sitting of the Parliament post-election within the timelines allowed in the Samoan Constitution, equivalent to Article 126(2)(a) of the Kenya Constitution. In the Samoan case, the Head of State indicated to the Clerk of Parliament, just a day to the event, that he would not attend the ceremony, whereupon his Deputy also indicated that in the absence of the Head of

State, he would also not attend. Efforts were made to have the Clerk of Parliament step into the shoes of the Head of State and his Deputy, but the Clerk also stayed away. The meeting was held on Parliament grounds, the absences of the three notwithstanding. A motion was moved for appointment of an acting Clerk, which passed, and the Acting Clerk was appointed, who took over and presided over the meeting, which elected a Speaker, who was sworn in by the acting Clerk. The newly elected Speaker then took over from her, and swore in the newly elected Members of Parliament, who went on to pass a resolution to confirm the Prime Minister Designate, who then took oath and it was announced by the Speaker that he had been duly appointed as Prime Minister. The new Prime Minister announced cabinet ministers, who also had their oaths administered by the Speaker. The litigation sparked by those events turned on the constitutionality of the swearing in ceremony in the absence of the input by the Head of State. The court concluded that the Head of State had power to convene Parliament before the lapse of the constitutional timelines, but he had failed to within the timelines, and, therefore, his power to call Parliament had expired and was moot, and his office had become *functus*, and, therefore, he lacked constitutional authority, and should have first applied to the Supreme Court for directions before purporting to postpone convening of Parliament past the set timelines. On the swearing in, the court concluded that the same was sound, given that the role of the Head of State in it was purely ceremonial or administrative, and the Speaker had been elected by persons who were qualified to participate in her election. *Attorney General vs. Latu* [2021] WSCA 6 (Perese CJ, Tuatagaloa & Warren JJ) is not binding on us, but it is of persuasive value, being from a Commonwealth and Common Law court.

81. In the case before us, the remaining six nominees were picked by the 1st interested party after a rigorous and competitive process of recruitment, and what remained, thereafter, was their formal appointment upon their names being forwarded to the 1st respondent. The language of Article 166(1)(b) of the Constitution is that the 1st respondent shall appoint all Judges, apart from the 3rd respondent and the Deputy Chief Justice, in accordance with recommendation of 1st interested party. That provision does not give the 1st respondent any discretion over the matter, and his role in the appointment would be administrative, ceremonial or a formality, going by the pronouncements

in *Law Society of Kenya vs. Attorney General & 2 others* [2016] eKLR (Mwongo PJ, W Korir, M. Ngugi, Odunga and Onguto JJ) and *Adrian Kamotho Njenga vs Attorney General, Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR (Achode PJ, JA Makau & Mwita JJ). Since the 1st respondent has failed to exercise his constitutional duty to appoint the six remaining Judges since July 2019, which delay is undoubtedly unreasonable, and despite the court, in *Adrian Kamotho Njenga vs. Attorney General, Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR (Achode PJ, JA Makau & Mwita JJ), reminding the 1st respondent of that duty, we are persuaded by *Attorney General vs. Latu* [2021] WSCA 6 (Perese CJ, Tuatagaloa & Warren JJ), and find that the power by the 1st respondent to appoint the nominees had expired fourteen days after receiving the names from the 1st interested party, and was moot, and the court could quite properly, in the interests of justice, advancement of the rule of law and access to justice, and to forestall further violation of the Constitution and sustenance of an unconstitutional state of affairs, proceed to deem the six nominees as duly appointed as Judges to the respective Superior Courts, subject to gazettement and swearing in. We believe that that would be the best way to get out of or unlock the constitutional crisis created by the failure of the 1st respondent to appoint the Judges in accordance with the law.

Whether the court can order the 3rd respondent and 1st interested party to swear in and assign to the six nominees, after being deemed as appointed as Judges, duties without them being appointed and sworn in by the 1st respondent

82. We have been asked by the petitioner to order the 3rd respondent and 1st interested party to swear in the six nominees. The 1st and 2nd respondents have not taken a position on the issue, while the 3rd respondent and 1st interested party have relied on grounds of opposition to contest the requests directed to them. They aver that the prayers, if granted, would violate the Constitution by requiring the 3rd respondent to swear Judges, who, ideally ought to be sworn in by the 1st respondent, asserting that the Constitution does not envisage a situation where the 1st respondent refuses to swear in Judges, whereas that is his constitutional duty, which he should discharge.

83. Under Article 74 of the Constitution, State officers, including Judges, are required to take an oath before assuming office. The Third Schedule of the Constitution prescribes oaths for President, Deputy President, Cabinet Secretaries, Members of Parliament, Speaker and Deputy Speaker of both Houses of Parliament, Chief Justice, Judges of the Supreme Court, Judges of the Court of Appeal and Judges of the High Court. Article 74 provides as follows:

> *"74. Before assuming a State office, acting in a State office, or performing any functions of a State office, a person shall take and subscribe the oath of affirmation of office, in the manner and form prescribed by the Third Schedule or under an Act of Parliament."*

84. Article 141(3)(5) of the Constitution provides that the oaths of the President and Deputy President are to be taken before the Chief Justice, or in his absence, the Deputy Chief Justice, in a public place; while Article 152(4)(a) provides the oaths for Cabinet Secretaries are to be taken before the President.

