



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTION PETITION NO. E004 OF 2020

UZALENDO INSTITUTE FOR LEADERSHIP AND DEMOCRACY...PETITIONER

-VERSUS-

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

THE SPEAKER OF THE NATIONAL ASSEMBLY.....2ND RESPONDENT

JUDGEMENT

1. The Petitioner, the Uzalendo Institute for Leadership and Democracy, filed a petition dated 3rd July, 2020, claiming that the procedure for the removal of a member of the Parliamentary Service Commission (‘PSC’) under Section 10 of the Parliamentary Service Act, 2019 (‘PS Act’) is different from the procedure for removal of commissioners of constitutional commissions under Article 251 of the Constitution and therefore contravenes Articles 27, 248, 251 and 259(1)(a) of the Constitution.

2. The Petitioner asserts that the procedure provided under Section 10 of the PS Act interferes with the independence of the PSC by granting Parliament so much powers in the removal of commissioners and denying the commissioners a secured tenure of office thus rendering the commissioners prone to intimidation and manipulation by Parliament thereby violating Article 251 of the Constitution.

3. The Petitioner therefore prays for:

a. A declaration that Section 10 of Parliamentary Service Act, 2019 is inconsistent with Article 251 of the Constitution of Kenya in so far as it provides a different mode of removal of members of the Parliamentary Service Commission than the one provided by the Constitution and therefore unconstitutional, illegal and null and void.

b. A declaration that the ruling of the Speaker of the National Assembly of 16th June 2020 contravenes Articles 248 and 251 of the Constitution thus null and void.

c. A declaration that any resolutions and decisions made pursuant to the provisions of Section 10 of the Parliamentary Service Act are null and void.

d. Any other relief that the Honourable Court deems fit to grant in the circumstances.

4. The 1st Respondent, the Attorney General, did not participate in the proceedings.

5. The 2nd Respondent, the Speaker of the National Assembly, filed a preliminary objection dated 12th August, 2020 seeking the dismissal of the petition on the grounds that the Petitioner is inviting the Court to interfere with the internal proceedings of Parliament contrary to the doctrines of separation of powers and political question; that the constitutionality of the entire PS Act was pending determination before a panel of three judges of this Court in Nairobi High Court Consolidated Constitution Petition No. 284 and 353 of 2019, The Senate of the Republic of Kenya & 5 others v The Speaker of the National Assembly of the Republic of Kenya & others (‘the Senate Petition’) and therefore the doctrine of *sub judice* applies to this petition; and, that the Petitioner lacked *locus standi* to complain in matters touching on the appointment or revocation of appointment of members of the PSC by virtue of Article 127(2)(c) & (d) as read together with Article 127(4)(b) of the Constitution, which state that only members of Parliament shall appoint or revoke the appointment of members of the PSC.

6. The 2nd Respondent also filed grounds of opposition dated 12th August, 2020 arguing that Article 251 of the Constitution on the removal

of members of commissions does not apply to the PSC; that the Constitution provides that Parliament shall have the last word on the appointment and revocation of appointment of the members of the PSC; and that Section 10 of the PS Act merely effects what the Constitution has expressly provided and cannot be said to be unconstitutional.

7. The Petitioner filed written submissions dated 27th July, 2020 and submits that the Constitution in Articles 127, 248 and 249 sets out the objects, authority and funding of the commissions and independent offices including the PSC. The Petitioner states that the procedure for removal of commissions under Article 251 ought to be followed in regard to the PSC.

8. The Petitioner relies on the cases of **Olum & another v Attorney-General [2002] EA** and **The Queen v Big M. Drug Mart Ltd, 1986 LRC (Const) 322** where the courts postulated on how to determine if an Act of Parliament is inconsistent with the Constitution. The Petitioner submits that the procedure laid down in the PS Act is a departure from Articles 127, 251 and 252 of the Constitution.

9. The Petitioner further relies on the principle that requires the Constitution to be interpreted holistically as espoused in **Paul Kawanga Ssemongere v Attorney General [2004] UGSC 10**; and **In the Matter of Kenya National Commission on Human Rights [2014] eKLR**.

10. In urging that Section 10 of the PS Act is inconsistent with the provisions of Article 127 of the Constitution, the Petitioner asserts that if the Constitution contemplated a scenario where a different procedure was to be followed in the removal of members of the PSC it would have provided otherwise.

