



Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (Advisory Opinion Reference 1 of 2017) [2020] KESC 54 (KLR) (Constitutional and Human Rights) (7 February 2020) (Ruling)

Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR

Neutral citation: [2020] KESC 54 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CONSTITUTIONAL AND HUMAN RIGHTS
ADVISORY OPINION REFERENCE 1 OF 2017**

**DK MARAGA, CJ, PM MWILU, DCJ & VP, MK IBRAHIM, JB
OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ**

FEBRUARY 7, 2020

BETWEEN

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS APPLICANT

AND

HONOURABLE ATTORNEY GENERAL RESPONDENT

AND

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION . INTERESTED PARTY

ETHICS & ANTI-CORRUPTION COMMISSION INTERESTED PARTY

AMANI NATIONAL CONGRESS INTERESTED PARTY

CHAMA CHA MWANANCHI INTERESTED PARTY

DEMOCRATIC PARTY OF KENYA INTERESTED PARTY

FORD KENYA INTERESTED PARTY

JUBILEE PARTY INTERESTED PARTY

KENYA AFRICAN NATIONAL UNION INTERESTED PARTY

LABOUR PARTY OF KENYA INTERESTED PARTY

MAENDELEO CHAP CHAP INTERESTED PARTY

NARC-KENYA INTERESTED PARTY



NATIONAL RAINBOW COALITION	INTERESTED PARTY
ORANGE DEMOCRATIC MOVEMENT	INTERESTED PARTY
WIPER DEMOCRATIC MOVEMENT- KENYA	INTERESTED PARTY
DIRECTOR OF PUBLIC PROSECUTIONS	INTERESTED PARTY
AUDITOR GENERAL	INTERESTED PARTY
OKIYA OMTATAH OKOITI	INTERESTED PARTY

Factors considered by the Supreme Court in determining if a reference qualifies for the Supreme Courts advisory opinion jurisdiction

The main issues before the Supreme Court were whether the Supreme Court had the jurisdiction to harmonize two conflicting decisions of the Supreme Court. In a split decision, the Majority held that the applicant enumerated the alleged contradicting decisions of the superior courts and invited the court to exercise its discretionary jurisdiction to address the contradicting decisions. The invitation could not be extended to the Supreme Court while exercising its discretionary jurisdiction under article 163(6) of the Constitution. By its invitation, the applicant sought to create an original jurisdictional creature called ‘harmonization’ jurisdiction contrary to the provisions of the Constitution and the statutes. In a dissenting opinion, per I Lenaola & MK Ibrahim, the dissenting court held that time was ripe for consideration and direction by the Supreme Court on the applicable criteria under Chapter Six of the Constitution and the instant reference was a distinctive situation in which the Supreme Court’s advisory opinion jurisdiction would be most propitious. An obligation unswervingly rested on the Supreme Court to render an opinion in accordance with the Constitution and the invitation to the Supreme Court to down it tools for lack of jurisdiction on account of the principle of sub-judice was not to be permitted, as such an action would occasion an injustice to the wider public interest.

Reported by John Ribia

Jurisdiction – jurisdiction of the Supreme Court – advisory opinion jurisdiction – qualifications to be met before invoking the Supreme Court’s advisory opinion jurisdiction - what factors did the Supreme Court consider in determining if a reference qualified for consideration by the Supreme Court under its advisory opinion jurisdiction - whether the Supreme Court could issue an advisory opinion where the matter in respect of which the reference had been made was the subject of proceedings in a lower court - whether the issues of whether chapter six of the Constitution set up a fit and proper test for leadership relating to elective and appointive offices; and if so, what was that test, were properly issues for which the Supreme Court’s advisory opinion jurisdiction could be invoked – Constitution of Kenya, 2010, articles 163(4)(b), (6) and 165; Supreme Court Act, section 13; Supreme Court Rules, 2016, rule 41.

Constitutional Law – locus standi – locus standi to seek an advisory opinion from the Supreme Court – whether the Kenya National Commission on Human Rights had the locus standi to seek an advisory opinion from the Supreme Court - Constitution of Kenya, 2010 articles 163(6); Supreme Court Act, section 13; Supreme Court Rules, 2016 rule 41.

Civil Practice and Procedure – sub judice – purpose of sub judice – factors to be proved in a claim of sub judice - whether the issues of whether chapter six of the Constitution set up a fit and proper test for leadership with respect to elective and appointive offices; and if so, what the applicable test was, were issues that were sub judice – whether the Supreme Court could issue an advisory opinion in a matter that was sub judice.

Words and phrases – sub judice – definition of - before the Court or Judge for determination - Black’s Law Dictionary 9th Edition.



Brief facts

The applicant was the Kenya National Commission on Human Rights. The applicant filed a reference which sought a purposive interpretation of chapter six of the Constitution in view of articles 38, 50, 99, 137, 180 and 193 of the Constitution, specifically in the context of the affairs of political parties. The reference was grounded on the contention that there was apparent contradiction, lack of clarity and/or guidance in High Court and Court of Appeal decisions on the place of chapter six of the Constitution, more so with regard to the leadership and integrity qualification of persons offering themselves to be elected or appointed to public service and/or offices within the Republic of Kenya.

The applicant averred that the superior courts as well as the various institutions set up under the Constitution and Statutes to vet the moral and ethical soundness of persons seeking elective or appointive offices, had interpreted the Constitution in an erroneous, restrictive, conflicting, inconsistent and incoherent manner hence the need for guidance by the apex Court. It urged further that such interpretation had resulted in a confused jurisprudence and rendered the provisions of chapter six of the Constitution ineffective and toothless. In response the respondents filed a preliminary objection challenging the jurisdiction of the Supreme Court to hear and determine the matter on grounds that the applicant lacked *locus standi* and the reference was *sub judice* as the matters for determination in the reference were pending in the High Court of Kenya at Nairobi in Constitutional Petition No. 68 of 2017, *Okiya Omtatah Okiiti vs. Jubilee Party of Kenya and Others* and Constitutional Petition No. 142 of 2017, *Okiya Omtatah Okiiti vs. Hon. Attorney General and 12 others* (the two constitutional petitions).

Issues

- i. What factors did the Supreme Court consider in determining if a reference qualified for consideration under the Supreme Court's advisory opinion jurisdiction?
- ii. Whether the Kenya National Commission on Human Rights had the *locus standi* to seek an advisory opinion from the Supreme Court.
- iii. Whether the Supreme Court could issue an advisory opinion where the matter in respect of which the reference had been made was a subject of proceedings in a lower court.
- iv. Whether there were conflicting decisions on the fit and proper test for leadership in relation to elective and appointive offices under chapter six of the Constitution.
 - a. Whether such contradiction warranted determination under the Supreme Court's advisory opinion jurisdiction.
- v. Whether the issues about whether chapter six of the Constitution set up a fit and proper test for leadership with respect to elective and appointive offices; and if so, what the applicable test was, invoked the Supreme Court's advisory opinion jurisdiction.
- vi. Whether the issues about whether chapter six of the Constitution set up a fit and proper test for leadership including elective and appointive offices; and if so, what the applicable test was, were *sub judice*.

Relevant provisions of the Law

Constitution of Kenya

Article 163(6)

163. Supreme Court

(6) The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government.

Held

Per DK Maraga, CJ & P; PM Mwilu, DCJ & VP; SC Wanajala, SN Ndungu, and I Lenaola, SCJJ (Majority)



