REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(Coram: A. C. Mrima, J.)

CONSTITUTIONAL PETITION NO. E283 OF 2020

BETWEEN

LAW SOCIETY OF KENYA.....PETITIONER

-VERSUS-

THE OFFICE OF THE ATTORNEY GENERAL.....1ST RESPONDENT

CABINET SECRETARY MINISTRY OF

AGRICULTURE, LIVESTOCK, FISHERIES AND IRRIGATION...2ND RESPONDENT

-AND-

THE KENYA MEAT COMMISSION.....1ST INTERESTED PARTY

MINISTRY OF DEFENCE.....2ND INTERESTED PARTY

JUDGMENT

Introduction:

1. The exercise of executive authority by the President of the Republic of Kenya (hereinafter referred to as '***the President***') has, once again, been challenged in the proceedings subject of this judgment.

2. The Petitioner herein, Law Society of Kenya, contends the manner in which the President, through Executive Order No. 3 of 2020, (which Executive Order was duly implemented by the Cabinet Secretary for Agriculture, Livestock, Fisheries and Irrigation) re-assigned ministerial responsibility of a State Corporation, the Kenya Meat Commission, the 1st Interested Party herein, from the Ministry of Agriculture, Livestock, Fisheries and Irrigation to the Ministry of Defence.

3. In defence of the Constitution, the law and in public interest, the Petitioner asserts that the President contravened the Constitution and the law and calls upon this Court to issue various reliefs to remedy the prevailing situation.

The Petition:

4. The Petition is dated 16th September, 2020. It was filed electronically on 17th September, 2020 together with an evenly dated Notice of Motion. The Motion was brought under certificate of urgency and sought some conservatory orders. Upon consideration by this Court, then sitting as a duty Court, the Notice of Motion was dispensed with *sue moto* and directions given towards the hearing and determination of the main Petition.

5. Whereas the Petitioner admits that the President has the authority under Article 132(3)(b) of the Constitution to direct and coordinate the functions of the ministries and government departments, it is strenuously contended that such authority does not extend to transfer of government institutions established under a statute without having due regard to the established mechanisms in the said statutes or triggering amendments to the statute in issue.

6. As such the Petitioner urges this Court to issue the following reliefs: -

> 1. ***A DECLARATION*** ***that*** *the Executive Order, Number 3 of 2020, purporting to transfer the Kenya Meat Commission from the Ministry of Agriculture, Livestock, Fisheries and Irrigation to the Ministry of Defense* ***is unconstitutional, null and void and contrary to Articles*** *2(1-4) 3, 10, 129(1) & (2), 132 (3) (a-c) and 243 of the Constitution of Kenya, 2010, Section 8 of the Kenya Meat Commission Act and Sections 8 & 10 of the Kenya Defense Forces Act 2012.*
>
> 2. ***AN ORDER OF JUDICIAL REVIEW*** *by way of* ***AN ORDER OF CERTIORARI****, pursuant to Article 3(23) (f) to remove into the Court for purposes of quashing portions of the Executive Order Number 3 of 2020 that purports to transfer Kenya Meat Commission from the Ministry of Agriculture, Livestock, Fisheries and Irrigation to the Ministry of Defense****.***
>
> 3. ***AN ORDER*** *awarding costs of the Petition to the Petitioner.*
>
> 4. *Any other or further orders, writs and directions this court considers appropriate and just to grant for the purpose of the enforcement of the petitioners fundamental rights and freedoms; the enforcement and defense of the Constitution pursuant to Article 23 (3) of the Constitution.*

7. The Petition is supported by the Affidavit of Nelson Andayi Havi sworn on 16th September, 2020. The deponent is the President of the Law Society of Kenya, the Petitioner herein.

8. In further support of the Petition, Messrs. Otwal & Manwa Associate Advocates for the Petitioner filed two sets of written submissions. The first set of the submissions is dated 1st October, 2020 whereas the other set is dated 6th 0ctober, 2020. Counsel also highlighted on the submissions. Counsel referred to several decisions in support of the Petition.

The Responses:

9. The Petition is opposed. The Honourable Attorney General appeared for the Respondents and the 1st Interested Party. It relied on Grounds of Opposition dated 2nd November, 2020 and a Replying Affidavit sworn by Hon. Peter Munya, MGH, the Cabinet Secretary for Agriculture, Livestock, Fisheries and Irrigation, on 10th November, 2020.

