Cherotich v Haji & 5 others (Constitutional Petition 11 of 2023) [2023] KEHC 20734 (KLR) (25 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20734 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CONSTITUTIONAL PETITION 11 OF 2023

HM NYAGA, J

JULY 25, 2023

BETWEEN

KHATHERINE CHEROTICH ..... PETITIONER

AND

NOORDIN MOHAMED HAJI ..... 1ST RESPONDENT

PRESIDENT OF THE REPUBLIC OF KENYA ..... 2ND RESPONDENT

PUBLIC SERVICE COMMISSION ..... 3RD RESPONDENT

LAW SOCIETY OF KENYA ..... 4TH RESPONDENT

HON. THE ATTORNEY GENERAL ..... 5TH RESPONDENT

SPEAKER OF THE NATIONAL ASSEMBLY ..... 6TH RESPONDENT

RULING

1. The Petitioner presented a petition dated 22nd May, 2023.

2. The Petition is brought under Articles 2(1), 3(1), 10, 19, 20,21,22,23, 73,75, 132, 157,159, 165, 232, 249,258 and 259 of *the Constitution* and Rules 3,4,13,23 & 24 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules,2013, sections 6, 7 and 8 of the *National Intelligence Service Act*, and sections 13 and 40 of the *Leadership and Integrity Act*.

3. The petition seeks the following reliefs from the court: -

    a. A declaration that the process of the Recruitment, nomination and recommendation of the 1st Respondent by the 2nd and 3rd Respondent was unconstitutional, illegal, null and void.

b. A declaration that the 2nd Respondent's acts of nominating the 1st Respondent and submitting his name to the National Assembly for approval was unconstitutional, illegal, null and void and has no effect whatsoever.

c. An order of certiorari to remove to this court for purpose of being quashed the decision by the 2nd and 3rd Respondent of picking the 1st Respondent as the successful candidate, nominating and submitting his name for approval by the National Assembly.

d. An order declaring the intended approval or actual approval by the National Assembly of the 1st Respondent and his ultimate appointment as the Director of National Intelligence Service as irregular, egregious, unconstitutional and a nullity.

e. An order directing the 2nd and 3rd Respondent to carry out a proper vetting, recommendation and nomination of the Director of National Intelligence Service in strict compliance with Constitution and *National Intelligence Service Act*.

f. A declaration that the 1st Respondent is not a fit and proper person with due regard to his honesty, dignity, personal integrity, competence and suitability and hence his appointment is inconsistent with *the Constitution* and invalid.

g. Any other relief the Court may deem fit to grant in redress to the clear violation of the Petitioner's right.

h. The petitioner be paid costs of this Petition.

4. The petition is based on the grounds set out therein. In a nutshell, the petitioner states that;

"23. That on 16th May, 2023 the 2nd Respondent through the recommendation of the 3rd Respondent nominated the 1st Respondent as the Director-General of the National Intelligence Service in total disregard of requirements that must be met by nominee for such position as provided under chapter six of *the constitution* and section 8 of the *National Intelligence Service Act*.

24. That the 2nd and 3rd Respondent disregarded chapter six of *the constitution* on leadership and integrity which renders the 1st Respondent unfit for the position of Director- General of the National Intelligence Service for violating *the constitution* and his his oath of office while serving as the Director of Public Prosecution. 25. THAT the 1st Respondent while serving as the Director of Public Prosecutions on several occasions violated *the constitution* and his oath of office by provisions of Article 157 of *the Constitution* of Kenya 2010 which prohibit commencement and/or withdrawal of criminal cases due to influence, coercion, consent or authority of any person.

26. That the1st Respondent admitted to have been misled and pressured through the media to charge Mr. Gachagua, then the Mathira MP by then Director of Criminal Investigations Mr. Kinoti which amounts to a violation of Articles 15 and 75 of *the constitution* of Kenya 2010.

27. That the 1st Respondent publicly admitted as the Director of Public Prosecutions to have been coerced and intimidated to charge and withdraw cases involving close associates of the 2"d Respondent in violation of Article 157 (10) of *the constitution* of Kenya 2010.

28. That 1st Respondent violated and failed to live up to his oath of office as the Director of public prosecution and does not meet the requirements of chapter six of *the constitution* and which renders him unfit for the position of Director- General of the National Intelligence Service under Article 73 (2) of *the constitution* of Kenya 2010.

29. That the 1st Respondent cited intimidation and lack of independence as a reason for dropping several cases. This character is itself wanting for the position he is soon toassume, it impacts on the public and jeopardized the public's confidence in the judiciary and other arms of the government as the 1st Respondent's power flows from its general functions and powers as donated by *the Constitution* which he is prone to violate without hesitation.

30. That the 1st Respondent while serving as the Director of Public Prosecutions displayed a serious lack of competence in discharging his duties as the head of the prosecution body, compromising the public interest and demeaning the office he held as the Director of Public prosecutions contrary to Article 73 and article 75 of *the constitution*.

31. That despite being the Director of Public Prosecutions, the 1st respondent never made any court appearance since his appointment to office on the 28th of March, 2018 thus raising questions and legitimate concerns on his competence and suitability to discharge his duties as the head of the prosecution body.

32. That the 1st respondent without sufficient reason did the following:

    a. The case against the Deputy President Rigathi Gachagua- the 1st respondent applied to withdraw the charges under section 87A of the criminal procedure code stating that investigations into the matter were not complete and he was under pressure to charge.

    b. The case against the Cabinet secretary Aisha Jumwa was withdrawn- the 1st respondent citing that the threshold test was met at the point of making the decision to charge but the evidentiary test in relation to the doctrine of common intention had not been met.

    c. The case against former Kenya Power managing director Ben Chumo was withdrawn after several years in Court.

9. The 1st respondent was used to hound professionals who were associated with the 2nd respondent for example the case against former and current Kenya Pipeline Company managing director Joe Sang where he was acquitted for want of prima facie case.

10. That the 1st respondent separately charged Hon. Oscar Sudi and Hon William Kamket for political reasons but were acquitted under section 210 of the

Criminal Procedure Code for want of prima facie case shows an incompetent person.

11. That many people have been extra judicially executed but no meaningful investigations were ordered by the 1st respondent and thus no justice has been served upon victims of the murder.

12. That the 1st respondent eroded the independence of the office of the Director of Public Prosecution which spilled over to court and his appointment would serve to bastardize *the constitution*, people of Kenya, and constitutional offices.

13. That it is in the interest of justice that this petition is urgently heard and determined so as to protect and prevent further violation of *the Constitution* of Kenya.

14. That recommending and nominating the 1st Respondent for the position of Director-General of the National Intelligence Service does not promote the purposes, values and principles of *the constitution* or advances the rule of law. It does not permit the development of the law and/or contributes to good governance as provided under Article 259 of *the constitution*.

15. That consequently the entire process of recommendation, nomination and would be appointment of the 1st Respondent to the office of Director-General of the National Intelligence Service constitutes a gross violation of the National values and principles of the Governance as set out in Article 10 of *the constitution*, integrity, transparency, accountability, rule of law, employment on the basis of competitiveness which the 2nd respondent has disregarded and nominated the 1st respondent.

16. That the Respondent's decision, actions, and omissions offend the rule of law and fairness and constitute a direct affront and assault to the constitutional dictates.

17. That the Petitioner is now coy and apprehensive that the Respondents shall proceed with the appointment of the 1st Respondent whose name has been forwarded to the National Assembly for approval unless the same is stopped on their tracks and the illegalities evident corrected by this honorable court.

18. That the 1st, 2nd ,and 3rd Respondent's actions were and/or are an affront to articles 10,73,75, 258 and 259 of *the Constitution* and go against the principles of good governance, integrity, transparency and accountability.

19. That the people of Kenya have a right to public participation on matters that directly affects them and to competitiveness and transparent processes of appointment of Director-General of the National Intelligence Service.

20. That the 2nd respondent in utter disregard of the principles of good governance and participation of the people under Article 10 did not invite the members of the public to submit comments on the suitability of the 1st Respondent to serve as the Director-General of the National Intelligence Service.

21. Thatshould the 1st Respondent be approved by parliament it would amount to a blatant disregard and violation of *the Constitution* of Kenya, 2010, and in particular Article 10 on good governance.

22. That pursuant to Article 23 of *the Constitution* of Kenya 2010, this honorable court is clothed with jurisdiction requisite to interfere with the actions of the Respondents as the same are unconstitutional.

23. That although the 2nd and 3rd respondents have a margin of discretion in the appointment of the Director-General of the National Intelligence Service the same should not be exercised arbitrarily and capriciously, but rationally and reasonably and in compliance with chapter six of *the constitution* of Kenya.

24. That no person, state officer or state organ is above *the constitution* or the law and all organs created by or under *the constitution* are subordinate to it.

25. That further Article 10(1) binds all state organs, state officers, public officers and all persons while applying interpreting *the constitution* or the law or public policy.

26. That therefore when the Respondents acts is in breach of *the constitution* this court must not hesitate to intervene and reverse those actions.

27. That*the Constitution* of Kenya, 2010 is supreme and dictates should be jealously protested by this court as per article 165 of *the constitution*.

28. That National Assembly is set to approve the nomination of the 1st Respondent anytime from now whereas the purposes and objectives of this Constitution during such recruitment and appointment has not been adhered to.

29. That the appointment of the 1st Respondent would serve to bastardize *the Constitution*, constitutional institutions as well as the People of Kenya.

30. That it is in the interest of justice that this matter is urgently heard and determined to prevent further violation of *the constitution* by the respondents.

Constitutional Provisions Denied, Violated Infringed And/or Threatened

31. To The Extent that the 2nd respondent has nominated the 1st Respondent as Director-General of the National Intelligence Service without due regard to requirements under chapter six of constitution and/or opening doors for public participation and input contrary to Article 10 *the constitution* 2010.

32. To The Extent that the 1st Respondent violated and failed to live up to his oath of office as the Director of public prosecution does not meet the requirements of chapter six of *the constitution* on leadership and integrity which renders him unfit for the position of Director- General of the National Intelligence Service under Article 73 (2) of *the constitution* of Kenya 2010.

33. To the Extent that the touchstone for appointment is the institutional integrity as well as the personal integrity of the candidate and if the working of the institution would suffer should a candidate be appointed, then there was a duty of the 2nd and 3rd Respondent not to recommend and nominate such a person for appointment, doing so is contrary to Article 10, 21 and 73 of *the constitution*.

34. To the Extent that the recruitment exercise undertaken by the 2nd and 3rd Respondent impacts the public as it flows from its general functions and powers that flows from *the constitution* and should be exercised in accordance with it and not contrary to provisions of chapter six.

35. To the Extent that the 2nd and 3rd Respondents have a margin of discretion in the appointment of the Director-General of the National Intelligence Service the same should be exercised arbitrary and capriciously, but rationally and reasonably and in compliance with chapter six of *the constitution* of Kenya.

36. To the Extent that the Respondents have blatantly, neglected and ignored to give the People of Kenya a platform to exercise their right to public participation and compete/apply for recruitment for the said position, their actions suffer from illegality.