85. In addition to Article 141(3)(5) of the Constitution, for the President and Deputy President, Parliament has passed legislation to govern assumption of office by the two, being the Assumption of the Office of the President Act, No. 21 of 2012. Under that Act, swearing in of the President is provided for under Part IV, where section 12 states that the swearing in ceremony shall be conducted in a public place, in the capital city, in accordance with Article 141 of the Constitution. The assumption committee shall cause to be published in the official gazette the time, date and venue of the swearing ceremony, and that day shall be a public holiday. The oath or affirmation shall be administered to the President-elect by the Chief Registrar before the 3rd respondent or in the absence of the 3rd respondent, by the Deputy Chief Justice. The oath must be admitted not earlier than 10.00 AM and not later than 2.00 PM. The Deputy Chief Justice to assume the duties of the 3rd respondent for this purpose only where the 3rd respondent is incapacitated. Upon taking or subscribing to the oath or affirmation, the President shall sign certificate of inauguration in the presence of the 3rd respondent, or his absence in the presence of the Deputy Chief Justice.

86. For County Government, the Constitution is silent on the swearing in of Governors, but there is legislation governing assumption of office of

Governors, being the Assumption of the Office of Governor Act, No. 4 of 2019, which amended Act No. 17 of 2012, section 11 of which provides for the swearing in ceremony, in terms of the date, time and place of the swearing, to be done on the first Thursday after the 10th day following the declaration of results. It is provided that the swearing in ceremony shall be conducted in public, before a High Court Judge.

87. For Parliament, the Constitution is silent on the process of the swearing in of Members, save that the Third Schedule of the Constitution has the form of the oath prescribed for them. There is also no legislation, by way of an Act of Parliament, to regulate the process. What is in place, for the purpose of swearing Members of National Assembly, is the parliamentary Standing Orders, currently in the 5th Edition, adopted by the 12th National Assembly on 6th May 2020, Standing Order No. 3, in Part II, states:

> *"On the first sitting of a new house pursuant to the President's notification under Article 126 (2), the Clerk shall administer the oath or affirmation of office provided for in the third schedule of the Constitution to all members present."*

88. From the above, it is clear that although the Constitution does provide for oaths by State officers and prescribe the forms of the oaths, apart from oaths for the 1st respondent, Deputy President and Cabinet Secretaries, the Constitution does not provide for the person or State officer before whom the oath is to be taken and the place of taking the oath.

89. Our focus is on swearing of Judges, and we have very closely and scrupulously perused and scoured through various legislation governing the Judiciary and Judges in general, including from the Judicature Act, Cap 8, Laws of Kenya; the Judicial Service Act; the Supreme Court Act, No. 7 of 2011; the Appellate Jurisdiction Act, Cap 9, Laws of Kenya; the Court of Appeal Administration and Organisation Act, No. 28 of 2015; the High Court Administration and Organisation Act, No. 27 of 2015; the Environment and Land Court Act, No. 19 of 2011; the Employment and Labour Relations Court Act, No. No. 20 of 2011; the Magistrates Courts Act, Cap 10, Laws of Kenya; the Kadhis' Courts Act, Cap 11 Laws of Kenya; legislation governing tribunals, among others, and we have not come across any provision in them relating to the time, date and place of

swearing in of Judges or other judicial officers, nor of the persons who ought to administer the oath and before whom the oaths should be taken.

90. As concerns Commissioners to the 1st interested party, the Judicial Service Act, under section 40(1), provides for the oath of office of members of the Commission on first appointment, to effect that they take the oath or make the affirmation in the form prescribed in the Third Schedule to the Constitution. It is not indicated who administers the same and before who, and at what place.

91. For most of Chapter Fifteen Commissions and Independent Offices, the respective statutes creating them provide a fairly clear manner of the swearing of their members, after their appointment by the 1st respondent and approval by Parliament. The members are identified and recommended for appointment in a manner prescribed by national legislation, are approved by National Assembly and appointed by the 1st respondent. The Teachers Service Commission Act, No. 20 of 2012, at section 9, provides that the chairperson, members and the Secretary shall each make and subscribe before the 3rd respondent the oath or affirmation set out in the First Schedule. The National Land Commission Act, No. 5 of 2011, similarly provides, at section 9, that the chairperson, members and the secretary shall, before assuming office, make and subscribe, before the 3rd respondent, to the oath or affirmation set out in the Second Schedule.

92. The Commissions under this paragraph provide something more or less similar, save that the swearing in by the 3rd respondent is not provided for in the body of the statute, but rather in a form in one of the schedules. The Independent and Electoral Boundaries Commission Act, No. 9 of 2011, at section 9, provides that the chairperson and members shall, before assuming office take and subscribe to the oath or affirmation of office prescribed in the Second Schedule of the Act. The said Second Schedule has nothing to do with oaths, but matters relating to conduct of the business of the Commission. It is the Third Schedule to the Act, which provides for oaths, which, according to the *jurat*, should be taken before the 3rd respondent. The Public Service Commission Act, No. 10 of 2017, at section 9, provides that the members shall before assuming office take and subscribe to the oath or affirmation of office prescribed in the Second Schedule of the Act, the *jurat* in the form in the Second Schedule indicates

that the oath and affirmation should be administered before the 3rd respondent. According to the Ethics & Anti-Corruption Commission Act, No. 22 of 2011, section 8 provides that the chairperson and members of the Commission shall take and subscribe to an oath of office as prescribed under the First Schedule, and the *jurat* of the form in the First Schedule indicates that the oath and affirmation should be administered before the 3rd respondent.

