



**Aukot & another v Attorney General & 3 others; Thirdway Alliance Kenya
& another (Interested Parties) (Constitutional Petition E147 of 2022)
[2022] KEHC 10537 (KLR) (Constitutional and Human Rights) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10537 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E147 OF 2022**

AC MRIMA, J

JUNE 23, 2022

BETWEEN

EKURU AUKOT 1ST PETITIONER

MIRURU WAWERU 2ND PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

RAILA ODINGA 2ND RESPONDENT

STEPHEN KALONZO MUSYOKA 3RD RESPONDENT

MUSALIA MUDAVIDI 4TH RESPONDENT

AND

THIRDWAY ALLIANCE KENYA INTERESTED PARTY

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION . INTERESTED
PARTY**

**Entitled persons under the Retirement Benefits (Deputy President and Designated State Officers)
Act are not State officers**

The petition and application were against the entitled persons under the Retirement Benefits (Deputy President and Designated State Officers) Act to contest for the position of President or Deputy President. The court found that the entitled persons under the Act were not State officers. The court further found that the Office of the Government Advisor/Consultant in the Act was not an office in the National Government, neither was it an office in the county government, nor was it an office in the public service. The court further held that the requirement in section 43(5)



of the Elections Act which required a public officer who intended to contest an election to resign from public office at least six months before the date of the election did not apply to the entitled persons under the Act.

Reported by Kakai Toili

Constitutional Law – *State offices – creation of State offices - information to be provided by a national legislation creating a State office - whether the entitled persons under the Retirement Benefits (Deputy President and Designated State Officers) Act were State officers - whether a county legislation could create a State office – Constitution of Kenya, 2010, articles 74 and 260; Retirement Benefits (Deputy President and Designated State Officers) Act, Cap 197B, sections 2 and 3.*

Constitutional Law – *public offices – creation of public offices -categories of public officers - ways in which an office may be established in the public service – whether the Office of the Government Advisor/Consultant in the Retirement Benefits (Deputy President and Designated State Officers) Act (the office in the Act) was an office established in the public service - whether the office in the Act was an office in the National Government or the county government - whether the office in the Act was a public office – Constitution of Kenya, 2010, articles 132(4) (a), 233, 234(3), 248 and 260; Public Service Commission Act, Cap 185, sections 27(1) and 29.*

Constitutional Law – *constitutional petitions – constitutional questions - what was the nature of a constitutional question.*

Constitutional Law – *interpretation of the Constitution – principles in the interpretation of the Constitution - what were the principles to be followed in interpreting the Constitution of Kenya, 2010.*

Constitutional Law – *fundamental rights and freedoms – limitation of fundamental rights and freedoms – limitation of fundamental rights and freedoms by legislation - what were the tests to be complied with in the limitation of rights and fundamental freedoms by a legislation – Constitution of Kenya, 2010, article 24 and 25.*

Statutes – *interpretation of statutory provisions – interpretation of section 43(5) of the Elections Act which required a public officer who intended to contest an election to resign from public office at least six months before the date of election - whether section 43(5) of the Elections Act applied to the entitled persons under the Retirement Benefits (Deputy President and Designated State Officers) Act – Elections Act, Cap 7, section 43(5).*

Jurisdiction – *jurisdiction of the High Court – jurisdiction to determine constitutional issues – limitation of the High Court’s jurisdiction by the doctrine of constitutional avoidance and ripeness - whether the High Court was barred by the doctrine of constitutional avoidance or ripeness to determine a petition which raised constitutional issues for the court’s interpretation – Constitution of Kenya, 2010, article 165(3)(d).*

Words and Phrases – *pension – definition of pension - a regular series of payments made to a person (or the person’s representatives or beneficiaries) for past services or some type of meritorious work done; especially such a series of payments made by the government; a fixed sum paid regularly to a person (or to the person’s beneficiaries), especially by an employer as a retirement benefit - Black’s Law Dictionary, 10th Edition at page 1315.*

Brief facts

The petition sought to challenge propriety of the 2nd, 3rd and 4th respondents to contest for the position of President or Deputy President of the Republic of Kenya. Simultaneously filed with the petition was an application in which the petitioners sought for among others a conservatory order barring the 2nd interested party from clearing the 2nd - 4th respondents to contest for the position of President or Deputy President pending the hearing and determination of the application and the petition.

The petitioners claimed that under section 8 of the Retirement Benefits (Deputy President and Designated State Officers) Act, No. 8 of 2015 as read with article 137(2) of the Constitution of Kenya, 2010 (the Constitution), the 2nd, 3rd and 4th respondents were State and public officers and as such were ineligible to be nominated for election as President and Deputy President.

The petitioners posited that the 2nd to 4th respondents were entitled persons under Retirement Benefits (Deputy President and Designated State Officers) Act who were granted a generous retirement package and an obligation to serve as advisors and consultants to the Government and the people of Kenya. It was their case



that unlike other public servants who could resign from their positions to run for public office, the privilege granted to the entitled persons did not give them the option to disengage or resign as public officers.

Issues

- i. Whether the entitled persons under the Retirement Benefits (Deputy President and Designated State Officers) Act were State officers.
- ii. What was the nature of a constitutional question?
- iii. Whether the High Court was barred by the doctrine of constitutional avoidance or ripeness to determine a petition which raised constitutional issues for the court's interpretation.
- iv. What were the principles to be followed in interpreting the Constitution of Kenya, 2010?
- v. Whether a county legislation could create a State office.
- vi. What information was to be provided by a national legislation creating a State office?
- vii. What were the categories of public officers?
- viii. What were the ways in which an office could be established in the public service?
- ix. Whether the Office of the Government Advisor/Consultant in the Retirement Benefits (Deputy President and Designated State Officers) Act
 1. was an office established in the public service.
 2. was an office in the National Government or the county government.
 3. was a public office.
- x. Whether section 43(5) of the Elections Act which required a public officer who intended to contest an election to resign from public office at least six months before the date of election applied to the entitled persons under the Retirement Benefits (Deputy President and Designated State Officers) Act.
- xi. What were the tests to be complied with in the limitation of rights and fundamental freedoms by a legislation?

Relevant provisions of the Law

Elections Act, Cap 7

Section 43 - Participation in elections by public officers.

(5) A public officer who intends to contest an election under this Act shall resign from public office at least six months before the date of election.

Held

1. A constitutional issue was one which confronted the various protections laid out in a constitution. Such protections may be in respect to the Bill of Rights or the Constitution itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of the Constitution alleged to have been contravened or threatened and the manifestation of contravention or infringement.
2. The jurisdiction of a court was conferred by either the Constitution or the law, in the instant case it was the Constitution which conferred the court with the jurisdiction over the petition. The court was seized of the jurisdiction over the matter. For clarity, the petition raised constitutional issues for the court's interpretation and, as such, the court was not barred by the doctrine of constitutional avoidance or ripeness.



3. One of the imports of recognition of the nature of the transformative character of the Constitution was that it had informed the methods of constitutional interpretation. In particular, the following four constitutional interpretive principles had emerged from Kenya's jurisprudence:
 - a. The Constitution must be interpreted holistically; only a structural holistic approach breathed life into the Constitution in the way it was intended by the framers.
 - b. Kenya's transformative Constitution did not favour formalistic approaches to its interpretation. It must not be interpreted as one would a mere statute.
 - c. The Constitution had provided its own theory of interpretation to protect and preserve its values, objects and purposes.
 - d. In interpreting the Constitution, non-legal considerations were important to give its true meaning and values.
4. Article 260 of the Constitution defined a State office. A State officer had been defined as a person holding a State office. A State office was such a senior office in Kenya and so was a State officer. From article 260, there were two ways in which a State office was established. The first way was when such an office was expressly provided for and established as a State office under the Constitution. The other way was where an office was established and designated as a State office by national legislation. In other words, a county legislation could not create a State office.
5. From the preamble, the Retirement Benefits (Deputy President and Designated State Officers) Act's purpose was to make provisions for pension and other retirement benefits for some entitled persons. Whereas the Act did not define what pension was, it described benefits to mean pension and other retirement benefits conferred by the Act. Section 2 of the Act defined an entitled person to mean any of the persons specified in section 3 thereof. Section 5(3) of the Act provided for instances where an entitled person died in service after the commencement of the Act whereas section 15 was on an entitled person's official funeral.
6. The State offices under the Retirement Benefits (Deputy President and Designated State Officers) Act were the ones vested with the consultative and advisory roles to the Government and the people of Kenya. The offices may loosely be referred to as the Office of Government Advisor/Consultant'.
7. The Constitution required any national legislation intent on creating a State office to establish and designate such an office as a State office. In other words, the intention to create a State office must be clear in the legislation. That was because, a look at the State offices created under article 260 revealed that the Constitution was very deliberate and express in creating such offices. The Constitution did not just give a name to a State office. It went further and provided for the tenure of the holders, how the holders of would ascend into office and the removal of the holder, among others.
8. Article 74 of the Constitution provided for all State officers to take and subscribe to an oath or affirmation of office. That trend was common to all State offices created under the Constitution. Therefore, it behoved any national legislation intent on creating a State office to likewise do so with precision and without ambiguity. The statute must be clear that it was creating a State office. Any national legislation creating a State office must certainly provide for at least the following: -
 - a. the intention to create a State office;
 - b. the name of the State office;
 - c. the functions of the State office;
 - d. the manner in which the holder of the office ascended into office;
 - e. the qualifications of the holder of the office;
 - f. the tenure of the holder;
 - g. the oath or affirmation to be taken and subscribed to; and
 - h. the removal and resignation from office.
9. The Retirement Benefits (Deputy President and Designated State Officers) Act did not provide in its preamble or otherwise that it created and established a State office. The closest the Act may be said to



- have come to naming an office was in sections 8 and 12 thereof. It was a fact that the Act dealt with retired persons who were described as entitled persons. Those persons were, prior to their respective retirements, holders of offices. However, unlike the Constitution, the Retirement Benefits (Deputy President and Designated State Officers) Act failed to attach names to the alleged State offices.
10. As to whether the functions of the alleged State offices were provided for, section 8 of the Retirement Benefits (Deputy President and Designated State Officers) Act had it that an entitled person shall be expected to play a consultative and advisory role to the Government and the people of Kenya. The exact nature of the consultative and advisory role was not provided for. Further, the Act failed to make provision for the manner in which the holder of the office may be removed from office or how one resigned from office. The Act did not provide for the holders to take and ascribe to oaths or affirmations prior to assuming such offices.
 11. The Retirement Benefits (Deputy President and Designated State Officers) Act neither intended to create and establish any State office nor created any such office. The Act neither established nor designated any State office. Consequently, the entitled persons under the Act were not State officers.
 12. Article 260 of the Constitution defined a public officer to mean any State officer or any person, other than a State officer, who held a public office. The two categories of public officers were: a State officer; or any other person who held public office – an office within the National Government, county government, or public service and which office was sustained in terms of remuneration and benefits from the public exchequer. The entitled persons were not public officers to the extent that they were not State officers.
 13. The Constitution created two levels of Government. Article 6 of the Constitution provided for devolution and access to services. Whereas a county government was in-charge of the affairs and governance of a specific county, on one hand, the National Government, on the other hand, was vested with the affairs of the whole country. Of importance was that both levels of Governments were called-out to conduct their mutual relations on the basis of consultation and cooperation. In the Fourth Schedule, the Constitution set out the functions of both Governments.
 14. The functions of the National Government assumed a national character and the National Government was called upon to ensure that such functions were reasonably accessible throughout all parts of Kenya. There were also some functions which were shared between the two Governments.
 15. Given the nature of the National Government and to enable smooth discharge of services, Parliament enacted the National Government Co-ordination Act, No. 1 of 2013. The legislation was An Act of Parliament to establish an administrative and institutional framework for co-ordination of National Government functions at the national and county levels of governance, to give effect to articles 131(1)(b) and 132(3)(b) of the Constitution and for connected purposes. From a look at Chapter 9 of the Constitution and the National Government Co-ordination Act, the National Government was comprised of the National Executive and all the other offices that enable the National Executive to discharge its functions throughout Kenya.
 16. Whereas the Constitution provided for the composition of the National Executive, there were legislations which provided for the rest of the offices in support of the National Executive. The constitutional design in Kenya was such that the commissions and independent offices were key drivers of the Constitution. They not only protected the sovereignty of the people and secure the observance by all State organs of democratic values and principles, but also promoted constitutionalism.
 17. In order to achieve the objects, the Constitution guaranteed each commission and independent office institutional and financial independence by declaring that each of them was only subject to the Constitution and the law and further that they were independent and not subject to the direction or control by any person or authority. The financial independence was guaranteed by the Constitution in directing Parliament to allocate the entities adequate funds. With such a well-guarded constitutional posture, the commissions and independent offices were properly positioned to attain their objectives