1. This Supreme Court's jurisdiction to issue advisory opinions was anchored in the Constitution by dint of article 163(6) of the Constitution of Kenya, (2010) (Constitution), section 13 of the Supreme Court Act and rule 41 of the Supreme Court Rules, 2016 (Rules) that *inter alia* provided that the Supreme Court could issue an advisory opinion at the request of the national government, any state organ, or any county government with respect to any matter concerning county government. However, it was not automatic that once an applicant had invoked article 163(6) of the Constitution, the Supreme Court undeniably had jurisdiction. Article 163(6) specified who could seek an advisory opinion, and in what matters such an opinion could be sought.
2. For a reference to qualify for consideration under the Supreme Court's advisory opinion discretion, it had to fall within the four corners of article 163(6) of the Constitution:
 1. it had to be a matter concerning county government. The question as to whether a matter was one concerning county government, would be determined by the court on a case-by-case basis.
 2. The only parties that could make a request for an advisory opinion were the national government, a State organ, or county government. Any other person or institution could only be enjoined in the proceedings with leave of the court, either as an intervener (interested party) or as *amicus curiae* (friend of the court).
 3. The court would be hesitant to exercise its discretion to render an advisory opinion where the matter in respect of which the reference had been made was the subject of proceedings in a lower court. However, where the court proceedings in question had been instituted after a request had been made to the court for an advisory opinion, the court could if satisfied that it was in the public interest to do so, proceed and render an advisory opinion.
3. Where a reference had been made to the court the subject matter of which was also pending in a lower court, the court could nonetheless render an advisory opinion if the applicant could demonstrate that the issue was of great public importance and requiring urgent resolution through an advisory opinion. In addition, the applicant could be required to demonstrate that the matter in question would not be amenable to expeditious resolution through adversarial court process. The court under article 163 (6) Constitution had to have *locus standi*. The court had to always consider whether the party seeking to move it, fell within the categories of parties decreed as having such *locus standi* by the Constitution. The court would then proceed to consider the subject matter to ascertain whether it was one involving a county government and if it found in the affirmative, the other considerations then came into play.
4. The applicant was a constitutional commission established under article 59 of the Constitution with the key mandate to promote, monitor, investigate and report on human rights matters in public and private institutions. Article 260 of the Constitution defined the term State organ, as a commission, office, agency, or other body established under the Constitution. The applicant had been admitted as a party with correct standing to move the Supreme Court for an advisory opinion. The applicant was a state organ under the Constitution of Kenya. The applicant had the *locus standi* to seek the Supreme Court's advisory opinion by virtue of article 163(6) of the Constitution.
5. The court would be hesitant to exercise its discretion to render an advisory opinion where the matter in respect of which the reference had been made was a subject of proceedings in a lower court. The High Court had been entrusted with the mandate to interpret the Constitution and where it had discharged that task, one could only challenge its judgment by way of appeal to the Court of Appeal and, if still not satisfied, then to the Supreme Court. The High Court should be allowed to duly discharge its constitutional mandate without interference. The Supreme Court committed itself to order and efficacy in the administration of justice, and to that end it could require that the process of litigation commenced in the High Court, and entailing constitutional interpretation, be exhausted and if need be, followed by appellate procedures. The Supreme Court's advisory opinion jurisdiction was not intended to usurp the other courts constitutional interpretation jurisdiction.



6. The term *sub-judice* was defined as before the court or judge for determination. The purpose of the *sub-judice* rule was to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. That meant that when two or more cases were filed between the same parties on the same subject matter before courts with jurisdiction, the matter that was filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that sought to invoke the doctrine of *sub-judice* had to establish that; there was more than one suit over the same subject matter; that one suit was instituted before the other; that both suits were pending before courts of competent jurisdiction and lastly; that the suits were between the same parties or their representatives.
7. The issues and prayers sought by the petitioner in the two constitutional petitions generally called for the interpretation and application of provisions of chapter six of the Constitution. The issues and orders in the two constitutional petitions substantially ascended from the criteria for the implementation of the provisions of chapter six of the Constitution. For the High Court to sufficiently pronounce itself in the two constitutional petitions, it had to interpret and apply the provisions of chapter six of the Constitution on leadership and integrity.
8. The instant reference, as framed, mainly raised issues of constitutional interpretation. Those issues were also substantially in issue before the High Court in Constitutional Petition No. 68 of 2017 and Constitutional Petition No. 142 of 2017. In view of article 165 of the Constitution, the High Court was the court of first instance with regard to jurisdiction for interpretation and application of the Constitution and that court had already been moved. The instant reference was *sub judice* and its consideration by the Supreme Court would to usurp the High Court's jurisdiction under article 165(3) of the Constitution.
9. A preliminary objection consisted of a point of law which had been pleaded or which arose by clear implication out of pleadings and which if argued as a preliminary point could dispose of the suit. The true preliminary objection served two purposes of merit: firstly, it served as a shield for the originator of the objection against profligate deployment of time and other resources and secondly, it could be committed only to deserving cases of dispute settlement.
10. The court could address conflicting decisions, especially of the Court of Appeal if moved under article 163(4)(b) of the Constitution as a matter of general public importance. A preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, would lead to but one conclusion: that the facts were incompatible with that point of law.
11. The applicant enumerated the alleged contradicting decisions of the superior courts and invited the court to exercise its discretionary jurisdiction to address the contradicting decisions. The invitation could not be extended to the Supreme Court while exercising its discretionary jurisdiction under article 163 (6) of the Constitution. By its invitation, the applicant sought to create an original jurisdictional creature called 'harmonization' jurisdiction contrary to the provisions of the Constitution and the statutes.

Dissenting opinion

Per I Lenaola and MK Ibrahim, SCJJ (Dissenting Opinion)

1. The issues and prayers sought by the petitioner in the two constitutional petitions, generally called for the interpretation and application of certain provisions in chapter six of the Constitution. However, the constitutional petitions were between specific parties and raised substantive and specific issues in a specific context. The subject matters in the constitutional petitions involved litigation disputes entailing issues of specific constitutional interpretation in the context of the 2017 General Election whereas, the reference before the instant court was not a litigation dispute. In the instant reference, the applicant was seeking the court's advisory opinion on the set issues and which were not related to a specific dispute between specific parties.



2. The issue before the High Court revolved around the question of who should determine whether a person had met the criteria for an elective position within chapter six of the Constitution and specifically in relation to the 2017 General Election (and perhaps in other such elections); while the broad issue in the instant reference revolved around the question of the criteria to be applied in vetting, appointing or electing persons in relation to the provisions of chapter six of the Constitution. Even if the two issues could be addressed as one, the High Court petitions and the instant reference could be distinguished and the proceedings before the High Court and the instant court did not raise substantially similar and specific questions for determination and the applicant's questions properly fell within the advisory opinion jurisdiction of the Supreme Court.
3. The 17th interested party would not be prejudiced by the rendering of an opinion by the Supreme Court, as the applicant had no specific claim against the 17th interested party or any other party to the instant reference.
4. If the dissenting court found that the instant reference was *sub-judice*, (which it did not), the instant court still had the discretion, depending on the circumstances of the case, to either to issue an advisory opinion or not, where a matter in respect of which a reference had been made was the subject of proceedings in a lower court.
5. Where a reference had been made to the Supreme Court, the subject matter of which was also pending in a lower Court, the Supreme Court could nonetheless render an advisory opinion if the applicant could demonstrate that the issue was of great public importance and requiring urgent resolution through an advisory opinion. The Supreme Court's advisory opinion was an important avenue for settling matters of great public importance which were not suitable for conventional mechanisms of justifiability. Such situations had clear evidence under the Constitution, and came with far-reaching implications.
6. The fit and proper test or criteria set under chapter six of the Constitution, had an important and central application to vet the moral and ethical soundness of persons seeking elective or appointive offices, and thus constituted issues of great public importance. The realization of the fit and proper test under chapter six raised a variety of implementation challenges unbeknown to traditional integrity and leadership criteria previously in force and the Supreme Court had to give clear directions in that regard.
7. Time was ripe for consideration and direction by the Supreme Court on the applicable criteria under chapter six of the Constitution and the instant reference was a distinctive situation in which the Supreme Court's advisory opinion jurisdiction would be most propitious. An obligation unswervingly rested on the Supreme Court to render an opinion in accordance with the Constitution and the invitation to the Supreme Court to down it tools for lack of jurisdiction on account of the principle of *sub judice* was not to be permitted, as such an action would occasion an injustice to the wider public interest.
8. Although the applicant had raised 14 questions on which the Supreme Court's advisory opinion was sought, the court could, within its discretion, limit those questions and leave to the High Court certain litigational issues for its determination without throwing out the baby with the bath water. One of the issues the dissenting court expected the Supreme Court to render an advisory opinion on was whether chapter six of the Constitution set up a fit and proper test for leadership including elective and appointive offices; and if so, what was that test?

Application would have been partly allowed.