93. The lack of clarity, in the statutes governing the swearing of Judges and judicial officers, contrasts sharply with the very elaborate processes set out in the Advocates Act, Cap 16, Laws of Kenya, on admission of advocates to the bar. The Advocates Act provides for taking of an oath by advocates upon admission to the Roll of Advocates. The same is administered before the 3rd respondent, and there are elaborate provisions on filing of petitions for admission, their hearing by the 3rd respondent, and thereafter admission to the Roll, swearing before the 3rd respondent, followed by the signing of the Roll before the Registrar, who thereafter keeps the Roll. The state of affairs, with respect to the law that ought to regulate swearing of Judges, is intriguing and embarrassing, when looked at against the practice under the Advocates Act, for admission of advocates, which the courts, and the specifically the 3rd respondent, oversees.

94. From our examination of the Constitution and the law, it is clear that the 1st respondent is vested with power to appoint all the persons recommended for appointment by the 1st interested party. Whereas the Article 74 requires the taking of oaths by nominee Judges, as State officers, before assuming office, the Constitution does not provide for swearing in of the appointees by or before the 1st respondent, neither is there any enabling statute which provides for such an exercise. There is nothing in the Constitution nor legislation which requires that Judges, be sworn in before the 1st respondent. It would appear to us that the current practice of Judges being sworn in before the 1st respondent is not founded on any constitutional or statutory law, and we are of the view that it is perhaps founded on tradition, based on his role as Head of State.

95. Under section 61(1) of the old Constitution, the President had absolute power to appoint the Chief Justice; while he appointed *puisne* Judges and Judges of Court of Appeal, under section 61(2), acting in

accordance with the advice of the Judicial Service Commission established under that Constitution. Under section 63 of the said Constitution, a Judge could not enter upon the duties of his office until he had taken and subscribed to his oath of allegiance and an oath for due execution of his office, the form of which was to be prescribed by Parliament.

96. The tradition and practice in Kenya is that Judges are sworn in by the Chief Registrar of the Judiciary in the presence of the 1st respondent. The swearing in ceremony is preceded by appointment, under Article 166 of the Constitution, by the 1st respondent in accordance with the recommendation of the 1st interested party, as discussed elsewhere, taking the form of a notice in the *Kenya Gazette*. According to Article 134 (2) (a) of the Constitution, nomination or appointment of Judges of superior courts is a power which has been exclusively reserved for the 1st respondent. The act of gazettement by the 1st respondent appears to be how the actual appointment takes place yet there is no legal basis of gazettement under Kenyan law. There is also no legal basis for the swearing of Judges before the 1st respondent, for the same is not anchored on any law, the Constitution or legislation, as elaborated above.

97. With respect to swearing in of the Judges in other jurisdictions, we have looked at the practice in Nigeria, India and South Africa. In Nigeria, Court of Appeal Judges are sworn in by the Chief Justice of Nigeria, at the main courtroom of the Supreme Court at Abuja, upon approval of their appointment following their nomination by the National Judicial Council. In India, the Federal Chief Justice is sworn in before the President, the Federal Chief Justice swears the Judges of the Supreme Court of India; while Judges of the Court of Appeal and the High Court make and subscribe to their oaths before the Governor or Chief Minister of the Federal State where they are posted. In South Africa, Judges of the Constitutional Court, the Supreme Court of Appeal, the High Court and the EF Court, take their oaths or make affirmations before the Chief Justice or any other Judge designated by the Chief Justice. The Chief Justice, if not a Judge already, at the time of appointment, swears or affirms before the Deputy Chief Justice or the next senior Judge of the Constitutional Court. In the United States of America, Justices of the Supreme Court are sworn in at the Supreme Court before the Chief Justice or any Judge of the Supreme Court of their own choice.

98. As there is no constitutional and legal framework upon which the 1st respondent is required to have the nominee Judges sworn before him, and he having failed to follow the tradition or practice referred to above, to have them formally appointed through gazettement, and thereafter sworn or affirmed before him, and we having found that the court could, quite properly, deem them to be duly appointed, we have not seen any constitutional or legislative provision, and none has been pointed out to us, which would bar the 3rd respondent from swearing the Judges, for there is no provision anywhere which gives the 1st respondent a constitutional or legal role or mandate or duty in the swearing of Judges, which then leaves it open for their swearing in before the Head of the Judiciary. We are fortified, in arriving at this conclusion, by the fact that the Constitution and various legislation passed to give effect to the Constitution have already conferred the duty of swearing various State officers, including members of Constitutional Commissions, who are appointed by the 1st respondent, on the 3rd respondent. Should this court find it appropriate to have the Judges deemed as appointed, and to have them sworn in by the 3rd respondent, the 3rd respondent would, in that eventuality, be within the powers of that office to assign to them duties upon their being sworn in.

99. As regards the functions of the 1st interested party on appointment of Judges, as provided for under Article 172(1)(b) of the Constitution, it is our view that there is no window or residual power left for the 1st interested party, once it has recommended persons for appointment to the 1st respondent, it cannot swear in the persons nominated as Judges, for it has no role in that exercise, neither is it its function to assign duties to Judges. Article 172(1)(b) of the Constitution states as follows:

> *"172(1)(b) recommend to the President persons for appointment as judges."*

Whether this court can sanction the 2nd respondent for his advice or conduct as requested

100. From the affidavit in support of the petition, the contention by the petitioner is that the 2nd respondent is a member of the 1st interested party, and that he participated in the nomination process which came up with the list of the nominees, including those who have not been gazetted

and appointed by the 1st respondent, and that he did not raise any question against any of the nominees at that time, as only one Commissioner, Mr. Macharia Njeru, Advocate, dissented, on grounds that not enough persons had been nominated for appointment from among private practitioners. It was contended that having participated in the recruitment process, the 2nd respondent cannot now turnaround and take a position contrary to that of the 1st interested party, by claiming that the 1st respondent could not be expected to defend and uphold the rule of law and at the same time be pressured to appoint into office individuals against whom competent State organs had produced adverse reports and information on their suitability. It is not in dispute that the 2nd respondent, in response to the press statement by the 3rd respondent, issued his own press statement, produced in these proceedings as CN1, in his capacity as the Chief Legal Advisor of the Government, and for the purposes of this petition, to the 1st respondent.