10. The Honourable Attorney General also filed written submissions dated 18th November, 2020. In these proceedings the Honourable Attorney General, the Respondents and the 1st Interested Party are represented by Miss. Omuom, Litigation Counsel.

11. The 2nd Interested Party relied on the Replying Affidavit sworn by Dr. Ibrahim Mohammed on 3rd November, 2020. The deponent is the Principal Secretary in the Ministry of Defence. The 2nd Interested Party also filed written submissions. Miss. A. M. Mate, a Special State Counsel appeared for the 2nd Interested Party.

12. Counsels for the Respondents and the Interested Parties also highlighted on their respective written submissions. They also relied on several decisions in their quest for the dismissal of the Petition.

Issues for Determination:

13. From the reading of the Court documents filed and consideration of the submissions of the Parties, the following issues arise: -

(a) The concept of ministerial responsibility;

(b) Whether the Kenya Meat Commission Act ought to have been amended prior to re-assigning ministerial responsibility from the Ministry of Agriculture, Livestock, Fisheries and Irrigation to the Ministry of Defence;

(c) Whether the re-assignment of ministerial responsibility from the Ministry of Agriculture, Livestock, Fisheries and Irrigation to the Ministry of Defence is arbitrary and amount to commercializing the Ministry of Defence;

(d) Whether the decision to re-assign the ministerial responsibility from the Ministry of Agriculture, Livestock, Fisheries and Irrigation to the Ministry of Defence is in violation of Article 10 of the Constitution for want of public participation;

(e) Whether the Petition meets the constitutional threshold.

14. I will deal with the issues in seriatim.

(a) The concept of ministerial responsibility:

15. In this matter, the need to understand the nature, scope and applicability of the concept of ministerial responsibility takes a centre stage.

16. There is unanimity in the considerable work done by scholars and the academia on this subject.

17. In my research on this subject I have greatly benefitted from several scholarly works including: -

(i) *The Executive and Public Law: Power and Accountability in Comparative Perspective*, Paul Craig and Adam Tomkins, Oxford University Press, 2010;

(ii) *The Executive in the Constitution: Structure, Anatomy and Internal Control*, Terrence Dainith & Alan Page, Oxford University Press, 2004;

(iii) *Cases and Materials on Constitutional and Administrative Law*, Michael Allen & Brian Thompson, 10th Edition, Oxford University Press, 2011;

(iv) *Constitutional and Administrative Law*, Paul Jackson & Patricia Leopold, 8th Edition, Sweet & Maxwell, 2001; and

(v) *Unlocking Constitutional & Administrative Law*, Mark Ryan, Hodder Education, 2012;

(vi) *Halsbury's Laws of England*.

18. The **Black's Law Dictionary**, 10th Edition, Thomson Reuters at page 1146 defines a *Minister* as: -

A prominent government officer appointed to manage an executive or administrative department.

19. At page 1506 the Black's Law Dictionary (supra) defines *responsibility* as: -

> *The quality, state, or condition of being answerable or accountable.*

20. By and large, the concept of ministerial responsibility, therefore, focuses on Government's accountability and justification of its actions either to Parliament, the Courts or the electorate.

21. The concept of ministerial responsibility has two aspects. There is the ***individual ministerial responsibility*** and the ***collective ministerial responsibility***.

22. The **Halsbury's Laws of England**, 4th Edition (Reissue) Volume 8(2) Butterworths, London 1996 deals with the issue of individual ministerial responsibility in paragraph 416 (pages 276 – 277) as follows: -