- i. *The 17th interested party's preliminary objection dated July 16, 2018, would be disallowed.*
- ii. *The instant reference would proceed to hearing on a limited number of questions taking into account the matters pending before the High Court, in High Court Constitutional Petitions No.68 and 142 of 2017.*

Application dismissed

Orders

- i. *The preliminary objection dated July 16, 2018, was upheld.*



- ii. *The reference for an advisory opinion dated April 20, 2017, was dismissed.*
- iii. *The High Court was to proceed, on the basis of priority, to hear and determine High Court Constitutional Petition No. 68 of 2017 and Constitutional Petition No. 142 of 2017 that were pending before it.*
- iv. *No order as to costs.*

Citations

Texts /Journals

Garner, BA., (Ed) (2009) *Black's Law Dictionary* West 9th Edn

East Africa

1. *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others*, Application No 50 of 2014
2. *Charo, Hassan Nyanje v Khatib Mwashetani & 3 others*, Civil Application No 23 of 2014;[2014]eKLR
3. *Commission on Administrative Justice v John Ndirangu Kariuki & IEBC*, Constitutional Petition No 408 of 2013;[2016]eKLR-(Mentioned)
4. *Council of Governors & others v the Attorney General & others*, Reference No 3 of 2019; [2019] eKLR-(Followed)
5. *In re the Matter of the Interim Independent Electoral Commission* Constitutional [2011] 2 KLR 32 - (Followed)
6. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] 3 KLR 720 -(Followed)
7. *In the matter of the Speaker of the Senate & another Advisory Opinion* Reference No 2 of 2013;[2013] - (Followed)
8. *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* Civil Application No 36 of 2014;[2015]eKLR- (Followed)
9. *Jobo & another v Shabbal & 2 others* [2014] 1 KLR 10-(Followed)
10. *Kenfreight (EA) Limited v Benson K Nguti*, Civil Application No 18 of 2016; [2016] eKLR -(Explained)
11. *Luka, Angaiya & another v Gerald Otieno Kajwang & another* Petition No 120 of 2013; [2013] eKLR-(Mentioned)
12. *Marson Integrated Ltd v Minister for Public Works & another* Petition No 252 of 2012;[2012]eKLR - (Mentioned)
13. *Mukisa Biscuit Manufacturing Company Limited v West End Distributors* [1969] EA 696-(Explained)
14. *Mumo Matemu v Trusted Society of Human Rights Alliance & others*, Civil Appeal No 290 of 2012; [2013] eKLR-(Mentioned)
15. *Mureithi, Benson Riitho v J W Wakhungu & 2 others*, Constitutional Petition No 19 of 2014-(Mentioned)
16. *Salat, Nicholas Kiptoo Arap v Electoral and Boundaries Commission & 7 others* Application 16 of 2014; [2014]eKLR- (Explained)
17. *Steyn, Hermanus Phillipus v Giovanni Gneccchi-Rusccone* Application No 4 of 2012; [2013] eKLR-(Explained)
18. *In the Matter of the National Gender and Equality Commission*, Reference No 1 of 2013;[2014]eKLR-(Followed)
19. *Thiba Minn – Hydro Co Ltd v Joshat Karu Ndwiga* Elc Case 596 of 2013;[2013] eKLR-(Mentioned)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 1(1); 2(1-4); 3(1); 10(2); 24, 25(c); 38(3)(c); 48; 50(1)(2)(a)(i); 59; 79; 99; 137; 157; 163(3)(4)(6); 165; 180(2); 193; 260 -(Interpreted)
2. Civil Procedure Act (cap 21) section 6 -(Interpreted)



3. Supreme Court Act, 2011 (No 7 of 2011) section 13 –(Interpreted)
4. Supreme Court Rules, 2016 (Act No 7 of 2012 Sub Leg) rule 41 –(Interpreted)
5. Elections Act, 2011 (Act No 24 of 2011) – In general (Cited)

RULING

A. Introduction

1. The Applicant herein is the Kenya National Commission on Human Rights (KNCHR). By way of a Reference dated 20th April 2017, the Applicant seeks to invoke this Court’s Jurisdiction pursuant to the provisions of Article 163(6) of the Constitution. The Reference in a nutshell seeks a purposive interpretation of Chapter Six of the Constitution in view of Articles 38, 50, 99, 137, 180 and 193 of the Constitution, specifically in the context of the affairs of political parties.
2. The Reference is grounded on the contention that there is apparent contradiction, lack of clarity and/or guidance in High Court and Court of Appeal decisions on the place of Chapter Six of the Constitution, more so with regard to the leadership and integrity qualification of persons offering themselves to be elected or appointed to public service and/or offices within the Republic of Kenya
3. The Applicant has thus averred that the Superior Courts as well as the various institutions set up under the Constitution and Statutes to vet the moral and ethical soundness of persons seeking elective or appointive offices, have interpreted the Constitution in an erroneous, restrictive, conflicting, inconsistent and incoherent manner hence the need for guidance by the apex Court. It has urged further that such interpretation has resulted in a confused jurisprudence and rendered the provisions of Chapter Six of the Constitution ineffective and toothless.
4. The alleged contradicting decisions of the Superior Courts cited by the Applicant include: International Centre for Policy and Conflict & 5 Others v The Hon. AG & 4 others, High Court Petition No. 552 of 2012; Luka Angaiya Lubwayo & Another v Gerald Otieno Kajwang & Another, High Court Constitutional Petition No. 120 of 2013; Mumo Matemu v Trusted Society of Human Rights Alliance & others, Civil Appeal No. 290 of 2012; Marson Integrated Ltd v Minister for Public Works & Another, High Court Petition No. 252 of 2012; Benson Riitho Mureithi v J. W. Wakhungu & 2 others, Constitutional Petition No. 19 of 2014; and Commission on Administrative Justice v John Ndirangu Kariuki & IEBC, Constitutional Petition No. 408 of 2013.
5. The Applicant also notes that a Constitutional Petition No.68 of 2017 Okiya Omtatah vs. the Jubilee Party, Wiper Democratic Movement and Maendeleo Chap Chap Part and the IEBC & AG (as Interested Parties), seeking a declaration that, only the High Court has the jurisdiction to declare that a person has contravened Chapter Six of the Constitution, was pending in the High Court. It contends that, in view of the existing and conflicting decisions from the High Court and Court of Appeal, another decision from the High Court would only add to the confusion hence the need to resolve the matter at this forum.
6. The 14 issues raised by the Applicant for an opinion by this Court are inter alia:
 - i. Whether Chapter Six of the Constitution sets up a fit and proper test for leadership including elective and appointive offices.
 - ii. Whether the fit and proper test for leadership required by Chapter Six is an objective test and not a subjective test in the mind of the vetting and/or appointing bodies for elective and appointive offices.



- iii. Whether the fit and proper test for leadership is wider than the criminal test of conviction for criminal offences.
- iv. Whether the vetting and/or appointing bodies/persons have an obligation to objectively and positively determine that a person seeking elective or appointive office is fit and proper.
- v. Whether persons who have been found to have breached their duty of trust to safeguard public funds and seeking to be elected at the County as Governor and Deputy County Governor or Member of County Assembly or at the Legislature as Member of National Assembly or the Senate or the Executive as the President or Deputy President should be disqualified from pursuing such office irrespective of whether he/she has been charged with a criminal offence, under the provisions of Chapter Six of the Constitution .
- vi. Whether a person found by an audit report by the Auditor General to have been responsible for loss of funds belonging to a public institution he was in charge of or that the said funds have not been applied lawfully and in an effective manner should be disqualified from seeking to be elected as the County Governor and Deputy County Governor or Member of County Assembly or at the Legislature as Member of National Assembly or the Senate or the Executive as the President or Deputy President, irrespective of whether he/she has not been charged with a criminal offence, on grounds that their breach of trust in safeguarding public funds as established by the Auditor-General's Report amounts to contravention of the provisions of Chapter Six of the Constitution and should be disqualified from seeking to be so elected.
- vii. Whether a person seeking to be elected as the County Governor and Deputy County Governor or Member of County Assembly or at the Legislature as Member of National Assembly or the Senate or the Executive as the President and Deputy President, though he has not [yet] been charged but a recommendation has been made by either the investigative bodies like the 2nd Interested Party for him/her to be charged with an offence involving misuse of public funds or some other heinous crime impacting on his integrity, should be found to have contravened the provisions of Chapter Six of the Constitution and should be disqualified from seeking to be so elected.
- viii. Whether a person seeking to be elected at the County as Governor and Deputy County Governor or Member of County Assembly or at the Legislature as Member of National Assembly or the Senate or the Executive as the President, Deputy President and the Cabinet, and has been convicted of a criminal offence involving misuse of public funds or some other heinous crime impacting on his integrity, and the sentence has been served, should be found to have contravened the provisions of Chapter Six of the Constitution and should be disqualified from seeking to be so elected;
- ix. Whether the Independent Electoral and Boundaries Commission should be pro-active in investigating and excluding from participating in elections and/or providing information to the electorate about candidates who do not pass the integrity test as provided for in Chapter Six of the Constitution instead of leaving it to the electorate or contestants to do so.
- x. Whether the Independent Electoral and Boundaries Commission and other institutions charged with the responsibility of vetting candidates owe it to the electorate and to all citizens of the Republic of Kenya to ensure that only persons who meet the threshold of Chapter Six of Constitution should be allowed to seek to be elected.
- xi. Whether a person seeking to be elected at the County as Governor and Deputy County Governor or Member of County Assembly or at the Legislature as Member of National



Assembly or the Senate or the Executive as the President and Deputy President, and has been convicted of a criminal offence involving misuse of public funds or some other heinous crime impacting on his integrity, and despite the pendency of an appeal or non-exhaustion of the appeal process against the conviction, should be found to have contravened the provisions of Chapter Six of the Constitution and should nonetheless be disqualified from seeking to be so elected.