- and with the result that constitutionalism permeated every corner of Kenya. Indeed, the commissions and independent offices were key drivers of constitutionalism.
18. Article 248 of the Constitution listed the various commissions and independent offices in Kenya. They were 10 commissions and 2 independent offices. The Public Service Commission (the PSC) was established under article 233 of the Constitution. There were three ways in which an office may be established in the public service:
 - a. By the President under article 132 (4)(a) of the Constitution.
 - b. By an authorized officer of a public body under section 27(1) of the Public Service Commission Act.
 - c. By the PSC on its own motion under section 29 of the Public Service Commission Act.
 19. The Office of the Government Advisor/Consultant in the Retirement Benefits (Deputy President and Designated State Officers) Act seemed not to be an office established in the public service. That was because the office was not established by the President under article 132(4)(a) of the Constitution, neither was it established by an authorized officer of any public body under section 27(1) of the Public Service Commission Act nor was it established by the PSC on its own motion and in accordance with section 29 of the Public Service Commission Act. As a result, the Office of the Government Advisor/Consultant in the Act was not an office established in the public service.
 20. Section 15 of the National Government Co-ordination Act required any recruitment and appointment of National Government officers to be undertaken by the PSC except where the Constitution and the law expressly provided otherwise. The Public Service Commission Act provided the manner in which it recruited public officers. In doing so, it must comply with the Constitution and the law. There was no evidence that the holders of the Office of the Government Advisor/Consultant in the Retirement Benefits (Deputy President and Designated State Officers) Act were ever recruited by the PSC into such offices. There was as well no evidence that the holders were subject to the elaborate and complex requirements in the Public Service Commission Act and Regulations made thereunder.
 21. It had not been demonstrated that the PSC could exercise any mandate over the impugned offices as provided for in article 234(3) of the Constitution. Therefore, the Office of the Government Advisor/Consultant in the Retirement Benefits (Deputy President and Designated State Officers) Act was not an office in the National Government, neither was it an office in the county government, nor was it an office in the public service.
 22. Under article 260 of the Constitution, for an office to qualify as a public office it must in the first instance be an office in the National Government, a county government or in the public service. Once an office fell within any of the three categories then the issue of the source of the remuneration and benefits for purposes of running that office followed. The converse could not hold.
 23. The makers of the Constitution and the Kenyans at large were well aware that there may be some offices in Kenya which although they were funded from the consolidated fund or by money provided by Parliament, such offices did not fall within the National Government, a county government or in the public service. Such offices would, therefore, not take up the constitutional character and definition of public offices. An example at hand was the Office of the Government Advisor/Consultant under the Retirement Benefits (Deputy President and Designated State Officers) Act.
 24. Section 43(5) of the Elections Act was meant to apply to public officers. Given that the entitled persons under the Retirement Benefits (Deputy President and Designated State Officers) Act were neither State officers nor public officers, the provision could not apply to any of them. The requirement in section 43(5) did not apply to the entitled persons under the Retirement Benefits (Deputy President and Designated State Officers) Act.
 25. Under articles 24 and 25, the Constitution robustly provided for the extent and the manner in which the rights and fundamental freedoms may be limited. Any limitation of rights and fundamental freedoms must squarely fit within the four corners of article 24 of the Constitution. The limitation of



- rights and fundamental freedoms by a legislation must also comply with the test laid in *R v Oakes* 1986 CanLII 46 (SCC), [1986] 1 SCR 103. The court in that case came up with three-pronged criteria:
- a. The objective which the limitation was designed to serve.
 - b. The means chosen to attain the objective must be reasonable and demonstrably justified. That was the proportionality test.
 - c. The effect of the limitation.
26. The rights allegedly limited in the instant case were *inter alia* political rights under article 38 of the Constitution. Since such rights were not among those which could not be limited in any manner whatsoever under article 25 of the Constitution, then article 25 did not have any room in that discussion. That left article 24 of the Constitution.
 27. The Retirement Benefits (Deputy President and Designated State Officers) Act was the legislation which was alleged to be limiting the rights and fundamental freedoms. The Act had no mention of any intention to limit any rights and/or fundamental freedoms. Given that there was no such intention, a consideration of whether the limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom did not arise. There could be no presumption of limitation of any rights and/or fundamental freedoms under the constitutional dispensation in Kenya. Any limitation of rights and/or fundamental freedoms must be intentional.
 28. Any legislation intending to limit rights and/or fundamental freedoms must be clear on such intention, the nature and extent of the limitation. Such legislation must fully comply with article 24 of the Constitution. Despite the requirement in article 24(3) of the Constitution that the State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of that article had been satisfied, the petitioners did not raise to that calling.
 29. The Access to Information Act was an Act of Parliament aimed at giving effect to article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes. The Access to Information Act was, therefore, deliberate in its intention to limit the right to information. The Retirement Benefits (Deputy President and Designated State Officers) Act failed the test of precision on the intention to limit any right or fundamental freedom. The Retirement Benefits (Deputy President and Designated State Officers) Act did not intend to limit any right or fundamental freedom provided for in the Constitution.
 30. Section 4 of the Retirement Benefits (Deputy President and Designated State Officers) Act was declared unconstitutional in *Coalition for Reforms and Democracy (CORD) v Attorney General; International Institute for Legislative Affairs & another (Interested Parties)* [2019] eKLR. It was for that reason that the court did not make any reference to section 4 despite it having been variously referred to by the parties.

Petition and notice of motion dismissed; each party to bear its own costs.

Citations

Cases

1. Anarita Karimi Njeru v Republic (Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); [1976-1980] KLR 1272) — Explained
2. Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & Another (Petition 628, 630 of 2014 & 12 of 2015 (Consolidated); [2015] eKLR) — Followed
3. Coalition for Reforms and Democracy (CORD) v Attorney General; International Institute for Legislative Affairs & Katiba Institute (Interested Parties) (Petition 476 of 2015; [2019] KEHC 10892 (KLR)) — Explained
4. Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 13 (KLR)) — Explained
5. In the Matter of Interim Independent Electoral Commission (Constitutional Application 2 of 2011; [2011] eKLR; [2011] 2 KLR 32) — Explained



6. Judicial Service Commission v Speaker of the National Assembly & another (Petition 518 of 2013; [2013] KEHC 1569 (KLR); [2013] 3 KLR 262) — Followed
7. Macharia & Another vs. Kenya Commercial Bank Limited & others (Application 2 of 2011; [2012]eKLR; [2012] 3 KLR 199) — Explained
8. Munya v Kithinji & 2 others (Application 5 of 2014; [2014] eKLR; [2014] 2 KLR 36) — Explained
9. Ndiu & others v Attorney General & others (Petition E282, 397, E400, E401, E402, E416 & E426 of 2020 (Consolidated); [2021] KEHC 9763 (KLR)) — Explained
10. Odinga & another v Independent Electoral and Boundaries Commission & 2 others (Presidential Election Petition 1 of 2017; [2017] KESC 33 (KLR)) — Followed
11. Okoiti , Okiya Omtatah & Another v Public Service Commission & others (Petition 33 & 42 of 2018 (Consolidated); [2021] eKLR) — Mentioned
12. Okoiti, Okiya Omtatah v Attorney General & Another (Constitutional Petition E008 of 2022; [2002] eKLR) — Explained
13. Onyango, Patrick Ouma & 12 others v AG & 2 others (Misc. Appln. No. 677 of 2005) — Followed
14. Outa, Fredrick Otieno v Jared Odoyo Okello& 4 others (Petition 6 of 2014; [2014] eKLR) — Explained
15. Paragon Electronics Limited v Njeri Kariuki (Petition 412 of 2019; [2021] KEHC 8742 (KLR)) — Explained
16. Waity v Independent Electoral & Boundaries Commission & 3 others (Petition 33 of 2018; [2019] KESC 54 (KLR)) — Explained
17. Fredricks & other v MEC for Education and Training, Eastern Cape & others ([2002] 23 ILJ 81 (CC)) — Explained
18. Minister of Safety & Security v Luiters ([2007] 28 ILJ 133 (CC)) — Explained
19. R. v Oakes (CanLII 46 (SCC), [1986] 1 SCR 103) — Explained

Statutes

1. Access to Information Act (cap 7M) — section 4, 5, 6 — Interpreted
2. Constitution of Kenya, 2010 — article 10, 20, 24, 25 , 27, 38, 47, 74 ; 87, 88, 88(4)(e); 132; 136; 137; 137(2); 137(2)(b), (c); 142 ; 144; 157 ; 165(3)(d); 166 ; 167 ; 168 ; 201; 232; 234; 248 ; 249 ; 252 ; 260; Chapter 9 , 13, 15; Schedule 4 part 1, 2 — Interpreted
3. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Sub Leg) — rule 10(1),(2) — Interpreted
4. County Governments Act (cap 265) — section 48, 48(1)(e) — Cited
5. Elections Act (cap 7) — section 2, 43(5); 74 — Interpreted
6. National Government Co-Ordination Act (cap 127) — section 14 , 15 — Interpreted
7. Pensions Act (cap 189) — Interpreted
8. Political Parties Act (cap 7D) — section 12(1) — Interpreted
9. Public Appointments (Parliamentary Approval) Act (cap 7F) — Cited
10. Public Officer Ethics Act (cap 185B) — section 2(g) — Interpreted
11. Public Service Commission Act (cap 185) — section 3, 4 , 27(1); 28 ; 29; part 4 — Interpreted
12. Retirement Benefits (Deputy President And Designated State Officers) Act (cap 197B) — section 3, 4, 4(2); 5(3); 8 ; 8(2); 12 — Interpreted
13. Supreme Court Act (cap 9B) — section 3 — Interpreted
14. Canadian Charter of Rights and Freedoms — section 1, 11(d) — Cited
15. Narcotic Control Act (C.R.C., c. 1041) — section 4(2); 8 — Interpreted
16. Constitution of the United States — Interpreted
17. Kenya Defence Forces Act

Texts



1. Garner, BA., Black, HC., (Ed) (2014), Black's Law Dictionary (St Paul, Minnesota: Thomson Reuters 10th Edn, page 1315)
2. Tribe, LH., (Ed) (1989), American Constitutional Law (University of Minnesota Law School 2nd Edn p 92)

Advocates

Mr. Kosgey and Mr. Muriuki for Petitioners.