> *Each minister is responsible and must answer to Parliament for his or her own acts and policies and for all that is done in his or her department. Theoretically the responsibility of each minister for unlawful conduct may be enforced by impeachment, in bar of which a pardon or the orders of the Crown cannot be pleaded. However, this remedy is now probably obsolete.*
>
> *In giving an account to Parliament a minister must not knowingly mislead Parliament. He must protect a civil servant who has carried out his explicit order, and must defend a civil servant who acts probably in accordance with the policy laid down by the minister. Except on an important issue of policy or where a claim to individual rights is seriously involved, where an official makes a mistake or causes some delay the minister should acknowledge the mistake and accept the responsibility although he is not personally involved; and he should state that he will take corrective action in the department. Where action has been taken by a civil servant of which the minister disapproves and has no previous knowledge and the conduct of the official is reprehensible, there is no obligation on a minister to endorse what he believes to be wrong or to defendant what are clearly shown to be errors of his officers. He remains, however, constitutionally responsible to Parliament for the fat that something has gone wrong, although this does not affect his power to control and discipline his staff.*
>
> *Although in principle ministers are expected to give an account of their departments and answer questions in parliament, they may refuse to answer questions on a number of grounds, for example that they concern confidential commercial information, or advice received by a minister from a civil servant, or that the information asked for cannot be obtained without undue expense. As far as making amends is concerned there is no legally coercive mechanism to enforce this where no unlawful conduct is involved if the minister does not wish to make amends. A person complaining of injustice in consequence of maladministration may ask a Member of Parliament to refer the matter to the Parliamentary Commissioner for Administration.*
>
> *A minister may be called upon in Parliament to make amends or resign if found to be personally at fault, for example if he or she is found to have committed an error of judgment, or to have been negligent in office. If the fault is not that of the Minister but of a civil servant it seems there is no duty to resign, though there is still a notional duty to make amends for the fault. In practice ministers do not resign even in the face of the Parliamentary criticism unless, for instance, they do not voluntarily on the basis that they accept personal responsibly for what has gone wrong, or they lose the support of the Prime Minister or the Cabinet, or their own backbenchers or they consider that they are too much of an embarrassment to the administration.*

23. At paragraph 417, the Halsbury's Laws of England (supra) deals with the issue of collective responsibility. It states as follows: -

> *Each administration is collectively responsible to Parliament for its conduct of government. The three elements of this convention are the requirements of unanimity, confidentiality and confidence.*

In order to preserve the dignity of the nation and the necessary appearance of unanimity which should be displayed by an efficient administration, with regard both to the advice given to the monarch in administrative and executive matters, and to legislative measure sin Parliament upon all question which have not been left open, it is recognized as being constitutionally necessary that individual ministers should in general support the decisions arrived at by the Cabinet.

Failure to support his colleagues upon vital questions may render a minister liable to dismissal from office; but under the recognized practice, where an individual minister votes against his colleagues on a government question in the House of Commons, it is usual for him to tender his resignation immediately in order to prevent the appearance of disunion in which the administration would otherwise be involve. Where permission has been given to a minister by the Cabinet to vote against the administration upon a particular measure, resignation does not, it seems, necessarily follow; and where in an emergency members of different parties combine to form an administration, the opposition of a minority to important measures may be tolerated if there is agreement on the other and still more vital matters, and it is therefore deemed necessary to retain the dissentient members in the Cabinet.

Members of the Cabinet owe a duty of confidentiality to the Crown and to one another in respect of what takes place in Cabinet, and publication of cabinet proceedings may be restrained by injunction if the court is satisfied that it is in the public interest to do so.

In an administration loses the confidence of the House of Commons, it should resign, or the Prime Minster should seek a dissolution.

24. I, also, came across an article in the Wikipedia. Although the Wikipedia website has its known limitations, I found the article very useful. It is an apt summary of the concept of ministerial responsibility. This is what the article partly states: -

Individual ministerial responsibility *is a constitutional convention in governments using the Westminster System that a cabinet minister bears the ultimate responsibility for the actions of their ministry or department. Individual ministerial responsibility is not the same as cabinet collective responsibility, which states members of the cabinet must approve publicly of its collective decisions or resign. This means that a motion for a vote of "no confidence" is not in order should the actions of an organ of government fail in the proper discharge of their responsibilities. Where there is ministerial responsibility, the accountable minister is expected to take the blame and ultimately resign, but the majority or coalition within parliament of which the minister is part, is not held to be answerable for that minister's failure.*

This means that if waste, corruption, or any other misbehaviour is found to have occurred within a ministry, the minister is responsible even if the minister had no knowledge of the actions. A minister is ultimately responsible for all actions by a ministry because, even without knowledge of an infraction by subordinates, the minister approved the hiring and continued employment of those civil servants. If misdeeds are found to have occurred in a ministry, the minister is expected to resign. It is also possible for a minister to face criminal charges for malfeasance under their watch.

