Ole Kina v Attorney General & another (Petition 6 of 2018) [2019] KEHC 4244 (KLR) (23 September 2019) (Judgment)

Tukero ole Kina v Attorney General & another [2019] eKLR

Neutral citation: [2019] KEHC 4244 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

PETITION 6 OF 2018

RN NYAKUNDI, J

SEPTEMBER 23, 2019

IN THE MATTER OF: ARTICLES 2, 3, 19, 20, 21, 22, 23, 27, 30, 48, 50, 159, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE CONTRAVENTION OR BREACH OF ARTICLE 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE INTERPRETATION, IMPLEMENTATION AND ENFORCEMENT OF ARTICLE 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE BILL OF RIGHTS UNDER CHAPTER FOUR OF THE CONSTITUTION OF KENYA, 2010

PETITION NO. 6 OF 2018 1

AND

IN THE MATTER OF: ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF: THE DISREGARD FOR NATIONAL VALUES AND PRACTICES, EQUALITY AND FREEDOM FROM DISCRIMINATION

AND

IN THE MATTER OF: THE MARRIAGE ACT, 2014

BETWEEN

TUKERO OLE KINA ..... PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL ..... 1ST RESPONDENT

THE NATIONAL ASSEMBLY ..... 2ND RESPONDENT

JUDGMENT

Introduction

1. The instant Petition seeks a declaration that Section 66(1) of the *Marriage Act*, 2014 is unconstitutional, null and void for running afoul of among other attendant rights and freedoms, Article 27 of *the Constitution* of Kenya, 2010 on the right to equality and freedom from discrimination.

2. The Petitioner Mr. Tukero Ole Kina is an advocate of the High Court of Kenya. He filed the Petition dated 12th June 2018 together with an Affidavit sworn by himself on 12th of June 2018 on the same date the.

3. The 1st Respondent on 1st November 2018 filed a Grounds of Opposition to the Petition dated 22nd October 2018. Additionally, the 2nd Respondent, through an affidavit sworn on 18th September 2018 by the Clerk of the National Assembly, Michael Sialai responded to the Petition.

4. The Petitioner subsequently filed written submissions dated 27th November 2018. The Advocate for the 2nd Respondent filed his submissions dated 29th January 2019 and later followed up with further submissions dated 9th May 2019. On 2nd April 2019, the State Counsel filed submissions dated 28th March 2019 on behalf of the 2nd Respondent.

The Petitioners Case

5. The Petitioner's case is rather straightforward. It was his argument that Section 66 (1) of the *Marriage Act*, 2014, which provides that a party to a Civil marriage may not petition the court for the separation of the parties or for the dissolution of the marriage unless three years have elapsed since the celebration of the marriage, is unconstitutional null and void. The impugned Section provides as hereunder:

   66.

(1) A party to a marriage celebrated under Part IV may not petition the court for the separation of the parties or for the dissolution of the marriage unless three years have elapsed since the celebration of the marriage.

6. The Petitioner contended that Section 66 (l) of the *Marriage Act*, 2014 is unconstitutional, null and void to the extent that it violates the provisions of Articles 2, 3, 10 (2) (b), 19, 20 (l) & (2), 21 (1) and 24 (2) (a) of *the Constitution* of Kenya, 2010. He argued that the Section further violates the provisions of Article 27 (l), (2), (4) and (5) on equality and freedom from discrimination, Article 28 on human dignity, Article 36 that entitles everyone the right to free association, Articles 48 on access to justice and Article 50 as read together with Article 159(2) (a) and (h) on the right to a fair and expeditious hearing.

7. The Petitioner contended that Section 66 (l) of the *Marriage Act*, 2014 is discriminatory in that it bars the filing of a petition for the separation of the parties or for the dissolution of the marriage under Civil Marriages unless three years have elapsed since the celebration of the marriage whereas under all the other forms of marriages as provided under Sections 65, 69 (l), 70 and 71 of the *Marriage Act*, 2014 there was no similar bar as to time when to file the same. This discrimination it was contended, was an affront to Article 27 (4) of *the Constitution* of Kenya, 2010 which mandates the State and all persons including the Respondents not to discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

8. It was further argued that by creating a requirement that essentially deprives a party who has entered into Civil marriage the right to commence either separation or divorce proceedings for a period of three years without giving equal treatment to the other forms of marriage, Section 66 was in violation of Article 27 (4) and it was null and void and should be struck out. The Petitioner contended that pursuant to Article 2(4), the impugned Section was invalid to the extent of its inconsistency with Article 27(4).

9. The Petitioner contended that whereas Section 3 (3) of the *Marriage Act*, 2014 provided that all marriages have the same legal status, Section 66 (l) contravened Article 21 (l) as the 2nd Respondent in formulating and passing the said provision failed to observe Respondent in formulating and passing into law the said provision failed to observe, respect, protect, promote and fulfil the right to equality and freedom from discrimination as provided under Article 27 (4) of *the Constitution* of Kenya, 2010.

10. It was further contended that Section 66 (1) contravened Article 28 of *the Constitution* of Kenya, 2010 as the 2nd Respondent in formulating and passing into law the said provision failed to ensure that the aggrieved parties' human dignity is respected and protected.

11. A case was made that whereas Section 3 (1) of the Act provided that marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with the *Marriage Act*, Section 66 (1) contravened Article 36 as the 2nd Respondent in formulating and passing into law the said provision failed to ensure that the aggrieved parties' right to freedom of association is respected and protected.

12. It was further argued that the 2nd Respondent in formulating and passing into law the said provision failed to ensure that aggrieved parties have an equal opportunity of access to justice as guaranteed under Article 48. According to the Petitioner, Section 66(1) was arbitrary in its purport and intent as it failed to take into account the fact that the arbitrary nature and application of this section would work injustice to a would be Petitioner in cases of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the would be Respondent.

13. The Petitioner further contended that Section 66(1) of contravened Article 30 and the 2nd Respondent in formulating and passing into law the said provision failed to ensure that aggrieved parties are not held to slavery or servitude.

14. An argument was made that the Section contravened Article 50(l) on the right to a fair hearing and by interfering with the judicial authority as required under Article 159(2) (a) and (b) on the equality of justice and the prompt access thereto.

15. Arising from the above, the Petitioner pleaded that the provision of Section 66 (l) of the *Marriage Act*, 2014 was unconstitutional, null and void as it contravened the above provisions of *the Constitution* of Kenya, 2010.

16. It was contended that Article 22 (1) conferred upon every person the right to enforce the rights and fundamental freedoms in the Bill of Rights and the values and principles of *the Constitution* of Kenya, 2010. That further, Article 258 (1) conferred every person the right to institute court proceedings, claiming that *the Constitution* of Kenya had been contravened, or was threatened with contravention. In addition, Article 258 (2) (c) permitted a person to institute court proceedings in the public interest.

17. The Petitioner averred that all persons, institutions or public officers are bound by the provisions of *the Constitution* of Kenya, 2010. That he recognized that there had been a breach and he therefore sought to bring this action in their own behalf and on behalf of Kenyans who want the government through the Respondents, Executive or other public organs to keep fidelity to the rule of law and Constitutionalism. Per the Petitioner, this Honourable Court has power under Article 23 of *the Constitution* of Kenya, 2010 to protect the fundamental rights and freedoms of the Petitioner under Article 22.

18. The Petitioner charged that this Petition was the most efficacious method of enforcing fidelity to *the Constitution* of Kenya 2010 and to have any law that contravened *the Constitution* declared a nullity to the extent of the inconsistency.

19. Based on the above the Petitioner prayed for:

    a. A declaration that Section 66 (l) of the *Marriage Act*, 2014 is unconstitutional, null and void.

    b. Costs of this Petition.

    c. Any such other Order(s) as this Honourable Court shall deem just.

The 1st Respondent's Case

20. The case advanced by the 1st Respondent was that the Petition offended the doctrine of presumption of constitutionality of an Act of Parliament. It was averred that the Courts held the presumption that legislation and regulations are constitutional and that the Petitioner bore the burden of establishing that *the Constitution* has been violated. In order to determine the Constitutionality of a statute, its overall object and purpose must also be considered.