37. The actions of the Respondents are affront the principles of good governance and unconstitutional.

5. Contemporaneously with the Petition, the Petitioner filed a Notice of Motion, under certificate of urgency dated 17th May, 2023 brought pursuant to Articles 2(1),3(1),10,19,20,21,22,23,73,75,132,157,159,165,232,249,258 and 259 of *the Constitution* and Rules 3,4,13,23 & 24 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules,2013. She sought the following orders: -

    a. Spent

    b. That pending the hearing and determination of this Application inter partes, this Honourable Court be pleased to issue a conservatory order of Injunction restraining the consideration, approval and/or appointment of the 1st Respondent as the Director General of the National Intelligence Service.

    c. That pending the hearing and determination of this Application inter partes, this Honourable Court be pleased to issue conservatory order by way of injunction restraining the 1st Respondent, his officers, staff, agent, servants and/or any other persons acting at his behest however from assuming, taking up office or performing any actions that would otherwise be performed by the holder of the office the Director General of National Intelligence Service.

    d. That pending the hearing and determination of this petition, this Honourable Court be pleased to issue a conservatory order of injunction restraining the consideration, approval and/or appointment of the 1st Respondent as the Director General of National Intelligence Service.

    e. That pending the hearing and determination of this petition, this Honourable Court be pleased to issue a conservatory order by way of injunction restraining the 1st Respondent, his officers, staff, agents, servants and/or any other persons acting at his behest however from assuming, taking up office of the Director General of National Intelligence Service.

    f. That this Court be pleased to certify that the petition raises weighty issues on interpretation of *the Constitution* and Fundamental Rights and Freedoms and the same ought to go for empanelment of at least three judges

by the Honourable Chief Justice for final Disposition and determination immediately.

g. That this Court gives certain directions as it may deem just and fit.

h. That the Respondents be condemned to pay costs.

6. The Application is predicated on the grounds on its face and supported by an Affidavit sworn by the Petitioner. The said affidavit largely adopts the averments contained in the Petition.

7. In response to the Petition and the Application, the 1st Respondent filed a Notice of Preliminary Objection dated 22nd May, 2023. The objection is based on the ground that the petition and the Application are misconceived, totally devoid of merit and bad in law and ought to be struck out for the reasons inter alia:-

a. That this Honourable Court is divested of jurisdiction to hear this matter in view of the non-justiciability of the case and by reason of the manifest breaches of the doctrine of Ripeness and the doctrine of Exhaustion and the Petitioner's disregard for available statutory and alternative avenues of ventilation and dispute resolution mechanisms.

b. That the Petitioner has not made any application to be exempted from such exhaustion of the available remedial process and or dispute resolution mechanism.

c. That the petition and application as presented are not justiciable for violating the doctrine of Ripeness which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contingencies.

d. That the petition and application and the orders sought therefrom offend the provisions of Article 159(2) (c) of *the Constitution* and Section 9(2) of the Fair Administrative Actions Act.

e. That the petition and the application are frivolous, incompetent, vexatious, misconceived and an outright abuse of the Court process.

8. The 1st Respondent also swore a Replying Affidavit on 22nd May, 2023 in opposition to the application.

9. The 2nd and 5th Respondents filed a joint Notice of Preliminary Objection dated 24th May, 2023. It is based on the following grounds:

a. That by dint of the provisions of Article 143(2) of *the Constitution*, this Honourable Court lacks the requisite jurisdiction to hear and determine the Petitioner's notice of motion and Constitutional petition in so far as the alleged impugned action relates to the office of the 2nd Respondent.

b. That under the doctrine of stare decisis, this Honourable Court is bound by the decision of the Supreme Court in Petition No.12 of 2021 (Consolidated with Petitions Nos. 11 & 13 of 2021) Hon.Attorney General & 2 others Versus David Ndii & 14 others which held that "Civil proceedings cannot be instituted in any court against the President or the person performing the

functions of the office of the President during their tenure of the office in respect of anything done or not done contrary *the Constitution* of Kenya 2010"

10. The 3rd Respondent filed Grounds of Opposition dated 24th May, 2023. The following grounds were set out:

    a. That Section 7 of the *National Intelligence Service Act*, 2012 provides for the appointment of the Director General to the National Intelligence Service through nomination by the President, subject to approval by the National Assembly.

    b. That section 7(2) of the *National Intelligence Service Act* 2012 gives the President the power to nominate a person for appointment as Director General by submitting their name to the National Assembly for vetting, contrary to the Petitioner's allegation that it is the 3rd Respondent who recommends the nominee to the President.

    c. That the office of the Director General of the National Intelligence Service is listed as a State Office under Article 260 of *the Constitution* of Kenya and as a result, the 3rd Respondent does not have the mandate to appoint, nominate or recommend a person for appointment to such office as stipulated under Article 234(2) and (3) of *the Constitution* of Kenya.

    d. That there is no provision in Law that requires the participation of the 3rd Respondent in the process of nominating, vetting, approval and appointment of a person as the Director General of the National Intelligence Service. The allegations made by the Petitioner against the 3rd Respondent are therefore false and misconceived.

    e. That the petition and application are devoid of merit and are an abuse of the court process.

11. The 5th Respondent also filed Grounds of Opposition dated 24th May, 2023. They are inter alia: -

    a. That the orders sought in the Constitutional petition and the accompanying notice of motion based on lack of public participation are speculative and based on conjecture since the issues raised by the Petitioner can still be raised in the National Assembly during the vetting and approval process of the nomination of the 1st Respondent pursuant to the provision of Section 7 of the National Intelligence Act No. 28 of 2012 as read together with the provisions of the *Public Appointments (Parliamentary Approval) Act* No.33 of 2011; an Act of the Parliament that provide for procedures for parliamentary approval of constitutional and statutory appointments and for connected purposes.

    b. That the Petitioner/Applicant has completely misconstrued the doctrine of Separation of Powers by failing to appreciate the provisions the National Intelligence Act that expressly provide for nomination of the Director General of the National Intelligence Service to be done by the President and approval thereafter by Parliament.

    c. That the constitutional petition is premature and an abuse of the court process and the jurisdiction of this court has been wrongly invoked to curtail and short

circuit the envisaged 14 days vetting and approval period by Parliament as provided by the law, which is detrimental to National Security as well as Public Interests due to the prolonged vacancy that will be occasioned by the said delay in appointment of a Director General of the National Intelligence Service.

d. That the High Court lacks the requisite primary jurisdiction to determine the matter based on the suitability and the qualification of the nominee herein which is a preserve of the Parliament under the provisions of Section 7 of the *Public Appointments (Parliamentary Approval) Act* No.33 of 2011.

e. That absolutely no grounds have been cited in support of the application dated 17th May,2023 and the facts deposed to in the supporting affidavit are not sufficient to form substrata on which the orders sought can be granted.

f. That the petition is incurably defective for want of substance and that the same is an abuse of court process, frivolous, vexatious and merely intended to embarrass the Respondents.

g. That the orders sought in the application cannot be granted as no revelation has been made to show that the Petitioner's rights were infringed upon by the Respondents.

h. That the subject application does not disclose material particulars of the alleged infringement of the Petitioner's rights by the 2nd and 5th Respondents.

i. That it is in the interest of fairness and justice that the Applicant's application dated 17th May,2023 be dismissed with costs to the Respondents.

12. The 6th Respondent also filed a Notice of Preliminary Objection dated 23rd May,2023, based on the following grounds:- -

a. That the Petition and Notice of Motion do not comply with Rule 4 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules,2013, as the Petitioner has not demonstrated the violation or threat of violation of rights to him or any other identified person.

b. That the Honourable Court lacks the jurisdiction to determine this matter and under the doctrine of 'exhaustion', courts must exercise restraint in exercising their jurisdiction conferred by law and must give deference to such dispute resolution mechanism established by law with the mandate to deal with such specific disputes in the first instance.

c. That the Petition is in contravention of Articles 37,119,132(2)(f) of *the Constitution* of Kenya as read together with section 7(1) of the *National Intelligence Service Act*,2012 and *Public Appointments (Parliamentary Approval) Act*,2011. The petitioner, having failed to exhaust the alternative mechanisms under *the Constitution* and the Public Appointment (Parliamentary Approval) Act, the Petition and Application violate *the Constitution* Principle/ Doctrine of exhaustion.

d. That the Petition is in contravention of Article 132 of *the Constitution* and *the Constitution* Principle of trias politica, separation of powers, as it is inviting the

Court not to approve the 1st Respondent for appointment when it is clear that the duty to vet and approve is a preserve of the National Assembly.

e. That the 6th Respondent is actively seized of the matters raised herein and the Petitioner has the opportunity and a right to present her complaint before the relevant Committee of the National Assembly.

f. That the Petition and the said Application are therefore premature and interfere with the independence of the 6th Respondent, contrary to Articles 94,95 and 132 of *the Constitution*.

13. The court gave directions that since the preliminary objections go to the question of jurisdiction of the court, then as a matter of settled law and procedure, they had to be argued first. The parties then filed written submissions and highlighted the same on 13th June, 2023.

14. The 4th Respondent did not file any response to the petition and application and did not in any way participate in these proceedings.

15. I will now proceed to summarise the submissions by the parties who participated in the proceedings.

1st Respondent's Submissions

16. The Counsel for the 1st Respondent submitted that as a requirement, the Preliminary Objection (P.O.) must be grounded on pure points of law, be based on facts agreed on by both parties and that the objection must be capable of disposing of the entire matter. To support this proposition, the Counsel placed reliance on the cases of Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors Ltd [1969] EA 696 & John Musakali v Speaker County of Bungoma & 4 others [2015] eKLR.

17. The Counsel for the 1st Respondent argued that an objection to jurisdiction is a pure point of law which can be determined solely by interpreting and applying the law without the need to consider factual disputes or extraneous factors. He also submits that matters of jurisdiction go to the root of the dispute and the court is constrained to determine matters of contested jurisdiction as soon as they are raised. To support his argument, the counsel for the 1st Respondent relied on Owners of the Motor Vessel "Lillian S" vs Caltex oil (Kenya) Ltd [1989] KLR 1 & Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 others [2012] eKLR

18. It was the 1st Respondent's submissions that the Preliminary Objection meets the requisite threshold for reasons that: -

a. The 1st Respondent's preliminary objection challenges the Jurisdiction of the Court on account of non-justiciability of the Petition and the Application, which is pure point of law.

b. The objection is based on uncontested set of facts being: -

i. That the 1st Respondent was nominated by the 2nd Respondent to take up the role of the Director General of the National Intelligence Service(N.I.S.) which process is provided for under Section 7 of the *National Intelligence Service Act* 2012;

ii. That the 2nd Respondent is the authorized person under the law to make such nomination;

iii. That the 1st Respondent's nomination by the 2nd Respondent was communicated in writing through the 'Notification of Presidential Action [1]16/06/2023' dated Tuesday 16th May,2023 issued and signed by Felix K. Koskei, Chief of Staff & Head of the Public Service;

iv. That the above Notice confirmed that the 2nd Respondent had transmitted the nomination of the 1st Respondent to the National Assembly for consideration by Parliament, in fulfillment of the legal requirements set out under *the Constitution* and the *National Intelligence Service Act*;

v. That consequent to the above, the 6th Respondent through the Clerk of the National Assembly did issue a Notification to the General Public dated 20th May,2023.

vi. That the Petitioner has to date not responded at all nor claimed in her petition to have responded to the said notifications in any manner whatsoever;

c. In particular, the Petitioner has failed, refused and or neglected to: -

i. Submit any representations that she may have by way of written statements on oath (Affidavits) with supporting evidence contesting the suitability of the nominee for appointment as the Director-General, National Intelligence Service;

ii. Submit any evidence of any of the allegations she has made in this petition to the National Assembly as is required both by the National Assembly and or the law;

iii. In any manner whatsoever appear before the National Assembly's Departmental Committee on Defence, Intelligence and Foreign Relations and /or convey to them her grounds of and evidence in support of her opposition to the nomination and appointment of the 1st Respondent;

iv. Confirm to this Honourable Court in her Petition that she intends to so appear before the National Assembly's Departmental Committee on Defence, Intelligence and Foreign Relations and/or convey to them her grounds of and evidence in support of her opposition to the nomination and appointment of the 1st Respondent.

d. The petitioner has instead completely ignored the aforesaid process and the opportunities accorded to her by the law and by the National Assembly to make her representations and lay her evidence of such representations for consideration before the National Assembly, which may exercise its discretion under the Law to either accept or reject the nomination of the 1st Respondent by the 2nd Respondent.

e. Instead, she rushed to this Honourable Court prematurely requesting that this court do apply and supplant its own discretion in the place and instead of the discretion of the National Assembly, without even giving the opportunity to the National Assembly through its committee the time and opportunity to conduct their affairs.

f. The Petitioner has thereby knowingly and purposefully avoided a constitutionally and statutory mandated process laid out for the very purpose for which she is now before this court, to wit, assessing the suitability of the nominee for appointment as the Director-General, National Intelligence Service;

g. The petitioner still has and continues as at the time of making these submissions, an ample opportunity to take advantage of the invitation by the National Assembly through the Departmental Committee on Defence, Intelligence and Foreign Relations given to all members of the public to submit any representations, by way of written statements on oath with supporting evidence contesting the suitability of the nominee for appointment as the Director-General of the NIS;

h. Further, the Petitioner has always and is still able to address all the concerns raised in her Petition and Application as relates to the 1st Respondent by any of the following avenues: -

i. By filing a Petition before the Public Service Commission (hereinafter referred to as "the PSC") under the Provisions of Article 158(1) of *the Constitution*, to challenge the 1st Respondent's competence to discharge his duties;

ii. By filing an appropriate motion before the trial Court or tribunal that is required to make the decision, to challenge the 1st Respondent's decision to charge or withdraw charges in court.

iii. By filing a Judicial Review Application before the High Court of Kenya seeking review orders of the DPP's decision to withdraw the cases in question.

iv. By lodging an Appeal in respect of any of the matters arising above.