The principle is considered essential, as it is seen to guarantee that an elected official is answerable for every single government decision. It is also important to motivate ministers to closely scrutinize the activities within their departments. One rule coming from this principle is that each cabinet member answers for their own ministry in parliament's question time. *The reverse of ministerial responsibility is that civil servants are not supposed to take credit for the successes of their department, allowing the government to claim them.*

In recent years some commentators have argued the notion of ministerial responsibility has been eroded in many Commonwealth countries. As the doctrine is a constitutional convention, there is no formal mechanism for enforcing the rule. Today ministers frequently use ignorance of

misbehaviour as an argument for lack of culpability, or argue that actions were instigated by a previous minister, or even a previous government. While opposition parties rarely accept this argument, the electorate is often more accepting. In most other Commonwealth countries such cases are today hardly ever brought to trial.

25. Much as I tried, I did not come across any decisions in Kenya where the concept of ministerial responsibility was discussed.

26. That said, I will now, briefly and comparatively, look at the applicability of the concept of ministerial responsibility in some commonwealth jurisdictions. Again the article comes in handy. It captures the position as under: -

*In **Australia**, the doctrine of ministerial responsibility was inherited in its adoption of the Westminster system. Commonwealth ministers are obliged to report failings of departments under their control to the Parliament, and to actively seek solutions to problems in their jurisdiction. A minister who fails to properly do either of these is expected to resign.*

However, in practice, resignations rarely occur for a number of reasons. Although public opinion remains strongly in favour of ministers resigning regardless of their personal involvement in departmental failings, the need for such actions has been eroded by the introduction of alternative mechanisms ensuring executive accountability, such as freedom of information laws and more powerful parliamentary committees.

*In **Canada**, for organizational purposes there are Cabinet Ministers who are responsible for all activity within their department. In Canada ministerial responsibility has been reduced as it has become increasingly common for top level civil servants to be called before Parliament, bypassing the minister.*

*In **New Zealand**, ministerial responsibility has tended to follow British practice. Ministers have resigned in cases of personal misconduct, but more rarely in cases of maladministration. Ministers have refused to resign in some cases where they have been asked to account for departmental errors. The most famous case was Bob Semple, who refused to resign in 1943 over engineering failures in the construction of a railway tunnel. He was quoted as saying "I am responsible, but not to blame." Subsequent notable incidents have included the refusal of a minister's resignation in the 1980s over compromised security of Budget documents, a minister resigning his portfolio (but not leaving Cabinet) over the 1995 Cave Creek disaster, and the resignation of Minister of ACC Nick Smith in 2011 for appearing to interfere in the administration of an ACC case.*

*In the **United Kingdom** it is currently unclear what individual action a minister ought to take when a civil servant within his department is guilty of maladministration. The formulation of some guidelines took place during the Crichel Down Affair in 1954 in which the Minister of Agriculture, Thomas Dugdale, resigned, despite an inquiry suggesting that all mistakes were made within his department without his knowledge and in some cases due to deliberate deceit by civil servants. Later details suggested that he resigned because he supported the civil servants' actions and because he disagreed with the government accepting the inquiry's conclusions.[2]*

The government announced that ministers must defend civil servants who act properly and in accordance with policies set out by the minister. Furthermore, it was stated that "where an official makes a mistake or causes some delay, but not on an important issue of policy and not where a claim to individual rights is seriously involved, the Minister acknowledges the mistake and he accepts the responsibility although he is not personally involved."

In 1982, Lord Carrington (then Foreign Secretary) and two other Foreign Office ministers resigned shortly after the invasion of the Falkland Islands. Later official reviews stated that, although there had been misjudgments within the Foreign Office, no responsibility attached to any individual within the government. However, in 1983, when 38 IRA prisoners broke out of

the Maze prison, the Secretary of State for Northern Ireland, James Prior, did not resign, explaining that the break-out was not caused by any policy initiative originating from him. This latter position has become the norm in British politics. An exception might be Estelle Morris, who resigned as Secretary of State for Education in 2002, saying she had not done well enough after a scandal over A-level marking.[3]

Some recent resignations due to personal errors of judgment or impropriety include the resignation of Ron Davies, the Secretary of State for Wales, for sexual misconduct in 1998, and the resignation of Peter Mandelson, Secretary of State for Trade and Industry, for failing to disclose a substantial loan by a Cabinet colleague in 1999.