101. The petitioner submitted that the conduct of the 2nd respondent in this matter was duplicitous and inconsistent with the Constitution, and that under Article 156 (4), the 2nd respondent must promote, protect and uphold the rule of law and defend public interest, while being guided by the principles of leadership and integrity under Article 73(2) of the Constitution, as elaborated in section 3(2) of the Leadership and Integrity Act, 2012. It was, therefore, contended that as a member of the 1st interested party, he sat in the interviews and drew allowances, and did not dissent or question the process in any way and, therefore, his conduct of going against the decision of 1st interested party was one which the court has jurisdiction, under Article 165 of the Constitution, to declare unconstitutional.

102. In response, the 2nd respondent, through his written submissions, contended that he enjoys statutory immunity from personal liability for actions made *bona fides* in the course of his duties under the provisions of section 8(2) of the Office of Attorney General Act, No. 49 of 2012, and argued that it would be absurd, therefore, for the court to hold that the 2nd respondent has violated the Constitution for representing the National Executive in court, merely because the views of the National Executive are at variance with those of the 1st interested party where he sits as a member. It was argued that 1st interested party is a corporate entity, distinct from its membership, and that the fact that 1st interested

party holds views which are different from the ones of the National Executive, on any given matter, could not bar the 2nd respondent from articulating the views of the National Executive in court. It was further submitted that the petitioner had not presented any evidence from the Secretary to the 1st interested party on what the 2nd respondent did or did not do in respect of the subject matter in dispute, and any purported averment thereon was hearsay and inadmissible evidence, in terms of Orders 18 Rule 3(1) of the Civil Procedure Rules.

103. It was further submitted that the petitioner had not adduced any evidence in support of its assertion that the actions of the 1st respondent had occasioned lack of access to justice, fair trial and fair hearing, as it was required to do, and that, by seeking to rely on newspaper reports, its claim remained unproven, for which *Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR (Githinji, Visram, Nambuye, J. Mohammed & Odek, JJA) was cited in support.

104. On the allegations of breach of the provisions of Chapter Six of the Constitution, it was submitted that the mandate of enforcing the said Chapter was conferred, by Articles 75(2) and 79 of the Constitution and section 11 of the Ethics and Anti-Corruption Commission Act, No. 22 of 2011, on the Ethics and Anti-Corruption Commission, and that this court should reject the invitation by the petitioner to usurp and undermine the functions of the said Commission. *James Gacheru Kariuki & 69 Others vs. William Kabogo Gitau & 104 Others* [2019] eKLR (Meoli J) was cited, to support the contention that the petitioner should have availed itself of the procedure in section 42 of the Leadership and Integrity Act, No. 19 of 2012; and *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR (Mutunga, CJ & P, Rawal, DCJ &VP, Tunoi, Ibrahim, Ojwang & Ndungu, SCJJ**),** for the argument that the court cannot prescribe for the other branches of Government the manner of enforcement of Chapter Six of the Constitution, where the function is vested elsewhere under the constitutional design.

105. It was finally submitted that the claim by the petitioner was not one for enforcement of any right under the Bill of Rights charter, and that this court could not issue a declaration to enforce another declaratory order made in *Adrian Kamotho Njenga vs. Attorney General, Judicial Service*

Commission & 2 Others (Interested Parties) [2020] eKLR (Achode PJ, JA Makau & Mwita JJ).

106. The other parties did not make any submissions on the issues related to the 2nd respondent, and, therefore, we are called upon to make a determination whether the 2nd respondent is in beach of the provision of Chapter Six of the Constitution and the provisions of the Leadership and Integrity Act, and whether the 2nd respondent is in violation of the said Act, on the basis of the position he had taken on the issue in dispute, while he is a Commissioner of the 1st interested party, which had recommended and forwarded the names of the nominee Judges to the 1st respondent for appointment.

107. From the pleadings before us, the following facts are not disputed: that the 2nd respondent is a member of the 1st interested party, by virtue of the provisions of Article 171 (2)(e) of the Constitution, having been appointed as the Attorney General under the provisions of Article 156(2), as the Principal Legal Advisor of the Government, and to represent the National Government in court or in any other legal proceedings to which the National Government is a party, other than criminal proceedings; that the 2nd respondent sat and participated in the interviews which led to the recommendation by the 1st interested party to the 1st respondent to appoint the 41 nominees, all who were subsequently appointed during the pendency of this petition, save for the surviving six; and that the 2nd respondent issued a press statement in response to the statement by the 3rd respondent on the position of the 1st interested party as regards the then pending appointment.

108. It is this action by the 2nd respondent which is now being questioned by the petitioner, who has taken the view that in going against the position of the 1st interested party, wherein he is a member, the 2nd respondent violated the provisions of Chapters Six and Ten of the Constitution and the Integrity and Leadership Act. We are, therefore, called upon to determine whether this court has jurisdiction to make a determination thereon in view of the provisions of Articles 79 of the Constitution and section 42 of the Leadership and Integrity Act.