19. The Counsel further submitted that the Petition is founded on the Petitioner's multiple breach of the concept of non-justiciability of disputes she has lodged before this court. That non-justiciability is a sound concept of law grounded on Article 159 of *the Constitution* that roots for the use of available and alternative dispute resolution mechanisms. He argued that the concept of non-justiciability comprises three doctrines, namely; the Political Question Doctrine; Constitutional Avoidance Doctrine and Doctrine of Ripeness.

20. The Counsel also submitted that the Petitioner is also running afoul of the Doctrine of Exhaustion and of the Fair Administrative Practices Act and the Preliminary Objections arising therefrom, if upheld by this Court are capable of disposing of the entire matter.

21. The Counsel stated that the Black's Law Dictionary 9th Edition defines justiciability as; "The quality or state of being appropriate or suitable for adjudication by a court". At page 944 justiciable is defined as: (of a case or dispute) properly brought before a Court of Justice; capable of being disposed of judicially."

22. The Counsel thus argued that a non-justiciable dispute is one that is not appropriate or properly before court or one that is incapable of being disposed of judicially. To support his submissions, the Counsel relied on the following authorities:Anthony Miano & others v Attorney General & others [2021] eKLRKiriro Wa Ngugi & 19 others v Attorney General & 2 others [2020] eKLR

23. The Counsel further submitted that the Political Question Doctrine is a legal principle that refers to the idea that certain issues are better suited for resolution by the political branches of Government rather than by the Judiciary, and it is based on the concept of separation of powers which divides governmental authority among the Legislative, Executive and Judicial branches.

24. The counsel further submitted that the above doctrine recognizes that some constitutional questions involve inherently political matters that are best left to the elected representatives of the people, rather than being decided by unelected judges which would speak to the essence of the doctrine of Separation of Powers and that it underscores the need for balance of powers to ensure that one arm is no more superior than another.

25. The Counsel also argued that the present matter is a prime consideration under this doctrine, as was held in Kiriro Wa Ngugi & 19 others vs Attorney General & 2 others (supra), that matters of foreign policy or national security fall within the discretionary power of the Executive and Legislature.

26. Citing Section 7 of the *National Intelligence Service Act*, 2012, Counsel argued that the said provisions clarify that the nomination and appointment of the Director- General is based on the initial nomination of the President and then the vetting/approval process by the National Assembly which constitutes a majority of elected officials and is a legislative section of the state. That the said section designates a process of selection that is only impeachable by the court if any of the steps was bypassed.

27. The Counsel further argued that while it is not in dispute that there is need for competitive recruitment in the public service, some roles, by their very nature, do not require an open or competitive recruitment. He posits that those involving intelligence and high-level policy making, require a more targeted selection process, taking into account specific qualifications and expertise that cannot easily be assessed in the usual manner. To buttress this position, the counsel placed reliance on the case of Katiba Institute vs Attorney General & 6 others [2018] eKLR.

28. With respect to the doctrine of Avoidance, the Counsel submitted that a Constitutional Court such as this one is not the correct forum to challenge the proceedings and or conduct Judicial Review of decisions made in other matters conducted before different courts and tribunals, all of which fora were competent to deal with any question(s) of constitutionality and or legality that were or ought to have been placed before them for determination.

29. Counsel further asserted that the underlying principle of constitutional avoidance is rooted in the idea of judicial restraint and the respect of separation of powers and that it recognizes that constitutional issues should be addressed only when necessary and the courts should, if possible, interpret laws in a way that upholds their constitutionality rather than striking them down.

30. The Counsel further stressed on the following points;

    i. The 1st Respondent's competence to discharge his duties ought to have been raised before the Public Service Commission under the provisions of Article 158(1) of *the Constitution*.

    ii. Objection to withdrawal of charges ought to have been filed before the appropriate court or tribunal that is required to make the decision, bearing in mind that under Article 157(8), the DPP may not discontinue a prosecution without the express permission of the court.

    iii. Jurisdictional review of the High Court ought to be addressed through an application of Judicial Review before the High Court.

31. The Counsel further submitted that concerns by the Petitioner can be addressed in a different forum in furtherance of the provisions of Article 159(2) (c) of *the Constitution* on alternative dispute resolution mechanisms. In support of this proposition, the counsel relied on the case of Bernard Murage vs Fineserve Africa Limited & 3 others [2015] eKLR where the court stated that not each and every violation of the law must be raised before the High Court as a constitutional issue and that where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.

32. It was the Counsel's submissions that the relevant authority to determine the issues raised in this petition is the National Assembly, and not this Court.

33. Counsel further submitted that based on decision of Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, the court has powers to hear matters of breach of process where a party has demonstrated that there was an illegality and procedural impropriety. He submitted that in this matter there is no allegation or evidence of the above.

34. In regard to the doctrine of Ripeness, the Counsel submitted that it relates to the timing of a case and whether it has matured to a point where it is ready for judicial review. That a case is considered ripe when the issues presented are sufficiently developed, and there is a genuine controversy that requires a Court's intervention.

35. He argued that in the present case, the petition and the related notice of motion offend the doctrine of Ripeness for reasons that the 1st Respondent has only been nominated as the Director General of the NIS and is yet to be vetted by Parliament before a determination may be made as to his fitness for the appointment.

36. Counsel also contended that it is self-evident from the Notice issued that the 1st Respondent's approval hearing(vetting) for appointment as the Director General, NIS is scheduled for Tuesday 30th May, 2023 in the Assembly mini-chamber, County Hall, Parliament Buildings and as such contrary to the Petitioner's assertion, the Petitioner and all other members of the public have adequate notice of that fact and therefore all have the opportunity to participate in the process of the confirmation or otherwise of the 1st Respondent's appointment as the Director General of the NIS. More specifically, as part of the public participation, they have an opportunity to provide the Clerk of the National Assembly with evidence contesting the suitability of a candidate to hold the office to which the candidate has been nominated. The counsel asserted that the state of a dispute that the matter has not passed the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made by the Court.

37. With regard to the doctrine of Exhaustion, the counsel submitted that this doctrine is defined in Black's Law Dictionary 9th Edition at page 654 as follows;

> "exhaustion of remedies. The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary."

38. He argued that the doctrine of exhaustion requires parties to pursue and complete all available administrative procedures and remedies before seeking Judicial Intervention. That it recognizes the expertise of administrative bodies, promotes efficient dispute resolution, ensures administrative accountability and supports judicial economy. In support of this proposition, the counsel relied on Section 159 (2) (c) and Section 9 of the Fair Administrative Actions Act, 2015 and the case of William Odhiambo Ramogi & 2 others vs Attorney General & 6 Others, Mombasa High Court Petition No.159 of 2018 [2018] eKLR

39. The Counsel also submitted that the Petitioner has invoked several Articles of *the Constitution* claiming constitutional violations without pleading with reasonable precision. He referred this court to the case of Anarita Karimi Njeru vs Republic [1979] eKLR where the court held that Constitutional violations must be pleaded with a reasonable degree of precision, which position was adopted by the Court of Appeal in the case of Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR.

40. The Counsel submitted that while the Petitioner herein referred to Articles1,2(1),3(1),10,19,20,21,22,23,73,75,132,157,159, 165,232,249,258 and 259 of *the Constitution* in its title and body of the petition, she merely repeats and regurgitates what these provisions or Articles of *the Constitution* state. The Counsel asserted that the petition provides little or no particulars or any specifics as to the allegations and the manner of the alleged infringements. He cites as an example, paragraph 23 of the petition, where the Petitioner avers that the 2nd Respondent through the recommendation of the 3rd Respondent nominated the 1st Respondent as the Director General of the NIS in total disregard of requirements that must be met by a nominee for such position as provided under Chapter 6 of *the Constitution* and Section 8 of the *National Intelligence Service Act*. That no particulars were enumerated, no details or specifics of the requirements are enumerated and more importantly, no identification is made of the specific requirements that were allegedly disregarded, thus making it impossible to determine what constitutional or legal provision was contravened and or mount any response or defence to the same.

41. The Counsel further submitted that no particulars have been made or evidence proffered for all the allegations made from paragraphs 23 to 32 and throughout the entire petition.

42. The Counsel cited the provisions of Section 107 of the *Evidence Act* and submitted that the Petitioner has the burden to prove the cause of action in her petition and not to write down the particulars and throw them at the court. He argued that parties must explain to court the contents of the documents and exhibits annexed to their affidavits and their relevance.

43. The Counsel argued that the Petitioner has not sought to persuade this Court to grant the exemption from the doctrine of Exhaustion but simply feigned ignorance of the available remedies. He contended that the court cannot aid the petitioner who has not been in view of doctrine of exhaustion, diligent to aid her cause.

44. The 1st respondent prayed that this Honourable Court upholds the Notice of Preliminary Objection and consequently strike out the Petition and Application with costs to the Respondents.

The 2nd & 5th Respondents' Submissions

45. The Counsel for the 2nd and 5th Respondents submitted that by dint of Article 143(2) of *the Constitution*, this Honourable Court lacks the requisite jurisdiction to hear and determine the Petitioner's Notice of Motion and the Constitutional Petition herein in so far as the alleged impugned action relates to the act done by the office of the 2nd Respondent.

46. The Counsel contended that the joinder of the 2nd Respondent in this matter is unnecessary and it would suffice if only the Attorney General is sued on behalf of the 2nd Respondent.

47. In regards to the above issue, the Counsel argued that under the doctrine of stare decisis this Honourable Court is bound by the decision of the Supreme Court in Petition 12, 11 & 13 of 2021 (Consolidated) Attorney-General & 2 others vs Ndii & 79 others where it was held that civil proceedings could not be instituted in court against the President or a person performing the duties of his office during their tenure in office.

48. The Counsel for the 2nd and 5th Respondents thus urged this court to strike out the 2nd Respondent from these proceedings.

49. The Counsel further associated the 2nd and 5th Respondents with the submissions of the 1st Respondent in regards to the doctrine of Ripeness, Justiciability, Exhaustion, and Separation of Powers.

50. To buttress the submissions on the principle of Separation of powers, the Counsel referred this court to the authorities of Justus Kariuki Mate & another vs Martin Nyaga Wambora & another [2017] eKLR; Pevans East Africa Limited & Another v Chairman, Betting Control & Licensing Board & 7 others [2018] eKLR; & Speaker of the Senate and Another vs the Attorney General and 4 others [2013] eKLR.

51. The Counsel therefore urged this court to allow their Preliminary Objection and to dismiss the instant matter with costs to the Respondents.