An argument put forward during the Scott Inquiry into the Arms-to-Iraq affair in the 1980s was a distinction between political responsibility and political accountability.

(emphasis added).

27. The position in Kenya is not very different from the other commonwealth jurisdictions. Aided by the doctrine of judicial notice, I will examine the local position.

28. In Kenya, a Cabinet Secretary (formerly known as a Minister) exercises both individual and collective responsibility. On individual responsibility, a Cabinet Secretary oversees, is responsible and accountable to the affairs of the ministry he/she is in charge of. Such a Cabinet Secretary is answerable to Parliament and Courts on the actions of the Ministry.

29. The Cabinet Secretary attends Parliament or Court when summoned. There are, however, times when other senior Government officials in the Ministries may be summoned to attend Parliament or Court instead of the Cabinet Secretary. Under the concept of individual ministerial responsibility, Cabinet Secretaries are called upon to resign or even face Court charges in cases of maladministration in the Ministry either alone or with some other senior officials.

30. In instances where a Government parastatal or a State corporation is concerned in Kenya, the general trend has been that the members of the Board of Directors and/or the senior management and/or the concerned department or committee are called to account in Parliament or Court. They may, as well, be called upon to resign or be accordingly charged before a Court of law. The Cabinet Secretary who exercises ministerial responsibility over the parastatal or a State corporation may also be summoned to appear in Parliament.

31. Collective ministerial responsibility equally applies in Kenya.

32. In sum, the concept of ministerial responsibility is a sound principle in law and plays a significant role in calling upon the Government to account for its actions. It is applicable in Kenya at both the individual and collective levels.

(b) Whether the Kenya Meat Commission Act ought to have been amended prior to re-assigning the ministerial responsibility from the Ministry of Agriculture, Livestock, Fisheries and Irrigation to the Ministry of Defence:

33. Having endeavored a general, but brief analysis of the concept of ministerial responsibility, I will now look at how ministerial responsibility is assigned in Kenya. I will, first, deal with the parties' positions.

34. The Petitioner pleads that Executive Order No. 3 of 2020 issued by the President (hereinafter referred to as **'the Executive Order'**) undermines the operations of the Commission whose functions are laid out in the statute establishing the Commission. The Petitioner further pleads that the Constitution and the Kenya Meat Commission Act, Cap. 363 of the Laws of Kenya (hereinafter referred to as '**the KMC Act**') has laid down governing principles on operations of government parastatals. The Constitution has also laid down a mechanism and criteria to be used in placing state parastatals in various parent ministries.

The Executive Order purports to override the Constitution and the KMC Act by directly transferring the Commission to the Ministry of Defense.

35. It is also pleaded that whereas Article 132(3)(b) of the Constitution expressly gives the President the discretion to direct and coordinate the functions of the ministries and government departments, to choose and assign functions to whichever Ministry and to transfer state corporations from one parent Ministry to another, that discretion must not be against public policy or offend statutes establishing the parastatals.

36. The Petitioner avers that the effect of the Executive Order is that the statutory functions of the Commission have been moved to the Ministry of Defense without any amendments to the KMC Act and therefore the move is inconsistent with Constitution and the KMC Act.

37. It is also pleaded that the Executive Order amounts to commercialization of the Kenya Defense Forces which is inconsistent with the provisions of Kenya Defense Forces Act No. 2 of 2012. The Petitioner further avers that the President ought to, in the first instance, trigger relevant amendments to the KMC Act before re-assigning or re-organizing the Commission.

38. The Petitioner submits that it is a fundamental principle of our system of government that the legislative arm has power to enact laws and to amend or repeal them, subject only to the provisions of the Constitution from which this power arises. It is contended that the Constitution contemplates a complete separation of powers where Parliament legislates. Article 95(3) of the Constitution clearly bestows on Parliament the mandate to make and amend laws.