109. This issue of jurisdiction was addressed in *Trusted Society of Human Rights Alliance vs. Attorney General & 2 others* [2012] eKLR (J.

Ngugi, M. Ngugi & Odunga JJ), where it was said that the court has the general jurisdiction to enforce Chapter Six of the Constitution, subject to Article 165, but such jurisdiction is to be exercised subject to existing and, especially, derivative statute. The court further stated that there is no requirement that the behaviour attributed in the conduct in question has to rise to the threshold of criminality. In *Mohamed Abdi Olge vs. Abdullahi Diriye & 3 Others* [2017] eKLR (Mativo J), the court said that there was no clear provision in the Constitution, the Ethics and Anti-Corruption Act and the Leadership and Integrity Act which ousts the jurisdiction of the court to make enquiry or determine issues relating to leadership and integrity. In *William Kabogo Gitau vs. Ferdinand Ndungu Waititu* [2016] eKLR (Onguto J), it was held that the court has jurisdiction make such enquiries or determinations, but the petitioner should first exhaust the other mechanisms or alternative processes provided for under the Constitution and legislation. In *Benson Riitho Mureithi vs. JW Wakhungu & 2 Others* [2014] eKLR (M. Ngugi J), the court took the view that the court has jurisdiction to address the issues, as there was, in the opinion of the court, no other mechanism in law for dealing with them.

110. From the authorities stated herein, we are persuaded and hold that Chapter Six of the Constitution does not limit or oust the jurisdiction of the High Court on matters of integrity and suitability to hold public office, and that the role of Ethics and Anti-Corruption Commission is complementary to that of the court, and, therefore, find that this court has jurisdiction to inquire and determine whether the 2nd respondent, by his actions stated hereinabove violated the provisions of Chapter Six of the Constitution. We must also add that there are criminal, civil and ethical integrity issues, and that whereas the Ethics and Anti-Corruption Commission has the sole mandate to inquire into the three issues, the court, where evidence is produced, of violation of ethical integrity may, in the absence of any inquiry by Ethics and Anti-Corruption Commission and or other relevant bodies, proceed to make a declaration thereon.

111. From the pleadings and the provisions of Chapter Six and Chapter Ten of the Constitution, in exercising his powers as a State officer, the 2nd respondent is expected to abide by the principles set out in Article 73 of the Constitution. It was said, in *International Centre for Policy and Conflict & 5 others vs. Attorney General & 5 others* [2013] eKLR (Mbogholi-Msagha, Kimaru, Omondi, Nyamweya & Kimondo JJ), with regard to

conduct of State officers, that the power State officers exercise is a public trust, and in exercising that power they are required to demonstrate respect for the people of Kenya, make decisions objectively and impartially, refuse to be influenced by favouritism or corruption, serve selflessly and be accountable for their actions. Quoting from *Black's Law Dictionary* (2nd Edition), the court in *Trusted Society of Human Rights Alliance vs The Attorney General and Others* [2012] eKLR (J. Ngugi, M. Ngugi & Odunga JJ), defined integrity, as used in statutes prescribing qualifications for public officers, among others, to mean soundness of moral principle and character, as shown by one person dealing with others, fidelity and honesty in discharge of trust, and that it is synonymous with probity, honesty and uprightness.

112. In addition, under Article 156(6), the 2nd respondent is required to promote, protect and uphold the rule of law and defend public interest. The powers of the 2nd respondent may be exercised in person or by subordinate officers acting in accordance with general or special instructions, according to Article 156(7) of the Constitution and section 14(1) of the Office of the Attorney General Act. The 2nd respondent, according to section 6(1) of the Office of the Attorney General Act, is the titular head of the bar, and takes precedence in all matters in courts whenever he appears. Under section 20 of the Advocates Act, the 2nd respondent takes precedence over all the Advocates in Kenya, in terms of seniority at the bar. That, no doubt, places him in a pole position in leadership within the legal profession, making him a figure that members of the legal profession and the general public look up to, with respect to matters pertaining to the legal profession, the judicial process and generally.

113. We are in agreement with the principles set out above, and add that we are only called to examine the conduct of the 2nd respondent based upon the material presented before us, which is his press statement in answer to the 3rd respondent, the Chair of the 1st interested party, wherein he was and is a member. The issue in dispute is not the representation of the National Executive in court by the 2nd respondent. We, however, agree with his submissions that the petitioner did not provide any evidence on how he, the 2nd respondent, voted in respect of the proposed names and his advice to the 1st respondent on the same, if any. It was the duty of the petitioner to prove to court how the 2nd

respondent voted at the meetings of the 1st interested party with respect to the appointments in question, and the nature of the advice which he gave to the 1st respondent thereafter, and whether or not the 1st respondent took into account the said advice. It was for the petitioner to prove, on a balance of probability, that the 1st respondent declined to exercise his constitutional mandate on the said appointment on the advice of the 2nd respondent, which it failed to do.

114. The only evidence on record, which is confirmed, through the press statement by the 2nd respondent, is that the 1st respondent acted upon advice of competent State organs, indicated to have had some undisclosed adverse reports on the six nominees, which reports were not tabled before the 1st interested party as at the time when the nominees were interviewed and recommended for appointment, according to the 3rd respondent.

115. We are, therefore, called upon to analyse the conduct of the 2nd respondent, based on the press statement which he issued in response to the 3rd respondent, and to weigh the same against what was expected of him as a State officer. It is common ground that the 2nd respondent took part in the interviews that led to the recommendation of the nominees herein for appointment, and that he is a member of the 1st interested party, and, therefore, was bound by the corporate decision of the 1st interested party, as represented by the 3rd respondent.

