



**Njenga v Attorney General; Judicial Service Commission (JSC) & 49  
others (Interested Parties) (Constitutional Petition E246 of 2020)  
[2022] KEHC 12038 (KLR) (Constitutional and Human Rights) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12038 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E246 OF 2020  
GMA DULU, J WAKIAGA & WM MUSYOKA, JJ**

**JULY 25, 2022**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 22, 23, 25, 27, 28, 47, 48, 50, 73,  
131, 132, 159, 160, 165, 166, 171, 172, 258 & 259 OF THE CONSTITUTION  
OF KENYA, 2010 AND IN THE MATTER OF THE RECOMMENDATION FOR  
THE APPOINTMENT OF JUDGES OF SUPERIOR COURTS BY THE JUDICIAL  
SERVICE COMMISSION AND IN THE MATTER OF THE FAILURE BY HIS  
EXCELLENCY THE PRESIDENT OF THE REPUBLIC OF KENYA TO APPOINT  
JUDGES OF THE SUPERIOR COURTS AND IN THE MATTER OF ASSUMPTION  
OF OFFICE BY PERSONS RECOMMENDED AS JUDGES OF SUPERIOR COURTS**

**BETWEEN**

**ADRIAN KAMOTHO NJENGA ..... PETITIONER**

**AND**

**ATTORNEY GENERAL ..... RESPONDENT**

**AND**

**JUDICIAL SERVICE COMMISSION (JSC) ..... INTERESTED PARTY**

**CHIEF JUSTICE & PRESIDENT OF THE SUPREME  
COURT ..... INTERESTED PARTY**

**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME  
COURT ..... INTERESTED PARTY**

**CHIEF REGISTRAR OF THE JUDICIARY ..... INTERESTED PARTY**

**CONTROLLER OF BUDGET ..... INTERESTED PARTY**

**INSPECTOR GENERAL OF NATIONAL POLICE SERVICE .... INTERESTED  
PARTY**



AUDITOR GENERAL ..... INTERESTED PARTY  
 KENYA MAGISTRATES & JUDGES ASSOCIATION ..... INTERESTED PARTY  
 LAW SOCIETY OF KENYA ..... INTERESTED PARTY  
 HON. MR. JUSTICE TUIYOT FRANCIS ..... INTERESTED PARTY  
 HON. LADY JUSTICE OMONDI HELLEN AMOLO ..... INTERESTED PARTY  
 HON. LADY JUSTICE NYAMWEYA PAULINE ..... INTERESTED PARTY  
 HON. MR JUSTICE WELDON KIPYEGON KORIR ..... INTERESTED PARTY  
 HON. MR. MSAGHA A MBOGHOLI ..... INTERESTED PARTY  
 HON. MR. JUSTICE MUCHELLULE AGGREY OTSYULA .... INTERESTED  
 PARTY  
 DR, KIBAYA IMAANA LAIBUTA ..... INTERESTED PARTY  
 HON. LADY JUSTICE LESIIT JESSIE WANJIKU ..... INTERESTED PARTY  
 HON. LADY JUSTICE NGUGI GRACE MUMBI ..... INTERESTED PARTY  
 HON MR. JUSTICE ODUNGA GEORGE VINCENT' ..... INTERESTED PARTY  
 HON. MR. JUSTICE JOEL MWAURA NGUGI ..... INTERESTED PARTY  
 MBOYA OGUTYU JOSEPH ..... INTERESTED PARTY  
 NAIKUNI LUCAS LEPERES ..... INTERESTED PARTY  
 MWANYALE MICHAEL NGOLO ..... INTERESTED PARTY  
 MAKORI EVANS KIAGO ..... INTERESTED PARTY  
 ADDRAYA EDDA DENA ..... INTERESTED PARTY  
 KIMANI LILIAN GATHONI ..... INTERESTED PARTY  
 KAMAU JOEPH MUGO ..... INTERESTED PARTY  
 WABWOTO KAROPH EDWARD ..... INTERESTED PARTY  
 KIROSS ANNE YATICH KIPINGOR ..... INTERESTED PARTY  
 GICHERU MAXWELL NDUIGA ..... INTERESTED PARTY  
 AKHALEMESI ANAN ..... INTERESTED PARTY  
 ONGARORA FRED NYAGAKA ..... INTERESTED PARTY  
 CHRISTOPHER KYANIA NZILI ..... INTERESTED PARTY  
 MUGO DAVID MWANGI & CHERUIYOT JUDITH ..... INTERESTED PARTY  
 ELIZABETH OMANGE ..... INTERESTED PARTY  
 OMOLLO LYNETT ACHIENG ..... INTERESTED PARTY  
 WASHE EMMANUEL MUTWANA ..... INTERESTED PARTY  
 NYUKURI ANNET' ..... INTERESTED PARTY  
 MURIGI TERESA WAIRIMU ..... INTERESTED PARTY