21. The 1st Respondent averred that the Petitioner had not met the judicially prescribed criteria and/or parameters for the granting of the declaration of invalidity of the impugned legislation. It was further averred that the Petitioner had unnecessarily sought the intervention of this Honourable court's power of judgment by calling upon the court to ascertain the constitutionality of the subject sections of the impugned legislation in contravention of Article 45 of *the Constitution*.

22. It was averred that the *Marriage Act* 2014 provisions under Section 3(1) were wide in scope and wide in its application and should be interpreted liberally and purposively in accordance with the letter and

spirit of the Act. That Section 95 of the *Marriage Act* provides for formation rules regulating court practice or procedure under the Act. That the constitutional and lawful purpose, objects and effect of the impugned legislation would stand defeated if the instant Petition is allowed.

23. It was contended that the impugned legislation was meant to actually give effect to inter alia Articles 36 and 45 of *the Constitution*. Further that Section 94(1) of the *Marriage Act* was wide in scope and wide in its application and should be interpreted liberally and purposively in accordance with the letter and spirit of the Act. These provisions grant the Cabinet Secretary powers to provide by Rules or Regulations for operation and better carrying into effect the overall purpose of the *Marriage Act* and involving public participation in accordance with *the Constitution*.

24. According to the 1st Respondent, there were no provisions under the *Marriage Act* obligating or requiring any person to conduct a specific marriage. Every person had an option to choose whether he or she preferred a civil or any other form of marriage which conformed with the right and freedom to contract or associate.

25. On the issue of which of the systems of marriages is suitable, constitutional, valid or desirable, it was contended that it was not for the court but for the people exercising their direct sovereignty under Article 1 of *the Constitution* to decide. This was not a justiciable issue on which reliefs can be granted according to the 1st Respondent.

26. According to the 1st Respondent, the challenge to the Constitutionality of Section 66 of the *Marriage Act* 2014 was unmeritorious and public interest and policy considerations as well as a plain and purposive reading of *the Constitution* weighed heavily against the Petition. In the premise, the 1st Respondent averred that the Petition was unmerited and ought to be dismissed.

The 2nd Respondent's Case

27. It was the 2nd Respondent's averment that the National Assembly's mandate to enact, amend and repeal laws is derived from *the Constitution*. As such, the Petitioner's prayers in the Petition dated 12th June, 2018 threatened the legislative role of Parliament and specifically the National Assembly under Articles 1(1), 94 and 95 of *the Constitution*. It was argued that the Petitioner sought to restrict the National Assembly from carrying out its constitutional mandate derived from Articles 95 and 186 (4) of *the Constitution*. It was further averred that Article 109 of *the Constitution* provided for the exercise of legislative powers by parliament through the passing of Bills to be assented to by the president.

28. It was averred that the impugned legislation begun its life as the National Assembly Bill No. 13 of 2013 and on 16th July 2013 the Marriage (Amendment) Bill No. 13 of 2013 went through its first reading and was thereafter forwarded to the Departmental Committee on Justice and Legal Affairs to scrutinize by way of requesting memoranda from the public as was mandated by Standing Order 127(3) and Article 118 of *the Constitution*.

29. On 8th August, 2013, comments from the public were invited through the print media by placing an advertisement in the Daily Nation Newspaper asking for memoranda from stakeholders. The public was thereafter, involved in the process of enactment of the Marriage Bill, 2013 through Submissions and Memoranda from stakeholders as indicated in the National Assembly Departmental Committee on Justice and Legal Affairs Report of 11th February, 2014. Consequently, it was argued, the amendments to the *Marriage Act* did not violate the principle of public participation under *the Constitution*.

30. The 2nd Respondent further averred that between 18th February, 2014 and 25th March 2014, taking into account the concerns of the different sectors, the National Assembly considered and enacted the

Marriage Bill, 2013 and forwarded in to the President for assent in accordance with Article 115 of *the Constitution*. The Bill was assented to on 29th April 2014 and subsequently commenced on 20th May, 2014.

31. It was averred that the Marriage Bill, 2013 was passed in accordance with *the Constitution* and the National Assembly's Standing Orders and therefore, the National Assembly did not infringe any Article of *the Constitution* as alleged by the Petitioner.

32. It was further averred that under Article 95 (2) the National Assembly deliberates on and resolve issues of the people and under Article 186 (4) it could legislate on any matter. It was further argued that Section 66(1) of the *Marriage Act* 2014 could not be unconstitutional as *the Constitution* permitted the National Assembly to resolve issues of concern to the people. Further, a Statute could not be unconstitutional merely because it did not meet the interest of the Petitioner.

33. It was further argued that the Petitioner had not demonstrated how he had been discriminated against by the enactment of the impugned legislation. The 2nd Respondent contended that Article 45(4) of *the Constitution* recognized that marriages were different depending on the regime under which the marriage was contracted and the provision therefore permitted Parliament to enact legislation that took into account varying traditions, systems and religions. According to them, in terms of marriage, the equality under Article 45(3) of *the Constitution* was granted to the parties to a marriage but Article 45(4) recognized that marriages could be contracted under different traditions, systems and religions.

34. It was also contended that each person chooses which regime they wish to be married under based on their religions and beliefs and the *Marriage Act*, gave citizens this freedom pursuant to *the Constitution*.

35. The 2nd Respondent's contention was that the instant Petition contravened the principle of presumption of constitutionality of legislation enacted by Parliament and therefore the Court should not entertain the same.

36. It was averred that the Petition was a threat to the doctrine of Separation of powers and an encroachment of the legislative mandate of Parliament. Granting the orders sought by the Petitioner would be a negation of the doctrine of separation of powers and this would be an interference of Parliament's constitutional powers, by the Judiciary.

37. Accordingly, the 2nd Respondent argued that in the circumstances of this case, the court ought not to exercise its discretion to grant the Orders sought as the Petitioner had not adduced any evidence to demonstrate that Section 66 (l) of the *Marriage Act*, 2014 is unconstitutional.

The Petitioner's Submissions

38. On behalf of the Petitioner, Mr. Ole Kina submitted under three heads to wit:

    a. Whether section 66(1) of the *marriage act*, 2014 is unconstitutional hence null and void.

    b. The Presumption of Constitutionality of a statutory provision.

    c. The Doctrine of Separation of powers.

39. On the first issue, Counsel begun by outlining the principles of statutory and constitutional interpretation. It was submitted that Article 259 of *the Constitution* of Kenya introduced a new approach to the interpretation of *the Constitution*. It obliges courts to promote 'the spirit, purport, values and principles of *the Constitution*, advance the rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance. For this argument reliance was placed

on the Supreme Court decision In the Matter of Interim Independent Electoral Commission [2011] eKLR and Apollo v Attorney General & 2 others [2018] eKLR.

40. Drawing from the principles enumerated in the above cited cases, it was submitted that Section 66(1) was unconstitutional as it was in violation of Articles 27(1), (2), (4) and (5). To make this argument, Counsel cited the Black's Law Dictionary for a definition of Discrimination and placed further reliance on Nelson Andayi Havi vs Law Society of Kenya & 3 Others Petition No. 607 of 2017 (2018) eKLR for the guiding principle in establishing where there has been discrimination. In this regard, it was submitted that by creating a requirement that essentially deprived a party who has entered into a civil marriage the right to commence either separation or divorce proceedings for a period of three years without giving equal treatment to the other forms of marriages, Section 66 (1) of the *Marriage Act* differentiates civil marriages from the other forms of marriages without any reasonable justification by imposing the said disadvantage to parties to a civil marriage which disadvantage is not imposed upon the other forms of marriages and which disadvantage deprives the said parties equal opportunity of access to justice.

41. Counsel contended that this limitation in itself was demeaning and unfair to the parties to a civil marriage and meet all the aforementioned 3 steps in Nelson Havi vs LSK (supra) hence discriminatory. Citing Article 24, it was contended that the rights or fundamental freedoms in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

42. It was Counsel's contention that the limitation imposed on parties to a civil marriage could not be said to be based on equality since the same was not imposed on the other various forms of marriages. It was contended that by violating Article 27 (4) the impugned section violated Article 19 which establishes the said rights and fundamental freedoms. As the same disregarded the right to equality and freedom from discrimination, it further violated Article 20 (1) and (2) on the application of the bill of rights which provided that The Bill of Rights applies to all law and binds all State organs and all persons and that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

43. Further, Mr. Ole Kina proffered the argument that whereas Section 3 (3) of the *Marriage Act*, 2014 provides that all marriages have the same legal status, Section 66(1) violated Article 21 (1) and the 2nd Respondent in formulating and passing into law the impugned provision failed to observe, respect, protect, promote and fulfil the right to equality and freedom from discrimination.