- xii. Whether there is a contradiction between the provisions of Chapter Six of the Constitution, on the one hand, and the provisions of Articles;
 - a. 38 (on the right of every citizen to make political choices);
 - b. 50 (on the right to be presumed innocent until the contrary is proved); and
 - c. 99, 137, 180 and 193, (which provides that a person is disqualified from being elected President, a member of Parliament, governor or Member of County Assembly, if the person is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election and that a person is not disqualified unless all possibility of appeal or review of the relevant sentence or decision has been exhausted, on the other hand);
 - xiii. If the answer to (viii) above is in the affirmative, whether the provisions of Chapter Six of the Constitution prevail and/or take precedence over the provisions of Articles 38, 50 and 99 of the Constitution as regards persons seeking to be elected. In any event what is a correct and purposeful interpretation of the said provisions so as to give effect to the aspirations and intentions of the people of Kenya.
 - xiv. Whether the criteria for qualification for elective positions at both the County and National level should apply, *mutatis mutandis*, to appointment to public office.
7. The Reference is supported by an affidavit sworn by one Patricia Mande Nyaundi, the Secretary/Chief Executive Officer of the Commission, verifying the correctness of the averments in the Reference.

B. Preliminary Objection

- 8. On 22nd May 2017, Okiya Omtatah Okoiti moved this Court to be joined as an interested party. Consequent to the filing of the Application for joinder, he filed a Preliminary Objection dated 19th May, 2017 challenging the jurisdiction of this Court to hear and determine the Reference. He later filed submissions on the Preliminary Objection dated 21st June, 2017.
- 9. The Application was heard and allowed on 13th July 2018, when he was admitted as the 17th Interested Party. Following his admission, he withdrew the Preliminary Objection dated 19th May 2017 and filed a replica Preliminary Objection dated 17th July 2018.
- 10. The Preliminary Objection is premised on the following grounds:
 - i. That the Supreme Court lacks jurisdiction to entertain appeals under Article 163(6) of the Constitution.
 - ii. That the Applicant, the KNHRC lacks the locus standi to institute an appeal to this Honourable Court disguised as an application for an advisory opinion under Article 163(6) of the Constitution.



- iii. That the instant application for an advisory opinion under Article 163(6) of the Constitution is sub-judice the following matters pending in the High Court of Kenya at Nairobi being:
 - a. Constitutional Petition No. 68 of 2017, Okiya Omtatah Okioti vs. Jubilee Party of Kenya and Others; and
 - b. Constitutional Petition No. 142 of 2017, Okiya Omtatah Okioti vs. Hon. Attorney General and 12 Others.
 - iv. That the Applicant is abusing the process of this Honourable Court by invoking the Court's appellate jurisdiction via its advisory opinion jurisdiction.
11. When the matter came up for hearing of the Preliminary Objection on 17th July 2018, the 17th Interested Party made an oral application for leave to admit his submissions dated 21st June, 2017 and annexures encompassing his pleadings in Constitutional Petition No. 68 of 2017 and Constitutional Petition No. 142 of 2017, all filed before his admission as an interested party.
 12. The Applicant, the Respondent and the other 16 Interested Parties had no objection to the application. However, they sought corresponding leave to admit their submissions on the Preliminary Objection filed before the 17th Interested Party's admission as such party.
 13. By consent, the parties, said submissions and the annexures thereof were admitted as properly before Court.

C. Submissions Of The Parties On The Preliminary Objection

i. 17th Interested Party

14. The 17th Interested Party submitted that the Applicant erroneously invoked this Court's advisory opinion jurisdiction under Article 163(6) of the Constitution, by seeking to harmonize decisions rendered by the High Court and the Court of Appeal in various determined cases.
15. He further argued that the Applicant's application is disguised as an Advisory Opinion but in its crux is a request to the apex Court to examine, review, affirm, vary, or overturn the impugned decisions, outside the jurisdiction conferred to the Court under Article 163(6).
16. As regards locus standi to file the Reference, the 17th Interested Party urged that the Applicant lacked the standing under Article 163(6) to seek an advisory opinion.
17. He also submitted that the instant Reference was sub-judice in view of the matters pending in the High Court of Kenya at Nairobi in Constitutional Petition No. 68 of 2017, Okiya Omtatah Okioti vs. Jubilee Party of Kenya and Others and Constitutional Petition No. 142 of 2017, Okiya Omtatah Okioti vs. Hon. Attorney General and 12 others.
18. He furthermore argued that moving the Supreme Court to entertain such a Reference, would be asking the Court to infringe on his right to access the High Court as enshrined in Articles 25(c), 48, and 50(1) of the Constitution. He thus argued that if the Court proceeded to hear and determine the Reference before it, the High Court jurisdiction would be automatically ousted, unlawfully so.
19. He, in addition, submitted that under Article 165 of the Constitution, the High Court has a right of first instance to hear matters of interpretation and application of the Constitution. That the Supreme Court should therefore await the outcome of the proceedings before the High Court and eventually any party dissatisfied with the resultant decision, could appeal to the Court of Appeal and eventually to this Court through its appellate jurisdiction. In that regard, he moved the Court to adopt the reasoning



in Re The Matter of the Interim Independent Electoral Commission Constitutional Application Number 2 of 2011 on the jurisdiction to render advisory opinion.

20. In conclusion, the 17th Interested Party submitted that the Reference was an abuse of the Court process as it was an attempt to invoke the Court's appellate jurisdiction under Article 163(3) & (4) of the Constitution via its advisory opinion jurisdiction under Article 163(6) of the Constitution. That further, the Reference is seeking to frustrate and usurp the proceedings before the High Court.
- 21 He thus prays for the Reference to be struck out with costs, to protect his proceedings before the High Court.

ii. Applicant

- 22 The Applicant filed its submissions dated 6th June 2017 addressing both the issues in the Reference and the Preliminary Objection.
- 23 Specifically as regards the Preliminary Objection, Counsel submitted that the issues raised in the Reference were not the subject of any Superior Court's proceedings and therefore could not amount to an appeal of the decisions rendered by those Courts. He has pointed the Court to the issues for determination set out in the Reference to make that point.
- 24 On whether the Reference was sub-judice, Counsel submitted that in order for a matter to be sub-judice under Section 6 of the Civil Procedure Act, it must either be the same or substantially similar to a matter already before the Court. He placed reliance on the decision in *Thiba Minn – Hydro Co Ltd vs. Joshat Karu Ndwiga* [2013] eKLR for that proposition. He proceeded to argue that the matters before the High Court were not directly or substantially in issue in the Reference and cannot therefore be sub-judice.
- 25 Counsel for the Applicant went to great lengths to compare the issues framed in the Reference with the issues framed before the High Court, and submitted that the issues were unrelated and totally different. He thus urged that the issue before the High Court was, 'who could determine whether a person met the criteria enshrined in Chapter Six of the Constitution' and that the broad issue in the Reference was, 'what was the criteria to be applied in vetting and appointing persons in relation to the provisions of Chapter Six of the Constitution?', a totally different matter. The Applicant in conclusion, prayed that the Preliminary Objection should be disallowed and the Reference heard and determined

iii. Respondent

- 26 The office of Attorney General filed its submissions dated 20th June 2017 and in response to the jurisdictional challenge by the 17th Interested Party, prayed for dismissal of the Preliminary Objection on the ground that a reference for an advisory opinion could not be disposed of by way of a Preliminary Objection.
- 27 It restated the Court's jurisdiction under Article 163(6) and submitted that the Applicant had complied with the criteria set therein. To support the argument that the Reference was properly before the Court, it urged that; the substratum of the Reference was on the interpretation and application of several provisions of the Constitution; the Applicant was an independent Commission established under the provisions of Article 59 of the Constitution of Kenya which by dint of Article 260 of the Constitution is a State organ; and their Advisory Opinion proceedings are not adversarial in nature as no specific orders had been sought against any party.
- 28 The Respondent furthermore submitted that the 17th Interested Party had confused the issue of jurisdiction and the issue of exercise of discretion by this Court. While relying on the decision in



Mukisa Biscuit Manufacturing Company Limited vs. West End Distributors [1969] EA 696, he urged that the issue of exercise of discretion could not be determined by way of a Preliminary Objection. That whenever a Court, if forced to go into the pleadings to inquire the substance, claim, issues or responses to determine a Preliminary Objection, then the Objection should fail.