The 3rd Respondent's Submissions

52. The 3rd Respondent did not file any submissions. However, during the highlighting of the submissions, the Counsel of the 3rd Respondent associated herself with the submissions of the 1st, 2nd and 5th Respondents. It was her position that the Petition is premature and that the court does not have jurisdiction to determine the suitability of the 1st Respondent for the position of the Director General of the NIS. She contended that the National Assembly is the right forum to determine the aforesaid suitability and they must be given an opportunity to do so and after a decision has been made by the Parliament, then anyone can come to court to challenge the legality of that decision.

53. Regarding the acts raised against the 1st Respondent as the DPP, the counsel contended that the right body to consider those issues is the Public Service Commission.

The 6th Respondent's Submissions

54. The Counsel for the 6th Respondent, relying on the Provisions of Rule 4 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 & the cases of Anarita Karimi Njeru's (Supra) & Mumo Matemu v Trusted Society of Human Rights Alliance & 5

others (supra) concurred with the Counsel for the 1st Respondent that the petition and the Application fail the specificity test.

55. With respect to whether this Court has the jurisdiction to determine this matter, the Counsel for the 6th Respondent submitted in the negative. Relying on Articles 37 and 119 of *the Constitution*, Sections 7(1) of the *National Intelligence Service Act*, 2012 and Section 6(9) of the *Public Appointments (Parliamentary Approval) Act*, 2011, the counsel asserted that the Petitioner is yet to exhaust the avenues provided for resolving the issues raised and that the appropriate avenue to resolve those issues is the National Assembly.

56. He referred this court to the case of Jeremiah Memba Ocharo vs Evangeline Njoka & 3 others [2022] eKLR that comprehensively discussed the doctrine of Exhaustion.

57. On whether the Petition is premature and interferes with the independence of the 6th Respondent, the Counsel submitted that the Petition and the Application are not ripe for determination by the Honourable Court and that should the court proceed to hear and determine the same then it would amount to interference with the independence of the National Assembly, contrary to Articles 94, 95 and 132 of *the Constitution*. To buttress this Position, the Counsel referred this court to the cases of In the Matter of the Speaker of the Senate & another [2013] eKLR as quoted with approval in Justus Kariuki Mate & another vs Martin Nyaga Wambora & another [2017]eKLR where the court while cautioning against undue interference with running processes in other arms of government, stated inter alia that the institutional comity between the three arms of the government must not be endangered by the unwarranted intrusions into the workings of one arm by another. Counsel also referred the Court to the decision in Trusted Society of Human Rights Alliance vs Attorney General & 2 others Petition No. 229 of 2012 where the court while considering the principle of separation of powers in relation to the judiciary and legislature observed inter alia that;

> "[64.] Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuan influence is palpable throughout the foundational document, *the Constitution*, regarding the necessity of separating the governmental functions. *The Constitution* consciously delegates the sovereign power under it to the three branches of government and expects that each will carry out those functions assigned to it without interference from the other two."

58. The Counsel therefore prayed that the Petition and the Application dated 17th May, 2023 be dismissed with costs to the 6th Respondent.

Petitioner's Submissions

59. In his submissions, the Counsel for the Petitioner raised the following issues for determination: -

i. Whether the Petition falls within the exceptions of the doctrine of Exhaustion;

ii. Whether the President can be sued;

iii. Whether the petition met the constitutional threshold set out in Anarita Karimi Njeru-Vs- Attorney General (No.1) 1979 1 KLR 154;

iv. Whether the petitioner has breached the doctrine of Separation of Powers and;

v. Whether this Honourable court has jurisdiction to hear and determine this matter.

60. On the first issue, the Counsel for the Petitioner submitted that the issue before the Honourable court is ripe for determination and thus the issue of non justiciability is not applicable. To buttress this position, the Petitioner's Counsel referred this court to exceptions to the said doctrine discussed in the case of William Odhiambo Ramogi & 2 others vs Attorney General & 6 Others, Mombasa High Court Petition No.159 of 2018 [2018] eKLR.

61. The Counsel therefore argued that the issues raised in the petition concerns the breach of Chapter 6 of *the Constitution* and by extension of the Petitioner's duty to protect *the Constitution* against breach under Article 3 and threatened violation of *the Constitution*.

62. Citing Article 23 of *the Constitution*, the Counsel for the petitioner submitted that this Court under Article 165 has jurisdiction to determine this petition as it is on threatened violation of *the Constitution*. He argued that the President's nomination is amenable to Articles 10,165 and Chapter 6 of *the Constitution* of Kenya and that the lapses by the President in compliance with Article 10 and Chapter 6 of *the Constitution* cannot be cured by vetting in Parliament, however optimistic one may be.

63. To buttress this position, on whether the 2nd respondent can be sued, the Petitioner's Counsel relied on the Court of Appeal decision of Geoffrey Muthinja & another vs Samuel Muguna Henry & 1756 others [2015] eKLR & Court of South Africa in Democratic Alliance v The President of the Republic of South Africa & 3 Others: CCT 122/11 [2012] ZACC 24.

64. The Petitioner's Counsel submitted that the 2nd Respondent has properly been sued for gazetting the 1st Respondent in utter breach of Chapter 6 of *the Constitution*. That the 2nd Respondent has not been sued in his name and that the Presidency as an office is not immune to Article 165 of *the Constitution* of Kenya. In support of his submissions the Petitioner's Counsel placed reliance on the case of Azimio la Umoja One Kenya Coalition Party vs The President of Kenya and Others Petition E183 of 2023.

65. With regard to the third issue, that of specificity, the Petitioner's Counsel submitted that the Petitioner has cited with precision her complaints and the particulars of violations of *the Constitution* and specifically, regarding the violation of Articles 2,3,10,73,75,132(4) and 232 of *the Constitution* 2010 at paragraphs 31- 37 of the Petition and therefore she is in compliance with the threshold set out in Anarita Karimi Njeru vs Attorney General (supra).

66. With respect to the fourth issue, that of separation of powers, the Counsel argued that appointment and gazettement are different but pieces of the same process and that what the Petitioner is challenging is the nomination that would lead to gazettement of the 1st Respondent and not his Appointment. He contended that the nomination was brazenly illegal and cannot be cured by Parliament through vetting. He asserted that the appointment which is founded on egregious nomination, is an illegality that is null and void, whether Parliament vets the 1st Respondent or does not. He placed reliance on the case of Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others(supra) where the court agreed with the High Court dicta that courts have an interpretive role including the last word in determining the constitutionality of all governmental actions.

67. It was therefore the Petitioner's submissions that the Petition seeks to check and balance the powers of the Executive and in so doing, it does not infringe on the principle of separation of powers.

68. On the last issue, which dwells on the jurisdiction of this court, Counsel for the Petitioner referred this court to the Court of Appeal decision of Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others(supra) where the court held inter alia that;

> " The High Court had jurisdiction under Article 165 (3) (d) (ii) to review and set aside the appointment of the appellant on grounds of constitutionality or legality."

69. The Petitioner also referred this court to the decision in Sonko vs County Assembly of Nairobi City & 11 others [2022]eKLR where the court reiterated the terms of Chapter 6 of *the Constitution* to the effect that it was not enacted in vain or for cosmetic reasons. The court further held that;

    a. The authority assigned to a state officer is a public trust to be exercised in a manner that demonstrates respect for the people, brings honour to the nation and dignity to the office and promotes public confidence in the integrity of the office.

    b. It vests in the State officer the responsibility to serve the people, rather than the power to rule them.

    c. The standard for leadership is premised on the foundation that only those who, by their words and deeds, have demonstrated commitment to good governance, transparency and accountability should be accorded the honour to lead and serve the people.

70. The Petitioner's Counsel further submitted that this petition is filed with the view of enforcing Chapter 6 of *the Constitution* and is thus ripe for determination.

71. Counsel further submitted that the 2nd Respondent's nomination of the 1st respondent is a standalone act that can be subjected to Articles 3, 10, 73 and 165 of *the Constitution* of Kenya. He contended that the court should not shy away from giving effect to Chapter 6 of *the Constitution* of Kenya.

72. In view of the foregoing, the Counsel for the Petitioner urged the Court to dismiss the Preliminary Objections by the Respondents.

Issues For Determination

73. Having considered the pleadings, arguments and counter arguments and the authorities cited by the parties, I discern the following issues suffice for my determination;

    i. Whether the preliminary objections by the 1st,2nd,5th and 6th Respondents are sustainable in law.

    ii. Whether the 2nd Respondent should be struck out from these proceedings.

    iii. Whether this court is barred by the doctrine of ripeness, exhaustion and constitutional avoidance from entertaining this petition.

    iv. Whether this petition violates the principle of separation of powers.

    v. Whether the Petitioner failed to set out her complaint with a reasonable degree of precision and further, whether the decision in Anarita Karimi Njeru v Republic [1979] KLR 159 has since been overruled.

    vi. Who should bear the costs of the preliminary objections?

74. I will deal with the issues in seriatim.

    Whether the Preliminary Objections by the 1st,2nd,5th and 6th Respondents are sustainable in law.

75. The objections herein have been raised by way of Preliminary Objections. It is thus paramount to look at the law guiding such objections.

76. The nature of preliminary objections was discussed in Mukisa Biscuit Manufacturers Ltd vs Westend Distributors Ltd, (supra) which has been extensively cited by the parties. The Court observed as follows;

> " A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop."

77. In Oraro vs Mbaja [2005] 1 KLR 141, Ojwang J, (as he then was), cited with approval the position in Mukisa Biscuit's case and stated as follows on the operation of preliminary objections: -

"I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed."

78. In Omondi v National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177, it was observed that a Court in determining a preliminary objection can look at the pleadings and other relevant documents but must abide by the principle that the objection must raise pure points of law. It was held thus: -

> " In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion."

79. The question whether a court has jurisdiction is a point of law. This was set out clearly by the Supreme Court in Petition No. 7 of 2013 Mary Wambui Munene v. Peter Gichuki Kingara and Six Others, [2014] eKLR, when the Learned Judges stated that;

> " Jurisdiction is a pure question of law' and should be resolved on priority basis."

80. The Supreme Court had earlier on in Constitutional Application No. 2 of 2011, In the Matter of Interim Independent Electoral Commission (2011) eKLR observed as follows in regard to jurisdiction and its source: -

> " Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid down in judicial precedent".

81. The objections raise six main issues regarding the jurisdiction of the Court. These are; the exhaustion doctrine, ripeness doctrine, principle of separation of powers, that petition is frivolous, vexatious, incompetent and an outright abuse of the court process, and that no constitutional issues are raised in the Petition. It is my considered view that each of these issues are valid points of law that can be argued as preliminary objections and are capable of terminating the Petition in its entirety if allowed.

82. It is, therefore, this Court's finding that the Preliminary Objections are sound in law and are ripe for consideration. That said, I will now delve into each ground raised.

Whether this Court is barred by the doctrines of ripeness, exhaustion, constitutional avoidance, from entertaining this petition

83. The jurisdictional issues raised by the Respondents relate to the doctrine of ripeness, constitutional avoidance and exhaustion.

84. Jurisdiction is defined in Halsbury's Laws of England (4th Ed.) Vol. 9 as;

> " ...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."

85. Black's Law Dictionary, 9th Edition, defines jurisdiction as;

> " .. the Court's power to entertain, hear and determine a dispute before it".

86. In Words and Phrases Legally Defined Vol. 3, John Beecroft Saunders jurisdiction is defined as follows:

> " By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

87. It is well settled law that a Court's jurisdiction is derived from *the Constitution*, an Act of Parliament or both. The court must always determine if it has the jurisdiction to entertain any matter before it, even if that issue has not been raised by the parties before it. The issue of jurisdiction can be raised at any stage of the proceedings. Once raised the Court is enjoined to determine is as a matter of priority. In the instant case the issue was raised at the most ideal time to do so, which is at the first opportunity, before the petition could be determined on its merits.

88. It goes without saying that a Court acting without jurisdiction is acting in vain. All it engages in, without jurisdiction, is a nullity. Nyarangi, JA, in Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1 famously expressed himself as follows on the issue of jurisdiction: -

> " Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings..."