44. Turning to the question of the right to human dignity under Article 28, it was submitted that the impugned section further contravened Article 28 as the 2nd Respondent in formulating and passing into law the said provision failed to ensure that the aggrieved parties' human dignity is respected and protected. Counsel argued that by failing to protect human rights and fundamental freedoms by being discriminatory as submitted above, Section 66 (1) failed to preserve the dignity of parties to a civil marriage hence was unconstitutional. Due to the discrimination, the would be Petitioner's dignity may be violated as he/she may be forced to live with someone under conditions of grave depravity without recourse. Reliance was placed on William Musembi & 13 Others v Moi Education Centre Co. Ltd & 3 Others [2014] eKLR

45. Regarding the freedom of association guaranteed under Article 36, it was submitted that whereas Section 3 (1) of the *Marriage Act*, 2014 provided that marriage is the voluntary union of a man and woman whether in monogamous or polygamous union and registered in accordance with the *Marriage Act*, 2014. Section 66(1) contravened Article 36 to the extent that the Article contemplated

freedom of association of every person and not just different categories of persons. Further, it was submitted, in limiting the freedom of the parties to a civil marriage to separate or dissolve their marriage until three (3) years had elapsed, parties who no longer wish to be in the said union were held in servitude of the said union which in effect deprived the parties their freedom to associate with people of their liking/choice as contemplated by Article 36. The would be Petitioner may be forced to live with someone under conditions of grave depravity without recourse in that he/she may not be able free himself or herself from say an abusive marriage due to the three (3) years limitation. Counsel was categorical that the law must always provide an avenue for the realisation and enjoyment of rights.

46. Next, the court was apprised of how the offending section was in violation of Article 48 on access to justice and Article 50 as read together with Article 159 (2) (a) and (b) of *the Constitution*. it was his submission that by barring the filing of a petition for the separation of the parties or for the dissolution of their marriage under Civil Marriages unless three years have elapsed since the celebration of the marriage whereas under all the other forms of marriages as provided under Sections 65, 69 (1), 70 and 71 of the *Marriage Act*, 2014 there is no similar bar as to time, the impugned section contravened the mentioned provisions since it failed to ensure that aggrieved parties have an equal opportunity of access to justice and the prompt access thereto as compared to the parties to the other forms of marriages who can file for separation or dissolution of the marriages at any time as long as they have the required grounds thereto.

47. Concluding on the first issue, Counsel submitted that Article 2 of *the Constitution* proclaimed *the Constitution* to be the supreme law of the country and importantly, it declared that any law or conduct inconsistent with it is invalid. That Section 66(1) being inconsistent with *the Constitution* as had been submitted above was therefore unconstitutional, null and void.

48. Having expended the arguments on the constitutionality of Section 66(1) of the *Marriage Act*, Mr. Ole Kina turned is sights to the principle of the presumption of the constitutionality of a statutory provision. It was submitted that the constitutionality of legislation is a rebuttable presumption. Since all state organs, including the 2nd Respondent, were obligated to uphold the rights and fundamental freedoms in the bill of rights, any law made and passed by the 2nd Respondent that violated the same could not be termed as constitutional and the presumption of constitutionality of the same could not stand. Reliance was placed on Katiba Institute & another v Attorney General & another [2017] eKLR for the submission that since the impugned section failed to meet the constitutional muster as it promoted inequality and discrimination as submitted above, the presumption of constitutionality had been rebutted hence nothing barred the Court from declaring it unconstitutional.

49. On separation of powers, it was submitted that the Respondents' contended that this honourable court ought to respect the doctrine of separation of powers by not interfering with the parliament's constitutional powers to make laws. In response to this argument Counsel sought to rely on the reasoning and words of The Supreme Court in Speaker of the Senate & Another vs Attorney General & 4 others Advisory Opinion Reference 2 of 2013 [2013] eKLR. Further inspiration was drawn from Centre for Rights Education and Awareness & 2 Others vs Speaker of the National Assembly & 6 Others [2017] eKLR and Trusted Society of Human Rights Alliance & 2 Others vs the A.G. & 2 Others.

50. It is on the basis of the above arguments that Counsel urged the court to grant the prayers sought in the Petition with costs.

The 1st Respondent's Submissions

51. Ms. Lutta for the Attorney General framed two issues for determination

a. Does the provision of Section 66(1) of the *Marriage Act* amount to discrimination?

b. Is the provision of Section 66(1) of the *marriage Act* therefore unconstitutional?

52. On the first issue, her point of departure was Section 3 of the *Marriage Act* which she submitted conferred equal status to all marriages contracted under the Act. She submitted that clearly, this provision was in line with Articles 45 and 36 of *the Constitution* in relation to the enactment of legislation that recognizes every marriage and right to have a family and on freedom of association, respectively.

53. She charged that the Petitioner had misconstrued Section 66 (1) of the Act and submitted that his section was not discriminatory. For a definition of discrimination, she placed reliance on the case of Mark Kubai Kariuki & 2 others v Attorney General & 2 others, petition 515 of 2014 [2015] eKLR which quoted the case of Peter K. Waweru vs Republic [2006] eKLR

54. Counsel submitted that the *Marriage Act* does not contain any provisions that treat civil marriages different from other marriages. Further that every person is free to choose a civil or Christian marriage or any other marriage under the Act, this was a conscious choice made by both parties who are adult, and who know and embrace the consequences of such a marriage.

55. It was further submitted that any person entering a marriage does so out of their own volition and choice with full knowledge of the attendant legal status and consequences of the marriage. The exercise of this choice with full knowledge of the facts and provisions of the legal consequences therefore does not render the Section unconstitutional. The Act promotes and protects the rights of men and women to choose freely and consciously, or according to their choice, cultural beliefs or religious faith, which marriage to celebrate amongst the marriage systems recognized by the Act and under *the Constitution*.

56. It was further proposed that the issue of which of the systems of marriage recognized under the *Marriage Act*, whether monogamous or polygamous or potentially polygamous marriages was suitable, constitutional, valid or desirable was not for the Court but for the people, exercising their direct sovereignty under Article 1 of *the Constitution*, to decide. It was not a justiciable issue on which the Court can grant relief. Reliance was placed on Petition 237 of 2014, Mary Wanjuhi Muigai v Attorney General & another [2015] eKLR.

57. Finally, it was submitted that the provision of the Act was merely different and not discriminatory. Reliance was placed on Durga Das Basu - Constitution of India, RM & another vs Attorney General [2006] eKLR and Petition 324 of 2017 Mohammed Abduba Dida vs Debate Media Limited (eklr).

58. Addressing herself on the second issue, Ms. Lutta addressed two propositions, the doctrine of presumption of constitutionality and whether the process followed parliament to enact this legislation was proper.

59. On the doctrine of presumption of constitutionality, it was submitted that it is presumed that Acts made by Legislations are valid and that they do not intend to enact a law that is ultra vires to *the constitution*. In constitutional law, it was submitted, the presumption of constitutionality is the legal principle that the judiciary should presume statutes enacted by the legislature to be constitutional, unless the law is clearly unconstitutional or fundamental right is implicated. Further, in determining the constitutionality of a statute, Counsel submitted that the court in the case of Olum & another v Attorney General [2002] 2 EA held that the court had to consider the purpose and effect of the impugned statute by *the Constitution*. If the purpose was not to infringe a right guaranteed by *the Constitution*, the court had to go further and examine the effect of its implementation. If either the purpose or the effect of its implementation infringed a right guaranteed by *the Constitution*, the statute

or section in question would be declared unconstitutional. Further reliance was placed on Abuki v Attorney General - Constitutional Petition 2 of 1997 and Murang'a Bar Operators another v Minister For State For Provincial Administration and Internal Security & 2 Others which both made reference to The Queen vs Big M. Drug Mart Limited(others intervening) [1986] LRC (Const) 322

60. For the submission that the burden on proof lay with the petitioner to prove that he impugned section was unconstitutional and that it violated the provisions of *the Constitution*, reliance was placed on Mumo Matemu and Another vs Trusted Society of Human Rights (2013) eKLR.