Mr. Simiyu and Mr. Kimengol for 3rd Respondent.

Mr. Olendo, for 2nd Interested Party.

JUDGMENT

Introduction:

1. The eligibility of some candidates in taking part in the forthcoming general election has once again been impugned in the proceedings subject of this judgment.
2. This time round, the challenge is against those who are described as 'entitled persons' under the *Retirement Benefits (Deputy President and Designated State Officers) Act*, No 8 of 2015 (hereinafter referred to as 'the *Retirement Act*').
3. Whereas the petition was supported by the Third way Alliance Kenya, the 1st interested party herein, it was, on an equal measure, opposed by the 1st, 2nd and 3rd respondents as well as by the 2nd interested party. The 4th respondent did not take part despite service.

The Petitioners' case:

4. Through the petition dated April 7, 2022 and supported by the two affidavits of the 2nd petitioner herein, Miruru Waweru, deposed to on April 7, 2022 and May 10, 2022 respectively, the Petitioners sought to challenge propriety of Raila Odinga, Kalonzo Musyoka and Musalia Mudavadi, the 2nd, 3rd and 4th respondents herein respectively, to contest for the position of President or Deputy President of the Republic of Kenya.
5. Simultaneously filed with filing of the main Petition was an undated application by way of a notice of motion (hereinafter referred to as 'the application') where the petitioners sought some interim conservatory reliefs pending the hearing of the main petition.
6. The petitioners founded their case on the *Retirement Act* claiming that under section 8 thereof as read with article 137(2) of the *Constitution*, the 2nd, 3rd and 4th respondents are state and public officers, and as such are ineligible to be nominated for election as President and Deputy President of the Republic of Kenya.
7. The petitioners posited that the 2nd to 4th respondents are 'entitled persons' under *Retirement Act* who are granted a generous retirement package and an obligation to serve as advisors and consultants to the Government and the people of Kenya.
8. It was their case that unlike other public servants who can resign from their positions to run for public office, the privilege granted to the entitled persons does not give them the option to disengage or resign as public officers.



9. The petitioners stated that the benefits paid to the entitled persons include an accountant and funds to support their official operation as advisors and consultants to the Government which privilege does not extend to other public officers.
10. It was further their case that the entitled persons, besides being retired are provided with monies from the Consolidated Fund to facilitate execution of their said role.
11. On the foregoing, it was the petitioners' case that it was improper, in view of article 137(2)(c) of the Constitution, for the 2nd, 3rd and 4th respondents to declare to vie for respective political seats for 2022 general elections whereas they are serving public servants.
12. In reference to the established principle that election is a process, as held in Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR, the petitioners submitted that it was urgently necessary that the Court pronounces itself on the eligibility of persons drawing benefits under the Retirement Act.
13. It was their case that failure to allow that petition would result in violation of articles 10, 20, 38, 47, and 137 of the Constitution.
14. On the foregoing, the petitioners in the application sought the following reliefs: -
 1. That this application be certified as urgent, fit and proper to be heard ex Parte and service thereof be dispensed with in the first instance.
 2. That there be and is hereby issued a conservatory order barring the 2nd interested party herein from clearing the 2nd- 4th respondents to contest for the position of President or Deputy President of the Republic of Kenya pending the hearing and determination of this application.
 3. That there be and is hereby issued a conservatory order barring the 2nd interested party herein from clearing the 2nd- 4th respondents to contest for the position of President or Deputy President of the Republic of Kenya pending the hearing and determination of this Petition
 4. That costs be provided for
15. And, in the main, the petitioners prayed for the following reliefs: -
 - a. A declaration that the 2nd, 3rd & 4th respondents are public officers under article 260 of the Constitution of Kenya.
 - b. A declaration that the section 3 & 8 of the Retirement Benefits (Deputy President and Designated State Officers) Act, 2015 as read together with articles 137(2)(b) of the Constitution disqualify the 2nd, 3rd & 4th respondents from being nominated as presidential candidates by the Independent Electoral & Boundaries Commission.
 - c. A declaration that a nomination of the 2nd, 3rd & 4th respondents as presidential candidates or deputy presidential candidates violates section 43(5) of the Elections Act, 2011.
 - d. An injunction barring the Independent Electoral & Boundaries Commission from nominating the 2nd to 4th respondents as candidates for the office of the President or Deputy President of the Republic of Kenya.
 - e. The costs of this petition be borne jointly and severally by the respondents.



The Petitioners' submissions:

16. In further support of their case, the petitioners filed written submissions dated May 19, 2022.
17. In asserting that the application had attained the requirements for the grant of conservatory orders, it was submitted that the Independent Electoral and Boundaries Commission (hereinafter referred to as 'the IEBC' or 'the Commission' or 'the 2nd interested party') was in the process of giving guidance to the candidates in the nominating process, and that the decision will be in violation of article 47 of the Constitution for being unlawful.
18. While relying on the decision in Judicial Service Commission v. Speaker of the National Assembly & Another [2013] eKLR, and the Supreme Court decision in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR, the petitioners submitted that there was need, in the circumstances of the case, to maintain the status quo.
19. The petitioners stated that if the court does not intervene, the clearance of the 2nd to 4th respondents will rubber stamp the precedent of the general election of 2017 where certain public officials enjoyed state benefits yet others earning much less were still required to compete with them occasioning them undue disadvantage.
20. In respect of the main petition, it was submitted that under article 260 of the Constitution, the 2nd to 4th respondents are public servants and this court ought to declare them as public officials.
21. On the foregoing, it was the petitioners' case that the respondents are subject to the provisions of the Elections Act as far as the eligibility of public officials to offer themselves for election to the office of the President or the Deputy President is concerned.
22. It was the petitioners' case that this court has the responsibility to ensure that an election illegality is not condoned since it will expose the tax payers to the possibility of losses on account of nullification of the election.
23. In contesting the 1st & 2nd respondents' position that the petition was not ripe for this court's adjudication on the basis that IEBC was yet to nominate the 2nd to 4th respondents for elections, the petitioners submitted that the petition seeks interpretation of article 260 as read with article 137 of the Constitution, a preserve of this court under article 165(3)(d) of the Constitution.
24. Support of the foregoing interpretational function of this court was sourced from the Supreme Court decision In the Matter of Interim Independent Electoral Commission [2011] eKLR where it was observed as follows;
 - 43] Quite clearly, the High Court has been entrusted with the mandate to interpret the Constitution. This empowerment by itself, however, does not confer upon the High Court an exclusive jurisdiction; for, by the appellate process, both the Court of Appeal and the Supreme Court are equally empowered to interpret the Constitution, certainly in respect of matters resolved at first instance by the High Court... 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... This is a situation in which this court must protect the jurisdiction entrusted to the High Court.
25. In submitting that the 2nd to 4th respondents are public officers, the petitioners referred to article 260, of the Constitution and Section 2(g) of the Public Officer Ethics Act and stated that they draw their



benefits as per the Retirement Act from allocations drawn from the Consolidated Fund and have offices assistants and accountants who as per section 12 of the Retirement Act are deemed as public officials.

26. The Petitioners referred to the Supreme Court decision in Fredrick Otieno Outa v Jared Odoyo Okello & 4 others [2014] eKLR, where the court discussed the meaning of a public officer as follows: -

Strictly speaking, the proper meaning of “public officer”, for purposes of the electoral law, is that embodied in article 260 of the Constitution as read together with section 2 of the Elections Act. The different definition in other statutory provisions, such as those enumerated earlier on, ought not to take precedence over the said constitutional provision. And thus, the proper meaning of “public officer” – currently is;

- (i) the person concerned is a state officer; or
- (ii) any other person who holds “public office” – an office within the national government, county government, or public service;
- (iii) a person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer.

27. Based on the foregoing it was the petitioners’ case that clearing a public officer to vie for an elective office is an illegality and a violation of article 47 of the Constitution.

28. The petitioners claimed further that to the extent that other public officers are required to resign and use private funds to facilitate their political affairs, allowing the designated persons to vie for elective positions was discriminative in accordance to article 27 of the Constitution.

29. As a consequence of the foregoing, the petitioners urged this court to allow the petition.

30. Although the 1st interested party herein supported the petition, it neither filed any disposition nor submissions.

The 1st Respondent’s case:

31. The 1st respondent herein, the honourable Attorney General, opposed the Petition through grounds of opposition dated April 22, 2022.

32. It stated that the petition did not meet the threshold set in Anarita Karimi Njeri v Republic [1976-1980] KLR 1272 requiring that a petitioner to identify with precision and specificity how constitutional provisions have been violated.

33. It further was its case that the petition was premature and based on mere suspicion as there was no one who had been cleared to vie for any specific position and that there are various relevant constitutional bodies with the mandate and procedure to clear candidates to contest in a general election.

34. The 1st respondent stated that the petition failed the test of justiciability and ripeness as it was being invited to embark in an academic exercise, a waste of scarce judicial time.

35. In challenging the merits of the petition, it was its case that the Retirement Act does contemplate and provide for the entitled persons under the Act not to participate in political activities.

36. It was urged that the petition was caught up by the constitutional avoidance doctrine since it relates to nomination of candidates whose jurisdiction according to article 88(4)(e) of the Constitution as read with section 74 of the Elections Act lies within the IEBC.



37. The 1st respondent urged the court to dismiss the petition for being an abuse of process and in public interest.

The Submissions:

38. In its written submissions dated May 10, 2022, the 1st respondent firstly submitted that since the dispute related to nomination dispute as provided for under article 88(4) of the Constitution as read with section 74 of the Election Act, it belonged to the IEBC as opposed to this court.

39. To buttress the foregoing, reference was made to the Supreme Court decision in Sammy Ndung'u Waity v Independent Electoral & Boundaries Commission & 3 others [2019] eKLR where it was observed that: -

IEBC has unquestionable jurisdiction under article 88(4)(d) to determine pre-election nomination disputes. It has exclusive jurisdiction to determine with finality, subject to appeal or judicial review, all intra - party nomination disputes.

40. The 1st respondent further stated that the petition was not ripe for this court's determination since the nomination process had not commenced and no candidate had not been cleared so far to vie. Support to that end was derived from the decision in Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & another HCCP 628 of 2014 [2015] eKLR, where the Court cited the case of Patrick Ouma Onyango & 12 others v AG & 2 others Misc Appln No 677 of 2005 where the author described the doctrine of justiciability as stated by Lawrence H. Tribe in his treatise American Constitutional Law, 2nd Ed Page 92 as follows: -

In order for a claim to be justiciable as an article III matter, it must present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted.

41. The 1st respondent further submitted that the petition did not disclose a cause of action since it is based on misinterpretation of the Retirement Act. It was its case that according to section 4 of the said Act, there is no intention for persons under section 3 to be lifelong public officers as the same provides for the instances when the provisions of the Act will not apply to the entitled persons under the Act.

42. It urged that the petition be dismissed with costs.

The 2nd Respondent's case:

43. The 2nd respondent, Raila Odinga, opposed the petition through grounds of opposition dated April 12, 2022 and cross-petition dated April 20, 2022.