ASATI ESTHER .....	INTERESTED PARTY
GAKERI JACOB KARIUKI .....	INTERESTED PARTY
BAARI CHRISTINE NOONTATUA .....	INTERESTED PARTY
KELI JEMIMAH WANZA .....	INTERESTED PARTY
MWAURE ANNA NGIBUINI & MATANGA BERNARD .	INTERESTED PARTY
ODONGO MANANI .....	INTERESTED PARTY
RUTTO CHEMTAI STELLA .....	INTERESTED PARTY
KABIRA OCHARO .....	INTERESTED PARTY
OKECHE HARRISON OGWENO .....	INTERESTED PARTY
KITIKU AGNES MUENI-NZEI .....	INTERESTED PARTY
NDERITU DAVID NJAGI .....	INTERESTED PARTY

## JUDGMENT

1. In 2019, the 1<sup>st</sup> interested party recommended 41 persons for appointment, as Judges of the superior courts, to the President of the Republic of Kenya. The President, however, did not act on the recommendation within that year, which led to the filing of Nairobi High Court Petition No. 369 of 2019, *Adrian Kamotho Njenga v Attorney General & 3 others (Interested Parties)* [2020] eKLR, in which the court, on 6th February 2020, made the following declaratory orders:
  - (a) A declaration be and is hereby issued that the President is constitutionally bound by the recommendation made by the Judicial Service Commission, the 1<sup>st</sup> 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 violated *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 courts 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. Despite the orders mentioned above, the President did not act, and the petitioner filed an application, on 24<sup>th</sup> February 2020, in Nairobi High Court Petition No. 369 of 2019, seeking a variety of orders for enforcement of the judgment. The court disposed of that application by holding that the orders sought were substantive, and were against entities or persons who were not parties to the petition before the court, leading to the filing of the present petition, dated 17<sup>th</sup> August 2020. In addition to the instant petition, Katiba Institute had filed a petition in Nairobi High Court Petition No. 206 of 2020 seeking, among other orders, that the President appoints all the 41, who have been named, in the instant petition, as interested parties, being numbers 10 to 50.
3. While these petitions were pending the President appointed 34 of the nominees, leaving out 6 of them, 1 having died. As a result of the failure to appoint all the 41 nominees, Dr. Magare Gikenyi J. Benjamin



filed Nairobi High Court Petition No. E196 of 2021, to stop the 34 being assigned duties, among other orders.