89. The Court of Appeal in Jamal Salim vs Yusuf Abdulahi Abdi & another Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows: -

> " Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;
>
> 1) .....
>
> 2) The jurisdiction either exists or does not ab initio ...
>
> 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
>
> 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal".

90. On a Court's jurisdiction, the Supreme Court of Kenya in Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & others (2012) eKLR stated as follows: -

> " A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

91. The importance of addressing the question of jurisdiction was dealt with by the Court of Appeal in Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 Others (2013) eKLR. The Court stated that: -

> " So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cul-de-sac. Courts, like nature, must not sit in vain".

92. In Orange Democratic Movement vs Yusuf Ali Mohamed & 5 others [2018] eKLR, the Court of Appeal further stated: -

> " .... a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the

High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court..."

93. This Court's Jurisdiction is provided for under Article 165 of *the Constitution* which states as follows: -

"(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) ..

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) ....

(e) ..

The only limitation to the above jurisdiction is clearly stated under sub-article 5 of that article and sets them out as being in respect of matters—

"(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162. (The courts of equal status)"

94. It is thus not in doubt that while this Court has the jurisdiction to entertain a petition alluding to a violation of *the Constitution*, the Court has to abide by its own boundaries so as not to be seen to be usurping the powers of other constitutional bodies. Such boundaries, set by the Courts themselves, include, but are not limited to the doctrines of Ripeness, Exhaustion and Constitutional Avoidance, raised by the Respondents herein.

95. All the above doctrines have been construed to broadly mean that a Petitioner need not come to the court when there are other mechanisms set out in law to address the complaint. They all address the question of jurisdiction of the court, but each doctrine has its own principles, set out by case law over the years. It is not in dispute that these principles may overlap, which is not a bad thing at all, as they are all aimed at determining whether a Court has been properly moved in the first instance. I will deal with each doctrine as hereunder.

96. As I proceed to do so, I am aware that at the time of delivering this ruling the 1st Respondent has already been appointed to the position in question. During the parties' presentation of their respective

arguments, Counsel for the Petitioner did concede that even if the process of appointing the 1st Respondent was to be completed, this Court, subject to my finding on the Preliminary Objections, still has powers to consider and declare the 1st Respondent as unfit to hold the position. I think that this is the correct position. A finding to the contrary would to providing parties with an avenue to scuttle a case like this by quickly rushing over the process and then say that the petition has been overtaken by events.

> 97. In regards to the doctrine of ripeness, the Respondents posit that this petition is premature and not ripe for determination for reason that the 1st Respondent has only been nominated as the Director General of the National Intelligence Service and he is yet to be vetted by Parliament, before a determination may be made as to his suitability to be appointed as such.

98. The Ripeness doctrine is just but one facet of the larger principle of non-justiciability. It is a jurisdictional issue that bars a court from considering a dispute whose resolution has not crystallized enough to warrant the court's intervention. Its operation is informed by the idea that there exist other fora with the capacity to resolve the dispute other than the court process. (see the case of Wambui & 10 others vs Speaker of the National Assembly & 6 others (Constitutional Petition 28 of 2021 & Petition E549, E037 & E065 of 2021 & E077 of 2022 (Consolidated)) [2022] KEHC 10275 (KLR) (Constitutional and Human Rights) (13 April 2022) (Judgment).

99. The doctrine stipulates that a court ought not to engage in premature adjudication of matters. While it is to be noted that the court retains the discretion to determine whether, on the circumstances of any matter before it ought to be determined by it, the court ought not to determine issues which are not yet ready for determination or are only of academic interest having been overtaken by events.

100. These principles were clearly set out by The Supreme Court in Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 of [2014] eKLR where it held:

> " The doctrine focuses on the time when a dispute is presented for adjudication. The Black's Law Dictionary 10th Edition, [supra] at page 1524 defines ripeness as:
>
> The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made
>
> Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies."

101. In Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others [2016] eKLR the court reiterated the same principles. It held that;

> " The extensive quotations were deliberate. It is clear from a review of the above case law that there is now a distinct and coherent jurisprudence within our jurisdiction on the justiciability dogma. There is settled policy with clear arguments as well as out of repetitive precedent that courts and judges are not advise-givers. The court ought not to determine issues which are not yet ready for determination or is only of academic interest having been overtaken by events. The court ought not to engage in premature adjudication of matters through either the doctrine of ripeness or of avoidance. It must not decide on what the future holds either.

It is however to be noted that the court retains the discretion to determine whether on the circumstances of any matter before it still ought to be determined."

102. The question is, did the petition run afoul of the principle of ripeness?

103. At the time the Petitioner came to Court, the 1st Respondent had just been nominated for appointment as the Director-General of the NIS. She had sought Conservatory Orders to stay the nomination, vetting and any subsequent appointment of the 1st Respondent to the said post.

104. It is important to note that the Petitioner, in her petition did not fault the process of the nomination of the 1st Respondent. Her petition is basically premised on the averment that the 1st Respondent is unqualified for such nomination as he has a history of violation of *the Constitution* while serving as the Director of Public Prosecution (DPP). She then proceeded to cite several situations to back up her arguments.

105. During the highlighting of the submissions, counsel for the petitioner brought in another angle of argument. He stated that the 2nd Respondent had not shown what criteria he used to nominate the 1st Respondent for the position in question.

106. It is not in dispute that the nomination by the 2nd Respondent was communicated to the public in writing through the Notification of Presidential Action [1]16/06/2023 dated Tuesday 16th May, 2023 issued and signed by Felix Koskei, Chief of Staff & Head of the Public Service. Consequent to the above, the 6th Respondent did issue a Notification to the General Public dated 20th May, 2023 inviting any person to contest the intended nomination.

107. The petition was presented to the court even before the notification to the General Public was issued by the 6th Respondent. In my view the Notification of Presidential Action was only a declaration of intent on the part of the 2nd Respondent. Legally, he was making known to the public of his choice for the position of the Director, NIS. The law as to such appointment is as set out in section 6 of the *National Intelligence Service Act*. It states as follows;

" Director-General

6.

(1) There shall be a Director-General of the Service who shall be appointed by the President, on such terms and conditions of service as the President may,in consultation with the Public Service Commission, determine".

108. The Presidential Notification was legally, to be followed by a process initiated by the Public Service Commission. The petitioner was well aware of the intended process which was to follow the Presidential Notification. This includes action by the Public Service Commission, and approval process by Parliament.

109. Where the Petitioner fell into error is as exposed in paragraph 20 of her petition. She avers that the 2nd Respondent, prior to issuing the Notification of Presidential Action, did not invite the participation of the general public. This is a misconceived argument. The 2nd Respondent is not required to invite any comments at that stage. Once he has made his proposal/nomination then the 6th Respondent was by law the institution enjoined to comply with the process regarding public office appointments. As I stated earlier, the 6th Respondent had not even begun its function when the petition was presented to court. Nothing had crystallized, legally, to make the Court hold that the 1st Respondent's nomination

and intended approval process by the 6th Respondent and Parliament, had flouted *the Constitution*. The Petitioner jumped the gun and made a false start. I am thus of the view that the matter was at that stage not ripe for contestation in court. I will revisit this issue later in this ruling.

110. I will now deal with the question whether the petition flouts the doctrines of constitutional avoidance and exhaustion.

111. The 1st, 2nd, 3rd, 5th and 6th Respondents submitted that the doctrine of exhaustion requires parties to pursue and complete all available administrative procedures and avenues before seeking judicial intervention.

112. It was argued that the doctrine of exhaustion is founded on the provisions of Article 159 2(c) of *the Constitution* and Section 9 of the Fair Administrative Act 2015. The said Article provides that;

> " In exercising judicial authority, the courts and tribunals shall be guided by the following principles alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted unless the traditional dispute resolution mechanisms is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality or is inconsistent with this Constitution or any written law."

113. It was further argued that Section 9(2) of the *Fair Administrative Action Act* implied that where there existed internal mechanisms for resolution of the dispute which, inevitably, would yield an alternative remedy, it was no longer a matter of the court's discretion to entertain, let alone grant, an application for judicial review. That in that event, the court would not review the administrative action until the internal mechanism had been exhausted.

114. In the case of William Odhiambo Ramogi & 3 others (supra) the court aptly discussed the doctrine of exhaustion and exceptions thereto as follows:

> " The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts..."

115. The Court went on to outline the exceptions to the rule as follows:

> " As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
>
> The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was

extensively elaborated by Mativo J in Night Rose Cosmetics [1972] Ltd v Nairobi County Government & 2 others [2018] eKLR.

In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

116. On this point, a five-judge bench of this Court in Mohammed Ali Baadi and Others v The Attorney General and 11 Others, [2018] eKLR was called upon to determine the question as to when an alternative dispute resolution mechanism may not be appropriate. It held as follows;

> " While our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute (See The Speaker of National Assembly vs James Njenga Karume41), the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of Dawda K. Jawara vs Gambia42 it was held that:
>
> "A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality] ...the Governments assertion of non exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."
>
> In the case of R. v Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance (NASA) Kenya43 after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the Court held:
>
> " What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it.
>
> "This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake."
>
> See also Moffat Kamau and 9 Others v Aelous (K) Ltd and 9 Others.)44"

117. As I had stated earlier, the nomination by the 2nd Respondent was communicated in writing through the Notification of Presidential Action signed by Felix Koskei, Chief of Staff & Head of the Public Service. Consequent to the above, the 6th Respondent did issue a Notification to the General Public dated 20th May, 2023 inviting any person to contest the intended nomination.

118. The Respondents argued that the Petitioner prior to filing this petition did not submit any evidence to Parliament contesting the suitability of the 1st Respondent to hold the office in issue and as such

she avoided that opportunity. That such avoidance of the process willingly jettisons the jurisdiction of the court to hear the petition.

119. It was the submissions of the Respondents that the issues raised by the petitioner are capable of being addressed in different forum in furtherance of the provisions of Article 159(2) (c) of *the Constitution*.

120. A perusal of the Petition indicates that petitioner believes the 1st respondent is unsuitable and or unfit to hold the office of the Director General of the National Intelligence Service for reasons that; - While he was serving as the Director of Public Prosecution(DPP)on several occasions he violated *the Constitution* and his oath of office by failing to adhere to provisions of Article 157 of *the Constitution* which prohibits commencement and/or withdrawal of Criminal Cases due to intimidation, coercion, consent and authority of any person.He admitted publicly through the media to having been intimidated to charge Mr. Gachagua and Mathira Mp by then Director of Criminal Investigations one Mr. Kinoti which amounts to violations of Article,157(10),73 and 75 of *the Constitution*;He publicly admitted as the DPP to have been coerced to charge and withdraw cases involving close associates of the 2nd Respondent;He violated and failed to live up to the oath of the office of the DPP and does not meet the requirements of Chapter 6 of *the Constitution*;While serving as the DPP he displayed lack of competence in discharging his duties thus demeaning that office;Since his appointment as the DPP he never appeared before court which raises legitimate concerns on his competence and suitability to discharge duties as the head of the prosecution body.He used to hound professionals who were associated with the 2nd Respondent e.g the case against the former and current Kenya Pipeline Company Authority Managing Director Joe Sang where he was acquitted for want of a prima facie case;He separately charged Hon.Oscar Sudi & Hon Wiliam Kamket for political reasons, but they were acquitted under Section 210 of the Criminal Procedure Code;Many people have been extra judicially executed but no meaningful investigations were ordered by him and that no justice has been served upon victims of Murder; andHe eroded the Independence of the Office of the Director of Public Prosecution which spilled over to court and his appointment would serve to bastardize *the Constitution*, People of Kenya and Constitutional offices.

121. Guided by the aforesaid authorities, it is my position that the Petitioner should have prepared a memoranda outlining the above issues and present them with evidence before the Parliament for consideration and scrutiny.