11. The Petitioner contends that the PSC is not a *sui generis* commission as argued by the 2nd Respondent and should therefore be subjected to the removal procedure laid down in Article 251. The Petitioner submits that a finding by the Court that the PSC is indeed a *sui generis* commission, will go against the clear provisions of Article 248 of the Constitution.

12. The 2nd Respondent filed written submissions dated 12th August, 2020 and submits that this Court has no jurisdiction to determine the petition. It is asserted that this Court lacks jurisdiction as the petition questions the internal proceedings of Parliament, raises political questions and offends the principle of separation of powers.

13. The 2nd Respondent contends that the impugned communication, being the communication from the Chair of the National Assembly on the procedure for the revocation of the appointment of a member of the PSC, is part and parcel of the internal proceedings of the House and cannot be questioned. It is argued that the impugned communication is protected from judicial scrutiny by dint of Article 117 of the Constitution and the Parliamentary Powers and Privileges Act, 2017.

14. It is the 2nd Respondent's submission that the issues raised in the petition are political questions, which the Court lacks the jurisdiction to resolve as the same can only be resolved by Parliament. It is asserted that the impugned communication resolved a political question and this Court should not supervise or sit on appeal over the decisions of the Speaker of the National Assembly on procedural matters. The 2nd Respondent supports the submissions by citing the decisions in **Patrick Ouma Onyango & 12 others v Attorney General & 2 others [2005] eKLR**; **National Assembly of Kenya & another v Institute for Social Accountability & 6 others [2017] eKLR**; and **Speaker of the Senate & another v Attorney General & 4 others [2013] eKLR**.

15. The 2nd Respondent contends that the appointment and the revocation of the appointment of the members of the PSC falls within the operational independence of Parliament and therefore members of the public should not be allowed to interfere in the affairs of the PSC. It is averred that the Constitution has expressly reposed the mandate to preside over sittings of Parliament on the speakers of the two Houses and not in the courts. The assertions are supported by reference to the cases of **Pevans East Africa Limited & another v Chairman Betting Control & Licensing Board & 7 others [2018] eKLR**; and **In the matter of the National Land Commission [2015] eKLR**.

16. The 2nd Respondent further raises the argument that the question of the constitutionality of the entire PS Act is pending before the Court in the Senate Petition and the 2nd Respondent is a party to that matter. It is therefore the 2nd Respondent's assertion that the *sub judice* doctrine is applicable to this petition.

17. The 2nd Respondent submits that a member of the public does not have the capacity to complain against the appointment and revocation of appointment of a member of the PSC under Article 127(3) & (4) of the Constitution as the power to do so is only granted to members of Parliament. It is therefore the 2nd Respondent's position that members of the public are denied *locus standi* over the process because it is political in nature.

18. It is further contended that in the present case the only persons with the capacity to question the impugned communication are members of Parliament and therefore the Petitioner lacks *locus standi*. The Court is urged to adopt the decision in **Communications Workers Union & another v Communication Authority of Kenya [2015] eKLR** and uphold the preliminary objection.

19. As to whether the impugned communication from the Speaker violates Articles 248 and 251 of the Constitution, the 2nd Respondent submits that Article 127 of the Constitution specifically provides for the appointment and revocation of the membership of the PSC by Parliament. This, the 2nd Respondent contends, means that the general provisions of Chapter 15 and specifically Article 251 applies to the commissions and independent offices whose manner of establishment, composition, appointment and removal of members have not been provided for anywhere else in the Constitution. The 2nd Respondent asserts that this is the only plain meaning which can be derived from the holistic and conjunctive interpretation of Articles 127 and 248 of the Constitution. The decisions in **Civil Appeal No. 426 of 2018, The Attorney General v Law Society of Kenya & others**; and **David King et al v Sylvia Burwell, Secretary of Health and Human Resources et al 576 US [2015]** are relied on to support this contention.