4. This bench was initially empaneled by the 2<sup>nd</sup> interested party in Nairobi High Court Petition No. 206 of 2020, and, subsequently, the same bench was empaneled to handle the instant petition and Nairobi High Court Petition No. E196 of 2021. Being empaneled at different times, with respect to the three matters, we gave directions on the disposal of the three at different times. Nairobi High Court Petition No. 206 of 2020 progressed faster than the rest, and we delivered a final judgment in it, on 21<sup>st</sup> October 2021, granting several final orders.
5. From the decision in Nairobi High Court Petition No. 369 of 2019, Adrian Kamotho Njenga vs. Attorney General & 3 others (Interested Parties) [2020] eKLR, of 6<sup>th</sup> February 2020, the respondent herein proffered an appeal at the Court of Appeal in Nairobi Civil Appeal No. 286 of 2020, and, in respect to the judgment of 21<sup>st</sup> October 2021, in Nairobi High Court Constitutional Petition No. 206 of 2020, the respondent obtained stay of execution orders on 19<sup>th</sup> November 2021, in Nairobi Civil Application No. E365 of 2021, and subsequently filed Nairobi Civil Appeal No. E88 of 2021 and the President filed Nairobi Civil Appeal No. 110 of 2022.

### **The Case for the Petitioner**

6. In the instant petition, dated 17<sup>th</sup> August 2020, the petitioner seeks the following reliefs:
  - a. That a declaration be and is hereby issued that the President's failure to appoint the 10<sup>th</sup>-50<sup>th</sup> interested parties as Judges of superior courts within 14 days violates Articles 10, 27, 28, 47 and 48 of *the Constitution of Kenya*;
  - b. That a declaration be and is hereby issued that the President's failure to appoint the 10<sup>th</sup>-50<sup>th</sup> interested parties contrary to the High Court judgment delivered on 6<sup>th</sup> February 2020 in Nairobi High Court Petition Number 369 of 2019 violates Articles 1, 2(1), 3(1), 10, 47, 48, 73, 131(2), 166(1)(b) and 259(8) of *the Constitution*;
  - c. That a declaration be and is hereby issued that the 10<sup>th</sup>-50<sup>th</sup> interested parties having been lawfully recommended for appointment as Judges of superior courts and the President having failed to appoint them within the constitutionally prescribed timeframe, the appointments have fully matured, entirely ripened and firmly crystallized by operation of law;
  - d. That a declaration be and is hereby issued that the President having failed to appoint the 10<sup>th</sup>-50<sup>th</sup> interested parties within the constitutionally established timeframe, his lawful opportunity to make the appointments has constitutionally dissipated and his role in the appointment process has abated and absolutely ceased;
  - e. That an order be and is hereby issued dispensing with any action, procedure or ceremony whatsoever by the President in relation to the assumption of office of Judge of the respective superior courts by the 10<sup>th</sup>-50<sup>th</sup> interested parties;
  - f. That an order be and is hereby issued directing the 2<sup>nd</sup> interested party, or in his absence, the 3<sup>rd</sup> interested party to forthwith administer the oath or affirmation of office upon the 10<sup>th</sup>-50<sup>th</sup> interested parties, in the manner and form prescribed by the Third Schedule to the Constitution;
  - g. That an order be and is hereby issued directing the 4<sup>th</sup> interested party to execute as necessary, instruments of appointment for the assumption of the respective office of Judge of superior court by the 10<sup>th</sup>-50<sup>th</sup> interested parties;



- h. That an order be and is hereby issued directing the 5<sup>th</sup> interested party to approve withdrawal of funds from the Consolidated Fund as lawfully prescribed in relation to the assumption of the respective office of Judge of superior court by the 10<sup>th</sup>-50<sup>th</sup> interested parties;
  - i. That an order be and is hereby issued directing the 6<sup>th</sup> interested party to provide the requisite security arrangements as per policy, with respect to the assumption of the respective office of Judge of superior court by the 10<sup>th</sup>-50<sup>th</sup> interested parties;
  - j. That costs and incidentals be provided for; and
  - k. That the honourable court be at liberty to grant any other order/reliefs that may be just and expedient.
7. The petitioner avers that the failure by the President to appoint the nominees has created a critical shortage of Judges of the superior courts; which has affected the citizenry right to access justice; and that the careers of the 10<sup>th</sup> to 50<sup>th</sup> interested parties lie in limbo, while their reputation and integrity continues to be in bad light, yet no allegations have ever been tabled, substantiated or proved against them; that this court is charged with the fundamental duty to observe, respect, uphold, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights in terms of Article 21(1) of *the Constitution*, and further that, under Article 23(3)(a-f) of *the Constitution*, the court has jurisdiction to grant relief; and that the failure to appoint the nominees has contravened numerous provisions of international legal instruments and violated the Constitution.