122. Section 4 and 6 of *Public Appointments (Parliamentary Approval) Act* No. 33 of 2011 provide as follows: -

> "
>
> "4. Notification of vetting requirements
> Any advertisement inviting applications for nomination for appointment to an office to which this Act applies shall indicate that candidates so nominated shall be required to appear before a committee of Parliament for vetting.
>
> 6. Approval hearing
>
> (1) Upon receipt of a notification of appointment, the Clerk shall invite the Committee to hold an approval hearing.
>
> (4) The Committee shall notify the public of the time and place for holding an approval hearing at least seven days prior to the hearing.

(5) Subject to this Act, all Committee proceedings on public appointments shall be open and transparent.

(7) An approval hearing shall focus on a candidate's academic credentials, professional training and experience, personal integrity and background.

(9) Any person may, prior to the approval hearing, and by written statement on oath, provide the Clerk with evidence contesting the suitability of a candidate to hold the office to which the candidate has been nominated."

123. It is clear from the petition that the Petitioner is not content with the nomination of the 1st Respondent to hold the office of the Director General of NIS. She has stated that he is incompetent and has questioned his integrity. The requisite Parliamentary committee prior approval/disapproval of a candidate is supposed to consider such matters under Section 7 above.

124. Under section 9, the petitioner had an opportunity to contest the suitability of the 1st respondent to hold the office in issue. At the time the parties were filing their submissions, the Public Service Commission had already issued a notice to the Public to make any submissions on the suitability of the 1st Respondent for the post in question. The petitioner did not tell the court if she had made any such submissions. She also did not tell the court if she had intended to make any submissions as required to the Parliamentary Committee that was to vet the 1st Respondent. It is thus clear that she failed to take advantage of that avenue before lodging the instant Petition.

125. The Court of Appeal, in Speaker of National Assembly v Karume [1992] KLR 21 did stress that :

> " Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

126. I have analyzed the facts of the petition in light of the authorities above and the exceptions to the exhaustion doctrine as set out in William Odhiambo Ramogi & 3 others vs Attorney General & 4 others(supra) and it is my view that petition does not fall within the said exceptions. The Petitioner has failed to demonstrate that the mechanism provided was not readily available to her or that the said avenue would not have served as a way to uphold the values enshrined in *the Constitution* and the law.

127. I will now briefly deal with the doctrine of Constitutional avoidance. The same was defined byThe Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR as follows: -

> " The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:
>
> I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

128. Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v Tennessee Valley Authority, 297 U.S. 288, 347 [1936].

129. In Sumayya Athmani Hassan vs Paul Masinde Simidi & Another [2019] eKLR the Court of Appeal stated:

> "... Where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on *the Constitution* without challenging the legislation in question. That principle has been reinforced by the Supreme Court in Communications Commission case (supra)."

130. The court in KKB v SCM & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) stated that Constitutional avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved.

131. Flowing from above, it is clear that the petitioner would be deprived a hearing before a constitutional court if a party successfully establishes the existence of the doctrine of constitutional avoidance.

132. As has been stated herein, there is a very elaborate and deliberate process set out by law on the approval/ disapproval of the 1st Respondent to the position in question. The petitioner has not shown the Court that she has taken any steps to follow that process. That process ought not to be short circuited by filing of a constitutional petition. The other institutions also have a mandate to uphold *the Constitution*. They should be allowed to carry out their mandates and only when it is clear that they have not, or do not intend to do so, that the Court's jurisdiction can be moved. The court must not be seen as a disruptor of due processes unnecessarily. It is the ultimate dispute resolution platform but it cannot purport to hold a monopoly on the same.

133. In view of the foregoing, it is my opinion that this court is barred by the doctrines of constitutional avoidance and exhaustion from hearing and determining the Petition.

Whether this petition violates the principle of separation of powers

134. The Respondents' position regarding the Doctrine of Separation of Powers is that the court does not have a license to take over functions vested in other organs of Government.

135. The Respondents posit that the appropriate avenue to resolve the Petitioner's issue with regard to suitability of the 1st Respondent for the Position of Director General of National Intelligence Service is the National Assembly and not this Court. They submitted that this court will be seen to interfere with the Principle of separation of powers if it proceeds to hear and determine this Petition.

136. The petitioner on her part submitted that she is challenging the nomination that would lead to gazettement of the 1st Respondent and not his appointment. She posits that the nomination was brazenly illegal and cannot be cured by Parliament through vetting and that this petition seeks to check and balance the powers of the executive, and in doing so does not infringe on the powers of the executive.

137. The Petitioner further submitted that Article 3 of *the Constitution* allows anyone to come to its defence without having to go to Parliament and that the jurisdiction to deal with Chapter 6 is not the exclusive duty of Parliament. She argued that this Court has residual power to review breach of procedure or illegality and that the President/2nd Respondent, at the nomination stage, ought to have considered the provisions of Article 10 of *the Constitution* that requires a judgement from him on why the 1st Respondent can transcend the office of the DPP to become Director General.

138. The question to be answered at this point is whether the Nomination of the 1st Respondent for the Position of the Director General National Intelligence Service was illegal and unconstitutional?

139. Article 132 (2) (f) of *the Constitution* provides that;

> " The President shall nominate and, with the approval of the National Assembly, appoint, and may dismiss in accordance with this Constitution, any other State or public officer whom this Constitution requires or empowers the President to appoint or dismiss."

140. Article 10 of *the Constitution* provides for national values and principles of governance as follows –

10. National values and principles of governance.

2. The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

   a. applies or interprets this Constitution;

   b. enacts, applies or interprets any law; or

   c. makes or implements public policy decisions.

3. The national values and principles of governance include—

   a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

   b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

   c. good governance, integrity, transparency and accountability; and

   d. sustainable development.

141. In compliance with Article 132(2) of *the Constitution*, the *National Intelligence Service Act*, 2012 at section 7 provides: -

> " 7.
>
> (1) 1) There shall be a Director-General of the Service who shall, with the approval of the National Assembly, be appointed by the President.
>
> (2) The President shall nominate a person for appointment as the Director-General and submit the name of the nominee to the National Assembly.
>
> (3) The National Assembly shall, within fourteen days after it first meets after receiving the names of the nominee —
>
> (a) consider the suitability of the nominee;
>
> (b) either approve or reject the nominee for appointment; and
>
> (c) the Speaker shall notify the President of the decision of the National Assembly.
>
> (4) If the National Assembly approves the nominee, the President shall, within seven days after receiving the notification to that effect, appoint the nominee as the Director-General.

(5) If the National Assembly rejects a nominee submitted by the President, the National Assembly shall request the President to submit a new nominee and the provisions of this section shall apply with necessary modifications with respect to the new nominee.

(6) If, after the expiry of a period of sixty days from the date of the nomination of a person for appointment as a Director-General under subsection (2), the National Assembly has neither approved nor rejected the nomination of the person, the nominee shall be deemed to have been approved by the National Assembly."

142. Section 8 of the same Act then provides for qualification for appointment as the Director General as follows: -

" 8.

(1) A person is qualified for appointment as the Director-General if the person—

(a) is a citizen of Kenya;

(b) holds a degree from a university recognized in Kenya;

(c) has knowledge and at least fifteen years' experience in intelligence or national security;

(d) has served in a senior management Position, in the Service or public service for at least ten years; and

(e) meets the requirements of Chapter Six of *the Constitution*.

(2) A person is not qualified for appointment as Director-General if that person— (a) is a member of Parliament, a member of a county assembly, a governor or a deputy governor; 1563 2012 National Intelligence Service (b) has, in the immediate preceding period of five years, served as a member of Parliament, a member of a county assembly, a governor, a ,deputy governor, a trade union official or held an office in a political party; (c) holds dual citizenship; (d) has been convicted of a criminal offence and has been sentenced to imprisonment for a term exceeding six months without an option' of a fine; (e) has previously been removed from office for contravening the provisions of *the Constitution* or any other written law; or (f) is an undischarged bankrupt."

143. Under *the Constitution* and the Act, there is a clear procedure of nomination of the Director General. The President has the sole discretion to nominate a Director General then forward his name for approval by the National Assembly. Section 7 of the *National Intelligence Service Act* is also instructive on the steps to be taken after a candidate has been nominated for the position in issue. Section 8 is succinct on the qualification for the Appointment of the position in question.

144. The Petitioner herein has not demonstrated that the President bypassed and or was in breach of the aforesaid Procedure and that the 1st Respondent was disqualified for the said position as per the provisions of Section 8 of the *National Intelligence Service Act*.

145. The Petitioner has not proffered any evidence that the recruitment or nomination for the position of the Director General NIS by the President called for public participation. Whereas he retains the authority to so nominate, the nominee must meet the threshold set out and must be subjected to approval process as required by law.

146. I am persuaded by the principles enunciated in the case of Katiba Institute vs The Attorney General & 9 others; Nairobi Civil Appeal No. 99 of 2019 where the Court stated –

> " Similarly, as far as the nomination of the 5th Respondent was concerned, Article 171(2) g requires that he be nominated by the Public Service Commission. He was nominated as such. His nomination in our view did not call for public participation. The competitiveness and merit provided for under the relevant provisions of the Public Service Act is within the Public Service Commission itself. The commissioners are best placed to determine which one of them passes the test as to merit as opposed to members of public. The members of the Commission decided to nominate the 5th respondent having found him qualified for such nomination. They were best placed to make the said decision and not the courts or members of public."

147. It is my position therefore that the President had discretion to nominate the 1st Respondent and in doing he did not act in contravention of the Law.

148. The objectives of Article 10 were met when the public were notified of the vetting hearings as required by Article 118 of *the Constitution* and invited to submit memoranda by way of affidavits if any contesting the suitability of a candidate to hold the office to which the candidate had been nominated.

149. The Supreme Court in Judicial Service Commission v Speaker of the National Assembly & 8 Others [2014] eKLR, stressed that by the doctrine of separation of powers, the limits on judicial authority, and *the Constitution*'s design of entrusting certain issues to other organs of Government, are vital principles. The Court proceeded to hold that:

> " *The Constitution* disperses powers among various constitutional organs. Where it is alleged that any of these organs has failed to act in accordance with *the Constitution*, then the Courts are empowered by Article 165 (3)(d)(ii) to determine whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with, or in contravention of *the Constitution*"

150. In the Mumo Matemo v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR the Court of Appeal stated as follows: -

> " It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separating of powers does not only proscribe organs of overmen from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court's dicta in the petition the subject of this appeal that:
>
> "[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our

constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent..."

The Court further stated that: -

The High Court's role, was therefore to review the decision of Parliament and to consider whether there had been:

(i) 'unconstitutionality' or 'illegality', i.e., whether Parliament misapplied or misdirected itself under *the constitution* or in law;

(ii) 'irrationality,' i.e., whether Parliament was outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it (Wednesbury unreasonableness); or

(iii) 'procedural impropriety,' i.e., whether there was departure by Parliament from any procedural rules governing its conduct or a failure to observe the basic rules of natural justice. This is commonly referred to as 'fundamental unfairness,' since in such situations, the absence of justice is conspicuous."

151. At the time the petitioner filed this petition the 1st Respondent had not been approved as the Director General of NIS. It was the work of the Parliament to consider his approval. A party can challenge the decision of Parliament if there was, for instance, a breach of the mandatory procedure laid down by law, or if the petitioner, or other persons, were not given an opportunity to be heard before the approval was done. The court's role at that stage would be to determine the issues as set in Mumo Matemu's case(supra).

152. It would thus be an infringement of the separation of powers principle if this court was to be asked to supplant its own decision over the decision of other constitutional organs. It cannot purport to hold the 1st Respondent unfit or unsuitable to hold the position unless the said Respondent has been subjected to due process, to determine this. That due process is vested in other constitutional organs, not this court.

153. It is not lost on me that the 1st Respondent was, at the time of his nomination, the holder of the office of the Director of Public Prosecutions. That office is established under Article 157 of *the Constitution*.