20. It is further submitted that there is a reason why the framers of the Constitution expressly used the word “*revocation*” for members of the PSC in Article 127(4)(b), and “*removal*” for members of other commissions in Article 251 of the Constitution. The 2nd Respondent posits that the drafters of the Constitution deliberately intended to make the PSC a special commission not subject to the provisions of Article 251.
21. On the Petitioner’s allegation that Section 10 of the PS Act violates Articles 27, 248 and 251 of the Constitution, the 2nd Respondent reiterates that the constitutionality of the entire PS Act is before a bench of three judges of this Court in the Senate Petition and the matter is therefore *sub judice*.
22. Furthermore, it is argued that for the Petitioner to prove that Section 10 of the PS Act is unconstitutional it must be established that Article 251 applies to members of the PSC and not Article 127. It is submitted that if the Court agrees with the 2nd Respondent’s submission that Article 251 of the Constitution does not apply to the PSC, the Petitioner’s challenge fails.
23. The Petitioner filed supplementary written submissions dated 9th November, 2020 in response to and in opposition of the 2nd Respondent’s written submissions. On the submission by the 2nd Respondent that the petition invites this Court to delve into the internal proceedings of Parliament contrary to the doctrine of separation of powers, the Petitioner submits that the doctrine of separation of powers cannot be used to avoid the obligation of the courts to intervene where there is a violation of the Constitution. It is urged that the Court is mandated to ensure that the activities of Parliament are in compliance with the Constitution and the laws of the land. This argument is supported by the decisions in a number of cases including **Speaker of the Senate & another v Attorney General & 4 others [2013] eKLR; De Lille & Another v The Speaker of the National Assembly (1998) (3) SA 430 (c); Supreme Court Petition No. 1 of 2017, Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & others; and The Council of Governors & others v The Senate, Petition No. 413 of 2014.**
24. As to whether the petition invites this Court to delve into political questions contrary to the principle that courts should avoid political questions, the Petitioner asserts that the doctrine does not apply in this matter as the petition does not raise a political question. It is argued that what is before this Court is a constitutional petition challenging the validity of a law passed in contravention of what is provided in the Constitution, and the Court therefore has jurisdiction to deal with such matters under Article 165(3)(d) of the Constitution.
25. The Petitioner asserts that the 2nd Respondent’s argument that the petition is *sub judice* the Senate Petition lacks merit as the issues in the two petitions are substantially different, the parties differ, and this petition does not seek the relief claimed in the Senate Petition. Further, that the Senate Petition, which had since been finalised, never challenged the constitutionality of Section 10 of the PS Act and neither did the Court interrogate the constitutionality of each and every provision of the Act.
26. On the 2nd Respondent’s claim that the Petitioner lacks the *locus standi* to bring this petition, the Petitioner asserts that it has the authority under Articles 22, 258 and 260 to defend the Constitution. Additionally, that this Court has the authority and jurisdiction to hear and determine the petition. Reliance is placed on the decisions in **Speaker of the National Assembly v Attorney General & 3 others [2013] eKLR; Minister of Health & others v Treatment Action Campaign & others [2002] 5 LRC 216; and, Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR.**
27. The Petitioner submits that upholding the impugned communication from the Speaker to the effect that the removal of a member of the PSC is in accordance with Section 10 of the PS Act as opposed to the procedure provided in Article 251 would lead to a violation of the doctrine of the supremacy of the Constitution. It is the Petitioner’s assertion that the impugned communication violates Article 248 as read with Article 251.
28. The Petitioner submits that much as Parliament has a general legislative mandate to establish procedures of how it conducts its business, it must abide by the prescriptions of the Constitution. It is further urged that the 2nd Respondent’s argument that the words ‘*revocation*’ and ‘*removal*’ have different meanings does not constitute the bone of contention in this petition, which is that Section 10 of the PS Act contravenes Article 251 of the Constitution as regards the removal from office of members of the PSC.
29. It is further asserted that the 2nd Respondent’s argument that Article 251 of the Constitution does not apply to the PSC negates the already laid down procedures that have been followed over time and would go against the provisions of Article 127 of the Constitution.
30. Upon perusal of the pleadings and submissions in this petition, I find that a preliminary issue which requires instant determination is whether this Court has jurisdiction to hear and determine this matter. The 2nd Respondent claims that this Court does not have jurisdiction to hear and determine this petition as it raises political questions. Furthermore, it is asserted that this Court lacks jurisdiction as the Petitioner has invited the Court to delve into the internal procedures of Parliament contrary to the doctrine of separation of powers.
31. On the other hand, the Petitioner contends that the Court has been invited to determine whether there has been an infringement of the Constitution and more specifically whether Section 10 of the PS Act is in violation of the provisions of the Constitution. The Petitioner asserts that the Court has jurisdiction under Article 165(3)(d) of the Constitution to determine the issues raised in the petition.
32. It is clear from a reading of the Constitution that Article 165(3)(d)(i) & (ii) specifically clothes this Court with jurisdiction to hear any question respecting the interpretation of the Constitution, including the determination of the questions whether any law is inconsistent with or in contravention of the Constitution and whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution.
33. It is additionally affirmed by the Constitution that this Court has the authority to examine legislation to determine whether the law or its provisions contravene the provisions of the Constitution. The authority bestowed upon this Court to declare that a law is unconstitutional is in line with Article 2 which dictates that any law that is inconsistent with the Constitution is void to the extent of the inconsistency.