- 29 In addition, it submitted that following to *Re The Matter of the Interim Independent Electoral Commission (supra)* one of the set criteria in the grant of an Advisory Opinion was that even where the matter was before the Superior Court, the jurisdiction of this Court was not automatically ousted as the Court still has the discretion, depending on the circumstances of the case, to decide whether to issue an Advisory Opinion or not. That this is the case where the Court should exercise discretion and give the required Opinion.

iv. 1st Interested Party

30. The 1st Interested Party filed its submissions dated 16th July 2018 in opposition to the Preliminary Objection. It urged that the Preliminary Objection was devoid of merit and contrary to public interest. Further, it submitted that the Applicant was a state organ by virtue of Article 260 of the Constitution and therefore had sufficient locus standi under Article 163 (6) of the Constitution.
- 31 On the issue whether the Reference was sub-judice, the 1st Interested Party submitted that even if this Court were to find that the Reference was indeed sub-judice, it would proceed to render an Advisory Opinion where it can be demonstrated that the matter was of great public importance and required urgent resolution. It relied on this Court's decision in *Re Matter of Interim Independence Electoral Commission (supra)*.

v. 2nd Interested Party

- 32 The 2nd Interested Party also opposed the Preliminary Objection. It submitted that the Reference met the pre-requisites for an advisory opinion within the meaning of Article 163(6) as the Reference involved a matter of great public importance and the issue in respect of which the Reference had been made was not a subject of proceedings in the Courts below.
- 33 Further, the 2nd Interested Party submitted that the Preliminary Objection was unmerited as the Applicant did not seek to overturn decisions of the lower Courts but merely sought guidance on how the conflicting decisions impacted on the implementation of Chapter Six of the Constitution. It also stated that, the instant Reference was not sub judice as the 17th Interested Party's cases before the High Court were neither directly nor substantially in issue in the Reference before this Court. It thus urged the same were totally unrelated and wholly different. It also urged that, unlike the 17th Interested Party's Petitions in the High Court, the Reference transcended all public institutions and concerned all candidates for elective and appointive positions.

vi. 15th Interested Party

- 34 The office of Director of Public Prosecutions filed its submissions dated 22nd May 2018, and participated in the proceedings pursuant to its mandate under Article 157 of the Constitution. Cognizant of the Preliminary Objection by 17th Interested Party, the 15th Interested Party submitted that this Court had jurisdiction to entertain the advisory opinion under Article 163(6) of the Constitution. It also made reference to the directorial principles on jurisdiction under Article 163(9) elucidated in *Re Matter of Interim Independence Electoral Commission (supra)* as applicable to this case.



35. The 15th Interested Party has further requested this Court to render an advisory opinion on the issues enumerated, for clarity of the application and enforcement of Chapter Six of the Constitution.
36. The other Respondents have not responded to the Preliminary Objection.

D. Issue for Judicial Opinion

37. The only issue for determination at this stage is; whether this Court has jurisdiction under Article 163 (6) of the Constitution and whether it should exercise it and render an advisory opinion.

E. Analysis

38. The 17th Interested Party challenges this Court's Jurisdiction on three limbs namely, that the Applicant lacks the locus standi to institute the Reference before us; that the issues raised in the Reference are sub-judice in view of Constitutional Petition No. 68 of 2017 and Constitutional Petition No. 142 of 2017, and that the Reference is an appeal of the various determined Petitions by the High Court camouflaged as an application for advisory opinion.
39. The Applicant, in opposition to the Preliminary Objection has argued that the issues raised in the Reference are not and had not been the subject of proceedings before the Superior Courts and further, that the issues in the Reference are neither res sub judice nor an appeal disguised as an advisory opinion.
40. The Respondent, the 1st, 2nd and 15th Interested Parties agree, in substance, with the Applicant and add that the Preliminary Objection is devoid of merit and contrary to public interest.

(a) Whether the Applicant has locus standi

- (41) This Court's jurisdiction to issue advisory opinions is anchored in the Constitution by dint of Article 163(6) which stipulates that:

“The Supreme Court may issue an advisory opinion at the request of the national government, any state organ, or any county government with respect to any matter concerning county government”. [Emphasis added]

42. The same provision is reflected at Section 13 of the Supreme Court Act, 2011 (No. 7 of 2011) and Rule 41 of the Supreme Court Rules, 2016. Rule 41 states:

“The National Government, a state organ or County Government may apply to the Court by way of reference for an advisory opinion under Article 163(3) of the Constitution”. [Emphasis added]

43. It cannot however, be said that once an applicant has invoked Article 163(6) of the Constitution, this Court, undeniably, has jurisdiction. Article 163(6) of the Constitution specifies who can seek an advisory opinion, and in what matters such an opinion may be sought.

- (44) In line with Article 163(6) of the Constitution, this Court has also developed a mechanism through which it sieves matters referred to it, to ascertain if they pass the admissibility test. Of relevance is this Court's opinion In Re Matter of the Interim Independent Electoral Commission (supra), where the Court held:

“(83) ..., we are in a position to set out certain broad guidelines for the exercise of the Supreme Court's Advisory-Opinion jurisdiction:



- (i) For a reference to qualify for the Supreme Court’s Advisory Opinion discretion, it must fall within the four corners of Article 163(6): it must be “a matter concerning county government.” The question as to whether a matter is one “concerning county government”, will be determined by the Court on a case-by-case basis.
- (ii) The only parties that can make a request for an Advisory Opinion are the national government, a State organ, or county government. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as an intervener (interested party) or as amicus curiae.
- (iii) The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court. However, where the Court proceedings in question have been instituted after a request has been made to this Court for an Advisory Opinion, the Court may if satisfied that it is in the public interest to do so, proceed and render an Advisory Opinion.
- (iv) Where a reference has been made to the Court the subject matter of which is also pending in a lower Court, the Court may nonetheless render an Advisory Opinion if the applicant can demonstrate that the issue is of great public importance and requiring urgent resolution through an Advisory Opinion. In addition, the applicant may be required to demonstrate that the matter in question would not be amenable to expeditious resolution through adversarial Court process.” Emphasis added)

45 In the Matter of the National Gender and Equality Commission Reference No. 1 of 2013 the Court further set out certain key considerations in applying the essentials expounded in Re Matter of the Interim Independent Electoral Commission (Supra). The Court thus set out that, a party moving the Court under Article 163 (6) must have locus standi. It held that under this condition, the Court must always consider whether the party seeking to move it, falls within the categories of parties decreed as having such standi by the Constitution. The Court would then proceed to consider the subject-matter to ascertain whether it is one involving a County Government and if it finds in the affirmative, the other considerations then come into play.

46 In that regard the Court opined;

“However, there are certain key considerations in applying these essentials. The starting point will always be that the party must have locus standi. The Court will always consider whether the party seeking to move it, falls within the categories of parties decreed by the Constitution. The Court will then proceed to consider the subject-matter: whether it is one involving County Government. Once it rules in the affirmative, the other considerations come into play.” [Emphasis added]



- 47 Having set out the jurisdiction of this Court on advisory opinion and the guiding principles for ascertaining whether a reference is properly before it under Article 163 (6), we shall now proceed to determine whether the Applicant meets the set criteria.
- 48 It is not in dispute that the Applicant herein is a Constitutional Commission established under Article 59 of the Constitution with the key mandate to promote, monitor, investigate and report on human rights matters in public and private institutions. Article 260 of the Constitution defines the term “State organ,” as: “a commission, office, agency, or other body established under the Constitution.” We also note that this Court In the Matter of Kenya National Commission on Human Rights Reference No 1 of 2012 admitted the Applicant as a party with correct standing to move the Supreme Court for an Advisory Opinion.
- 49 Guided by the cited provisions of the Constitution, the statutory provisions and this Court’s precedent, it is our finding that the Applicant is a “State organ” under the Constitution of Kenya. We also find that the Applicant indeed has the locus standi to seek the Supreme Court’s Advisory Opinion by virtue of Article 163(6).

(b) Whether the Reference is sub judice?

50. A second ground on which this Reference is contested by the 17th Interested Party is that the subject-matter forms part of the proceedings in High Court Constitutional Petition No. 68 of 2017, Okiya Omtatah Okoiti vs Jubilee Party of Kenya and Others; and Constitutional Petition No. 142 of 2017, Okiya Omtatah Okoiti v Hon Attorney General and 12 others. That this Court is thus barred by the doctrine of res sub judice from giving an opinion on the issues raised by the Applicant.
- 51 Counsel for the Applicant, the Respondent, the 1st, the 2nd, and the 15th Interested Parties on the other hand submit that the issues in the Reference are not sub judice. They have argued thus that there is a fundamental difference between the Reference and the Petitions before the High Court, and that in any event, a reference for an advisory opinion cannot be disposed of by way of a Preliminary Objection and further that the objection is devoid of merit and contrary to public interest.
- 52 In the above context, we first note that this Court in Re Matter of Interim Independent Electoral Commission (supra) stated that:

“The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court. However, where the Court proceedings in question have been instituted after a request has been made to this Court for an Advisory Opinion, the Court may, if satisfied that it is in the public interest to do so, proceed and render an Advisory Opinion.”