116. Having taken part in the said interviews, we take the view that the 2nd respondent was, therefore, conflicted, and could not express any view thereafter, contrary to that of the 1st interested party, as presented by the 3rd respondent. If the Executive had any contrary view, as stated in the said press statement, then that position should have been expressed and articulated by any other responsible State officer, that is other than the 2nd respondent. In taking a contrary view in public, the 2nd respondent acted in conflict of interest, and in the process violated the provisions of the Leadership and Integrity Act. In taking on the 3rd respondent in public, and answering him in the manner stated in the said press statement, we find and hold that the 2nd respondent brought the offices of the 2nd and 3rd respondents and the 1st interested party into disrepute, and, to that extent, his conduct fell short of the national values in Chapter

Ten and the integrity and leadership provisions of the Constitution, as set out in Article 73.

117. On whether the 2nd respondent should be declared incompetent and unfit to hold office, we take the view that Article 156 of the Constitution provides for the appointment, functions and removal of the 2nd respondent from office. These provisions are further contained in the Office of the Attorney General Act, which should be read together with the provisions of Article 79 of the Constitution, section 11 of the Ethics and Anti-Corruption Commission Act and section 4 of the Leadership and Integrity Act, all of which provide for lodging of complaints against State officers, and, in our view, the petitioner should follow the said procedures as regards the conduct of the 2nd respondent in this matter.

118. In this we find support in *Githu Muigai & Another vs. Law Society of Kenya & Another* [2015] eKLR (W. Korir, M. Ngugi & Odunga JJ), where the Law Society of Kenya, had made a decision to censure the then occupant of the office of the 2nd respondent, for conduct which was considered by the Society to be dishonourable, and, the court, while declining to allow the censure, and pointing out the proper course of action in the circumstances, stated:

> *"69. As a State Officer appointed, in accordance with the Constitution, by the President with the approval of the National Assembly, the route that the respondents had initially taken - lodging a petition in Parliament and filing a petition before the Court with regard to the alleged mishandling of the case in the Queen's Bench Division in the United Kingdom, was the proper way for the respondents to exercise their statutory power. Were they also of the view that the petitioner had violated the Constitution through acts of omission or commission, they also had the option to also institute legal proceedings pursuant to the provisions of Article 258 (1). Further, in accordance with the provisions of Chapter 6 of the Constitution on Leadership and Integrity, they had the further option of pursuing the alleged misconduct of the petitioner through the provisions of the Leadership and Integrity Act. These are all lawful processes, provided in law and underpinned by the Constitution, open to the respondents."*

119. Based on the matters stated above, and in the absence of any evidence that the petitioner has taken that route, and is without remedy, we decline to make any declaration on this issue, as the Constitution has put in place an elaborate procedure relating to questioning the conduct of and removal from office of members of the Executive, of which the 2nd respondent is one.

Who should bear costs of the petition?

120. The petitioner submitted that costs of the matter should be paid by the 1st and 2nd respondents, personally.

121. The general rule is set out in section 27 of the Civil Procedure Act, Cap 21, Laws of Kenya, which states as follows:

> *"Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."*

122. As regards public interest litigation, the jurisprudence in Kenya is still developing, but the general principle, so far, is that there are special circumstances that may arise to justify a departure from the traditional "loser pays" cost rule, taking into account the principles of access to justice and the spirit of Article 3(c) of the Constitution, which provides that "Every person has an obligation to respect uphold and defend this Constitution."

123. Further, Article 258(1)(2) of the Constitution recognizes that a person can initiate legal proceedings in the interest of the public, as was stated in the case of *John Harun Mwau and 3 Others vs. Attorney General & 2 Others* [2012] eKLR (Lenaola, M. Ngigi & Majanja JJ), where the court stated:

> *"179. The intent of Articles 22 and 23 of the Constitution is that persons should have free and unhindered access to this court for the enforcement of their fundamental rights and freedoms. Similarly, Article 258 allows any person to institute proceedings claiming the Constitution has been violated or is threatened. The imposition of costs would constitute a deterrent and would have a chilling effect on the enforcement of the Bill of Rights.*
>
> *180. In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the state but lost. Equally, there is no reason why the state should not be ordered to pay costs to a successful litigant. The court also retains its jurisdiction to impose costs as a sanction where the matter is frivolous, vexatious or an abuse of the court process."*

124. We are now called upon to ask ourselves, based on the history of this litigation, what order as to costs will adequately address public benefit concerns inherent in the circumstances of this case. We are satisfied that this was a public interest litigation, wherein the petitioner, who has partially succeeded, had no private interest in the outcome of the same, save that it was for the benefit of the public, and to advance the right to access to justice, which was the purpose for which 1st interested party recommended the nominees herein for appointment to the respective courts.