34. Courts have spoken in several decisions on the role of the courts in the constitutional matrix. The role of courts was succinctly explained by the Supreme Court in the Advisory Opinion of **In the Matter of the Speaker of the Senate & another [2013] eKLR (Speaker of the National Assembly v Attorney General & 3 others [2013] eKLR)** as follows:

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

[62] However, where a question arises as to the interpretation of the Constitution, this Court, being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty. We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering this Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act....

[64] Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises *conflicts touching on the integrity of the Constitution itself*. It is our perception that all reading of the Constitution indicates that the ultimate judge of “right” and “wrong” in such cases, short of a resolution in plebiscite, is only *the Courts and, ultimately, the Supreme Court.*”

35. As demonstrated by the holding above, this Court has the constitutional jurisdiction to scrutinize the decisions of Parliament or its committees in order to determine whether there has been an infringement of the Constitution. Even though the petition appears to attack the decision of the Speaker, the clear impression one gets from the pleadings is that the Petitioner is asking the Court to determine whether the impugned Section 10 of the PS Act accords with the provisions of the Constitution. That is an issue that falls squarely within the jurisdiction of this Court.

36. The Petitioner herein has called into question the validity and unconstitutionality of Section 10 of the PS Act claiming that it is inconsistent with the provisions of the Constitution. In my humble opinion, this does not raise any political question as suggested by the 2nd Respondent. The petition does not also offend the doctrine of separation of powers. The Petitioner is well within the provisions of the Constitution which protect the right to institute proceedings calling into question the constitutionality of a legal provision including Section 10 of the PS Act.

37. What may seem contentious is the Petitioner’s complaint against the ruling delivered on 16th June, 2020 by the Speaker of the National Assembly. Nevertheless, the issue is easily resolved when one considers that what is being called into question is the constitutionality of the determination of the Speaker of the National Assembly. I do not understand the Petitioner to be questioning the authority of the Speaker of the National Assembly to communicate his opinion as to the procedure for the removal of a member of the PSC. In my view, the Petitioner is saying that the communication of the Speaker of the National Assembly is contrary to the provisions of Article 251 of the Constitution, which, in the Petitioner’s view provides the procedure for removal of members of constitutional commissions like the PSC.

38. It is therefore my view that this petition raises valid constitutional questions and does not raise political questions, violate the doctrine of separation of powers or interfere with the internal workings of Parliament. The preliminary points taken up by the 2nd Respondent in respect of those three grounds therefore fail.

39. Another argument raised by the 2nd Respondent, in an attempt to make this Court down its tools, is that the petition violates the *sub judice* principle as the constitutionality of the entire PS Act is pending before a bench of three judges of this Court in the Senate Petition.

40. The Petitioner’s response is that the 2nd Respondent’s assertion that the petition is *sub judice* lacks merit as the subject matter of the two petitions is substantially different, the parties are not the same, and the petitions do not seek the same relief.

41. The ingredients of the principle of *sub judice* were stated in **Republic v Registrar of Societies - Kenya & 2 others Ex-Parte Moses Kirima & 2 others [2017] eKLR** as follows:

“32. Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

42. In the Senate Petition, which was indeed instituted before this petition, the issue before the Court was that the PS Act was legislated without reference to the Senate thereby violating the process provided by the Constitution for the enactment of laws. This differs from the question raised in this petition, even though the outcome of the previous matter would indeed have an impact on this one. The Senate Petition is about process whereas this petition is about content.

43. I am indeed aware that in a judgement delivered on 29th October, 2020 in the Senate Petition the Court declared the PS Act, among other Acts of Parliament, unconstitutional for being enacted in contravention of various provisions of the Constitution. The order nullifying the laws was, however, suspended for a period of nine months so as to allow the respondents in that matter to regularise the laws. As such, the PS Act is at the moment a valid Act of Parliament and the constitutionality of its provisions is open to challenge by any person who deems any of those provisions unconstitutional. I thus concur with the Petitioner that this matter is not *sub judice* as the conditions laid down in Section 6 of the Civil Procedure Act, Cap. 21 have not been met.