154. The petitioner avers, and cited instances, that the 1st Respondent has expressly shown that he has violated Chapter 6 of *the Constitution*.

155. In my view, this is not the appropriate forum to determine whether the decisions to charge or withdraw charges against the named individuals, point to the 1st Respondent's failure to meet the Constitutional threshold set out under Chapter 6. These are decisions subject to appeals or reviews in their respective individual situations. I cannot be called upon to decree that the decisions are an indication of the incompetence of the 1st Respondent.

156. More importantly, if the petitioner felt that the said decisions are evidence of the unsuitability of the 1st Respondent from holding public office, there is a procedure laid down to have him so declared. The same is set out under Article 158 of *the Constitution*. It states as follows;

" 158. Removal and resignation of Director of Public Prosecutions.

(1) The Director of Public Prosecutions may be removed from office only on the grounds of—

(a) inability to perform the functions of office arising from mental or physical incapacity;

(b) non-compliance with Chapter Six;

(c) bankruptcy;

(d) incompetence; or

(e) gross misconduct or misbehaviour.

(2) A person desiring the removal of the Director of Public Prosecutions may present a petition to the Public Service Commission which, shall be in writing, out the alleged facts constituting the grounds for the removal of the Director.

(3) The Public Service Commission shall consider the petition and, if it is satisfied that it discloses the existence of a ground under clause (1), it shall send the petition to the President.

(4) On receipt and examination of the petition, the President shall, within fourteen days, suspend the Director of Public Prosecutions from office pending action by the President in accordance with clause (5) and shall, acting in accordance with the advice of the Public Service Commission, appoint a tribunal consisting of—

(a) four members from among persons who hold or have held office as a judge of a superior court, or who are qualified to be appointed as such;

(b) one advocate of at least fifteen years' standing nominated by the statutory body responsible for the professional regulation of advocates; and

(c) two other persons with experience in public affairs.

(5) The tribunal shall inquire into the matter expeditiously and report on the facts and make recommendations to the President, who shall act in accordance with the recommendations of the tribunal."

157. There is no indication that there has been any petition by the petitioner, or any other person, to move to remove the 1st Respondent from office as the DPP, or declare him unsuitable to hold that office. In the absence of any finding to the contrary, the 1st Respondent has to be presumed to be qualified and competent to continue holding that office.

158. Is it then plausible that while the 1st Respondent is competent to hold one constitutional office, he can be held as unsuitable to hold another constitutional office? I don't think so. All Constitutional, State or Public offices are subject to the same standards under *the Constitution*. There is no office that requires a higher threshold. As such I am unable to make any finding on the competence or otherwise of the 1st Respondent herein, even if the petition was to be heard on its merits.

159. The next issue for my consideration is whether the Petitioner failed to set out her complaints with a reasonable degree of precision and whether, as submitted by Counsel for the petitioner, the case of Anarita Karimi Njeru vs Republic [1979] KLR 159 is no longer good law.

160. It was the 1st Respondent's case that the petitioner herein referred to Articles 1, 2(1), 3(1), 10, 19, 20, 21, 22, 23, 73, 75, 132, 157,159,165,232,249,258 and 259 without providing sufficient particulars as to the allegation and the manner of infringement. It was contended that the allegations made from

paragraphs 23 to 32 and throughout the entire petition are made without any particulars being stated or evidence of the same being proffered.

161. The 6th Respondent on its part submitted that the petitioner failed to set out with reasonable degree of precision how and the manner in which the said articles have been infringed by the process of recruitment, nomination and recommendation of the 1st Respondent as the Director General of National Intelligence Service.

162. According to the petitioner, the threshold set out in Anarita Karimi Njeru's case was met as she set out in great detail the particulars of violation of *the Constitution* at paragraphs 31 to 37 of the petition. However, during hearing of the application, the Counsel for the Petitioner contended that Anarita Karimi Njeru's case is no longer good law, without referring this court to any precedent that overruled the same.

163. I will first address the latter issue on whether the Anarita Karimi's case is no longer good law.

164. The court in Anarita Karimi Njeru v The Republic (supra) held that a Constitutional petition should set out with a degree of precision the petitioner's co-plaint, the provisions infringed and the manner in which they are alleged to be infringed.

165. This principle was later reaffirmed by the Court of Appeal in the case of Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR when the Court at paragraph 87(3) of the judgment stated as follows: -

> " It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of *the constitution* of Kenya and the *Ethics and Anti-corruption Commission Act*, 2011, accordingly the petition did not meet the standard enunciated in the Anarita Karimi Njeru case."

166. Justices J. Ngugi, Mumbi Ngugi, G.V. Odunga (as they then were), in Trusted Society of Human Rights Alliance vs Attorney General & 2 others; Matemu (Interested Party); With Kenya Human Rights Commission & another (Amicus Curiae) (Petition 229 of 2012) [2012] KEHC 2480 (KLR) (Constitutional and Human Rights) (20 September 2012) (Judgment) stated as follows in regards to Anarita Karimi Njeru's case;

> " We must point out that Anarita Karimi Njeru was decided under the old Constitution. The decision in that case must now be reconciled and be brought into consonance with the New Constitution. In our view, the present position with regard to the admissibility of petitions seeking to enforce *the Constitution* must begin with the provisions of article 159 on the exercise of judicial authority. Among other things, this article stipulates that:(d) justice shall be administered without undue regard to procedural technicalities; and(e)the purpose and principles of this Constitution shall be protected and promoted.
>
> We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a petition as stated raises issues which are so insubstantial and so attenuated that a court of law properly directing itself to

the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against respondents in a constitutional petition are fashioned in a way that gives proper notice to the respondents about the nature of the claims being made so that they can adequately prepare their case.

While the present petition might not be the epitome of precise, comprehensive, or elegant drafting, our view is that the complaints raised by the petitioner are concrete enough to warrant substantive consideration by the court:"

167. The court in Peter Michobo Muiru v Barclays Bank of Kenya Ltd & another [2016] eKLR while discussing the Principles enunciated in Anarita Karimi Njeru's case observed as follows: -

> " The principle, as this court has previously stated, does not however equate absolute precision. There is no need for absolute and artificial specificity: see Kevin Turunga Ithagi vs Hon. Justice Fred Ochieng & 5 Others (No.1) HCCP No.442 of 2015 [2015] eKLR. The general approach should be that each case must be independently viewed and understood by the court and where the court as well as the Respondent can painlessly identify and understand the petitioner's case as well as the constitutional trajectory the case takes, then the merits of the case ought to be ventured into. Stalling the case through the technicality of want of formal competence will take a back seat. As was stated in the case of Donovan Earl Hamilton –v- Ian Hayles (Claim No. 2009 HCV 04623) by the Supreme Court of Judicature in Jamaica, the striking out of pleadings in constitutional petitions should be done only in the clearest of cases.
>
> The principle established in the Anarita Karimi Njeru's case should thus not be applied line hook and sinker and the court must always be cautious to avoid impeding the course of justice by denying a party access to the court: see Samuel Gunja Sode & Another v The County Assembly of Marsabit & 2 others [2016] eKLR, Nation Media Group Ltd –v- Attorney General [2007] 1 EA 261 as well as the Court of Appeal decision in Peter M. Kariuki –v- Attorney General [2014] eKLR."

168. It is clear therefore from the above precedents of the High Court that the ratio decidendi in Anarita Karimi Njeru's case has never been overruled, but the courts appreciated that Justice must not be sacrificed at the altar of strict adherence to procedural law which at times create hardship and unfairness. It was appreciated that Article 159 (2) (d) of *the Constitution* accords precedence to substance over form.

169. The above notwithstanding, it is not right for a party to throw every Constitutional provision it can muster at the court and ask it to determine a petition or application. The court needs to frame the issues for determination and that is only possible where the party moving it has pleaded with specificity the provisions of *the constitution* that have allegedly been infringed or flouted.

170. It is my considered view, therefore, that the case of Anarita Karimi Njeru is still good law. Moreover, Mumo Matemu's case(supra) is of a superior court and by the principles of stare decisis it is binding upon this court in so far as similar matters are concerned.

171. It is thus well settled law that in a constitutional petition therefore, a party is not supposed to merely cite constitutional provisions. He/she must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the

manner of the violation and/or threatened violation and state some particulars of alleged infringement to enable the respondent to be able to respond to each allegation accordingly.

172. I have perused the petition and I do note that the Petitioner did indeed cite Articles 1, 2(1) ,3(1) ,10, 19, 20, 21, 22, 23, 73, 75, 132, 157,159,165,232,249,258 and 259 purportedly infringed but only set out the manner in which Articles 10,21 and 73 are alleged to be infringed, as set at paragraphs 31 to 37 thereof.

173. In my view, it is incorrect to state that the petition has insufficient particulars regarding the manner in which the aforesaid articles of *the constitution* were allegedly infringed. Some articles do not require to be elaborated as they merely refer to general rights and powers under *the Constitution*. In any case, the Petitioner's claims are easily discernible from the Petition, application and the Affidavits filed. It is also evident from the responses and submissions filed by the Respondents that they were able to understand the issues in controversy.

I therefore decline to accept the argument that the Petition was imprecisely drafted.

Whether the 2nd Respondent should be struck out from these proceedings.

174. The 1st, 2nd, 5th and 6th Respondents all concurred in the argument that a President of the Republic of Kenya or a person performing the duties of his office cannot be sued for any acts of omission and commission in the performance of his constitutional duties during their tenure in office.

175. The Petitioner on her part holds the view that the Presidency as an office is not immune to Article 165 of *the Constitution* of Kenya. It was her position that the 2nd Respondent has properly been sued for gazetting the 1st Respondent in utter breach of Chapter 6 of *the Constitution*.

176. The relevant provision to this matter is Article 143 (2) which states:

> "(2) Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution".

177. A literal reading of the provision shows that the President is immune from civil proceedings in respect of anything done or not done in exercise of his power under *the Constitution* while in office.

178. The Supreme Court in Attorney General & 2others vs Ndii & 79 others; [2022] eKLR elaborately discussed the issue whether civil proceedings could be instituted against the President or person performing the functions of the office of the President during their tenure of office in respect of anything done or not done contrary to *the Constitution*. It held as follows: -

> "The superior courts below fell in error in their interpretation and application of article 143(2) of *the Constitution* by holding that civil proceedings could be instituted against the President or a person performing the functions of the office of President during their tenure of office in respect of anything done or not done contrary to *the Constitution*. Civil proceedings could not be instituted against the President or a person performing the functions of the office of President during their tenure of office in respect of anything done or not done contrary to *the Constitution*. Such proceedings could be instituted against the President vide the Attorney General".

179. The above decision is binding on this court. I have not been referred to and neither could I find any other decision of the said Court that departs from that finding.

180. In the most recent case of Eliud Karanja Matindi and Others vs President Republic of Kenya [2023] KEHC 19534 (KLR) (The 50 CAS's case) the High Court did revisit this issue. The 3 Judge bench also cited Attorney General & 2others vs Ndii & 79 others(supra) and held as follows;

> " Having considered the submissions of the parties on this issue as set out above, we are guided by Article 143 of *the Constitution* and the decision of the Supreme Court in Attorney-General & 2 others v Ndii & 79 others; Prof Rosalind Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) more commonly known as 'the BBI case', where at the following paragraphs the court stated as follows:
>
> " (282) Consequently, this leads to the inescapable conclusion that the immunity of the President is unlike that of the other state actors. The President not only enjoys functional immunity like all public officials who perform state duties, which protects them from civil liability for official functions, they further enjoy sovereign immunity as the Head of State and the single representation of the sovereignty of the Republic. Indeed, it is only sovereign immunity that can immunize anyone against both proceedings and criminal liability...
>
> (288) With respect to legal accountability, the protection of the President from legal proceedings under Article 143(2) does not mean that a President's actions or omissions cannot be challenged in court. Anybody or party aggrieved by the President's actions or failures can initiate proceedings against the Attorney General who by virtue of being the legal representative of the government in legal proceedings also represents the President, who is the Head of Government. The immunity on the other hand offers protection that shields the President from civil suits being filed against them in their personal capacity. As rightly conceded by the President in his written submissions before this Court... (emphasis ours) As such, pursuant to Article 156(4) of *the Constitution*, the exercise of public power by the President can be challenged in a court of law by suing the Attorney General through an action of judicial review or constitutional petition wherein the court may issue appropriate remedies... (emphasis ours)
>
> Pursuant to Article 143 of *the Constitution*, and based on the law as set out above, we find that the 1st respondent was improperly joined into the consolidated petition.
>
> We further find that the misjoinder is not fatal to the consolidated petition but take the opportunity to urge the petitioners and future litigants to avoid this practice in light of the unequivocal pronouncement by the Supreme Court on this issue."