125. In determining the issue of costs, the court, in *Republic vs. Independent Electoral and Boundaries Commission & Others ex parte Alinoor Derow Abdullahi & Others* [2017] eKLR (Odunga J) stated that:

> *"17. … the Court is entitled to look at* inter alia *the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the legal proceedings, the events which eventually led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, the relationship between the parties and the need to promote*

reconciliation amongst the disputing parties pursuant to Article 159(2)(c) of the Constitution. In other words, the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation, the eventual termination thereof and the likely consequences of the order for costs. See Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287 and *Mullah (12thEdn) P. 150."*

126. On the history of this litigation, as stated herein above, this is not the first time the issues of appointment of persons nominated as Judges recommended by the 1st interested party has been litigated upon. This court has previously made similar pronouncements on the issue, in the following cases:

1) *Law Society of Kenya vs. Attorney General & 2 others* [2016] eKLR (Mwongo PJ, W Korir, M. Ngugi, Odunga and Onguto JJ), where the 1st respondent was found to have had violated the Constitution by purporting to "process," "approve," or "disapprove" the nominees to be appointed, and went ahead to hold that the period taken in gazetting, appointing and swearing in the Judge nominees was unreasonable;
2) *Adrian Kamotho Njenga vs Attorney General, Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR (Achode PJ, JA Makau & Mwita JJ), where a specific clear determination was made that the 1st respondent was bound to make the appointments based on the recommendations made by the 1st interested party and that he had violated the Constitution and the Judicial Service Commission Act by failing to appoint the Judges; and
3) *David Kariuki Ngari & another vs. Judicial Service Commission & another; Law Society of Kenya & 2 others (Interested Parties)* [2020] eKLR (Achode PJ, Makau & Mwita JJ), where it was stated that Judges shall be appointed by the 1st respondent in accordance with the recommendations of the 1st interested party, which is the body tasked with the mandate to determine suitability and the appropriate constitutional and statutory declaration for persons to be appointed as Judges, and that the Constitution and the law contemplate no other role for the 1st respondent, any other authority or body in determining the persons to appoint or not to appoint as Judge.

127. Having taken into account the conduct of the 1st respondent herein, and having once again found that the same violated the Constitution, the Judicial Service Act, and the rule of law generally, by not gazetting, appointing and swearing in all the nominees as recommended by the 1st interested party, as was stated in *David Ndii & others vs. Attorney General & others* (2021) eKLR (J. Ngugi, Odunga, Ngaah, Mwita & Matheka JJ) and *Independent Electoral & Boundaries Commission & 4 others vs. David Ndii & 82 others; Kenya Human Rights Commission & 4 others (Amicus Curiae)* [2021] eKLR (Musinga P, Nambuye, Okwengu, Kiage, Gatembu, Sichale & Tuiyott JJA), we are persuaded that the Constitution is not helpless and provides remedies and sanctions against the 1st respondent, and in this matter we have come to the conclusion that the 1st respondent ought to pay costs of this petition to the petitioner. The 1st respondent was not sued in person; consequently, the costs shall not be met personally by him.

128. In this holding, we find support in *KM & 9 others vs. Attorney General & 7 others* [2020] eKLR (A. Omollo J), where on costs, the court said:

> *"174. The petitioners also prayed to be awarded costs of the petition. The 1st – 6th Respondents also submitted that the petition should be dismissed with costs. The practice of the courts has been not to award costs in constitutional petitions. However, before costs are waived a basis must be laid for the same. The history of this petition reveals non-action by the Respondents in spite of several complaints received from the petitioners and failing to act on their own (Respondents) recommendations to remedy the environment. Therefore, their inaction having led to the filing of this suit, it is my considered view and I so hold that the petitioners are entitled to costs of the petition."*

129. As regards the 2nd respondent, we have noted that he is not the appointing authority, and his role therein is very limited, and he should, therefore, not be penalized personally with costs for an omission or commission on the part of the 1st respondent. However, he remains the Chief Advisor to the Government, and, by extension, the 1st respondent, and naturally his office has to bear the burden of shouldering costs in litigation of this kind.

DISPOSITION

130. The principal orders sought in the petition are seven: two prohibitions, two *mandamus* and three declarations. The first prohibition is directed against the 1st respondent, to have him barred from appointing only a section of the persons nominated for appointment; while the second seeks to stop the 3rd respondent and the 1st interested party from assigning duties to Judges appointed by the 1st respondent from a partial list. The first *mandamus* order is for compelling the 1st respondent to appoint all the persons recommended by the 1st interested party for appointment by the 1st respondent, within seven days. The second *mandamus* order is pegged on a declaration, should the 1st respondent fail to make the appointments, that the court deems the persons recommended as duly appointed as Judges to the respective Superior Courts, and it seeks to have the 3rd respondent and the 1st interested party swear the nominated Judges into office. The second declaration is with respect to the insistence by the 1st respondent to make partial appointments, and the court is asked to find the same as unlawful, unconstitutional and an affront to the independence of the Judiciary and the 1st interested party. The last declaration is with respect to finding the 2nd respondent incompetent and unfit to hold office.

131. Let us start with the prohibitory orders. According to *Halsbury's Laws of England*, 4th Edition Vol. 1 at Pg. 37, paragraph 128, prohibition is defined as an order from the High Court, directed to an inferior tribunal or body, which forbids that tribunal or body from continuing proceedings in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it, but also for departure from the rules of natural justice, and it does not lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings. We take judicial notice of the fact that the events that the petitioner seeks to stop, through these two prayers, are now past, and effectively the prayers have been overtaken by the said events. Prohibition is futuristic, the orders do not lie in the circumstances of this case, for the court does not issue orders in vain.

132. *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty, and it controls procedural

delays. It can only issue where it is clear that there is wilful or implied or unreasonable delay. Factors taken into account, for grant of the order, were identified in *Coalition for Reforms and Democracy (CORD) vs. Attorney General; International Institute for Legislative Affairs & another (Interested Parties)* [2019] eKLR (Nyamweya, Okwany & Mativo JJ). It was stated that there must be a public legal duty to act, the duty must be owed to the applicants and there must exist a clear right to the performance of that duty. It was said that the applicants must satisfy all conditions precedent, and there must have been prior demand of performance, reasonable time given to comply unless there was outright refusal, or an express refusal or implied refusal through unreasonable delay. The other considerations would be that no other adequate remedy is available to the applicants, the order sought is of a practical value, no equitable bar to the relief exists and that balance of convenience favours grant of *mandamus*.