### **The Case for the Respondent**

8. The respondent replied, by an affidavit sworn by Mr. Allan Kamau, on an unknown date, where it is stated that the issues raised in the instant petition were the subject of Nairobi High Court Petition No. 369 of 2019 from which the respondent, being aggrieved, has filed Nairobi Civil Appeal No. 286 of 2020, currently pending at the Court of Appeal. ‘The respondent further contends that there was also another petition then pending, being Nairobi High Court Constitutional Petition No. 206 of 2020, filed by Katiba Institute, in which similar orders were sought.

### **Directions on Disposal**

9. Directions on the disposal of the petition were given on 17<sup>th</sup> December 2020, for canvassing by way of written submissions. The matter was mentioned on 8<sup>th</sup> February 2021 for compliance and directions, when the respondent raised an issue on stay of proceedings, in view of a pending appeal at the Court of Appeal, and directions were given for filing and service of a formal application for stay of proceedings, together with written submissions on it, and for filing of a response to it, together written submissions.

### **The Application**

10. The respondent complied with the directions given on 8<sup>th</sup> February 2021, by filing an application, dated 22<sup>nd</sup> February 2021, supported by an affidavit sworn by Allan Kamau, seeking the following orders, that:
- a. This honourable court be pleased to stay the proceedings in this petition pending the hearing and determination of Nairobi Civil Appeal No. 286 of 2020 Attorney General vs. Adrian Kamotho Njenga and others;
  - b. This honourable court be pleased to stay its proceedings in this petition pending the hearing and determination of its intended appeal in the Court of Appeal; and



- c. The cost of application be provided for.
11. The application is principally founded on grounds that the decision of the Court of Appeal in Nairobi Civil Appeal No 286 of 2020 would have a direct bearing on the present petition, that the appeal is arguable and that directions on its disposal had already been given.
  12. The petitioner filed grounds of opposition, dated 18<sup>th</sup> March 2021, arguing:
    - a. That the matters raised in the instant application were exhaustively dealt with by this honourable court vide its ruling of 17<sup>th</sup> December 2020;
    - b. That the respondent's rationale for stay of proceedings sought herein is hypothetical and unknown to law;
    - c. That the reliefs sought by the respondent would tremendously violate legitimate citizenry rights and inflict irreparable injury upon the petitioner, the 10th-50th interested parties herein and the wider public;
    - d. That the habitual lodging of groundless applications in the matter herein by the respondent amounts to an abuse of the process of this honourable court;
    - e. That the application is brought mala fides with an intention to perpetually delay the conclusion of the substantive petition herein; and
    - f. That, wholesomely, the respondent's application is mischievous, vexatious and invites the honourable court to grant impractical reliefs.
  13. At the time of the hearing of the main petition, the application had not been disposed of, and so it was directed that the application be disposed of simultaneously with the main petition. We shall first determine of the application for stay, as it raises a preliminary issue, and the outcome is likely to affect our determination on the petition.

### **Submissions by the Respondent**

14. It is submitted by the respondent that the petition seeks to enforce orders issued in Nairobi High Court Petition No. 369 of 2019, which is the subject of the Civil Appeal No. 286 of 2020, and, should the appeal succeed, this court will have proceeded in vain. Milimani HCCC No. 126 of 1999 *Niazons (Kenya) Ltd vs. China Road & Bridge Corporation (Kenya) Ltd* (unreported) is cited, for the proposition that a court ought not to order stay of proceedings where an appeal may have very serious effects on the entire case, so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile. It was contended, by the respondent, that the appeal before the Court of Appeal is not frivolous. The decision of the Supreme Court in Petition No. 42 of 2019; *Kenya Vision 2030 Delivery Board and the Commission on Administrative Justice, the Hon. Attorney General* is cited, to support the submission that where *the Constitution* intended for a binding recommendation to be made, it explicitly provides so and where the same is not binding, it is not provided so. It is further submitted that the Constitution does not expressly provide that a recommendation of the 1<sup>st</sup> interested party is binding; and, therefore, the question as to what the President may or may not do, arising from such a recommendation, is not a frivolous one but an arguable one.