44. I now turn to the substantive question as to whether Section 10 of the PS Act is inconsistent with Article 251 of the Constitution. The question is whether requirements of Article 251 applies to members in the PSC in light of the provisions of Article 127(4) of the Constitution. Article 127(4) provides in respect of the PSC as follows:

“(4) A member of the Commission shall vacate office—

(a) if the person is a member of Parliament—

(i) at the end of the term of the House of which the person is a member; or

(ii) if the person ceases to be a member of Parliament; or

(b) if the person is an appointed member, on revocation of the person’s appointment by Parliament.

45. On the other hand, Article 251 of the Constitution provides the procedure for removal of members of constitutional commissions from office as follows:

Article 251. Removal from office

(1) A member of a commission (other than an *ex officio* member), or the holder of an independent office, may be removed from office only for—

(a) serious violation of this Constitution or any other law, including a contravention of Chapter Six;

(b) gross misconduct, whether in the performance of the member’s or office holder’s functions or otherwise;

(c) physical or mental incapacity to perform the functions of office;

(d) incompetence; or

(e) bankruptcy.

(2) A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.

(3) The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the President.

(4) On receiving a petition under clause (3), the President—

(a) may suspend the member or office holder pending the outcome of the complaint; and

(b) shall appoint a tribunal in accordance with clause (5).

(5) The tribunal shall consist of—

(a) a person who holds or has held office as a judge of a superior court, who shall be the chairperson;

(b) at least two persons who are qualified to be appointed as High Court judges; and

(c) one other member who is qualified to assess the facts in respect of the particular ground for removal.

(6) The tribunal shall investigate the matter expeditiously, report on the facts and make a binding recommendation to the President, who shall act in accordance with the recommendation within thirty days.

(7) A person suspended under this Article is entitled to continue to receive one half of the remuneration and benefits of the office while suspended.”

46. Article 251 cannot be read without reference to Article 248 which states that:

248. Application of Chapter

(1) This Chapter applies to the commissions specified in clause (2) and the independent offices specified in clause (3), except to the extent that this Constitution provides otherwise.

(2) The commissions are—

(a) the Kenya National Human Rights and Equality Commission;

(b) the National Land Commission;

(c) the Independent Electoral and Boundaries Commission;

(d) the Parliamentary Service Commission;

(e) the Judicial Service Commission;

(f) the Commission on Revenue Allocation;

(g) the Public Service Commission;

(h) the Salaries and Remuneration Commission;

(i) the Teachers Service Commission; and

(j) the National Police Service Commission.

(3) The independent offices are—

(a) the Auditor-General; and

(b) the Controller of Budget.

47. The principles applicable to the interpretation of the Constitution have been stated in several cases. In the decision of **Center for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR**, the Court of Appeal stated those principles as follows:

- that as provided by Article 259 the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.
- that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.
- that the Constitution must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism.”
- that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).”

48. The Court went ahead and provided additional interpretation principles as follows:

“These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statutes which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption

against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.

49. In the Advisory Opinion of **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR** the Supreme Court held that:

“In interpreting the Constitution and developing jurisprudence, the Court will always take a purposive interpretation of the Constitution as guided by the Constitution itself.”

50. Furthermore, the Supreme Court in its Advisory Opinion **In the Matter of Kenya National Commission on Human Rights [2014] eKLR** opined that:

“[26] In his written and oral submissions, Mr. Kitonga has persistently urged us to holistically, broadly and robustly interpret the Constitution, so as to find that Article 163(6) means *all persons*, and not just the entities mentioned therein, can apply for advisory opinions. Counsel is, in effect, asking us to find that Article 163(6) of the Constitution does not mean what it says, through “*a holistic interpretation*”. But what is meant by a ‘*holistic interpretation of the Constitution*’? It must mean interpreting the Constitution *in context*. It is the 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 light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.”

51. If one looks closely at the wording of Article 248(1) it is revealed that Chapter 15 of the Constitution is to apply to the commissions and independent offices specified therein **“except to the extent that this Constitution provides otherwise.”** A plain and holistic reading of this Article reveals to me that where the Constitution specifically provides for the membership, composition, removal and general mode of operation of any commission or independent office, then the provisions of Chapter Fifteen will not apply.