133. The court, in *Adrian Kamotho Njenga vs Attorney General, Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR (Achode PJ, JA Makau & Mwita JJ), having found that the 1st respondent to be in breach of the Constitution and the Judicial Service Act, the *mandamus* order would be available. There obviously is a constitutional duty cast on the 1st respondent, under Article 166(1), to appoint Judges, once their names are forwarded to him by the 1st interested party. That duty is owed to Kenyans in general, for the appointments in question are meant for the benefit of the people, the petitioner included. The Constitution commands the 1st respondent to make the appointments upon receiving the names, and, as repeatedly said here above, there is no discretion on his part to tinker with the list of names, hence the question about prior demand should not arise. On delay, it was said, in *Law Society of Kenya vs. Attorney General & 2 others* [2016] eKLR (Mwongo PJ, W Korir, M. Ngugi, Odunga and Onguto JJ), that such appointments ought to be made within fourteen days upon receipt of the names. The names in question were delivered in 2019, and delay has become unreasonable, as was found and held to be so in *Adrian Kamotho Njenga vs Attorney General, Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR (Achode PJ, JA Makau & Mwita JJ). Indeed, there was express refusal to appoint, on grounds that the six remaining nominees had integrity questions, yet in *Adrian Kamotho Njenga vs Attorney General, Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR (Achode PJ, JA Makau &

Mwita JJ) and *Law Society of Kenya vs. Attorney General & 2 others* [2016] eKLR (Mwongo PJ, W Korir, M. Ngugi, Odunga and Onguto JJ), the courts had said that those were issues that the 1st respondent could not raise after the 1st interested party had delivered its list. The order is of value, for the Kenyan Judiciary would have a fuller establishment. There is nothing to suggest that there is an equitable bar to the relief, and, on a balance, *mandamus* should issue. The court can make the *mandamus* order sought, or issue any other order that it finds suitable in the circumstances.

134. On the declarations sought, the court has comprehensively dwelt on their substance in the main body of this judgment, given that these were the most contested aspects of the litigation. We are mindful of the fact that this is an enforcement suit, where the court ought not to be making declaratory orders to enforce other declarations. We have found and held, above, that this is a proper case for deeming the nominated Judges duly appointed, should the 1st respondent persist in not acting according to the dictates of the Constitution and the orders made earlier by the court in *Adrian Kamotho Njenga vs Attorney General, Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR (Achode PJ, JA Makau & Mwita JJ) and *Law Society of Kenya vs. Attorney General & 2 others* [2016] eKLR (Mwongo PJ, W Korir, M. Ngugi, Odunga and Onguto JJ), guided by the Samoan case of *Attorney General vs. Latu* [2021] WSCA 6 (Perese CJ, Tuatagaloa & Warren JJ). The declaration sought with respect to the appointment of a section of the nominees, on grounds that it would be unlawful and constitutional, is also an order that we need not make given the emphatic pronouncement in *Law Society of Kenya vs. Attorney General & 2 others* [2016] eKLR (Mwongo PJ, W Korir, M. Ngugi, Odunga and Onguto JJ). Declaration of the 2nd respondent as unfit to hold office has been dealt with comprehensively above, and there would be no need to revisit it.

135. In the event a *mandamus* order, or any of those sought in the petition, would not be appropriate as a remedy, this court can prescribe an appropriate relief for the breach or violation established. It was stated, in *Law Society of Kenya vs. Attorney General & another vs. Mohamed Abdullahi Warsame & another (Interested Parties)* [2019] eKLR (Mwita J), that the court, as the custodian and protector of the Constitution and the rule of law, must prescribe a remedy, following its

determination of the matter. *EWA & 2 others vs. Director of Immigration and Registration of Persons & another* [2018] eKLR (Mativo J), defined appropriate relief as any necessary relief that may be required to secure the protection and enforcement of constitutional rights. The court put it in the following terms:

> *"... appropriate relief will in essence be relief that is required to protect and enforce the Constitution. depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all-important rights ... The courts have a particular responsibility in this regard and are obliged to forge new tools and shape innovative remedies, if need be, to achieve this goal."*

136. The order that commends itself to us to make, in the circumstances, is as follows:

(a) That an order of *mandamus* is hereby issued directing the 1st respondent to appoint the remaining six nominees as Judges to their respective courts, within the next fourteen days;

(b) That upon the lapse of the fourteen days, in (a), above, without the 1st respondent having made the appointments, it shall be presumed that his power to make them has expired and his office become *functus*, so far as the appointments are concerned, and the six nominees shall be deemed duly appointed, effective from the date of default, as Judges of the Superior Courts for which they were recommended;

(c) That subsequent to their being deemed appointed, under (b), above, the 3rd respondent, in conjunction with the 1st interested party, shall be at liberty to take all necessary steps to swear the six Judges; and

(d) That the costs of the petition to be paid to the petitioner by the 1st and 2nd respondents.

137. We so order.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS……DAY OF……2021

……
G. DULU
JUDGE

……
J. WAKIAGA
JUDGE

……
W. MUSYOKA
JUDGE

In the presence of: -

…… for the petitioner

…… for the respondent

Court Assistant ……