61. Submitting that there was a rebuttable presumption that legislation is constitutional and that the onus of rebutting the presumption rested on those who challenge that legislation's status, Counsel buttressed her argument with the cases of Ndyanabo v Attorney General [2001] 2 EA 485, South Dakota v North Carolina [1940] 192 US 268 and Hambarda Wakhana v Union of India AIR (1960) AIR 554 cited with approval in the case of Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County of Nairobi Government & 3 others [2013] eKLR.

62. In the end, Counsel submitted, the court's duty was to delicately ascertain whether the legislation is in accordance with or in contravention of *the Constitution* and make an appropriate declaration and then do no more. That the object, purpose and effect of the impugned statute ought to be drawn from the Preamble and further from the content of the Act which must be read as a whole. Based on the case of Tinyefuza vs Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC3), it was submitted that it was also a cardinal principle that the provisions of *the Constitution* must be read as an integrated whole without any one particular provision destroying the other but each sustaining the other and the court ought to take a liberal approach that promotes the rule of law, has jurisprudential value and that takes into account the Spirit of *the Constitution* in line with the mischief of the intended purpose and spirit of the Statute Laws in issue.

63. At this point in the 1st Respondent's submissions, the attention turned to whether the process followed parliament to enact the impugned legislation was proper. In this regard, it was submitted that Parliament was mandated under Article 45(4) to revise rationalize existing family law.

64. Counsel submitted that prior to the effecting of the amendments the National Assembly Committee on land went through a rigorous exercise and compiled a report which took into account various concerns of different stakeholders through a process of public participation. These concerns were documented into reports which were presented to severally to the National Assembly and Senate before the bill was formulated and passed into law as evidenced by the Affidavit of the 2nd Respondent. It was further submitted that the whole process was to ensure that when the final bill when passed would be in total conformity with *the Constitution* and the intentions of the Acts that were being amended. On this limb, reliance was placed on Petition Number 3 of 2016 Law Society of Kenya versus the Attorney General & 10 Others

65. A submission was made that the Act did not in any manner undermine judicial authority under Article 159 of *the Constitution*.

66. In conclusion the Counsel for the 1st Respondent urged this court to clearly evaluate all the Respondents' submissions presented in this matter in any event the construction of the words in the Section are not mandatory and if so the Act itself is self- regulatory as provided for under Rule 93, 94 and 95 of the Act. Ms. Lutta hence submitted that the Petition lacked merit and ought to be dismissed with costs.

The 2nd Respondent's Submissions

67. Mr. Mwendwa submitting on behalf of the 2nd Respondent formulated five issues for determination to wit:

    a. Whether the 2nd Respondent exercised its legislative authority in accordance with *the Constitution*.

    b. Whether section 66(1) of the *Marriage Act*, 2014 is Unconstitutional

    c. Whether Parliament in the enacting of the *Marriage Act* followed the correct legislative procedure.

    d. Whether section 66(1) of the *Marriage Act*, 2017 discriminate against the petitioner

    e. Whether the courts can interfere with the functions of Parliament.

68. On the first issue, it was submitted that Parliament had a constitutional obligation to take legislative and policy measures to ensure that there is progressive realization of each and every right guaranteed by *the Constitution*. It was further submitted that the National Assembly derived its mandate to enact, amend and repeal laws from *the Constitution* of Kenya and specifically under Article 94 which provided for the role of Parliament. It was submitted that article 95(2) stated that the National Assembly deliberates and resolves issues of concern to the people. Going further, Mr. Mwendwa submitted that Article 109 provided for the manner in which legislative powers ought to be exercised.

69. Regarding the constitutionality of Section 66(1) of the *Marriage Act*, 2014, reference was made to the case of JAC vs PW [2015] eKLR and SB vs SM [2016] eKLR where the court in both instances declined to entertain petitions for divorce before the lapse of three years as the Act did not provide for the same unlike the repealed Matrimonial Causes Act which had a proviso to the effect that such an application could be entertained.

70. It was further submitted that *the Constitution* allowed for a difference in treatment of marriage. Citing Article 45(4), it was submitted that *the Constitution* had authorized parliament to enact legislation that recognised that marriage can be contracted under varying systems, religions or traditions. It was submitted that the varying systems in the *Marriage Act*, 2014 were sanctioned by *the Constitution* itself and therefore different requirements for each system in the Act could not be unconstitutional. That been a matter of policy, it was not for this Honourable Court to substitute its decision with the Policy. This argument was buttressed with reference to the Indian case of Maharashtra State Board vs Kurmarsheth & Others, [1985] CLR 1083.

71. Counsel urged that each citizen was permitted to choose the system of law under which they wish to contract their marriage and the *Marriage Act*, 2014 being a public document, each person has an opportunity to choose which system they wish to apply to them.

72. Mr. Mwendwa sought to draw inspiration from a paper titled 'The Law Commission working paper No. 76: Time restriction on presentation of divorce and nullity petitions' where it was explained that the Morton Commission in 1956 stated that the rule was a "stabilizing effect" on marriage. That the commission thought that the rule encouraged husbands and wives to face and resolve their differences in the period of adjustment which necessarily takes place during the first few years of married life. Further, the Law Commission's report on law reform of the divorce law recommended for the retention of the three year rule in England as it was useful to shape an attitude of mind and safeguard against irresponsible or trial marriages during the difficult early years. Further reference was made to a paper by Debbie S L. Ong titled, "The Restriction on divorce in Singapore" where it was

contended that the three year restriction was a matter of public policy. It was therefore submitted that the idea that the institution of marriage should not be devalued by permitting early divorce is therefore a public policy consideration.

73. Regarding whether the enactment of the *Marriage Act* flouted procedural and substantive requirements, it was submitted that on 16th July, 2013, the Marriage Bill went through the first reading and was immediately committed to the Departmental Committee on Justice and Legal affairs to scrutinize by way of requesting for memoranda from the public as is mandated by standing order 127(3). The 2nd Respondent indicated that on the 25th March, 2013, taking into account into account the concerns of the different sectors, The National Assembly considered and passed the Bill. Further that the Bill was subsequently forwarded to the President for assent in accordance with Article 115 of *the Constitution*. Additionally, it is indicated by the Respondent that on the 29th April, 2014 the President in exercise of powers conferred to him under Article 115(1)(b) of *the Constitution*, assented to the Bill and the same commenced on 20th May, 2014.

74. As to whether the court can interfere with the constitutional mandate of parliament, learned counsel submitted that the actions that are the subject of this petition are matters relating to the legislative role of Parliament. According to the 2nd Respondent, the Parliament is vested a legislative role and all arms of government including the Legislature are mandated to exercise control over its internal proceedings and the legislature ought to be allowed to regulate its own affairs without undue interferences and this principle is universal. It is indicated that the right of Parliament to regulate matters of its own internal management is firmly rooted in *the Constitution* under Article 117 and 124.

75. Further, the 2nd Respondent, through counsel, submitted that the privilege of Parliament is also protected by statute under the National Assembly and Senate (Powers and Privileges) Act, Cap 6, Laws of Kenya. This Act has since been repealed and replaced by the Parliamentary Powers and Privilege Act of 2017. It is also indicated that the privilege of Parliament is bestowed upon the legislature to protect Parliament in the discharge of its functions as a representative of the people and as an oversight body that provides checks and balances in line with the principle of separation of powers.

76. Mr. Mwendwa argued that the independence of the legislature does not allow for decisions of either House or its Speaker to be questioned by any court and therefore this Application violates the principle set out by the Court of Appeal in Civil Appeal No. 157 of 2009; John Harun Mwau vs Dr. Andrew Mullei & 3 Others. According to the 2nd Respondent, as a general principle, a person wronged by Parliamentary proceedings cannot apply for Judicial Review except where an Act of Parliament is Unconstitutional. It is further indicated that therefore the Courts ought to refrain from judicial interference in Parliamentary Proceedings. The Respondent placed reliance on the case of U.S vs Butler, 297 U.S (1936) to advance its contention.