44. It was his case under that article 38 of the Constitution, the 2nd, 3rd and 4th interested parties have the right to offer their candidature to positions of governance in a political party in Kenya.

45. He posited that under articles 137 and 260 of the Constitution, the 2nd, 3rd and 4th respondents are neither public officers nor state officers and do not hold any such state office or public office and that the petition was mounted on misconstruction of the Retirement Act.

46. It was his position that as per section 8 of Retirement Act, an advisory and consultative function to the government and the people of Kenya is not a public office function.

47. He further stated that under section 4 of Retirement Act, a beneficiary is entitled to attain the status of entitled persons only upon retiring or leaving the designated public office. He submitted that section 4(2) recognizes and appreciates the 1st, 2nd, 3rd and 4th respondents that entitled persons can



simultaneously hold an elective post in government and still access and receive benefits under the [Retirement Act](#).

48. In the end the 1st respondent stated that the petition and the application was fatally defective and an abuse of court process and ought to be dismissed with costs.

The Submissions:

49. In his written submissions dated May 11, 2022, the 2nd respondent submitted on the first instance that in light of articles 87 and 88 of the [Constitution](#) as read with section 74 of the [Elections Act](#), the Petitioners had prematurely invoked the court's jurisdiction.
50. The 2nd respondent submitted that the 1st, 2nd, 3rd & 4th respondents were not yet candidates in the forthcoming general election.
51. The 2nd respondent faulted the lack of specificity of the petition and the defectiveness thereof for reliance of newspaper cuttings as evidence.
52. In reference to the petitioners' letter dated March 21, 2022 addressed to the Controller of Budget requesting for expenditures pursuant to [Retirement Act](#), the 2nd respondent submitted that the petitioners were in a fishing expedition to vex the respondents.
53. The 2nd respondent's take on the import of section 8 of the [Retirement Act](#) was that the position is without pay and is on ad hoc basis. It was submitted that under section 8(2), the retiree plays an optional role and attracts an unspecified reasonable allowance.
54. Based on the foregoing, it was his case that section 8 does not fit into the description of Public Officer under article 260 of the [Constitution](#) and, therefore, cannot bar him from running for President.
55. It was submitted further that under article 234 of the [Constitution](#), it is the Public Service Commission that has the power to make appointments such as that of the 2nd respondent as an advisor to the Government. It was his case that the [Retirement Act](#) was not self-executing.
56. On the foregoing, the 2nd respondent submitted that he had never been appointed or approved as a state or public officer.
57. It was submitted further that the only qualifications required of a President is as outlined in article 137(2) of the [Constitution](#) and that those preferred by petitioners are contrary to the spirit and tenure of articles 27, 28, 36, 38 and 20(1) & (2) of the [Constitution](#) requiring the Bill of Rights to apply to all and binds all state organs and persons to the greatest extent consistent with the nature of the right or freedom.
58. In reference to article 24 of the [Constitution](#) on limitation of rights, the 2nd respondent submitted that [Retirement Act](#) does not expressly or specifically limit the 2nd respondent's political rights under article 38 of the [Constitution](#).
59. According to the 2nd respondent, section 4(2) and 8 of the [Retirement Act](#) contemplated a double role for the entitled person as both a holder of an elective position and at the same time serving as an entitled person.
60. In the end, it was submitted that the petitioners had not demonstrated any prejudice they would suffer or stand to suffer should the orders sought be denied.
61. The 2nd respondent also made reference to several decisions and scholarly works in support of his case.



The 3rd Respondent's Case:

62. The 3rd respondent, Stephen Kalonzo Musyoka, opposed the application and the petition through grounds of opposition dated May 26, 2022.
63. It simply was its case that the application and the petition were misconceived, bad in law and devoid of merit as against him.
64. He urged the court to dismiss them for being grossly defective, scandalous and an abuse of the process of court.

The Submissions:

65. The 3rd respondent further urged its case through written submissions dated May 26, 2022.
66. It was his case that the court's jurisdiction has been invoked prematurely and the Petition is premised on a wrongful and erroneous interpretation and application of the provisions of Retirement Act, as read with the various provisions of the Constitution.
67. To that end, it was reiterated that the petition is an affront to the provisions of articles 87 and 88 of the Constitution of Kenya as read with section 74 of the Elections Act on the jurisdiction of the Commission to clear candidates, hear and determine any such disputes arising from such clearance and nomination.
68. It was his case that since he is yet to be cleared to participate in the forthcoming general election, objections and disputes that shall arise therein as a result of the clearance or rejection of their respective applications would only crystallize at that point.
69. In urging the court to interpret the Constitution as a whole, the 3rd respondent submitted that this court cannot read into article 137 as imposing a limit on the exercise of political rights under article 38 when applying the Retirement Act.
70. He was emphatic that the Retirement Act as read with the Constitution and the Public Service Commission Act, Public Appointments (Parliamentary Approval) Act No 33 of 2011, does not qualify him to be described as a public officer.
71. He stated that the petitioner's case was an attempt to limit his constitutional right under article 24. He relied on the decision in Okiya Omtatah Okoiti v Attorney General & another [2022] eKLR Nairobi High Court Petition E008 of 2022 where this court interpreted the said article in the following manner:
 - (52) From the reading of the above provision, it comes to the fore that a provision limiting the rights and fundamental freedoms as provided in the Bill of Rights must in essence, comply with article 24(1) and also article 24(2) of the Constitution and to the satisfaction of a Court, tribunal or other relevant authority. In other words, article 24(2) of the Constitution is as stand-alone provision which must be separately fulfilled regardless of compliance with article 24(1).
 - (53) Article 24(1) of the Constitution calls upon the satisfaction of the fact that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and taking into account the relevant factors as highlighted under the said sub-article.
 - (54) On the other hand, article 24(2) of the Constitution as a further requirement provides that even if a legislation fully complies with article 24(1) of the Constitution, it must, as a condition precedent to its validity, demonstrate that the legislation specifically expresses the intention to



limit that right or fundamental freedom and the nature and extent of the limitation among other requirements

72. The 3rd respondent finally urged the court to dismiss both the petition and the application with costs.

The 2nd Interested Party's case:

73. The 2nd interested party opposed the petition through the replying affidavit of Chrispine Owiye, the Director Legal and Public Affairs, deposed to on April 20, 2022.

74. He deposed that as per their Gazette Notice No 430 of January 20, 2022, the Commission had set between the May 29, 2022 and June 6, 2022 as the days for nomination of the presidential candidates election. Therefore, the Petition was premature, actuated with malice since the petitioners have been aware of the political activities that the 2nd, 3rd and 4th respondents have publicly engaged in and the provisions of section 12(1) of the Political Parties Act that bars public officers from being eligible to be a founding member of a political party but have never sought interpretation of the same until now when the respondent is preparing for general election.

75. It was his deposition that the Commission has set June 9, 2022 as the last day for lodging disputes relating to or arising from the nominations, which shall be determined within 10 days of lodging.

76. He deposed further that the Commission has the mandate to determine who has complied with the Constitution and the Electoral Laws to approve and qualify them to vie for a given electoral position.

77. On the foregoing, he stated that the petitioner was without any substantiation casting aspersions on IEBC and pre-empting a decision not yet made in respect of the 2nd, 3rd and 4th respondents.

78. It was his case that article 38 of the Constitution entitles the 2nd, 3rd and 4th Respondents to offer their candidature for elective positions.

79. Further, in reference to article 137 of the Constitution and the decision in Fredrick Otieno Outa v Jared Oduyo Okello & 4 others [2014] eKLR, it was his deposition that the 2nd, 3rd and 4th respondents are neither public officers nor state officers and neither do they hold any state or public office.

80. In the end, Mr Owiye deposed that even if the remuneration and benefits sustaining the entitled persons comes from the exchequer, they are neither public officer not state officers but retired public officers under Pensions Act whose pensions, gratuity and other allowances are charged on the Consolidated fund.

81. He therefore stated that the petition was a grave misconstruction and appreciation of Retirement Act.

82. He further deposed that section 8 of the Retirement Act is not a public office function whereas section 4(1) only entitles the beneficiaries under the Act to attain the status of entitled persons only upon retirement or leaving the designated public office.

83. He further urged his case by deposing that section 4(2) of the Retirement Act, recognizes an entitled person to simultaneously hold an elective post in government and still access and receive benefits under the Retirement Act.

84. In the end the 2nd interested party deposed that the petition is devoid of merit and ought to be dismissed with costs.

85. The 2nd interested party also filed written submissions dated May 16, 2022 wherein it reiterated the foregoing position and referred to several decisions in support of its position.



Issues for Determination:

87. On careful reading of the material presented before court by the parties including the submissions and the decisions referred to, this court discerns the following issues for determination: -
- (a) Whether the jurisdiction of the court has been properly invoked.
 - (b) In the event issue (a) is answered in the affirmative, a brief look at the principles of constitutional interpretation.
 - (c) Whether the Retirement Act created State offices and the holders thereof are State officers.
 - (d) Whether the entitled persons under the Retirement Act are public officers.
 - (e) Whether the entitled persons under the Retirement Act ought to have complied with section 43(5) of the Elections Act.
 - (f) Whether the Retirement Act limits the entitled persons' political rights.
88. I will deal with the issues in seriatim.

Analysis and Determination:

a. Whether the jurisdiction of the court has been properly invoked:

89. The jurisdictional contest in this matter is two-pronged. It was contended that the petition does not raise any constitutional issues for determination and that the dispute had not crystalized into one capable of being instituted before court, hence, it offended the principle of constitutional avoidance and ripeness.
90. The court will first look at whether there are any constitutional issues raised in this matter. Given the unique nature of constitutional petitions, courts, since the pre-2010 constitutional era, have variously emphasized the need for clarity of pleadings. See: Anarita Karimi Njeru v Republic [1979] KLR 154.
91. Upon the promulgation of the Constitution in 2010, the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly referred to as 'the Mutunga Rules') were later on enacted.
92. These rules make provision for the contents of petitions in rule 10 thereof.
93. Further, the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR had the following on constitutional petitions: -
- Although article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.
94. As to what a constitutional issue is, the South African Constitutional Court decision in Fredricks & other v MEC for Education and Training, Eastern Cape & others [2002] 23 ILJ 81 (CC) comes in



handy. The court, rightly so, delimited what it entails in light of the jurisdiction of a Constitutional Court as follows: -

the *Constitution* provides no definition of 'constitutional matter'. What is a constitutional matter must be gleaned from a reading of the *Constitution* itself: if regard is had to the provisions of... Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the *Constitution*, as well as issues concerning the status, powers and functions of an organ of State.... the interpretation, application and upholding of the *Constitution* are also constitutional issues. So too is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the *Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...

95. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the US *Constitution*.
96. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or the *Constitution* itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened or threatened and the manifestation of contravention or infringement.
97. In the words of Langa, J in *Minister of Safety & Security v Luiters*, [2007] 28 ILJ 133 (CC): -

... When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider constitutional rights and values...
98. I have perused the petition in this matter. It, no doubt, complies with rule 10(1) and (2) of the *Mutunga Rules* as well as the requirements in *Communications Commission case* (*supra*).
99. A reading of the Petition brings forth the contention as to whether articles 1, 2, 10, 38, 47, 137 and 201 of the *Constitution* as read with section 43(5) of the *Elections Act*, Section 12(1) of the *Political Parties Act* and sections 3 and 4 of the *Retirement Act* bar the 2nd to 4th respondents, who are alleged to be State and public officers, from being nominated to any position in the forthcoming General election having not resigned 6 months to the said election.
100. In the main, the petition, therefore, calls for the interpretation of the *Constitution* and the law as opposed to a mere application thereof. As such, the provision of article 165(3)(d) of the *Constitution* is readily triggered. Under article 165(3)(d) of the *Constitution*, it is only the High Court which has the jurisdiction to interpret the *Constitution*.
101. The foregoing finding, therefore, settles both aspects of the jurisdictional challenge. Given that the petition calls for the interpretation of the *Constitution*, then the contention that the dispute is not ripe for adjudication before a court of law is not merited.
102. As was held by the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others* (2012) eKLR that the jurisdiction of a court is conferred by either the *Constitution*



or the law, in this instance, it is the Constitution which confers this court with the jurisdiction over the petition herein.

103. This court, therefore, finds and hold, that the court is seized of the jurisdiction over the matter. For clarity, the petition raises constitutional issues for this court's interpretation and, as such, the court is not barred by the doctrine of constitutional avoidance or ripeness.

104. Having so found, and since the first issue is now answered in the affirmative, I will deal with the rest of the issues.

b. The principles of constitutional interpretation:

105. This issue will lay a solid basis for consideration of the rest of the issues.

106. The High Court in David Ndi & others v Attorney General & others [2021] eKLR (famous referred to as 'the BBI case') captured with precision the manner in which our transformative Constitution ought to be interpreted. The Learned Judges presented themselves thus: -

399. One of the imports of recognition of the nature of the transformative character of our Constitution is that it has informed our methods of constitutional interpretation. In particular, the following four constitutional interpretive principles have emerged from our jurisprudence:

- a) First, the Constitution must be interpreted holistically; only a structural holistic approach breathes life into the Constitution in the way it was intended by the framers. Hence, the Supreme Court has stated in *In the Matter of the Kenya National Commission on Human Rights*, Supreme Court Advisory Opinion Reference No 1 of 2012; [2014] eKLR thus (at paragraph 26):

But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances.

- b) Second, our Transformative Constitution does not favour formalistic approaches to its interpretation. It must not be interpreted as one would a mere statute. The Supreme Court pronounced itself on this principle in *Re Interim Independent Election Commission* [2011] eKLR, para [86] thus:

The rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles 20(4) and 259(1)). the Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. the Constitution has a most modern Bill of Rights, that envisions a human rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in article 10, in chapter 6, and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the courts.



c) Third, the Constitution has provided its own theory of interpretation to protect and preserve its values, objects and purposes. As the Retired CJ Mutunga expressed in his concurring opinion in *In Re the Speaker of the Senate & another v Attorney General & 4 others*, Supreme Court Advisory Opinion No 2 of 2013; [2013] eKLR. (paragraphs 155-157):

(155) In both my respective dissenting and concurring opinions, *In the Matter of the Principle of Gender Representation in the National Assembly and Senate*, Sup Ct Appl No 2 of 2012; and *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai and 4 others* Sup Ct Petition No 4 of 2012, I argued that both the Constitution, 2010 and the Supreme Court Act, 2011 provide comprehensive interpretative frameworks upon which fundamental hooks, pillars, and solid foundations for the interpreting our Constitution should be based. In both opinions, I provided the interpretative coordinates that should guide our jurisprudential journey, as we identify the core provisions of our Constitution, understand its content, and determine its intended effect.

(156) The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the court to illuminate legal penumbras that Constitution borne out of long drawn compromises, such as ours, tend to create. The constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the court as the searchlight for the illumination and elimination of these legal penumbras.

d) Fourthly, in interpreting Constitution of Kenya, 2010, non-legal considerations are important to give its true meaning and values. The Supreme Court expounded about the incorporation of the non-legal considerations and their importance in constitutional interpretation in the *Communications Commission of Kenya* case. It stated thus:

(356) We revisit once again the critical theory of constitutional-interpretation and relate it to the emerging human rights jurisprudence based on Chapter Four – The Bill of Rights – of our Constitution. The fundamental right in question in this case is the freedom and the independence of the media. We have taken this opportunity to illustrate how historical, economic, social, cultural, and political content is fundamentally critical in discerning the various provisions of the Constitution that pronounce on its theory



of interpretation. A brief narrative of the historical, economic, social, cultural, and political background to articles 4(2), 33, 34, and 35 of our Constitution has been given above in paragraphs 145-163.

(357) We begin with the concurring opinion of the CJ and President in *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others*, Supreme Court Petition No. 2B of 2014 left off (see paragraphs 227- 232). In paragraphs 232 and 233 he stated thus:

(232) ...References to Black's Law Dictionary will not, therefore, always be enough, and references to foreign cases will have to take into account these peculiar Kenyan needs and contexts.

(233) It is possible to set out the ingredients of the theory of the interpretation of the Constitution: the theory is derived from the Constitution through conceptions that my dissenting and concurring opinions have signalled, as examples of interpretative coordinates; it is also derived from the provisions of Section 3 of the Supreme Court Act, that introduce non-legal phenomena into the interpretation of the Constitution, so as to enrich the jurisprudence evolved while interpreting all its provisions; and the strands emerging from the various chapters also crystallize this theory. Ultimately, therefore, this court as the custodian of the norm of the Constitution has to oversee the coherence, certainty, harmony, predictability, uniformity, and stability of various interpretative frameworks dully authorized. The overall objective of the interpretative theory, in the terms of the Supreme Court Act, is to “facilitate the social, economic and political growth” of Kenya.

400. With these interpretive principles in mind, which we will call the Canon of constitutional interpretation principles to our Transformative Constitution, we will presently return to the transcendental question posed in these consolidated petitions.....

107. With such a background, a consideration of the next issue follows.

c. Whether the Retirement Act created State offices and the holders thereof are State officers:

108. To sufficiently deal with this issue, I will look at what a state office is and how it is created.

What is a State office?

109. Article 260 of the Constitution defines a State office as follows: -

“State office” means any of the following offices-

- (a) President;
- (b) Deputy President;
- (c) Cabinet Secretary;
- (d) Member of Parliament;
- (e) Judges and Magistrates;
- (f) Member of a Commission to which Chapter Fifteen applies;



- (g) Holder of an independent office to which Chapter Fifteen applies;
- (h) Member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government;
- (i) Attorney-General;
- (j) Director of Public Prosecutions;
- (k) Secretary to the Cabinet;
- (l) Principal Secretary;
- (m) Chief of the Kenya Defence Forces;
- (n) Commander of a service of the Kenya Defence Forces;
- (o) Director-General of the National Intelligence Service;
- (p) Inspector-General, and the Deputy Inspectors-General, of the National Police Service; or
- (q) an office established and designated as a State office by national legislation;

110. A State officer has been defined as a person holding a State office.

111. Looking at the State offices listed above, there is no doubt that a State office is such a senior office in Kenya and so a State officer.

The creation of a State office:

112. From the reading of article 260 of the Constitution, there are two ways in which a State office is established. The first way is when such an office is expressly provided for and established as a State office under the Constitution.

113. The other way is where an office is established and designated as a State office by national legislation. In other words, a county legislation cannot create a State office.

114. In this case, it is readily admitted that the Constitution does not create any of the offices under the Retirement Act as State offices or at all. The contention by the Petitioners is, however, that it is instead the Retirement Act which creates a State office.

115. A look at the Retirement Act, therefore, becomes inescapable.

116. The Preamble of the Retirement Act describes it as follows: -

An act of Parliament to provide for the granting of pension and other retirement benefits to persons who hold the office of the Deputy President and persons who have served as Prime Minister, Vice-President or Speaker, Deputy Chief Justice or Chief Justice after the January 1, 1993, and for connected purposes.

117. From the Preamble, the Retirement Act's purpose is to make provisions for pension and other retirement benefits for some entitled persons.

118. Whereas the Retirement Act does not define what pension is, it describes 'benefits' to mean pension and other retirement benefits conferred by the Retirement Act.



119. The *Black's Law Dictionary*, 10th Edition, defines 'pension' at page 1315 as follows: -
1. A regular series of payments made to a person (or the person's representatives or beneficiaries) for past services or some type of meritorious work done; esp., such a series of payments made by the government.
 2.
 3. A fixed sum paid regularly to a person (or to the person's beneficiaries), esp. by an employer as a retirement benefit.
 4.
 5.
 6.
120. Section 2 of the *Retirement Act* defines an "entitled person" to mean any of the persons specified in section 3 thereof. Those persons are provided as follows: -
3. Persons entitled to benefits:
 Subject to sections 5(3) and 15, the persons entitled to the benefits conferred by this Act shall be persons who—
 - (a) at any time after the January 1, 1993, retire as Deputy President, Prime Minister, Vice-President or Speaker; or
 - (b) at any time after the August 27, 2010, retire as Chief Justice or Deputy Chief Justice.
121. Section 5(3) of the *Retirement Act* provides for instances where an entitled person dies in service after the commencement of the Act whereas section 15 is on an entitled person's official funeral.
122. According to the petitioners, the state offices under the *Retirement Act* are created in sections 8 and 12 thereof, and as follows: -
8. Role of entitled person:
 - (1) An entitled person shall be expected to play a consultative and advisory role to the government and the people of Kenya.
 - (2) An entitled person may be requested by the government to perform, subject to his or her concurrence, specific official functions and shall be paid a reasonable allowance in respect of such official functions.
 12. Staff:
 The professional and other staff required to be provided for an entitled person under the First Schedule shall be public officers, but no person shall be appointed or posted to serve on such staff except with the concurrence of the entitled person and such staff shall, in the performance of their duties, be responsible only to the entitled person.
123. Returning to the issue at hand, this court will now draw a parallel between the way the *Constitution* variously created and established State offices, on one hand, and the manner in which the *Retirement Act* allegedly so created the State offices, on the other hand. For avoidance of doubt, the said State offices under the *Retirement Act* are the ones vested with the consultative and advisory roles to



the Government and the people of Kenya. The offices may loosely be referred to as ‘The Office of Government Advisor/Consultant’.