- 53 In addition to the above, this Court is also alive to the danger of the advisory opinion jurisdiction being perceived as a normal litigation mandate. The Court thus cautioned itself In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Advisory Opinion No. 2 of 2012 as follows:

“(17) In the earlier Advisory-Opinion matter, this Court had elected to proceed with caution in such cases. Only a truly deserving case will justify the Court’s Advisory Opinion, as questions amenable to ordinary litigation must be prosecuted in the normal manner; and the Supreme Court ought not to entertain matters which properly belong to first-instance-Court litigation. Only by due deference to the assigned jurisdiction of the different Courts,



will the Supreme Court rightly hold to its mandate prescribed in section 3(c) of the Supreme Court Act, 2011 (Act No. 7 of 2011), of developing ‘rich jurisprudence that respects Kenya’s history and traditions and facilitates its social, economic and political growth.’”

54 Further, we note that the High Court has been entrusted with the mandate to interpret the Constitution and where it has discharged this task, one can only challenge its Judgment by way of appeal to the Court of Appeal and, if still not satisfied, then to the Supreme Court. To this end, the High Court should be allowed to duly discharge its constitutional mandate without interference. This was the holding of this Court in the Matter of Interim Independent Electoral Commission (supra), stated in that context as follows (Para. 43):

“... The Supreme Court too, for the purpose of rendering an Advisory Opinion, may take its position as guided by its own interpretation of the Constitution. Only where litigation takes place entailing issues of constitutional interpretation, must the matter come in the first place before the High Court, with the effect that interpretation of the Constitution by both the Court of Appeal and the Supreme Court will have been limited to the appellate stages”.

55 At paragraphs 44 and 45, this Court proceeded to make the following statements of principle regarding the nature of its Advisory-Opinion jurisdiction:

“It follows that the Supreme Court may, indeed, while rendering an Advisory Opinion under Article 163(6) of the Constitution, undertake any necessary interpretation of the Constitution.

“[45] In this instance similar questions, entailing constitutional interpretation, have been brought simultaneously before the High Court and the Supreme Court; and, as already noted, such a move by parties is apt to precipitate contretemps in resolving the question of jurisdiction. In principle, the Supreme Court commits itself to order and efficacy in the administration of justice, and to that end it may require that the process of litigation commenced in the High Court, and entailing constitutional interpretation, be exhausted and if need be, followed by appellate procedures. In such circumstances, this Court will be cautious in considering a request for an opinion, to ensure the two jurisdictions do not come into conflict; and each case will be carefully considered on its merits.”

56 Further emphasis that this Court’s advisory opinion jurisdiction was not intended to usurp the other courts constitutional interpretation jurisdiction was expressly made In the Matter of the National Gender and Equality Commission, Reference No. 1 of 2013. The Court stated at paragraphs 45 and 46 that:

“45. This reference, as framed, mainly raises issues of constitutional interpretation, but this Court will not usurp the High Court’s jurisdiction to interpret the Constitution. The Constitution provides in Article 165 (3) that:

“Subject to clause (5), the High Court shall have –

.....

(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 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) a question relating to conflict of laws under Article 191....”

46. Clearly, the High Court has been entrusted with the mandate to interpret the Constitution. [Emphasis added].

57 We secondly also emphasize that this Court’s jurisdiction under Article 163(6) is discretionary. In *Re Matter of the Interim Independent Electoral Commission (Supra)*, the Court held that, ‘It must be emphasized that the advisory jurisdiction of the Supreme Court under Article 163(6) is discretionary in nature.’ Further, In the *Matter of the National Gender and Equality Commission* it held that:

“As already stated, this jurisdiction is discretionary, and its application is determined on a case-by-case basis. The sieving mechanism is not a scientific formula that warrants a specification of the precise elements to be fulfilled. Neither are some of those elements more fundamental than others. Even where a party meets all, the Court could still exercise its discretion not to give an opinion, upon consideration of other prevailing factors.”

58 This Court has furthermore persistently cautioned itself in the exercise of its advisory Opinion jurisdiction. It opined in the same decision that, ‘...In view of the practical and legal constraints attendant on Advisory Opinions, this Court will, in principle, exercise that jurisdiction with appropriate restraint”.

59 A similar caution was sounded by this Court in *Speaker of Senate and Another vs. The Attorney General and 4 Others*, Advisory Opinion No. 2 of 2013, as follows (paragraph 18):

“The Supreme Court must guard against improper transformation of normal dispute issues for ordinary litigation into Advisory Opinion causes, as the Court must be disinclined to take a position in discord with the core principles of the Constitution.”

60. Taking caution from the above past decisions therefore, we note that the parties in High Court Constitutional Petition No. 68 of 2017 are Okiya Omtatah Okioti against the Jubilee Party of Kenya, the Wiper Democratic Movement Party and the Maendeleo Chap-Chap Party. The issue therein is whether the requirement for clearance by state and private bodies, (being the Criminal Investigations Department, Higher Education Loans Board, Ethics and Anti-Corruption Commission, Kenya Revenue Authority and the Credit Reference Bureau), to vie for elective positions as demanded by the respondents therein, was ultra vires the provisions of Chapter Six of the Constitution.

61 We further note that the reliefs in Constitutional Petition No. 68 of 2017 are declaratory in nature. The Petitioner therein seeks a declaration that the requirement for clearance by the state and private



- organs threatened and violated the provisions of the Constitution by imposing unreasonable, unlawful and unconstitutional candidate eligibility criteria for election to public office; a declaration that the requirement for clearance by the public and private bodies was ultra vires Articles 24, 38(3)(c), 99 and 193 of the Constitution; permanent orders prohibiting the Jubilee Party of Kenya, Wiper Democratic Movement Party and Maendeleo Chap-Chap Party from demanding for clearance by the said private and public bodies from persons wishing to vie in elections to public office on their party tickets; and an order quashing the requirement for clearance by the said public and private bodies by the Jubilee Party of Kenya, Wiper Democratic Movement Party and Maendeleo Chap-Chap Party from persons seeking to vie in elections to public office on their party tickets.
- 62 On the other hand, the parties in Constitutional Petition No. 142 of 2017 are Okiya Omtatah Okoiti against the Attorney General, the IEBC, the Judiciary, the EACC, the Registrar of Political Parties, the Director of Public Prosecutions, the Kenya National Examination Council, the Department of Immigration Services and the Official Receiver.
- 63 The issue before the Court in Constitutional Petition No. 142 of 2017 is whether a working group dubbed the Chapter Six Working Group on Election Preparedness (the Working Group) established by the Attorney General with the mandate to vet all candidates vying for the 8th August, 2017 General Elections was ultra vires the Constitution and the Elections Act.
64. The Petitioner therein, has urged that the enforcement of Chapter Six of the Constitution is the exclusive mandate of the Ethics and Anti-Corruption Commission as provided under Article 79 of the Constitution. He has also argued that the Working Group had no capacity in law to determine the eligibility of candidates to vie for elections. He further argued that the requirements set by the Working Group were unconstitutional, null and void for being in contradiction of Article 24 of the Constitution, to the extent that they were not based on any legislation, they negate the presumption of innocence under Article 50(2)(a) and the right to refuse to give self-incriminating evidence under Article 50 (2)(i).
- 65 He thus seeks 14 orders including declarations that the Working Group is unconstitutional; the impugned actions and/or omissions of the respondents therein threatened and violated the Constitution by imposing unlawful and unconstitutional requirement for compliance under Chapter Six; the requirement for clearance of candidates for elective public office by the Working Group was ultra vires Articles 1(1), 2(1-4), 3(1), 10 (2), 24, 38 (3)(c), 99, 137, 180(2) and 193 of the Constitution; an order for quashing the requirements by the respondents therein that persons seeking to vie for elective posts be cleared by the Working Group; and order for quashing the documents titled ‘Resolution on Complimentary Framework of Collaboration by Agencies to Ensure Compliance with Leadership and Integrity Requirements in August 2017 General Elections’ and ‘Compliance with Leadership and Integrity Requirements in the 2017 General Elections.’
- 66 Having addressed the crux of the Constitutional Petitions pending before the High Court, this Reference and the submissions by the counsels, our task now is to find whether the issues raised in the Reference are sub-judice.
- 67 The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A