77. It is also indicated by the 2nd Respondent that in examining whether a particular statutory provision is unconstitutional, the Court the Court must have regard not only to its purpose but also its effect. Reliance was placed on Canadian Supreme Court in the R vs M Drug Mart Ltd (1985) 1 S.C.R 295 to advance this principle. On the principle of allowing Parliament to regulate its internal matters, the 2nd Respondent relied on the Supreme Court of Kenya in Speaker of the Senate & Another vs Attorney-General & 4 Others (2013) eKLR; Republic v National Assembly Committee of Privileges & 2 Others Ex-Parte Ababu Namwamba (2016) eKLR; Pevans East Africa Limited and Another vs Chairman, Betting Control & Licensing Board and Board and Others Civil Appeal No.11 of 2018 at Nairobi.

78. The 2nd Respondent argued that the orders sought in this petition violated the principle of separation of powers as they seek for this Honorable Court to interfere with management of Parliament. Reliance was placed on the case Blackburn vs Attorney General (1971) 1 WLR 1037 to advance its contention.

Further that in order for this Honorable Court to invoke its jurisdiction to inquire into acts of the Parliament pursuant to its powers and obligations under Chapter Eight of *the Constitution*, the Petitioners must establish that there is a violation or threatened violation of *the constitution*. The 2nd Respondent relied on the case of The Speaker of the Senate & Another v Attorney-General & 4 Others (2013) eKLR; In Marbury vs Madison, 5 U.S 137 (1803), HC Petition No. 227 of 2013 Okiya Omtatah Okoiti & 3 Others v Attorney General & 5 Others (2014) eKLR.

79. It was indicated by the 2nd Respondent that this Honorable Court should not be seen to prevent the National Assembly from undertaking its Constitutional obligations as the Petitioner seeks to do, as the same goes against the important tenet of Parliament's oversight role. The 2nd Respondent relied to the case of The Judicial Service Commission vs Speaker of the National Assembly and Others Petition No. 518 of 2013 (UR).

80. The 2nd Respondent relied on Article 165(3)(b) of *the Constitution* which provides for the jurisdiction of the High Court to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringement or threatened and in terms of Article 165(3) (d) (ii) the High Court also has jurisdiction to determine the question whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with, or in contravention of, this Constitution this is when the court can declare unconstitutionality of a given section.

81. The 2nd Respondent contended that the Petitioners failed to demonstrate that there has been any violation of *the Constitution*. It was submitted that Parliament's business was conducted in an open manner and there is no evidence to the contrary. The 2nd Respondent therefore takes the view that there is no basis to invoke the jurisdiction of this Court under Article 165 of *the Constitution*.

82. On whether the Bill in question is unconstitutional, the 2nd Respondent states that in order to determine the constitutionality of a statute, the Court has to consider the purpose and effect of the impugned statute or section thereof. Further that if the purpose was not to infringe a right guaranteed by *the Constitution*, the Court has to go further and examine the effects of its implementation. It is also indicated if either the purpose or the effect of its implementation infringed a right guaranteed by *the Constitution*, the statute or section in question would be declared unconstitutional. Reliance to the effect was placed on the case of Muranga Bar Operators and Another vs Minister of State for Provincial and Internal Security & 2 Others. Further reliance was placed on the case of R v Big M Drug Mart Ltd (1985) 1 S.C.R. 295; and Mugambi Imanyara and Another (Supra).

83. On whether section 66(1) of the Bill discriminates against the petitioner, the 2nd Respondent was of the view that the said section cannot be declared unconstitutional or discriminatory just because it is not in favor or does not meet the economic interest of the petitioner. Further that there can be no discrimination where there is no obligation as each citizen chooses the regime that they wish to apply to them and in this regard therefore the Bill's provision granting citizens the right to choose a regime manifests each individual's constitutional rights as envisaged by *the constitution*. Reliance was placed in the case of Petition No. 291 of 2015, David Mwaure Waihiga vs the Public Service Commission and 4 Others (Unreported) where it was stated that unfair discrimination is differential treatment that is demeaning and that it is not every differentiation that amounts to discrimination.

84. Further reliance was placed in the Willis vs The United Kingdom where the European Court of Human Rights observed that discriminated means treating differently, without any objective and reasonable justification, persons in similar situations. The 2nd Respondent cited article 27(4) which basically provides for the principle of non-discrimination. Reliance was also placed on the case of Mohammed Abduba Dida v Debate Media Limited & Another (2017) eKLR.

85. The 2nd Respondents submitted that the imposition on section 66(1) is not mandatory provision the petition still has the option of choosing other forms of marriage that are provide under the *Marriage Act* that don't have that particular restriction. It was humbly submitted that the 2nd Respondent's submits that the Petitions herein is devoid of merits lacks any basis in law and prays that the Petition be dismissed. Further, the orders sought violate the constitutional power granted to Parliament to enact, amend or repeal any law through Bills passed and assented to by the President. The 2nd Respondent urged the Honorable Court to dismiss the petition with costs.

The Law, Analysis and Determinations

86. The Court has expended every effort to evaluate the arguments made in favour of nullifying Section 66(1) of the *Marriage Act*, 2014 by the Petitioner, Mr. Ole Kina, Advocate. In the same vein, the court has also taken into account the averments and submissions espoused on behalf of the Attorney General by Senior State Counsel Ms. Lutta and the National Assembly represented by Mr. Mwendwa, in support of the authenticity of the impugned section. The Court in this instance is being asked to declare as unconstitutional, null and void the impugned Section on the basis that the Section as currently constituted is not only discriminatory and an affront to the right to human dignity but also infringes on the freedom of association and the right to access to justice and to a fair and expeditious hearing.

87. As I see it, in executing the arduous task of scrutinizing the validity of the impugned section, it is incumbent upon this court to give consideration to the following issues:

    a. Whether the issues raised in the Petition successfully rebut the Presumption of constitutionality of the *Marriage Act*, 2014

    b. Whether a determination on the constitutionality of the *Marriage Act*, 2014 is a usurpation of the mandate of Parliament hence an affront to the doctrine of separation of powers

    c. What is the effect of the doctrine of proportionality test when applied to the instant Petition

    d. Whether Section 66 (1) of the *Marriage Act*, 2014 is unconstitutional and in violation of, amongst other provisions of *the Constitution*, Articles 27 on equality and freedom from discrimination.

    e. Was the *Marriage Act*, 2014 procedurally enacted in observance of the basic tenets of public participation

88. It is no small thing to call into question the legitimacy of statute law. However, this court is constitutionally mandated under Article 23(1) to hear and determine applications for redress of a denial, violation or threat to a right or fundamental freedom in accordance with Article 165. When the violation or threat stems from a clause contained in a statute, it behoves the court to lay side by side the impugned provision of statute and Articles of *the Constitution* it is alleged to have offended and see whether the former squares with the latter. (See United States v. Butler, 297 U.S. 1 (1936). It follows therefore that before the Court can get into the business of the cogency or lack thereof of the challenged section, it must first bring a few issues to bear. My point of departure is to elaborate the guiding principles of constitutional interpretation.

89. Article 2 ordains *the Constitution* as the supreme law of the land and further avows that any law that fails to resonate with *the Constitution* is invalid to the extent of its inconsistency.

90. Article 10 on the other hand is premised on the basis that that the national values and principles are binding to all and ought to be considered when enacting, applying and interpreting any law. These

principles, especially as they relate to the instant Petition include "human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized."

91. Article 259 of *the Constitution* is the cornerstone of the interpretation of *the constitution*. It lays down the guidelines as follows:

> "(1) This Constitution shall be interpreted in a manner that—
>
> (a) Promotes its purposes, values and principles;
>
> (b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
>
> (c) Permits the development of the law; and
>
> (d) Contributes to good governance."

92. Discussing constitutional interpretation, the Supreme Court In the Matter of Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 [2011] eKLR rendered itself as below:

> "...The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). *The Constitution* has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. *The Constitution* has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.
>
> (87) In Article 259(1) *the Constitution* lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance." Article 20 requires the Courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights."

93. In Apollo v Attorney General & 2 others Petition No. 472 of 2017 [2018] eKLR, citing various authorities, the Honourable Mativo J. summarized the principles on interpretation in the following manner:

> "33. When the constitutionality of legislation or a provision in a statute is challenged, a court ought first to determine whether, through "the application of all legitimate interpretive aids," The impugned legislation or provision is capable of being read in a manner that is constitutionally compliant. Differently put, whether a law is invalid is determined by an objective enquiry into its conformity with *the Constitution*.