15. The Supreme Court in Petition No. 42 of 2019; *Kenya Vision 2030 Delivery Board and the Commission on Administrative Justice, the Hon. Attorney General* stated as follows:

“We have observed that the question on the implementation of recommendations to public entities from commissions has been recurring in different cases before this Court and other superior courts. As such, we are of the opinion that the following guiding principles ought to assist courts when considering a matter concerning the binding nature of recommendations from commissions or other public bodies;

- a. Any power to make a recommendation ought to be specifically provided for in the constitution or in law.
  - b. Recommendations do not necessarily bind the person to whom, or the entity to which, it is addressed.
  - c. A recommendation from a commission is only binding upon a public entity where it has been specifically provided for in the constitution or in law.
  - d. The manner in which a recommendation is to be implemented by a public entity is discretionary.
  - e. Exercise of discretion in implementing a recommendation may only be interfered where there is abuse of discretion, manifest injustice of palpable excess of authority.
  - f. Any recommendation by a commission which is not implemented may be reported to parliament for any further action, if necessary.”
16. It is submitted that the subject matter of the proceedings herein is unique, in that it deals with appointment of Judges who, upon appointment, have security of tenure, and may only be removed from office for actions undertaken during their tenure through a rigid tedious and expensive process, specifically designed to protect their tenure. It is submitted that a consideration of the position occupied by Judges in society, and the need for public confidence in the integrity of persons appointed into the office of Judges, are all peculiar considerations that merit the issuance of a stay order. It is contended that judicial policy has it that there ought not be parallel proceedings before different courts of competent jurisdiction, and that this court ought to exercise deference to the higher court. *Ezekiel Mule Musembi H. Young & Company Limited* [2019] eKLR is cited in support of that contention.

### **Submissions by the Petitioner**

17. The petitioner has identified the following issue, that is whether the court should stay the proceedings in this petition pending the hearing and determination of Nairobi Civil Appeal No. 286 of 2020: Attorney General vs. Adrian Kamotho Njenga. He submits that the relief sought in the application is merely premised on the view by the petitioner that there exists an arguable appeal in relation to Nairobi High Court Petition No. 369 of 2019, and that the decision in Civil Appeal No. 286 of 2020 is likely to have a bearing on the present petition. He submits that, in its ruling dated 17<sup>th</sup> December 2020, this court had made it clear that the issues raised in the present petition are way broader and substantially distinct from the issues canvassed in Nairobi High Court Petition No. 369 of 2019. He submits that the petition raises matters for determination by the High Court under Article 165 of the Constitution, and the Court of Appeal can only deal with them by way of appeal from a decision made in this matter. He submits that the Court of Appeal cannot validly entertain appeals on matters that have not been





determined or are awaiting determination at the High Court, as is the situation herein. He relies on the decision in *Deynes Muriithi & 4 Others vs. Law Society of Kenya & Anor* [2016] eKLR.

18. The decision in *Law Society of Kenya vs. Attorney General & 2 others* (2016) eKLR is cited, for the submission that courts have previously pronounced themselves on the issue of appointment of Judges by the President, which decisions have not been successfully challenged. It is also submitted that the application was lodged after unreasonable delay and no effort had been made to account for the delay or to rationalize the purpose of the stay sought. Further, he submits that no substantial loss would be occasioned to the respondent if stay is not granted.