124. the Constitution requires any national legislation intent on creating a State office to establish and designate such an office as a State office. In other words, the intention to create a State office must be clear in the legislation. I say so because, a look at the State offices created under article 260 reveal that the Constitution was very deliberate and express in creating such offices.
125. the Constitution did not just give a name to a State office. No. It went further and provided for the tenure of the holders, how the holders of will ascend into office and the removal of the holder, among others.
126. Further, a careful consideration of the State offices created under article 260 of the Constitution shows that the holders of those offices are either appointed, nominated or elected. The functions of the office are also provided. For instance, article 132 of the Constitution provides the functions of the President. Articles 136 to 138 inclusive of the Constitution provides the process in which the President is elected into office. Article 142 is on the term of the President whereas article 144 is on the removal of the President from office.
127. A further example is the Director of Public Prosecutions. Article 157 of the Constitution provides how the Director is nominated and with the approval of the National Assembly, appointed by the President. The powers and function of the Director are also provided for as well as the term of office. Article 158 of the Constitution provides for the removal and resignation of the Director.
128. Another example are the Judges of the superior Courts. Article 166 is on the appointment of Chief Justice, Deputy Chief Justice and the rest of the Judges. Article 167 is on the tenure of office of the judges whereas article 168 is on the removal of Judges from office.
129. There is also article 74 of the Constitution which provides for all State officers to take and subscribe to an oath or affirmation of office. The provision states as follows: -
 74. Oath of office of State officers:

Before assuming a State office, acting in a State office, or performing any functions of a State office, a person shall take and subscribe the oath or affirmation of office, in the manner and form prescribed by the Third Schedule or under an Act of Parliament.
130. The above trend is common to all State offices created under the Constitution. It, therefore, behoves any national legislation intent on creating a State office to likewise do so with precision and without ambiguity. The statute must be clear that it is creating a State office.
131. Having said so, it can be deduced that any national legislation creating a State office must certainly provide for at least the following: -
 - (i) The intention to create a State office;
 - (ii) The name of the State office;
 - (iii) The functions of the State office;
 - (iv) The manner in which the holder of the office ascends into office;
 - (v) The qualifications of the holder of the office;
 - (vi) The tenure of the holder;



- (vii) The oath or affirmation to be taken and subscribed to;
 - (viii) The removal and resignation from office;
132. Applying the foregoing to the *Retirement Act*, what comes to fore and, in the first instance, is that the *Retirement Act* did not provide in its Preamble or otherwise that it created and established a State office.
133. The closest the *Retirement Act* may be said to have come to naming an office is in sections 8 and 12 thereof. The said provisions have already been referred to above.
134. Going further in demonstrating the ineptitudeness of the *Retirement Act* to create State offices, suffice to say that it is a fact that the *Retirement Act* deals with retired persons who are described as ‘entitled persons.’ Those persons were, prior to their respective retirements, holders of offices. However, unlike the *Constitution*, the *Retirement Act* fails to attach names to the alleged State offices.
135. As to whether the functions of the alleged State offices are provided for, section 8 of the *Retirement Act* has it that an entitled person shall be expected to play a consultative and advisory role to the Government and the people of Kenya. The exact nature of the consultative and advisory role is not provided for.
136. Further, the *Retirement Act* fails to make provision for the manner in which the holder of the office may be removed from office or how one resigns from office.
137. It is also the position that the *Retirement Act* does not provide for the holders to take and ascribe to oaths or affirmations prior to assuming such offices.
138. By, therefore, placing the foregoing requirements and the provisions of the *Retirement Act* side by side, it is apparent that the *Retirement Act* neither intended to create and establish any State office nor created any such office.
139. In the end, this court finds and hold that the *Retirement Act* neither established nor designated any State office. Consequently, the entitled persons under the *Retirement Act* are not State officers.

d. Whether the entitled persons under the *Retirement Act* are public officers:

140. Article 260 of the *Constitution* defines a public officer to mean any State officer or any person, other than a State officer, who holds a public office.
141. the *Constitution* further defines a public office as follows: -
- “public office” means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament;
142. The Supreme Court in Petition No. 6 of 2014 *Frederick Otieno Outa v Jared Odoyo Okello & 4 others* [2014] eKLR discussed who a public officer is at great length. The Court referred to several legislations and, in the end, stated as follows: -
- (148) Strictly speaking, the proper meaning of “public officer”, for purposes of the electoral law, is that embodied in article 260 of the *Constitution* as read together with section 2 of the *Elections Act*. The different definitions in other statutory provisions, such as those enumerated earlier on, ought not to take precedence over the said constitutional provision. And thus, the proper meaning of “public officer” currently is:



- (i) the person concerned is a State officer; or
- (ii) any other person who holds “public office” – an office within the national government, county government, or public service;
- (iii) a person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer.

(Emphasis added)

143. The apex court, hence, brought out two categories of public officers. They are: -

- (i) A State officer; or
- (ii) any other person who holds “public office” – an office within the national government, county government, or public service and which office is sustained in terms of remuneration and benefits from the public exchequer.

144. In this case, it has already been demonstrated that the *Retirement Act* did not create any State office and that the entitled persons are not State officers. As such, the entitled persons are not public officers to the extent that they are not State officers.

145. Could the entitled persons, therefore, be public officers by virtue of the second category of public officers?

146. Under the second category, a person is a public officer if that person holds an office within the national government, county government, or public service and the office is sustained in terms of remuneration and benefits from the public exchequer.

147. I will consider the three limbs as under.

Whether the entitled persons are holders of offices in the National Government:

148. One of the sterling governance changes in Kenya courtesy of the 2010 Constitution is the manner in which the country is governed.

149. the *Constitution* created two levels of government. Article 6 of the *Constitution* provides for devolution and access to services in the following manner: -

1. The territory of Kenya is divided into the counties specified in the First Schedule.
2. The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation.
3. A national State organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service.

150. Whereas a County government is in-charge of the affairs and governance of a specific county, on one hand, the National government, on the other hand, is vested with the affairs of the whole country. Of importance is that both levels of governments are called-out to conduct their mutual relations on the basis of consultation and cooperation.

151. In the fourth schedule, the *Constitution* sets out the functions of both governments. Part 1 deals with the functions of the National government whereas Part 2 is on the functions of the County governments.



152. The functions of the National government assume a national character and the National government is called upon to ensure that such functions are reasonably accessible throughout all parts of the Republic.
153. There are also some functions which are shared between the two Governments.
154. Given the nature of the national government and to enable smooth discharge of services, Parliament enacted the [National Government Co-ordination Act](#), No. 1 of 2013. The legislation is An Act of Parliament to establish an administrative and institutional framework for co-ordination of national government functions at the national and county levels of governance, to give effect to Articles 131(1) (b) and 132(3)(b) of the [Constitution](#) and for connected purposes.
155. Looking at chapter 9 of the [Constitution](#) and the [National Government Co-ordination Act](#), it comes out that the National government is comprised of the National executive and all the other offices that enable the National executive to discharge its functions throughout the country.
156. Whereas the [Constitution](#) provides for the composition of the National executive, there are legislations which provide for the rest of the offices in support of the National executive.
157. One of such legislations is the [National Government Co-ordination Act](#). In section 15, the Act states as follows: -
15. Recruitment and appointment of the national government administrative officers:
- (1) In accordance with the national government functions under the [Constitution](#), this Act or any other written law, the Public Service Commission shall, in consultation with the Cabinet Secretary, recruit and appoint national government administrative officers to coordinate national government functions and to perform such other functions as may be assigned to them under this Act or any other law.
- (2) Pursuant to subsection (1), the Public Service Commission shall appoint—
- (a) a county commissioner in respect of every county;
- (b) a deputy county commissioner in respect of every sub-county;
- (c) an assistant county commissioner in respect of every ward;
- (d) a chief in respect of every location;
- (e) an assistant chief in respect of every sub-location; and
- (f) any other national government administrative officer in respect of a service delivery unit established under section 14.
158. Section 14 of the [National Government Co-ordination Act](#) makes the following provision: -
14. Service delivery co-ordination units:
- (1) The Cabinet Secretary may, with the approval of the President and by a notice in the Gazette, establish national government service delivery co-ordination units.
- (2) In establishing the national government service delivery co-ordination units, the Cabinet Secretary shall accord and respect the county government decentralised units established under section 48 of the [County Government Act](#), 2012 (No 17 of 2012).



- (3) Where a county government has not decentralised its units pursuant to section 48(1)(e) of the *County Government Act*, 2012, the national government may, where necessary, establish its own service delivery co-ordination units for purposes of co-ordination of national government functions.
- (4) For purposes of this section, the locations and sub-locations in existence immediately before the commencement of this Act shall continue to exist as national government service delivery units.
- (5) The national government service delivery co-ordination units established under this section shall be headed by national government administrative officers appointed under section 15.

159. As stated elsewhere above, there are many other legislations that provide for many other positions in the national government.
160. In this case, the petitioners contended that the entitled persons under the *Retirement Act* are Advisors to the National government and as such their offices are in the Office of the President. It was further contended that all the affairs of the entitled persons are co-ordinated under the Office of the President.
161. This court has considered several legislations which provide for various positions in the national government, the county governments and in the public service in general. Again, the court noted some common trends in such positions.
162. Since I will later deal with the public service, I opt to hold the discussion under the current sub-issue as well as on whether the entitled persons are holders of offices in the county governments with a view of dealing with all related issues at once under the consideration of whether the entitled persons hold offices in the public service.
163. With such a direction, I will now consider whether the entitled persons are holders of offices in the public service.

Whether the entitled persons are holders of offices in the public service:

164. Under article 260, the *Constitution* defines ‘public service’ as follows:

“public service” means the collectivity of all individuals, other than State officers, performing a function within a State organ.
165. A ‘State organ’ is constitutionally-defined as follows: -

“State organ” means a commission, office, agency or other body established under this Constitution.
166. the *Constitution* makes further provisions for the public service under chapter 13 thereof.
167. Article 232 of the *Constitution* makes provision for the values and principles of public service as under: -
 - (1) The values and principles of public service include-
 - (a) high standards of professional ethics;
 - (b) efficient, effective and economic use of resources;
 - (c) responsive, prompt, effective, impartial and equitable provision of services;



- (d) involvement of the people in the process of policy making;
- (e) accountability for administrative acts;
- (f) transparency and provision to the public of timely, accurate information;
- (g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;
- (h) representation of Kenya's diverse communities; and
 - (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—
 - (i) men and women;
 - (ii) the members of all ethnic groups; and
 - iii. persons with disabilities.
- (2) The values and principles of public service apply to public service in-
 - (a) all State organs in both levels of government; and
 - (b) all State corporations.
- (3) Parliament shall enact legislation to give full effect to this article.

168. In chapter 15, the *Constitution* provides for Commissions and Independent offices. It is article 249 that provides for the objects of the Commissions and Independent offices, and in the following manner: -

- (1) The objects of the commissions and the independent offices are to-
 - (a) protect the sovereignty of the people;
 - (b) secure the observance by all State organs of democratic values and principles; and
 - (c) promote constitutionalism.
- (2) The commissions and the holders of independent offices-
 - (a) are subject only to this Constitution and the law; and
 - (b) are independent and not subject to direction or control by any person or authority.
- (3) Parliament shall allocate adequate funds to enable each commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote.

169. In article 252, the *Constitution* accords the Commissions and independent offices more powers and functions. They are vested with the power to conduct investigations on their own initiatives or on complaints made by a member of the public, the powers necessary for conciliation, mediation and negotiation and the power to recruit their own staff. The Commissions and independent offices may also perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by the *Constitution*.

170. From the foregoing, it is apparent that the constitutional design in Kenya is such that the Commissions and Independent offices are key drivers of the *Constitution*. They not only protect the sovereignty of



the people and secure the observance by all State organs of democratic values and principles, but also promote constitutionalism.