34. It is useful to restate the well-known general principles relating to constitutional interpretation, which are, in any event, incontrovertible. The first principle is that *the Constitution* of a nation is not to be interpreted like an ordinary statute. In his characteristic eloquence, the late Mahomed AJ described *the Constitution* as "a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government" The spirit and tenor of *the Constitution* must therefore preside and permeate the process of judicial interpretation and judicial discretion. In keeping with the requirement to allow the constitutional spirit and tenor to permeate, *the Constitution* must not be interpreted in 'a narrow, mechanistic, rigid and artificial' manner. Instead, constitutional provisions are to be 'broadly, liberally and purposively' interpreted so as to avoid what has been described as the 'austerity of tabulated legalism.' It is also true to say that situations may arise where the generous and purposive interpretations do not coincide. In such instances, it was held that it may be necessary for the generous to yield to the purposive. Secondly, in interpreting constitutional rights, close scrutiny should be given to the language of *the Constitution* itself in ascertaining the underlying meaning and purpose of the provision in question." (See National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24, Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (Ferreira v Levin) at para 26., S v Acheson 1991 NR 1(HC) at 10A-B, Government of the Republic of Namibia v Cultura 2000 1993 NR328 (SC) at 340A-C., The South African Constitutional Court cases of S v Makwanyane 1995 (3) SA 391 (CC) at Para [9] footnote 8; Soobramoney v Minister of Health (KwaZulu-Natal) 1998 (1) SA 765 (CC) at para 17., Kauesa v Minister of Home Affairs and Others 1995 NR 175 (SC) at 183J-184B; S v Zemburuka (2) 2003 NR 200 (HC) at 20E-H; Tlhoro v Minister of Home Affairs 2008 (1) NR 97 (HC) at116H-I; Schroeder and Another v Solomon and 48 Others 2009 (1) NR 1 (SC) at 6J-7A; Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia 2009 (2) NR 596 (SC) at 269B-C. and Minister of Defence v Mwandinghi 1993 NR 63 (SC); S v Heidenreich 1998 NR 229 (HC) at 234.")

94. Flowing from the principles so succinctly summed up in the preceding authorities, the spirit and tenor of *the Constitution* of Kenya, 2010 ought to reverberate throughout my approach towards the interpretation of *the constitution* in relation to the question at hand. In addition, my interpretation ought to be holistic rather than restrictive. In construing the impugned provisions, I am enjoined to go further than avoiding an interpretation that clashes with the Constitutional values, purposes and principles. I must also seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances rule of law, human rights and fundamental freedoms in the Bill of Rights. My interpretation ought to permit development of the law and contributes to good governance. I must also promote and protect the purposes and principles of *the Constitution* as required by the provisions of Article 159 (e).

95. Bearing in mind the foundation already set, I shall now address the first issue of whether the argument in favour of invalidating Section 66(1) rebutted the presumption of the constitutionality of the *Marriage Act*, 2014. I make reference to the reflexions on the presumption of constitutionality by

Sykes CJ in Robinson, Julian v The Attorney General of Jamaica 2018 HCV01788 [2019] JMFC Full 04 where he quoted the case of Attorney General of Trinidad and Tobago v Mootoo (1976) 28 WIR 304, where in the passage at page 335 Corbin JA had stated:

> There is a very heavy burden cast on any person challenging the validity of any piece of legislation since there is a presumption that the legislature understands and correctly appreciates the needs of the people and that its laws are directed to problems made manifest by experience. The court will only declare a statute invalid if it conflicts with *the Constitution* and so the onus is on anyone seeking to impugn a statute to show that in the circumstances which existed at the time it was passed, the legislation violated rights enshrined in *the Constitution*.
>
> This strong presumption in favour of validity has been recognised by many learned authors of textbooks, but it will be sufficient to refer only to one or two of these, eg Cooley on Constitutional Limitations (1972) reprint at p 183:
>
> > 'The constitutionality of a law, then is to be presumed, because the legislature, which was first required to pass upon the question, acting, as they must be deemed to have acted, with integrity, and with a just desire to keep within the restrictions laid by *the Constitution* upon their action, have adjudged that it is so. They are a co-ordinate department of the government with the judiciary, invested with very high and responsible duties, as to some of which their acts are not subject to judicial scrutiny, and they legislate under the solemnity of an official oath, which it is not to be supposed they will disregard.'
>
> Black on Interpretation of Laws (1911) p 110:
>
> > 41. Every Act of the legislature is presumed to be valid and constitutional until the contrary is shown. All doubts are resolved in favour of the validity of the Act. If it is fairly and reasonably open to more than one construction, that construction will be adopted which will reconcile the statute with *the Constitution* and avoid the consequence of unconstitutionality.
> >
> > Legislators, as well as judges, are bound to obey and support *the Constitution*, and it is to be understood that they have weighed the constitutional validity of every Act they pass. Hence the presumption is always in favour of the constitutionality of a statute; every reasonable doubt must be resolved in favour of the statute, not against it; and the courts will not adjudge it invalid unless its violation of *the Constitution* is, in their judgment, clear, complete, and unmistakable. And, further, a State statute can be declared unconstitutional only where specific restrictions upon the power of the legislature can be pointed out, and the case shown to come within them, and not upon any general theory that the statute is unjust, oppressive, or impolitic, or that it conflicts with a spirit supposed to pervade *the Constitution*, but not expressed in words. Neither will any court, in determining the constitutional validity of a statute, take into consideration or pass upon the motives of the legislature in its enactment.'

And in Seervai's Constitutional Law of India at p 54:

> 'There is a presumption in favour of constitutionality and a law will not be declared unconstitutional unless this case is so clear as to be free from doubt; to doubt the constitutionality of a law is to resolve it in favour of its validity.'
>
> The same principle has also been emphasised by the courts in a long list of decided cases. One of the most recent of these is the decision of the Privy Council in Attorney-General v Antigua Times Ltd ((1975) 21 WIR 560, [1975] 3 All ER 81, [1976] AC 16, [1975] 3 WLR 232) where Lord Fraser of Tulleybelton stated ((1975) 3 All ER at p 90):
>
> 'In some cases it may be possible for a court to decide from a mere perusal of an Act whether it was or was not reasonably required. In other cases, the Act will not provide the answer to that question. In such cases has evidence to be brought before the court of the reasons for the Act and to show that it was reasonably required? Their Lordships think that the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required. This presumption will be rebutted if the statutory provisions in question are, to use the words of Louisy J, "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power but constitutes in substance and effect, the direct execution of a different and forbidden power".'

And in Hinds v The Queen and DPP v Jackson ((1975) 24 WIR 326, [1976] 1 All ER 353, [1976] 2 WLR 366, [1977] AC 195) Lord Diplock, after expressing the opinion that the presumption exists ((1976) 24 WIR at P 340), stated:

> 'The presumption is rebuttable. Parliament cannot evade a constitutional restriction by a colourable device. But in order to rebut the presumption their Lordships would have to be satisfied that no reasonable member of Parliament who understood correctly the meaning of the relevant provisions of *the Constitution* could have supposed that hearings in camera were reasonably required for the protection of any of the interests referred to; or, in other words, that Parliament in so declaring was either acting in bad faith or had misinterpreted the provisions of *the Constitution* under which it purported to act.' (Emphasis added)

96. Instrumental in illuminating the way forward, the above rendition in my view will be crucial in determining whether the Respondents' argument that the Petitioner failed to rebut the presumption of constitutionality holds water. This can only be done upon an analysis of whether Section 66(1) was discriminatory. If it is my finding that the impugned Section was in violation of *the constitution*, then the presumption of its constitutionality will have sufficiently been rebuked. Conversely, should I reach the conclusion that Section 66(1) of the Act augured well with the constitutional dictates, then the Petition would ultimately fail.

97. Due to an intersectionality that will become evident in my analysis of the question of whether the doctrine of separation of powers ought to curry favour over the principle of proportionality of statutes, I propose to tackle these issues concurrently.