### **Analysis and Determination**

19. From the proceedings and submissions herein, we shall determine whether to grant stay of these proceedings, pending hearing and determination of the three appeals filed in respect of the subject matter herein.
20. As stated in the foregoing paragraphs, this petition was filed more or less at the same time with Nairobi High Court Constitutional Petition No. 206 of 2020, in which this court pronounced itself on the issues of the appointment of the interested parties as Judges to respective courts where they were recommended to by the 1<sup>st</sup> interested party, and made substantive orders thereon, which issue is now pending for determination at the Court of Appeal. The Court of Appeal, in Civil Application No. E365 of 2021, *Attorney General vs Katiba Insitute & Others* on 19<sup>th</sup> November 2021, granted conservatory orders, staying the execution of the judgment and orders made thereon by this court pending the filing, hearing and determination of the intended appeal, which appeal, as at the time of this judgement, had been filed, being Civil Appeals Nos. E88 of 2022 and E110 of 2022, which are pending determination. Further, the decision which the petitioner herein seeks to enforce, through this petition, was also appealed against, by the respondent, in Civil Appeal No. 288 of 2020 Attorney General vs. Adrian Kamotho Njenga & Others.
21. The principles, on whether or not to grant stay of proceedings pending appeal, were stated in *Global Tours & Travels Limited* Nairobi HC Winding Up Cause No. 43 of 2000 (Ringera J), as follows:

“As I understand it the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice ... the sole question is whether it is in the interest of justice to order stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order stay, the court should essentially weigh the pros and cons of granting the order. And I considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilisation of judicial time and whether the application has been brought expeditiously.”
22. The respondent, therefore, seeks to persuade us to grant stay of these proceedings pending the determination of the appeals filed on the subject matter, and that we ought to exercise deference to the Court of Appeal. Most of the orders sought by the petitioner herein have substantially been determined in the Nairobi High Court Constitutional Petition No. 206 of 2020, save for the prayers sought against the 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested parties, as they are not party of any of the other petitions that are the subject of the appeals, and we are of the considered view, and hold, that those issues can be determined by this court substantively, without rendering the appeals nugatory, and, therefore, granting stay of proceedings herein with respect to them would not be in the best interests of justice.





23. In the circumstances, we decline the request for stay of these proceedings pending appeal, and proceed to determine the petition herein.

## The Petition

### Submissions by the Petitioner on the Petition

24. The petitioner identifies the following two issues for determination, namely; whether the President has complied with the constitutionally envisaged timelines for the formal appointment of the 10<sup>th</sup> to 50<sup>th</sup> interested parties, and the appropriate remedies or reliefs available, in the event it is found that the President has failed to perform his constitutional role in relation to the lawful recommendations of the 1<sup>st</sup> interested party.
25. On the first issue, the petitioner submits that under Article 259(8) of *the Constitution*, where particular time is not prescribed for performing a required act, the act should be done without unreasonable delay. He cites *Adrian Kamotho Njenga vs. Attorney General: Judicial Service Commission & 2 Others (Interested Parties)* (2020) eKLR where the court stated that Article 259(8) of *the Constitution* demands that actions be taken without unreasonable delay, and as often as the occasion arises. With respect to appointment of Judges, the court, in that case, stated that the reasonable time contemplated by the Constitution, should be within 14 days from the date the recommendations are received by the President.
26. On the second issue, he cites *Minister of Health & Others vs. Treatment Action Campaign & Others* (2002) ZACC 15; 2002(5) SA 721 BCLR(CC), where the Constitutional Court of South Africa cited with approval *Fose vs. Minister of Safety & Security* (1977) ZACC 6. In the latter case, it was held that:
- “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 Courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.”
27. He has also cited the case of *Justus Kariuki Mate & Anor vs. Martin Nyaga Wambora & Anor* (2014) eKLR, where the Court of Appeal held that:
- “When a litigant approaches the High Court seeking remedies for alleged breach of fundamental rights, the Court is mandated to determine the grievances and issue orders as it may deem fit.
28. The petitioner submits that the Constitution never envisaged a situation where the President would fail to abide by the Constitution, and it in fact designated him as its principal guardian, as stated in Article 131(2)(a)(e). It is also his submission that constitutional interpretation should be based on methods and techniques that uphold the purpose of the Constitution, that where there is mischief, as is apparent in the circumstances herein, the court must resolutely fashion and configure reliefs in a manner that bolsters public confidence in the Constitution as a living document. Finally, on costs, he submits that unless parties agree, costs usually follow the event. He cites the case of *Jabir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others* (2014) eKLR.