171. In order to achieve the objects, the Constitution guarantees each Commission and Independent office institutional and financial independence by declaring that each of them is only subject to the Constitution and the law and further that they are independent and not subject to the direction or control by any person or authority.
172. The financial independence is guaranteed by the Constitution in directing Parliament to allocate the entities adequate funds.
173. With such a well-guarded constitutional posture, the Commissions and independent offices are properly positioned to attain their objectives and with the result that constitutionalism permeates every corner of our country. Indeed, the Commissions and independent offices are key drivers of constitutionalism.
174. Article 248 of the Constitution lists the various Commissions and independent offices in Kenya. They are 10 Commissions and 2 independent offices.
175. Of relevance to the discussion at hand is the Public Service Commission (hereinafter referred to as ‘the PSC’).
176. The PSC is established under article 233 of the Constitution. Sub-articles 1 thereof establishes the PSC. Sub-articles 2, 5 and 6 thereof are on the composition of PSC whereas sub-articles 3 and 4 are on the eligibility for appointment as a Commissioner.
177. The functions and powers of the PSC are provided for in article 234(1) and (2) as follows: -
 - (1) The functions and powers of the Commission are as set out in this Article.
 - (2) The Commission shall-
 - (a) subject to this Constitution and legislation-
 - i. establish and abolish offices in the public service; and
 - (ii) appoint persons to hold or act in those offices, and to confirm appointments;
 - (b) exercise disciplinary control over and remove persons holding or acting in those offices;
 - (c) promote the values and principles referred to in articles 10 and 232 throughout the public service;
 - (d) investigate, monitor and evaluate the organisation, administration and personnel practices of the public service;
 - (e) ensure that the public service is efficient and effective;
 - (f) develop human resources in the public service;
 - (g) review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service;
 - (h) evaluate and report to the President and Parliament on the extent to which the values and principles referred to in articles 10 and 232 are complied with in the public service;
 - (i) hear and determine appeals in respect of county governments’ public service; and



- (j) perform any other functions and exercise any other powers conferred by national legislation.

178. Sub-articles 3 and 4 limits the powers of PSC in the following manner: -

- (3) Clauses (1) and (2) shall not apply to any of the following offices in the public service—
 - (a) State offices;
 - (b) an office of high commissioner, ambassador or other diplomatic or consular representative of the Republic;
 - (c) an office or position subject to—
 - (i) the Parliamentary Service Commission;
 - (ii) the Judicial Service Commission;
 - (iii) the Teachers Service Commission;
 - (iv) the National Police Service Commission; or
 - (d) an office in the service of a county government, except as contemplated in clause (2)(i).
- (4) The Commission shall not appoint a person under clause (2) to hold or act in any office on the personal staff of the President or a retired President, except with the consent of the President or retired President.

179. On delegation of the powers of the PSC, article 234(5) states as follows: -

The Commission may delegate, in writing, with or without conditions, any of its functions and powers under this article to any one or more of its members, or to any officer, body or authority in the public service.

180. The legislation contemplated under article 232(3) of the *Constitution* include the *Public Service Commission Act*, No 10 of 2017 (hereinafter referred to as ‘the PSC Act’).

181. The scope and application of the *PSC Act* is provided for in Section 3 as follows: -

Subject to articles 155(3)(a), 158(3), 234(2)(a), 234(3) and 252(1) of the *Constitution* and section 28 of the *Kenya Defence Forces Act* (No. 25 of 2012), this Act shall apply to all public bodies and persons holding office in the public service.

182. Section 4 of the *PSC Act* is on the guiding principles and is tailored as under: -

The Commission shall in fulfilling its mandate, be guided by the national values and principles of governance in article 10 of the *Constitution* and the values and principles of public service in article 232 of the *Constitution*.

183. This Court had an occasion to, and discussed at length, how public offices are established in Kenya. That was in Nairobi High Court Petition No. 33 of 2018 (consolidated with Petition No 42 of 2018) *Okiya Omtatah Okiiti & Another v Public Service Commission & others* [2021] eKLR.

184. This Court rendered itself as follows: -



136. Returning to the procedure for establishment of an office in public service, the *PSC Act*, further to article 132(4)(a) of the *Constitution*, provides for other procedural requirements. Part IV of the *PSC* is on Establishment and Abolition of Offices in the Public Service.
137. Given the centrality of Part IV of the *PSC Act* in the process, I will reproduce the same save for section 28 which deals with abolition of a public office. The other sections of Part IV states as follows: -
25. This part shall apply in the exercise of the Commission's constitutional function to establish and abolish offices in the public service under article 234(2)(a) of the *Constitution*.
26. For the purpose of this Part, "establishment of offices in the public service" means the determination and creation of the number and kinds of offices in the public service.
- 27.
- (1) The Commission may establish an office in the public service after receipt of a written request by an authorized officer of a public body if the Commission is satisfied that —
- (a) the request is based on comprehensive plans informed by the public body's workload analysis;
 - (b) the financial implications of creating the office are indicated;
 - (c) the office to be created relates to or supports the core functions of the public body;
 - (d) the office to be created is to be domiciled in the requesting public body;
 - (e) information on the current authorized establishment, level of grading, designation, extra posts required and evidence of optimum utilization of existing posts has been submitted;
 - (f) the office including its level of grading, qualification and remuneration shall not disadvantage similar offices in the public service or occasion unfair competition for staff among public bodies; and
 - (g) the functions of the office to be established are consistent with the *Constitution* or any other legislation.
- (2) The written request for establishment of an office shall include a statement by the respective authorized officer verifying that the conditions in subsection (1) have been met.
28.
- 29.
- (1) Subject to the provisions of this Part, the Commission may on its own motion establish or abolish any office in the public service.
- (2) The Commission shall, before establishing or abolishing an office under subsection (1), give the authorized officer of the concerned public body an



opportunity to make representation in respect of the action to be taken under subsection (1).

- (3) The Commission's decision to act on its own motion shall be based on the need to facilitate improvement in service delivery and shall comply with the conditions prescribed in section 28.

30.

- (1) Where the President, under article 132(4)(a) of the *Constitution*, requests the Commission to recommend the establishment of an office in the public service, the Commission shall act in accordance with the conditions provided for in this Part.
- (2) Where the President considers it necessary to establish an office in the public service under article 132(4)(a) of the *Constitution*, a request to the Commission for recommendation for establishment of an office shall be in writing.

138. There are, therefore, three ways in which an office may be established in the public service. The first way is by the President under article 132(4)(a) of the *Constitution*. The second way is by an authorized officer of a public body under section 27(1) of the *PSC Act* and the third way is by the PSC on its own motion under section 29 of the PSC Act. In this matter, the establishment of the impugned public office of the CAS was by the President.
185. Drawing from the foregoing, the 'Office of the Government Advisor/Consultant' in the *Retirement Act* seems not to be an office established in the public service. I say so because the office was not established by the President under article 132(4)(a) of the *Constitution*, neither was it established by an authorized officer of any public body under section 27(1) of the *PSC Act* nor was it established by the PSC on its own motion and in accordance with section 29 of the *PSC Act*.
186. As a result, this court finds and hold that the 'Office of the Government Advisor/Consultant' in the *Retirement Act* is not an office established in the public service.
187. Having so found, and going back to the consideration as to whether the office in the *Retirement Act* is an office in the National government, suffices to say that section 15 of the *National Government Co-ordination Act* requires any recruitment and appointment of National government officers to be undertaken by the PSC except where the *Constitution* and the law expressly provides otherwise.
188. The *PSC Act* provides the manner in which it recruits public officers. In doing so, it must comply with the *Constitution* and the law. In this case, there is no evidence that the holders of the 'Office of the Government Advisor/Consultant' in the *Retirement Act* were ever recruited by the PSC into such offices. There is as well no evidence that the said holders are subject to the elaborate and complex requirements in the *PSC Act* and regulations made thereunder.
189. Further, it has also not been demonstrated that the PSC can exercise any mandate over the impugned offices as provided for in article 234(3) of the *Constitution*.
190. It, therefore, turns out that the 'Office of the Government Advisor/Consultant' in the *Retirement Act* is not an office in the National government.
191. As to whether the 'Office of the Government Advisor/Consultant' in the *Retirement Act* is an office in the County government, again there has been no such averment, neither has there been any contention to that end.



192. In fact, this Court recalls the position taken by the Petitioners to be that the impugned office is one in the national government.
193. This Court now returns the verdict that the ‘Office of the Government Advisor/Consultant’ in the Retirement Act is not an office in the County government.
194. Flowing from the above, it is apparent that the office created under the Retirement Act is not an office in the National government, neither is it an office in the County government, nor is it an office in the public service.
195. As I draw to the end of this issue, it is of paramount importance to point out that under article 260 of the Constitution, for an office to qualify as a public office, it must, in the first instance, be an office in the national government, a county government or in the public service. Once an office falls within any of the three categories then the issue of the source of the remuneration and benefits for purposes of running that office arises follows. The converse cannot hold.
196. In other words, the makers of the Constitution and the Kenyans at large were well aware that there may be some offices in our country which although they are funded from the Consolidated Fund or by money provided by Parliament, such offices do not fall within the national government, a county government or in the public service. Such offices would, therefore, not take up the constitutional character and definition of ‘public offices.’ An example at hand is the ‘Office of the Government Advisor/Consultant’ under the Retirement Act.
197. Having said so, and in the end, this Court finds and hold that the entitled persons under the Retirement Act are not public officers.

e. Whether the entitled persons under the Retirement Act ought to have complied with Section 43(5) of the Elections Act:

198. Section 43(5) of the Elections Act states as follows: -
43. Participation in elections by public officers
- (5) A public officer who intends to contest an election under this Act shall resign from public office at least six months before the date of election.
199. The above provision is meant to apply to public officers.
200. Given that this court has already found that the entitled persons under the Retirement Act are neither State officers nor public officers, the provision cannot apply to any of them.
201. This court, therefore, finds and hold that the requirement in section 43(5) of the Elections Act does not apply to the entitled persons under the Retirement Act.

f. Whether the Retirement Act limits the entitled persons’ political rights:

202. The subject of limitation of rights and fundamental freedoms is at the heart of the Constitution. Under articles 24 and 25, the Constitution robustly provides for the extent and the manner in which the rights and fundamental freedoms may be limited.
203. This court also acknowledges the submissions by the 2nd and 3rd respondents on the subject. Indeed, the submissions are detailed and have referred to relevant decisions and scholarly works.



204. This court has also had a sight of articles 24 and 25 of the Constitution in several decisions. The court has taken the position that any limitation of rights and fundamental freedoms must squarely fit within the four corners of article 24 of the Constitution.
205. In Petition No. 412 of 2019 Paragon Electronics Limited v Njeri Kariuki [2021] eKLR this court rendered as follows: -
49. Therefore, for a party to succeed in demonstrating that a limitation under article 24 of the Constitution cannot hold, that party must prove two ingredients. The first one is that no law on the impugned limitation has been passed. The second one is that, even though there is a law on the limitation, the limitation does not conform to the other requirements of article 24 of the Constitution.
206. In Petition No. E008 of 2022 Okiya Omtatah Okioti v Hon. Attorney General & Another [2022] eKLR this Court had the following to say:
52. From the reading of the above provision, it comes to the fore that a provision limiting the rights and fundamental freedoms as provided in the Bill of Rights must, in essence, comply with article 24(1) and also Article 24(2) of the Constitution and to the satisfaction of a Court, tribunal or other relevant authority. In other words, article 24(2) of the Constitution is a stand-alone provision which must be separately fulfilled regardless of compliance with article 24(1).
53. Article 24(1) of the Constitution calls upon the satisfaction of the fact that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and taking into account the relevant factors as highlighted under the said sub-article.
54. On the other hand, article 24(2) of the Constitution as a further requirement provides that even if a legislation fully complies with article 24(1) of the Constitution, it must, as a condition precedent to its validity, demonstrate that the legislation specifically expresses the intention to limit that right or fundamental freedom and the nature and extent of the limitation among other requirements.
207. The limitation of rights and fundamental freedoms by a legislation must also comply with the test laid in R v Oakes 1986 CanLII 46 (SCC), [1986] 1 SCR 103.
208. The brief facts are that the respondent, David Edwin Oakes, was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s 4(2) of the Narcotic Control Act, but was convicted only of unlawful possession. After the trial judge made a finding that it was beyond a reasonable doubt that the Respondent was in possession of a narcotic, the Respondent brought a motion challenging the constitutional validity of s. 8 of the Narcotic Control Act. That section provides that if the Court finds the accused in possession of a narcotic, the accused is presumed to be in possession for the purpose of trafficking and that, absent the accused's establishing the contrary, he or she must be convicted of trafficking. The Ontario Court of Appeal, on an appeal brought by the Crown, found that this provision constituted a "reverse onus" clause and held it to be unconstitutional because it violated the presumption of innocence now entrenched in s 11(d) of the Canadian Charter of Rights and Freedoms. The Crown appealed and a constitutional question was stated as to whether s. 8 of the Narcotic Control Act violated s 11(d) of the Charter and was therefore of no force and effect. Inherent in this question, given a finding that s 11(d) of the Charter had been violated, was the issue of whether or not s. 8 of the Narcotic Control Act was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society for the purpose of s 1 of the Charter.