party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

- 68 In the above context, it cannot be denied that the issues and prayers sought by the Petitioner in the two Constitutional Petitions generally call for the interpretation and application of provisions of Chapter Six of the Constitution. The issues and orders in the two Constitutional Petitions substantially ascend from the criteria for the implementation of the provisions of Chapter Six of the Constitution. For the High Court to sufficiently pronounce itself in the two Constitutional Petitions, it has to interpret and apply the provisions of Chapter Six of the Constitution on leadership and integrity.
- 69 In Constitutional Petition No. 142 of 2017, the Petitioner challenges the constitutionality of the Working Group as well as the criteria on the implementation of the provisions of Chapter Six of the Constitution as established by the Working Group. The High Court has therefore been tasked to examine the constitutionality or otherwise of the criteria so established by the Working Group.
70. In Constitutional Petition No. 68 of 2017 the Petitioner therein challenges requirement for clearance by the state and private organs on grounds that it threatens and violates the provisions of the Constitution. For the High Court to determine the constitutionality of the requirement for clearance challenged by the Petitioner in Constitutional Petition No. 68 of 2017 or the Working Group criteria as well as the ‘Resolution on Complimentary Framework of Collaboration by Agencies to Ensure Compliance with Leadership and Integrity Requirements in August 2017 General Elections’ and ‘Compliance with Leadership and Integrity Requirements in the 2017 General Elections’ challenged in Constitutional Petition No. 142 of 2017, it has to examine, interpret and apply the provisions of Chapter Six of the Constitution.
- 71 In so doing, the High Court shall be compelled, to determine whether a Constitutional test is set up in Chapter Six of the Constitution, whether the set test (if any) is fit and proper, objective or subjective, the scope of application of the test, the implementing organs and bodies. These are substantially the same issues subject of the Advisory Opinion sought by the Applicant comprised at pages 13 to 19 of the Reference before this Court.
- 72 We therefore find that this Reference, as framed, mainly raises issues of constitutional interpretation. These issues are also substantially in issue before the High Court in Constitutional Petition No. 68 of 2017 and Constitutional Petition No. 142 of 2017. In view of Article 165 of the Constitution, the High Court is the Court of first instance with regard to jurisdiction for interpretation and application of the Constitution and that Court has already been moved.
- 73 Guided therefore by these principles, and in exercise of our discretion, we decline to exercise our jurisdiction under Article 163(6) of the Constitution. This Reference is sub-judice and this Court will not usurp the High Court’s jurisdiction under Article 165 (3).

(c) Whether the Reference is an appeal disguised as an advisory opinion

- 74 The 17th Interested Party relies on this third limb to challenge this Court’s jurisdiction. He has in that regard urged that the Reference is an appeal cloaked as an advisory opinion seeking to harmonize the decisions of the Superior Courts with regard to various cited matters. He has thus, emphasized that a matter that had been determined by the Court below would only come to this Court through the appellate process and not under Article 163(6) of the Constitution.



- 75 The Applicant in opposition submits that in all the referenced decisions, there was an attempt to make reference to the provisions of Chapter Six of the Constitution, but the issue of interpretation and application of Chapter Six was not addressed. It added that any pronouncements of the High Court on interpretation and application of Chapter Six of the Constitution were only discussed as obiter.
- 76 The Respondent, the 1st, 2nd and 15th Interested Parties associates themselves with the submissions of the Applicant. They submit that arguments as to whether this Court ought to exercise its discretionary jurisdiction can not be addressed at a preliminary stage. This issue can only be determined by looking at the Preliminary objection before us, setting out what criteria it must meet and thereafter asking the question whether the argument that the Reference is a disguised appeal is merited.
- 77 As to whether the preliminary objection before us is one of merit, this Court has already pronounced itself on the threshold to be met. The Court endorsed the principle in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors* [1969] EA 696, in the case of *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others*, Petition No. 10 of 2013, in paragraph 31 where it held thus:

“To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors* (1969) EA 696:

‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... 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’.”

- 78 The Joho decision has been subsequently cited by this Court in *Hassan Nyanje Charo vs. Khatib Mwashetani & 3 Others*, Civil Application No. 23 of 2014; and in *Aviation & Allied Workers Union Kenya vs. Kenya Airways Ltd & 3 Others*, Application No. 50 of 2014, in which the Court further stated at paragraph 15;

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

(16) It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (See *Hassan Nyanje Charo v Khatib Mwashetani & 3 Others*, Civil Application No. 14 of 2014, [2014] eKLR).

- 79 Further the Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* Civil Application No. 36 of 2014, stated;

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of



dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

80. This Court has also pronounced itself and clarified the jurisdiction under which it can address conflicting decisions especially of the Court of Appeal. The Court has specified that in such instances, it can only be moved under Article 163 (4) (b) of the Constitution as a matter of general public importance. This was adequately elucidated in the case of *Hermanus Phillipus Steyn vs. Giovanni Gnecci-Ruscione SC Application No. 4 of 2012*. The Court stated thus:-

“... iv) where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;” [Emphasis added]

81. Similarly in *Kenfreight (E.A) Limited vs. Benson K. Nguti, Civil Application No. 18 of 2016 (Unreported)*, this Court in an application for review under Article 163(5) certified the intended appeal as one of general public importance on the ground of an inconsistency between the Appellate Court’s decisions in two cited cases. The Court held that the contradiction could only be fully evinced upon a hearing of the intended appeal.

82. The Court stated thus:

“Considering that the prospect of inconsistent determinations in relation to the law of employment would affect the process of application of the law, and would have a bearing on the interests of members of the public, we find this matter to fall within the terms of Article 163(5) of the Constitution.”

83. Against this background, we find it quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. On that basis, two questions emerge for this Court’s consideration under this limb: what pure point of law has the 17th interested Party raised in his preliminary objection and whether the facts in issue, are settled.

In *Hermanus* and *Kenfreight (E.A) Limited* decisions, this Court’s jurisdiction under which it can address conflicting decisions especially of the Court of Appeal, can only be under Article 163 (4) (b) of the Constitution as a matter of general public importance. Where time has lapsed the principles for extension of time as elucidated in *Nicholas Kiptoo Arap Salat vs. Electoral and Boundaries Commission & 7 Others Application 16 of 2014* are instructive.

84. We find that the Applicant’s averment at paragraph 13 of the Reference enumerating the alleged contradicting decisions of the Superior Courts, and at paragraph 15 of the Reference which provided that ‘this Court needs to clarify the fit and proper test for leadership under Chapter Six of the Constitution in light of the conflicting and confusing case law that has built up on this issue’, was an invitation to this Court to resolve the contradictory precedents.

85. This invitation cannot be extended to this Court while exercising its discretionary jurisdiction under Article 163 (6) of the Constitution. By its invitation therefore, the Applicant sought to create an original jurisdictional creature called ‘harmonization’ jurisdiction contrary to the provisions of our Constitution and the statutes. This ground must also succeed.



F. Dissenting Opinion of I. Lenaola, SCJ

86 I have read the Ruling by the Majority in this matter. I agree with their rendition of the facts and submissions. I also agree that the only issue to determine is; whether this Court has the jurisdiction under Article 163(6) of the Constitution to determine the Reference and as a corollary, whether it should exercise such jurisdiction.

87 On whether the Court is clothed with jurisdiction, I agree with the finding by the Majority that the Applicant has locus standi to institute the Reference and that the Court is also well within its jurisdiction to render an opinion as sought, should the corollary question be addressed in the positive. I do not deem it necessary to extrapolate on this point.

88 My departure with the Majority is based on my understanding of the Court's precedents as regards the determination of questions pending before other Superior Courts and the applicability of the doctrine of res sub-judice to the present matter. The Majority has set out the rival arguments on this issue and again, I see no need to repeat those arguments.

89 Like the Majority, I note that this Court in Re Matter of Interim Independent Electoral Commission (supra) stated that:

“The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court. However, where the Court proceedings in question have been instituted after a request has been made to this Court for an Advisory Opinion, the Court may, if satisfied that it is in the public interest to do so, proceed and render an Advisory Opinion.” [Emphasis added]

90. In addition to the above, the caution expressed In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory Opinion No. 2 of 2012 is important to restate. The Court stated thus:

“(17) In the earlier Advisory-Opinion matter, this Court had elected to proceed with caution in such cases. Only a truly deserving case will justify the Court's Advisory Opinion, as questions amenable to ordinary litigation must be prosecuted in the normal manner; and the Supreme Court ought not to entertain matters which properly belong to first-instance-Court litigation. Only by due deference to the assigned jurisdiction of the different Courts, will the Supreme Court rightly hold to its mandate prescribed in section 3(c) of the Supreme Court Act, 2011 (Act No. 7 of 2011), of developing 'rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth.'” [Emphasis added]

91 On the mandate of the High Court, In the Matter of Interim Independent Electoral Commission (supra), the Court stated thus:

“... The Supreme Court too, for the purpose of rendering an Advisory Opinion, may take its position as guided by its own interpretation of the Constitution. Only where litigation takes place entailing issues of constitutional interpretation, must the matter come in the first place before the High Court, with the effect that interpretation of the Constitution by both



the Court of Appeal and the Supreme Court will have been limited to the appellate stages”.