## Submissions by the Respondent on the Petition

29. The respondent, on the other hand, submits that the orders sought in the instant petition are the same as those sought or should have been sought in Nairobi High Court Petition No. 369 of 2019, as they arise from the same transaction between the same parties, and the same issues are currently pending determination before the Court of Appeal, in Civil Appeal No. 286 of 2020, between the same parties. It is further submitted that there were pending proceedings before the very same bench of the High Court, dealing with this matter, on the same subject matter, being Nairobi High Court Constitutional Petition No. 206 of 2020, making the petition sub-judice. It is submitted that the petition is not premised on any of the rights set out in the Bill of Rights chapter and, therefore, the provisions of Article 23 of *the Constitution* are not applicable. It is contended that, to the extent that the cases cited by the petitioner are in respect to the Bill of Rights, the same are distinguishable from the present case, and are, therefore, of no persuasive value. It is submitted that constitutional provisions, dealing with procedure and appointment of State officers, must be construed strictly, otherwise there will arise questions of legitimacy, and adjudication of disputes will be undermined. Relying on Article 134 of *the Constitution*, it is submitted that the power of appointing Judges is so exclusive that not even a person exercising presidential powers during temporary incumbency is allowed to appoint a Judge. The respondent further submits that some of the named interested parties have no stake in the proceedings, as no case has been made of their failure to do or refrain from doing anything they were lawfully expected to do, and ought not to have been joined. *Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 Others* (2014) eKLR is cited to support these contentions.
30. On issuance of orders in public law claims, it is submitted that such orders are discretionary, and the court should consider all factors, including: pendency of the appeal before the Court of Appeal, the need to protect the substratum of the appeal, the consequences of the orders sought in light of the constitutional guarantees of security of tenure for Judges of the superior courts, and whether the status quo ante may be attained in the event the appeal succeeds. In support of that argument, *Republic vs. Chairperson Business Premises Rent Tribunal & Anor Ex-parte Keiyo Housing Cooperative Society Ltd & Anor* (2014) eKLR is cited. The respondent has urged this court to exercise deference to the Court of Appeal, now that the matter is pending before it and due to the fact that the Court of Appeal is higher in hierarchy. *Law Society of Kenya vs. Attorney General & Another* (2019) eKLR is cited in support. Finally, the respondent submits that there is a real danger of turning public interest into an enterprise, if parties who institute proceedings under public interest are allowed to punish the very public with costs.

## Analysis

31. In considering this matter, we have to state that by the time the same was reserved for judgment, the following significant developments had occurred. On 3<sup>rd</sup> June 2021, the President gazetted 34 of the nominees for appointment, left out 6 of the nominees and 1 nominee had passed on. In addition, Nairobi High Court Constitutional Petition No. 206 of 2020 had been determined by this bench, a judgment was delivered on 21<sup>st</sup> October 2021, and orders made. Accordingly, the position now is that only 6 nominees are pending appointment by the President. In the judgment of 21<sup>st</sup> October 2021, we made the following orders:

- “(a) That an order of mandamus is hereby issued directing the 1st respondent (President) 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.”

32. We now consider the prayers sought in the instant petition, as against the orders in the judgments delivered in the various petitions related to this matter.