98. The principle of Separation of Powers developed as a political idea and as fronted by Charles Louis de Baron Montesquieu in the ever eternal The Spirit of the Laws, was intended to enhance liberty and restrict tyranny by ensuring that all power in a governance system was not concentrated in the same person or group of persons. In the words of Montesquieu:

> " In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.
>
> By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other, simply, the executive power of the state."

99. The Supreme Court in Speaker of the Senate & Another vs Attorney General & 4 others Advisory Opinion Reference 2 of 2013 [2013] eKLR held:

> " (61) It emerges that Kenya's legislative bodies bear an obligation to discharge their mandate in accordance with the terms of *the Constitution*, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation. This Court recognizes the fact that *the Constitution* vests the legislative authority of the Republic in Parliament. Such authority is derived from the people. This position is embodied in Article 94(1) thereof. The said Article also imposes upon Parliament the duty to protect *the Constitution* and to promote the democratic governance of the Republic. Article 93(2) provides that the national Assembly and the Senate shall perform their respective functions in accordance with *the Constitution*. It is therefore clear that while the legislative authority lies with Parliament, the same is to be exercised subject to the dictates of *the Constitution*. While Parliament is within its general legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of *the Constitution*. It cannot operate besides or outside the four corners of *the Constitution*. This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.
>
> (62) However, where a question arises as to the interpretation of *the Constitution*, this Court, being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty."

100. Speaking on the doctrine of Separation of Powers, at. Para 93 of Petition No. 472 of 2018 (supra) the Court reasoned that:

> " 93. According to the classical doctrine of the separation of powers, the power of enacting laws (legislative power) should be separated from the power of administering the state (executive power) and the power of interpreting

> and applying the laws to particular cases (judicial power).[43] However, constitutions adhering to this doctrine such as ours do not typically keep the branches of government entirely separate. As James Madison argued, the doctrine allows for each of the three branches of government to have some involvement in, or control over, the acts of the other two. This partial mixture of mutually controlling powers is known as a system of checks and balances. [44]"

101. By the same token, Sykes CJ in Robinson, Julian v The Attorney General of Jamaica (supra) at para. 159 the Court stated:

> " Each arm of government is free to operate in its sphere but all three arms must operate according to *the Constitution*. A judge is not authorised to make an unconstitutional decision any more than the legislature can enact an unconstitutional law, and any more than the executive can promulgate an unconstitutional policy. *The Constitution* stands above all three arms of government and must be obeyed by all three arms."

102. At para. 168 it was further stated:

> " If the legislature decides to pass a law it still has wide powers to decide the content of the law, its purpose, the means to achieve the purpose which restricts any particular right or freedom the least. The legislature, while having full control over the content of legislation is not without constraints. *The constitution* sets out the parameters of the legislature's choices. The choices made or to be made are circumscribed by fundamental rights and freedoms. The purpose and the means to realise the purpose must be constitutional."

103. In the same tenor, the Court in the Apollo Mboya case, at para. 30 stated:

> " 30. It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot not go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot not legislate itself."

104. The doctrine of proportionality on the other hand states that all laws enacted by the legislature and all actions taken by any arm of the state, which impact a constitutional right, ought to go no further than is necessary to achieve the objective in view. To illustrate what this test encompasses, I look no further than to the aphorism of Dr Dhananjaya Chandrachud J in Justice K Puttaswamy (Rtd) and Anr v Union of India Writ Petition (Civil) NO 494 of 2012 (delivered September 26, 2018). His Lordship at paragraphs 197 – 198 stated:

> The test of proportionality, which began as an unwritten set of general principles of law, today constitutes the dominant "best practice" judicial standard for resolving disputes that involve either a conflict between two rights claims or between a right and a legitimate government interest. It has become a "centrepiece of jurisprudence" across the European

continent as well as in common law jurisdictions including the United Kingdom, South Africa and Israel. ... It has been raised to the rank of fundamental constitutional principle, and represents a global shift from a culture of authority to a culture of justification. ...

...The test of proportionality stipulates that the nature and extent of the State's interference with the exercise of the right ...must be proportionate to the goal it seeks to achieve.... (Emphasis added)

105. Put differently, proportionality involves the Court taking into consideration both the purpose and effect of the legislation. In the Canadian Supreme Court decision in Queen vs Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, this principle was enunciated in the following terms:

> " Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity." (Emphasis added)

106. In Olum and another v Attorney General [2002] EA, the court held that;

> " To determine the constitutionality of a section of a statute or Act of parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by *the Constitution*, the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by *the Constitution*, the impugned statute or section thereof shall be declared unconstitutional."

107. Armed with the meticulous exposition above, I am confident, and it is thus my finding that it is the duty of this court to scrutinize allegations of rights infringement. This duty is germane to the edicts of constitutional interpretation and is no way a usurpation of the mandate of parliament. Where the purpose or the effect of an impugned provision goes against the grain of *the Constitution*, or where there is no discernible link between the legislation and the purpose, then the Court cannot shirk its constitutional fiat to call the offending provision into question.

108. That being said, I now fix my gaze upon the Petitioner's gravamen. To begin with, the Petitioner contends that by limiting the presentation of a Petition for the dissolution of a civil marriage before the lapse of three years, the Section discriminates against persons in this type of union or keen on getting into the said union. He contends that Section 66 (1) unnecessarily makes a distinction between civil marriages and the other forms of marriages contemplated under the Act without any reasonable justification by imposing the said disadvantage to parties to a civil marriage which disadvantage is not imposed upon the other forms of marriages. Per the Petitioner, not only is the requirement for three years discriminatory but it also potentially has the net effect of keeping persons in unions they no longer wish to be part of hence denigrating their human dignity by exposing the parties in that civil marriage to conditions they are not content with.

109. The Respondents' took a diametrically opposed view. The running thread through their arguments in support of the propriety of the impugned Section was that the Section was merely different rather than discriminatory. They furthered the proposition that in any case, parties had the option of choosing any of the other regimes of marriage contemplated under the Act if they were not comfortable with

the three year waiting period provided for under Section 66(1). That merely because the Section did not serve the interests of the Petitioner was not enough basis to declare the impugned Section discriminatory.

110. Does the position advanced by the Respondents' portray a correct analysis of the law? I think not. Let me elaborate. Section 66(1) of the Act is couched thus:

66.

(1) A party to a marriage celebrated under Part IV may not petition the court for the separation of the parties or for the dissolution of the marriage unless three years have elapsed since the celebration of the marriage.

111. Article 27 provides that:-

1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.

2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

112. Article 28 provides:

28. Human dignity

Every person has inherent dignity and the right to have that dignity respected and protected.

113. The Court in Nelson Andayi Havi vs Law Society of Kenya & 3 Others Petition No. 607 of 2017 (2018) eKLR formulated a three pronged approach to identifying discrimination. It was stated thus:

> " 90. In determining discrimination, the guiding principles are clear. The first step is to establish whether the law differentiates between different persons. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair."

114. In the case of Nyarangi & 3 Others v Attorney General [2008] KLR 688, the Court defined discrimination as-

> " The effect of law or established practice that confers privilege on a class or that denies privileges to a certain class because of race, age, sex, nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when reasonable distinction can be found between those favoured and those not favoured."

115. On its part, the Court in John Harun Mwau v Independent Electoral and Boundaries Commission & Another [2013] eKLR stated;

> " [i]t must be clear that a person alleging a violation of Article 27 of *the Constitution* must establish that because of the distinction made between the claimant and others the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of *the constitution*."

116. Taking into account the decisions I've cited above it is my finding that Section 66(1) denies parties desirous of dissolving their union under the umbrella of Civil Marriage the opportunity to do so unless and until a three year period has lapsed since the celebration of that union. This is prima facie discriminatory. Whether or not this discrimination is unfair can be assessed by taking the cue from Harksen v Lane NO and Others {1997} ZACC 12; 1998 (1) SA 300(CC); 1997 (11) BCLR 1489(CC) (Harksen) at para 48 where it was stated:

> " They are: -
>
> (a) Does the provision differentiate between people or categories of people" If so, does the differentiation bear a rational connection to a legitimate purpose" If it does not then there is a violation of *the constitution*. Even if it does bear a rational connection, it might nevertheless amount to discrimination.
>
> (b) Does the differentiation amount to unfair discrimination" This requires a two-stage analysis: -
>
> (i) Firstly, does the differentiation amount to 'discrimination'" If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
>
> (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'" If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation.....
>
> (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause of the ...Constitution).