[Emphasis added]

- 92 On this Court’s discretionary powers under Article 163(6), the Court In the Matter of the National Gender and Equality Commission (supra) stated as follows:

“As already stated, this jurisdiction is discretionary, and its application is determined on a case-by-case basis. The sieving mechanism is not a scientific formula that warrants a specification of the precise elements to be fulfilled. Neither are some of those elements more fundamental than others. Even where a party meets all, the Court could still exercise its discretion not to give an opinion, upon consideration of other prevailing factors.”

[Emphasis added]

- 93 I need not repeat the prayers in High Court Constitutional Petitions Nos. 68 of 2017 and 142 of 2017. In that context, it cannot be denied that the issues and prayers sought by the Petitioner in the two Constitutional Petitions, generally, call for the interpretation and application of certain provisions in Chapter Six of the Constitution. However, first, the said Constitutional Petitions are between specific parties and raise substantive and specific issues in a specific context. Thus, in Constitutional Petition No. 68 of 2017, Okiya Omtatah Okoiti has challenged the requirement of clearance by identified State and private bodies as well as the Jubilee Party of Kenya, the Wiper Democratic Movement Party and the Maendeleo Chap-Chap Party, for persons wishing to vie for an elective post on their party ticket. He has urged therefore that the requirements were ultra vires the provisions of Chapter Six of the Constitution. In Constitutional Petition No. 142 of 2017, the said Okiya Omtatah Okoiti has challenged the constitutionality of the mandate of the Working Group aforesaid to vet all candidates vying for the 8th August, 2017 General Elections. He has argued that such mandate was ultra vires the Constitution and the Elections Act.

- 94 Second, the Petitioner in the two pending Petitions is seeking an interpretation of the provisions of the Constitution as set out in paragraphs 9 to 24 of the Petition in Constitutional Petition No. 68 of 2017 and paragraphs 42 to 62 of the Petition in Constitutional Petition No. 142 of 2017. The subject matters in the Constitutional Petitions thus involve litigation disputes entailing issues of specific Constitutional interpretation in the context of the 2017 General Election whereas, the Reference before this Court is not a litigation dispute. In the Reference, the Applicant is seeking the Court’s advisory opinion on the 14 set issues and which are not related to a specific dispute between specific parties.

- 95 In that regard, I would agree with the submissions of the Applicant and the other Interested Parties, save the 17th Interested party, that the issue before the High Court is ‘who should determine whether a person has met the criteria for an elective position within Chapter Six of the Constitution and specifically in relation to the 2017 General Election (and perhaps in other such elections)? while the broad issue in the Reference is, ‘what is the criteria to be applied in vetting, appointing or electing persons in relation to the provisions of Chapter Six of the Constitution?’ In my humble view therefore, even if the two issues could be addressed as one, the High Court Petitions and the Reference can be distinguished and that the proceedings before the High Court and this Court do not raise substantially similar and specific questions for determination and the Applicant’s questions properly falls within the advisory opinion jurisdiction of this Court.

- 96 Furthermore, I find that the 17th Interested Party will not be prejudiced by the rendering of an opinion by the Supreme Court, as the Applicant has no specific claim against the 17th Interested Party or any other party to the Reference.



97 In any case, if I had reached the finding that the Reference was sub-judice, (and I have not), I am persuaded that this Court still has the discretion, depending on the circumstances of the case, to decide whether to issue an Advisory Opinion or not, where a matter in respect of which a Reference has been made is the subject of proceedings in a lower Court. In that regard, this Court In Re Matter of Interim Independent Electoral Commission (supra), stated;

“(iv) Where a reference has been made to the Court, the subject matter of which is also pending in a lower Court, the Court may nonetheless render an Advisory Opinion if the applicant can demonstrate that the issue is of great public importance and requiring urgent resolution through an Advisory Opinion. In addition, the applicant may be required to demonstrate that the matter in question would not be amenable to expeditious resolution through adversarial Court process.” [Re- emphasized]

98 Further, In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (supra), while dismissing a preliminary objection on jurisdiction, this Court held at paragraph 26 that;

“The Attorney-General’s request for an Advisory Opinion, in our view, raises issues of great public importance. The forthcoming general elections are not only the most important since independence, but are complex and novel in many ways...” [Emphasis added]

99 This Court further restated;

“Clearly, any ambivalence or uncertainty in the path of such crucial elections must, as a matter of public interest, be resolved in time: and the task of resolution rests, in the circumstances prevailing, with the Supreme Court, by its Advisory-Opinion jurisdiction.”

100. Most recently, in Council of Governors & Others vs. the Attorney General & others, Reference No.3 of 2019, in a Ruling delivered on 8th October 2019, we stated thus:

“This Court has ... previously exercised its advisory opinion jurisdiction in The Speaker of the Senate [case] for the public interest. We are also persuaded by the submissions by the Speaker of the Senate that certain issues being raised herein cannot await the normal appeal mechanism so as to reach this Court. This Court therefore will exercise its discretion to render an opinion as prayed, but in terms that shall be explained in directions to follow”.

101. I reiterate the above findings as applicable in the present matter and would only add that this Court’s Advisory Opinion is an important avenue for settling matters of great public importance which may not be suitable for conventional mechanisms of justifiability. I also note that such situations have clear evidence under the Constitution, and come with far-reaching implications.

102. It is furthermore my opinion that the fit and proper test or criteria set under Chapter Six of the Constitution, has an important and central application to vet the moral and ethical soundness of persons seeking elective or appointive offices, and thus constitute issues of great public importance. I also note that the realization of the fit and proper test under Chapter Six raises a variety of implementation challenges unbeknown to traditional integrity and leadership criteria previously in force and this apex Court must give clear directions in that regard.



103. I therefore find, without hesitation, that time is ripe for consideration and direction by the Supreme Court on the applicable criteria under Chapter Six of the Constitution and this Reference, therefore, is a distinctive situation in which the Supreme Court's Advisory Opinion jurisdiction will be most propitious. An obligation unswervingly rests on the Supreme Court to render an opinion in accordance with the Constitution and the invitation to this Court to down it tools for lack of jurisdiction on account of the principle of res sub-judice is not to be permitted, as such an action would occasion an injustice to the wider public interest.
104. Lastly, although the Applicant has raised 14 questions on which the Court's Advisory Opinion is sought, like the Court did in the Council of Governors case cited above, the Court can, within its discretion, limit those questions and indeed leave to the High Court certain litigational issues for its determination without throwing out the baby with the bath water. One of the issues that I would have expected this Court to render an advisory opinion on, is this: whether Chapter Six of the Constitution sets up a fit and proper test for leadership including elective and appointive offices; and if so, what is that test? This is issue No.1 in the Reference.
105. Having held as above, I would have made the following Orders:
- a. The 17th Interested Party's Preliminary Objection dated 16th July 2018, be and is hereby disallowed.
 - b. The Reference shall proceed to hearing on a limited number of questions taking into account the matters pending before the High Court, in High Court Constitutional Petitions No.68 and 142 of 2017.
 - c. There shall be no order as to costs.
106. However, as the Majority is of a contrary opinion, the final orders shall be as they have proposed.

G. Dissenting Opinion Of M. K. Ibrahim, SCJ

107. I have had the advantage of reading in advance the dissenting opinion of Honourable Justice Lenaola, with which I entirely agree. However, as the Majority is of a contrary opinion, the final orders shall be as they have proposed.

H. Orders

108. We have read the Reference, the attendant depositions from the parties and we have considered the detailed written and oral submissions from Counsels. Consequently, we make the following Orders:
- a. The Preliminary Objection dated 16th July 2018, be and is hereby upheld.
 - b. The Reference for an advisory opinion dated 20th April, 2017, be and is hereby dismissed.
 - c. The High Court shall proceed, on the basis of priority, to hear and determine High Court Constitutional Petition No. 68 of 2017 and Constitutional Petition No. 142 of 2017 pending before it.
 - d. We make no order as to costs.
109. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY 2020.

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D. K. MARAGA P. M. MWILU
CHIEF JUSTICE & PRESIDENT DEPUTY CHIEF JUSTICE & VICE
OF THE SUPREME COURT PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM J. B. OJWANG
JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT

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S. C. WANJALA NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT

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I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original
THE REGISTRAR
SUPREME COURT OF KENYA