33. In our view, prayers (1) and (2) of the instant petition have already been determined by orders (a) and (b) in the judgment of 6<sup>th</sup> February 2020 in Nairobi High Court Petition No. 369 of 2019, which state:

- (a) A declaration be and is hereby issued that the President is constitutionally bound by the recommendation made by the 1<sup>st</sup> 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...*”

34. With regard to prayers (3), (4) and (5) of the instant petition, in our view, the three prayers have been addressed by orders (a) and (b) of the judgment delivered on 21<sup>st</sup> October 2021 in Nairobi High Court Constitutional Petition No. 206 of 2020, which state:

- (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...”

35. Prayer (6) of the instant petition has been addressed by order (c) of the judgment delivered on 21<sup>st</sup> October 2021 in Nairobi High Court Constitutional Petition No. 206 of 2020, which is:

“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...”

36. Prayers (7), (8) and (9) of the instant petition are what the petitioner refers to as “facilitative” prayers. They are directed at the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested parties, that is to say Chief Registrar of the Judiciary, the Controller of Budget and the Inspector General of Police. These are the only prayers pending determination. As stated hereinabove, the Court of Appeal granted stay of execution of the judgment



of this court in Nairobi High Court Constitutional Petition No. 206 of 2020, we, therefore, take the view that any orders made by this court, at this stage, against the three interested parties, will be in vain, as there is already a stay order against execution of the judgment. It was stated, in *B vs. Attorney General [2004] eKLR*, that a court does not make orders in vain, otherwise it will be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality and for the rights of all people. We have taken the view that, since the 13<sup>th</sup>, 15<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 24<sup>th</sup> and 35<sup>th</sup> interested parties have not been appointed to the respective offices in to which they have been nominated, any order, in respect of them, against the 1<sup>st</sup> to 7<sup>th</sup> interested parties, cannot at this stage, be granted, based on the doctrine of ripeness, which prohibits the courts from exercising jurisdiction over a cause until an active controversy is presented.

37. *R vs. National Employment Authority & 3 Others Ex parte Middle East Consultancy Services Ltd* [2018] eKLR discusses the doctrine of ripeness, which prevents a party from approaching a court prematurely, at a time when that party has not yet been subjected to prejudice, or the real threat of prejudice, as a result of conduct alleged to be unlawful. The principle of ripeness highlights that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallized, and not with prospective or hypothetical ones. It was observed that the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. Ripeness refers to the readiness of a case for litigation, and a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated or not occur at all. The goal of ripeness is to prevent premature adjudication; if a dispute is insufficiently developed, any potential injury or stake is too speculative to warrant judicial action. In *Faraj & 3 others vs. Police & 2 others*, [2022] KEHC 287(KLR), it was stated that the doctrine of ripeness could also be considered alongside the doctrine of avoidance. The two doctrines can preclude a court from entertaining a case.
38. Our understanding of the petition herein is that the petitioner is trying to enforce the judgment which he had obtained from this court in Nairobi High Court Petition No. 369 of 2019, in respect of the appointment of the interested parties named herein, and since the 6 have not been appointed to date, despite several court orders and judgments thereon, we take the view, and hold, that the prayers sought against the said 3 interested parties are not yet ripe for granting or making, as the said interested parties have not yet been presented with a situation or occasion requiring them to act and have declined to do that which is sought against them.

## **Disposal**

39. Based on our conclusions above, we have, therefore, come to the only logical conclusion, that the petition herein has no merit as the interested parties, to which the orders of Mandamus are targeted, have not failed to act, and the duty that is sought to be enforced or compelled has not arisen or crystallised. Consequently, we decline to grant the Mandamus orders sought. On the issue of costs, we take the view that the petition herein was filed in good faith, for the benefit of the wider public, and, therefore, it will not be in the interest of justice to condemn the petitioner to pay costs.
40. In the result, therefore, both the application, for stay of these proceedings pending appeal, and the petition herein are dismissed. Each party bear their own costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS DAY OF 25<sup>TH</sup> JULY 2022**

**G.A. DULU**

**JUDGE**

**J. WAKIAGA**



**JUDGE**  
**W. MUSYOKA**  
**JUDGE**