209. The appeal was dismissed and the constitutional question answered in the affirmative. In so holding, the Supreme Court of Canada, then presided by the Chief Justice in a Seven-Judge bench discussed the criteria in ascertaining the manner in which a limitation to a right or fundamental freedom may be justified. The court came up with three-pronged criteria. First, the objective which the limitation is designed to serve. Second, the means chosen to attain the objective must be reasonable and demonstrably justified. This is the proportionality test. Third, the effect of the limitation.
210. On the objective test, the Supreme Court stated as follows: -
67. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R v Big M Drug Mart Ltd*, supra, at p 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
211. On the proportionality test, the Supreme Court stated that: -
70. Second, once a sufficiently significant objective is recognized, then the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R v Big M Drug Mart Ltd*, supra, at p 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R v Big M Drug Mart Ltd*, supra, at p 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".
212. On the third test, that is the effect of the limitation, the Supreme Court stated that: -
71. With respect to the third component, it is clear that the general effect of any measure impugned under s 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.



213. The rights allegedly limited in this case are *inter alia* political rights under article 38 of the Constitution. Since such rights are not among those which cannot be limited in any manner whatsoever under article 25 of the Constitution, then article 25 does not have any room in this discussion. That leaves article 24.
214. To enable the ease of this discussion further, i will reproduce the article 24 of the Constitution.
- (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: -
 - (a) the nature of the right or fundamental freedom;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
 - (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
 - (2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom: -
 - (a) in the case of a provision enacted or amended on or after the Limitation of rights and fundamental freedoms, effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;
 - (b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
 - (c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.
 - (3) The state or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this article have been satisfied.
 - (4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.
 - (5) Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service: -
 - (a) Article 31—Privacy;
 - (b) Article 36—Freedom of association;
 - (c) Article 37—Assembly, demonstration, picketing and petition;
 - (d) Article 41—Labour relations;
 - (e) Article 43—Economic and social rights; and



(f) Article 49—Rights of arrested persons.

215. This court will now juxtapose the provisions of article 24 of the *Constitution* and the criteria in *R v Oakes* with the provisions of the *Retirement Act* in deciding whether the *Retirement Act* limits the entitled persons' political rights.
216. In this case, there is a legislation in place. It is the *Retirement Act*. That is the legislation which is alleged to be limiting the rights and fundamental freedoms.
217. The next requirement is whether the *Retirement Act* specifically expresses the intention to limit the political rights, and if so, the nature and extent of the limitation.
218. This court has carefully perused the *Retirement Act*. The Act has no mention of any intention to limit any rights and/or fundamental freedoms. Given that there is no such intention, a consideration of whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom does not arise.
219. This court must emphasize that there can be no presumption of limitation of any rights and/or fundamental freedoms under the current constitutional dispensation in our country. Any limitation of rights and/or fundamental freedoms must be intentional.
220. Any legislation intending to limit rights and/or fundamental freedoms must be clear on such intention, the nature and extent of the limitation. Such legislation must fully comply with article 24 of the *Constitution*.
221. In this matter, despite the requirement in article 24(3) of the *Constitution* that the State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this article have been satisfied, it appears that the Petitioners did not raise to that calling. Unlike the Respondents who attempted to demonstrate to the court that the *Retirement Act* did not front any limitation, the Petitioners instead put a lot of premium on the preceding issues instead.
222. On that score, and with a view to demonstrate how a legislation ought to express the intention to limit a right or fundamental freedom, I will take a look at the *Access to Information Act*, No 31 of 2016.
223. The *Access to Information Act* is an Act of Parliament aimed at giving effect to article 35 of the *Constitution*; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes.
224. In section 4, the *Access to Information Act* provides for the right to information. The provision accords more life to article 35 of the *Constitution*.
225. Section 5 is on the disclosure of information by public entities. The provision is also quite elaborate.
226. Section 6 is on the limitation of right of access to information. The section elaborately provides as follows: -
6. Limitation of right of access to information:
- (1) Pursuant to article 24 of the *Constitution*, the right of access to information under article 35 of the *Constitution* shall be limited in respect of information whose disclosure is likely to—
- (a) undermine the national security of Kenya;



- (b) impede the due process of law;
 - (c) endanger the safety, health or life of any person;
 - (d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;
 - (e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;
 - (f) cause substantial harm to the ability of the Government to manage the economy of Kenya;
 - (g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;
 - (h) damage a public entity's position in any actual or contemplated legal proceedings; or
 - (i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.
- (2) For purposes of subsection (1)(a), information relating to national security includes—
- (a) military strategy, covert operations, doctrine, capability, capacity or deployment;
 - (b) foreign government information with implications on national security;
 - (c) intelligence activities, sources, capabilities, methods or cryptology;
 - (d) foreign relations;
 - (e) scientific, technology or economic matters relating to national security;
 - (f) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security;
 - (g) information obtained or prepared by any government institution that is an investigative body in the course of lawful investigations relating to the detection, prevention or suppression of crime, enforcement of any law and activities suspected of constituting threats to national security;
 - (h) information between the national and county governments deemed to be injurious to the conduct of affairs of the two levels of government;
 - (i) cabinet deliberations and records;
 - (j) information that should be provided to a State organ, independent office or a constitutional commission when conducting investigations, examinations, audits or reviews in the performance of its functions;
 - (k) information that is referred to as classified information in the *Kenya Defence Forces Act*; and



- (l) any other information whose unauthorized disclosure would prejudice national security.
- (3) Subsection (1)(d) and (e) shall not apply if a request for information relates to the results of any product or environmental testing, and the information concerned reveals a serious public safety or environmental risk.
- (4) Despite anything contained in subsections (1) and (2), a public entity or private body may be required to disclose information where the public interest in disclosure outweighs the harm to protected interests as shall be determined by a court.
- (5) A public entity is not obliged to supply information to a requester if that information is reasonably accessible by other means.
- (6) In considering the public interest referred in subsection (4), particular regard shall be had to the constitutional principles on the need to—
 - (a) promote accountability of public entities to the public;
 - (b) ensure that the expenditure of public funds is subject to effective oversight;
 - (c) promote informed debate on issues of public interest;
 - (d) keep the public adequately informed about the existence of any danger to public health or safety or to the environment; and
 - (e) ensure that any statutory authority with regulatory responsibilities is adequately discharging its functions.
- (7) Unless the contrary is proved by the public entity or private body, information is presumed not to be exempt if the information has been held for a period exceeding thirty years.

227. The [Access to Information Act](#) is, therefore, deliberate in its intention to limit the right to information.

228. As stated above, the [Retirement Act](#) fails the test of precision on the intention to limit any right or fundamental freedom. As further stated above, a limitation of a right or fundamental freedom cannot be implied, it must instead be specifically and intentionally provided for.

229. The totality of the foregoing discussion yields that the [Retirement Act](#) did not intend to limit any right or fundamental freedom provided for in the [Constitution](#).

Conclusions:

230. In this matter, the petitioners have failed to prove their case. However, there are a few conclusions and findings made in the course of the discussion. They are: -

- (a) That the [Retirement Act](#) neither established nor designated any State office. As such, the entitled persons under the [Retirement Act](#) are not State officers.
- (b) That although the [Retirement Act](#) created offices for the entitled persons, such offices are not offices in the National government, neither are they offices in the County government, nor are they offices in the public service. Consequently, the ‘Office of the Government Advisor/ Consultant’ created under the [Retirement Act](#) is not a public office and the entitled persons are not public officers.



- (c) Since the entitled persons under the *Retirement Act* are neither State officers nor public officers, the requirement under section 43(5) of the *Elections Act* requiring persons intending to contest in a General election to resign from public office at least six months before the date of election does not apply to the said entitled persons.
- (d) There may be some offices which although they are funded from the Consolidated Fund or by money provided by Parliament, such offices do not fall within the national government, a county government or in the public service. Such offices are, therefore, not public offices as defined under article 260 of the *Constitution*.
- (e) The *Retirement Act* is not intended to limit any right or fundamental freedom provided for in the *Constitution*.

Disposition:

231. As I come to the end of this judgement, I must point out that section 4 of the *Retirement Act* was declared unconstitutional in *Coalition for Reforms and Democracy (CORD) v Attorney General; International Institute for Legislative Affairs & another (Interested Parties)* [2019] eKLR where the High Court held as follows: -
- a. A declaration be and is hereby issued that section 4 of the *Retirement Benefits (Deputy President and designated State Officers) Act*, 2015 is unconstitutional on grounds that it offends articles 27, 38, 40, 47, 50 and 151(3) and 160(4) of the *Constitution*.
 - b. A declaration be and is hereby issued that section 4 of the *Retirement Benefits (Deputy President and designated State Officers) Act*, 2015 is unconstitutional on grounds that it offends the doctrine of separation of powers and the common law principles of ambiguity, uncertainty, vagueness, unreasonableness, double jeopardy and retrospective application.
 - c. As this was a public interest matter we make no orders as to costs.
232. It is for the above reason that I did not make any reference to the said Section 4 of the *Retirement Act* despite it having been variously referred to by the parties.
233. On the basis of, and flowing from, the foregoing, the Petition and the Notice of Motion evenly dated April 7, 2022 are not successful.
234. The petition and the notice of motion, be and are, hereby dismissed.
235. On costs, the order which commends in view of the petition being a public interest litigation aimed at furthering constitutionalism and the rule of law, is that each party bears its own costs.
236. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RDM DAY OF JUNE, 2022.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Kosgey and Mr. Muriuki, Learned Counsel for the Petitioners.

Miss Kiramana, Learned State Counsel instructed by the Honourable Attorney General for the 1st Respondent.



Mr. George Gilbert, Prof. Ben Sihanya, Miss Winnie Makaba, Mr. Ochieng Oginga and Miss. Celestine Anyango, Learned Counsel for the 2nd Respondent.

Mr. Simiyu and Mr. Kimengo, Learned Counsel for the 3rd Respondent.

Mr. Olendo, Learned Counsel for the 2nd Interested Party.

Jared Ouma – Court Assistant.