52. Article 248(1) is therefore clear that Chapter Fifteen of the Constitution which provides for commissions and independent offices is only applicable to the extent that the Constitution does not provide otherwise. Where other provisions of the Constitution make specific provisions in respect of a commission or an independent office, then those specific provisions should prevail whenever there is a dispute about the applicable provisions.

53. My position is backed by the decision in **Attorney-General v Law Society of Kenya & 4 others [2019] eKLR** where the Court of Appeal pronounced that:

“Now, a plain reading of those Articles will show, that Article 248 identifies all Chapter 15 commissions and applies the provisions of the chapter to all of them, including JSC. However, the same Article anticipates that there would be other constitutional provisions and aspects, specific to the various commissions, which may differ from the provisions of Chapter 15, and provided an exemption. There can be no argument that the Constitution itself can make exemptions to the application of any Article and that would not amount to a conflict or contradiction. A provision of the Constitution cannot be unconstitutional. Indeed, illustration of such provisions in respect of some of the commissions were made before us.”

54. I therefore answer in the affirmative that Article 251 applies to the PSC, but to the extent that Article 127 has not made specific provisions about any particular issue. Where what is provided for in Article 127 in respect of removal of a member of the PSC is different from what is provided for in Article 251 for the removal of a commissioner, then the provisions of Article 127 will carry the day.

55. The Constitution must be read as one document, and no provision is to be overlooked. There is evident distinction between the procedures laid down in Article 127(4) and 251 of the Constitution. This was not a mistake on the part of the drafters of the Constitution. The expectation is that anyone reading the Constitution would pay close attention to the language and wording of each provision.

56. The question that follows is whether Section 10 of the PS Act is unconstitutional. Section 10 of the PS Act provides that:

10. (1) A Member of Parliament, supported by at least one-quarter of all the Members of the respective House, may propose a motion for the removal of a member of the Commission only for —

- (a) serious violation of the Constitution or of any other law including a contravention of Chapter Six;**
- (b) gross misconduct, whether in the performance of the member's functions or otherwise;**
- (c) physical or mental incapacity to perform the functions of office;**
- (d) incompetence; or**

(e) bankruptcy.

(2) If a motion presented under sub-section (1) is supported by at least one-third of the Members of the respective House —

(a) the respective House shall appoint a select committee comprising of eleven of its Members to investigate the matter;

(b) the select committee shall within ten days report to the respective House whether it finds the allegations against the member of the Commission to be substantiated.

(3) Where the select committee finds that —

(a) the allegations against the member of the Commission have not been substantiated, there shall be no further proceedings on the matter;

(b) the allegations against the Member of the Commission have been substantiated and the motion is supported by a majority of all the members of the respective House —

(i) the Speaker of that House shall inform the Speaker of the other House of the resolution within seven days; and

(ii) the member of the Commission shall continue to perform the functions of the office pending the outcome of the proceedings under this section.

(4) The procedure prescribed in sub-sections (1), (2) and (3) shall apply with the necessary modifications to the consideration of the Motion for removal of a member of the Commission by the other House.

(5) If both Houses pass the motion in the same form, the member of the Commission shall stand removed.

57. A review of the cited provision shows that there is merit in the 2nd Respondent's submission that the procedure found therein is in furtherance of the procedure in Article 127(4) which grants Parliament power to revoke the appointment of a member of the PSC. Indeed, members of the PSC being members of a constitutional commission can only be removed on the grounds established in Article 251 of the Constitution. In my view, Section 10 of the PS Act does not violate the Constitution. It speaks the language of the Constitution and states how the provisions of Article 127(4) are to be enforced. In order words, it operationalizes the constitutional provision.

58. The procedure for removing a member appointed to the PSC by Parliament from office is found in Article 127(4)(b) and Section 10 of the PS Act provides the details of that procedure. The submission by the Petitioner that Section 10 of the PS Act is unconstitutional is therefore not correct. What the impugned Section simply does is to provide the procedure for removal under Article 127(4)(b).

59. It is therefore my finding that Section 10 of the PS Act is not in contravention of the Constitution as it restates the grounds in Article 251 and establishes the procedure for removal of members of the PSC under the provisions of Article 127(4)(b).

60. In short, I find this petition has no merit. The petition is therefore dismissed. The parties are directed to bear their own costs of the proceedings.

Dated, signed and delivered virtually at Nairobi this 25th day of February, 2021

W. Korir,

Judge of the High Court