181. The law is thus well settled that the 2nd Respondent ought not to be sued in his name or office. The Attorney General is the correct party to be sued whenever the President allegedly contravenes any Constitutional provisions.

182. The argument by the Petitioner that the President has not been sued in his own name is neither here nor there. This court takes Judicial Notice that there an occupant of the office in question and that is the President of Republic of Kenya. He is the one who has been sued as the Second Respondent in this petition. Clearly, the Petitioner has gone afoul of very express provisions of the said Article, which addresses itself to the office and the occupier of the office. The petitioner cannot purport to distinguish the 2 to suit her convenience.

183. It is thus my finding that the petition against the 2nd Respondent was therefore wrong itself. I proceed to strike out the 2nd Respondent from this Petition. That alone cannot lead to the court declaring that the petition was fatally defective, as stated in the cited authorities above. However, in view of my finding on the other grounds of the Preliminary objections, that is now water past the bridge. Further orders shall follow at the end of this ruling.

184. Having considered all the matters that were germane to the preliminary objections, it now the moment to determine the last issue; who should bear costs of the Petition.

185. The 1st, 2nd, 5th and 6th Respondents have urged this court to dismiss the Petition with costs. The 3rd Respondent associated itself with the submissions of the 1st Respondent.

186. The petitioner on her part submitted that costs are not ordinarily awardable in a public interest litigation.

187. What then is Public Interest litigation (PIL)and does a petition brought in public interest qualify to be exempted from an award of costs?

188. The Black's Law Directory the 10th Edition describes public interest litigation as follows: -

> " Public Interest Litigation means a legal action initiated in a Court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected."

189. The court in Kenya Anti-Corruption Commission v Deepak Chamanlal Kamni and 4 others [2014] eKLR was also called upon to determine what a matter of public interest is. It held that:

> " ...a matter of public interest must be a matter in which the whole society has a stake, anything affecting the legal rights or liability of the public at large."

190. In the Indian case of Thakur Bahadur Singh and Another vs Government of Andhra Pradesh the court also described what public interest litigation was. It stated: -

> " PIL has a significant American development. The Council for Public Interest Law set up by the Ford Foundation in USA, in its report [1976] at pp.6-7 defined PIL thus:
>
> "Public Interest Law is the name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in recognition that the ordinary market place for legal services fails to provide such services to significant segments of the population and to significant interest. Such groups and interests include the poor, environmentalists, consumers, racial and ethnic minorities, and others."

191. In another Indian case of People's Union for Democratic Rights & Others v Union of India & Others [1982] 3 SCC 235, the court observed that: -

> " Public interest litigation is essentially a cooperative or collaborative effort by the Petitioner, the State or public authority and the Court to secure observance of constitutional or basic human rights, benefits and privileges upon poor, downtrodden and vulnerable sections of the society."

192. In the case of Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others [2014] eKLR the Supreme Court explained the essence of public interest litigation as follows;

> " Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was *the Constitution*'s aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis a vis the status of the parties before it. This discretion is drawn from the command of Article 259 (1), to interpret *the Constitution* in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance".
>
> In determining whether the Petition herein is a public interest litigation, the court needs to look at the pleadings as drawn. Such was the finding of the court in Dindi Oscar Okumu vs Robert Pavel Oimeke & 5 others [2021] eKLR, where the court approached the issue as follows;

> " In determining whether the Petition herein is a public interest litigation, I have to have a look at the Petition as drawn and filed. The Petition herein is dated 10th March 2020 drawn by Petitioner Mr. Dindi Oscar Okumu under paragraph 1 of the Petition, the Petitioner states:-
>
> "The Petitioner is a Kenyan Citizen residing and working in Nairobi City County within the Republic of Kenya. He is a tax payer and a consumer of various products directly and or indirectly under the ambit of the Energy & Petroleum Regulatory Authority as managed by the 1st and 2nd Respondents. He brings this Petition on his own behalf and on behalf of the entire Kenyan Public as the issues to be addressed in this Petition affecting or are likely to affect the entire country."
>
> From the contents of paragraph 1 of the Petition it is clearly pleaded that "He brings this Petition on his own behalf and on behalf of the entire Kenyan Public as the issues to be addressed in this Petition affect and or are likely to affect the entire country.
>
> From the contents of paragraph 1 of the Petition herein, it is clear that this Petition is brought in public interest litigation, as the legal action as initiated in this Petition is purely for enforcement of public interest or general interest in which the public or class of community have pecuniary interest or some interest by which thein legal rights or liabilities are affected. The whole society has a stake in the Petition in which the legal rights or liability are threatened and this Petition purely is for advancement of the cause of minority or disadvantaged groups or individuals and is not for Petitioner's personal gain."

193. Accordingly, I have perused the Petition as drawn and filed. In paragraph 1, the Petitioner herein states that: -

> " The Petitioner is a female adult of sound mind, law abiding citizen, an ardent proponent of the Rule of Law, a Public interest litigator, and an advocate of the High Court of Kenya residing and working for gain within the Republic of Kenya"

194. At paragraphs 8 and 29 of the Petition, the petitioner states as follows: -

"8. The Petitioner contends that all the Respondents herein are fait accompli to the egregious decision of the 2nd Respondent who has since overthrown *the Constitution* Particularly Articles 10 and 232.

29. That the appointment of the 1st Respondent would serve to bastardize *the Constitution*, constitutional institutions as well as the People of Kenya."

195. From the contents of the above paragraphs it is clear that the Petition is not for Petitioner's personal gain but it has been brought as public interest litigation. The legal action as initiated in this Petition is purely for enforcement of public interest or general interest through which *the constitution*, constitutional institutions as well as the constitutional rights of people of Kenya will be safeguarded.

196. Rule 26(1) and (2) of *the Constitution* of Kenya (Protection of Rights and fundamental Freedoms Practice and Procedure Rules 2013) provides: -

"26. (1) The award of costs is at the discretion of the Court.

(2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms."

197. The Supreme Court in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR regarding costs in such cases stated that: -

> " It is clear that there is no prescribed definition of any set of "good reasons" that will justify a Court's departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the Courts have proceeded on a case-by-case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question, shows that, as an example, matters in the domain of public-interest litigation tend to be exempted from award of costs.

198. Ruling in Raila Odinga and Others v The Independent Electoral and Boundaries Commission and Others Supreme Court Petition No. 5 of 2013, in which the parties were required to bear their own respective costs, the Court's reasoning was captured as follows;

> " Yet we have to take into account certain important considerations. It is already clear that the nature of the matters considered in a Presidential-election petition is unique. Although the petitions are filed by individuals who claim to have moved the Court in their own right, the constitutional issues are of a public nature – since such an election is of the greatest importance to the entire nation.
>
> "Besides, this is a unique case, coming at a crucial historical moment in the life of the new Kenyan State defined by a new Constitution, over which the Supreme Court has a vital oversight role. Indeed, this Court should be appreciative of those who chose to come before us at this moment, affording us an opportunity to pronounce ourselves on constitutional questions of special moment. Accordingly, we do not see this instance as just another opportunity for the regular professional-business undertaking of counsel"

199. In the case of Brian Asin & 2 others v Wafula W. Chebukati & 9 others [2017] eKLR the issue as to whether public interest litigation should attract costs was determined as follows:

> " The Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice. But the profound need of this tool has been plagued with misuses by persons who file Public Interest Litigations just for the publicity and those with vested political interests. The courts therefore, need to keep a check on the cases being filed and ensure the bona fide interest of the petitioners and the nature of the cause of action, in order to avoid unnecessary litigations. Vexatious and mischievous litigation must be identified and struck down so that the objectives of Public Interest Litigation aren't violated. *The constitution* envisages the judiciary as "a bastion of rights and justice...
>
> The question is whether the proceedings before me are frivolous or vexatious bearing in mind that it is the duty of the court to see whether the petitioner who approaches the court has a bona fide intention and not a motive for personal gain, private profit or political or other oblique considerations."

200. In the case of Feisal Hassan & 2 others v Public Service Board of Marsabit County & another [2016] eKLR it was stated that: -

> " In constitutional litigation, the principle of access to the court must, consistently with the public importance and interest in the observance and enforcement of the Bill of Rights in *the Constitution*, override the general principle that costs follow the event, unless it can be shown that the petition was wholly frivolous, or that petitioner was guilty of abuse of the constitutional court process by say filing a constitutional petition on matters that do not raise purely constitutional issues and which properly belonged to other competent courts or tribunals, and which should, therefore, have been filed and competently disposed of by those other courts or tribunals. However, a petitioner for constitutional enforcement need not present a case that must succeed and it cannot therefore, be taken against him that his petition is eventually lost if it otherwise meets the public interest criteria. Although developed in the realm of protection and enforcement of rights and fundamental freedoms, the principle applies with the same force in general constitutional litigation for interpretation and enforcement of *the Constitution*. Indeed, the rights of access to court under Article 22 and 258 of *the Constitution* for the enforcement, respectively, of the Bill of Rights and the other parts of *the Constitution* are in the same terms."

201. Further in John Harun Mwau & 3 Others v Attorney General & 2 Others [2012] eKLR it was held that: -

> " In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the state but lost. Equally, there is no reason why the state should not be ordered to pay costs to a successful litigant. The court also retains its jurisdiction to impose costs as a sanction where the matter is frivolous, vexatious or an abuse of the court process."

202. Lastly, in Khelef Khalifa & 2 others v Independent Electoral and Boundaries Commission & another [2018] eKLR the court stated that while it appreciated that the emerging practice in our courts is not to award costs in public interest litigation matters, the said practice does not in any way take away the discretionary powers of the court to award costs to successful litigants in such cases, where in the opinion of the judge, such an award is merited.

203. In an ordinary suit or petition touching on personal issues, costs are at the discretion of the court and they normally follow the event.

204. I have no doubt that the petitioner herein has brought the instant petition in good faith. She does not stand to gain anything, financially or otherwise. It was alleged that the petitioner was looking for fame and glory, if she succeeded. I do not think that her petition was aimed at stardom. It takes exceptional courage to present such a petition, in the interest of the public, who at times, may exhibit total indifference to the matter at hand. A public spirited litigant ought to be applauded, even when the court dismisses her case. Burdening her with costs will only put off other such litigants from accessing the court.

205. Having already opined that this is a public interest litigation, and being duly guided and persuaded by the above authorities, I direct each party to bear their own costs.

Conclusions and Disposition

206. It is the court's findings that the Preliminary Objections by the 1st,2nd, 5th and 6th Respondents have merit to the effect that;

    i. The 2nd Respondent was wrongly joined as a party to this petition and he is struck out from these proceedings.

    ii. The Petition dated 17th May 2023 offends the doctrines of ripeness, constitutional exhaustion, constitutional avoidance, and separation of powers.

207. Therefore, the preliminary objections are upheld and the Petition together with the Notice of Motion dated 17th May, 2023 are struck out.

208. Each party will bear their own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 25TH DAY OF JULY, 2023.

HESTON M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Mr. Kipkoech for Petitioner

Mr. Taib (Sc) for 1st Respondent (with Miss Gathoni)

Mr. Emacar for 6th Respondent