117. The discrimination in the instant case is on an unspecified ground, it was upon the complainant to establish the same. The test for this focuses primarily on the impact of the discrimination on the

situation of the complainant. The Respondent's argued that the three year limit was a public policy consideration. That it was put in place in order to protect the sanctity of marriage as parties ought not to be allowed to waltz willy-nilly in and out of the hallowed institution of marriage. That this period was meant to have a stabilizing effect on new unions by creating an opportunity for newlywed couples to navigate through the vagaries of marriage. In Matadeen and Another vs Pointu and Others [1998] 3 WLR 18 Lord Hoffman in addressing differential treatment of persons stated that:

> " of course, persons should be uniformly treated unless there is some valid reason to treat them differently. The reasons for not treating people uniformly often involve questions of policy."

118. The policy argument fronted by the Respondents' as a basis for the differential treatment of persons desirous of dissolving a marriage falls short in my view. A cursory observation of the underpinnings of this argument reveals that the same was wholly based on the position in England as presented in the paper titled 'The Law Commission working paper No. 76: Time restriction on presentation of divorce and nullity petitions'. Further reliance was placed on the position in Singapore as discussed in the paper by Debbie S L. Ong titled, 'The Restriction on divorce in Singapore'. However, scarce effort was expended by the Respondents' to prove that in passing the impugned provision, the drafters of the Act paid any mind to public policy. If the imposition of the three year limitation was indeed a public policy consideration, all the parliamentary draughtsmen had to do was to express said intention uniformly across all the regimes of marriage contemplated under the Act. After all, it is provided in Section 3 (3) of the *Marriage Act*, 2014 that all marriages have the same legal status. Why was no such limit imposed on the four other regimes of marriage envisioned under the Act? Furthermore, if we were to take this line of reasoning as the gospel, what informed the decision to pick three years and not two or four? What reasoning was used to arrive at the conclusion that the three year period was sufficient enough to make a fledgling marital union stable? None of the foregoing questions were answered to my satisfaction or at all by the Respondents'.

119. The position of Civil Marriage as one of the five regimes recognised in Kenya cannot be understated. Christian Marriages as per Section 17 of the Act are restricted to parties that profess the Christian faith. Per Section 43(1), customary marriage is entered into in observance of the customs of the communities of one or both of the parties. Respectively, Sections 46 and 48 of the Act dictate that only parties that profess the Hindu or Islamic faith can enter into such unions. Inverse to the foregoing is the position of Civil Marriages. There is no limitation as to creed or community. All that is required is the intention of consenting adults. The umbrella of Civil marriages shelters not only the persons that do not fit the specific restrictions of faith and community but also persons that though having those options, for one reason or the other chose to celebrate a civil marriage. Therefore, it is clear that not only does the three year limit affect a wide classification of people but also that the Respondents' notion that this wide category can simply resort to the other available regimes of marriage recognised under the law is patently false. From my perspective, the only logical conclusion left to draw is that the decision to limit the presentation of petitions for separation and dissolution of Civil Marriages until after the lapse of three years since the celebration of the union is arbitrary and with no backing whatsoever. This is an embodiment of the rationale in the Harksen case (supra) where the South African court held that differentiation that that was bereft of any rational connection to a legitimate purpose was tantamount to unfair discrimination. It is therefore my finding that Section 66 (1) is discriminatory and in violation of Article 27(4) to the extent that it arbitrarily limits parties that have celebrated a union under the auspices of a Civil Marriage to a three year wait period before such a union may be dissolved.

120. The right to form a marriage union should not be subject to such restrictions as may be presented by law that infringes on the fundamental rights and freedoms. This was as espoused in the case of Silver & another v United Kingdom A1 [1983] where the court held that the requirements of a prescribed

law are: "The law must be adequately accessible, the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case and a norm cannot be regarded as law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able if need be with appropriate advice to foresee to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

121. To apply this principle to the instant petition I hold a strong view: That looking at the provisions of Section 66 (1) of the *Marriage Act* as enacted by the legislature and assented to read together with other relevant provisions on forms of systems of marriage the aforesaid provision attaching a 3 year limit does amount to a discrimination and a violation to the right on equality in terms of Article 27 of *the Constitution*.

122. Corollary to the above is the fact that by imposing the three year limitation, the impugned Section had the effect of forcefully keeping parties in a situation they no longer wished to be part. So that while Section 66 (2) contemplated cruelty and exceptional depravity as a ground for dissolution of marriage, a Petition could not be entertained until the time limit was reached. This, in my view, is a prima facie is a case of an affront to a person's human dignity preserved by Article 28 and I have no hesitation in holding as much.

123. Having debunked the notion that the limitation was a valid public policy consideration, it follows that by parties being unreasonably proscribed from enjoying the right to Petition for a divorce before the lapse of three years, their right to access to Justice guaranteed under Article 48 is infringed upon.

124. Faced with the preceding revelations and findings, it is the opinion of the court that the Petitioner has amply rebutted the presumption of constitutionality of the *Marriage Act*, 2014. Before making the final declarations however, I find it necessary to speak on the issue of public participation. This necessity has arisen from the realization that, having scanned the length and breadth of the Hansard Reports and the material presented by the Respondents' in opposition of the petition, there is no evidence of a discussion on the effect of Section 66(1) and neither is there any on efforts to seek out stakeholders views and comments from the public at large who were affected by the imposition of the three year limit. In the case of Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) vs. Salaries and Remuneration Commission, Petition No. 294 of 2013, the Court observed:

> " Public participation as a national value is recognized under Article 10 of *the Constitution*. *The Constitution* at Article 94 has vested legislative authority of the people of Kenya in Parliament and Article 118 has provided for public participation and involvement in the legislative business."

125. Analogously, in the South African case of Land Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of Provinces and others [2016] ZAACC22 the Constitutional Court observed with regard to the standard of participation;-

> " The standard to be applied in determining whether Parliament has met its obligation of facilitating public participation is one of reasonableness. The reasonableness of Parliament's conduct depends on the peculiar circumstances and facts at issue. When determining the question whether Parliament's conduct was reasonable, some deference should be paid to what Parliament considered appropriate in the circumstances, as the power to determine how participation in the legislative process will be facilitated rests upon Parliament. The Court must have regard to issues like time constraints and potential expense. It must

also be alive to the importance of the legislation in question, and its impact on the public."(emphasis)

126. In view of the impact of Section 66(1) on the public, this court holds that it was prudent for the National Assembly to actively engage the public. Had such an exercise been undertaken, the likelihood of the impugned provision being retained would have been minimal. Be that as it may, this court is willing to rise to the occasion to right this wrong as it is bound to do by the supreme law of the land.

127. The long and short of it is that having analysed the entirety of the Petitioner's case and bearing in mind the edicts of constitutional interpretation the court is enjoined to abide by, I am inclined to hearken to the Petitioner's prayers. The Petitioner and the persons whom he has brought the instant Petition on behalf of, that is the public at large, are deserving of the orders sought. In the Julian Robinson case (supra), Batts J cited with approval the decision in Hinds and other v R [1976]1 All ER 353 where Lord Diplock at page 372 (i), explained the approach the Court should take after having found that sections of a statute offend *the Constitution*. He opined:

> " The final question for their Lordships is whether they are severable from the remaining provisions of the Act so that the latter still remain enforceable as part of the law of Jamaica... The test of severability has been laid down authoritatively by this Board in Attorney-General for Alberta v. Attorney-General for Canada [1947] A.C. 503, 518:
>
> > 'The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.'"

128. The only part of Section 66(1) that this Court has held unconstitutional is the three year period pre-requisite. On a fair view of the whole matter, it can be surmised that it would have been possible for the Section 66(1) to be enacted without the offending requirement. Striking it down would not be a disservice to the operation of the entire Section 66 and neither will it jeopardise the application of the rest of the *Marriage Act*, 2014.

129. In the upshot, the Court hereby makes the declaration that Section 66 (1) of the *Marriage Act*, 2014 is unconstitutional, null and void to the extent that it limits the presentation of a Petition for separation or divorce in a civil marriage until the expiry of three years.

130. I make no order as to costs

131. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF SEPTEMBER 2019

R NYAKUNDI

JUDGE