39. It is further submitted that in a bid to distinguish the President's powers under Article 115 of the Constitution and the powers under Article 132 of the Constitution, the Court in ***Coalition for Reforms and Democracy (CORD) v Attorney General; International Institute for Legislative Affairs & another (Interested Parties) [2019] eKLR*** had this to say: -

> *52. The executive powers, authority and functions of the President are also specifically provided for in the Constitution under Articles 129 to 133. It is significant to note that the Presidential powers of assent and referral of Bills under Article 115 of the Constitution are granted in the context of the legislative framework provided by the Constitution. Under the Constitution, the President plays a key role in the legislative process because all Parliamentary Bills require his/her approval before they can take effect. Thus, it is correct to state that under the Kenyan Constitution, the Parliament and the President share the legislative powers and functions, with the former making laws to which the latter must assent if they are to come into force. In our view, this discourse settles the legal theory and philosophy underlying Article 115 of the Constitution.*

40. It is contended that the Executive Order irregularly purports to assign commercial and or income generating activities of the Commission to the Ministry of Defence and the Kenya Defence Forces. That, goes against the letter and the spirit of the National Defence Policy which only allows the Ministry of Defence and Kenya Defence Forces to engage in National economic development activities and national industrial development activities and not in any income generating activities. Such a move, effectively amounts to unlawfully amending the said KMC Act.

41. The Petitioner submits that the Constitution vests the executive powers in the President. The Executive is the organ of government responsible for effecting and applying laws. As Black's Law Dictionary states the executive branch is sometime said to be the residue of all Government after subtracting the judicial and legislative branches. Parliament in enacting the KMC Act clearly envisioned the need for a coordinating body, with advisory and recommendatory powers to deal with the mandate and the entity of the Commission. It had a particular structure in mind, with a particular framework and composition. However, all of the carefully calibrated provisions set out in the KMC Act are meaningless if the Executive through the President can create his own separate, independent and unaccountable structure or way of creating legislature that is unconstitutional.

42. The Petitioner vehemently submits that the only way such powers of the Commission can be

delegated to another body is purely by way of amendment of the legislations that seeks to institute the Commission and its functions. It asserts that such a role cannot be purported to have been done by the Executive Order, a prerogative that is purely the preserve of Parliament.

43. The Petitioner also submits that the Executive Order in all fronts violates the Constitution as it tends to transfer functions of the Commission to the Ministry of Defence as well as the associated budgets. Similarly, the effect of the order is that the Commission which is created by an Act of Parliament has been deprived of its functions and purports to amend the KMC Act by taking away its functions and transferring them to the Ministry of Defence, without amending the said Act.

44. The Executive Order was hence unilaterally issued and that offended the institutional and structural duties of Ministries. The Executive Order hence violates the Constitution and is unconstitutional, unlawful, illegal, unprocedural, null and void *ab initio*.

45. On the strength of the Grounds of Opposition and the Replying Affidavit sworn by Hon. Peter Munya, the Respondents and the 1st Interested Party, through the Honourable Attorney General, averred that the Executive Order is constitutional and within well-defined legal parameters. They further averred that the Petitioner failed to lay any admissible evidence before Court in support of the Petition.

46. It is deponed that Article 132 of the Constitution as read with Section 4 of the State Corporations Act is the basis on which the Executive Order was issued. It is contended that the impugned transfer is purely an internal administrative function within the President's mandate which required no amendments to the KMC Act.

47. The 2nd Interested Party submits that the alleged amendments which ought to have been made before the President would safely issue the Executive Order were not pointed out. On the strength of ***Centre for Rights Education and Awareness & Another vs John Harun Mwau & 6 Others (2012) eKLR*** and ***USIU vs. Attorney General and Another (2012) eKLR*** this Court is urged to avoid an interpretation which will result in absurdity and instead take a holistic approach which will yield in settling greater societal needs for the country.

48. Back to the issue of assignment of ministerial responsibility in Kenya, I must assert that Courts have a duty and power to ensure that all three arms of Government act, but within the Constitution and the law.

49. Just to further drive the point home, the High Court in a 5-Judge Bench in the ***High Court in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 Others vs. The Attorney General & Others*** reiterated the supremacy of the Constitution as follows: -

> *115. The starting point is the Constitution. Article 2 inter alia declares the Constitution as the supreme law of the land which binds all persons and all State organs at both levels of government. It also provides that the validity or legality of the Constitution is not subject to any kind of challenge and that any law that is inconsistent with it is void to the extent of that inconsistency.* ***Further, any act or omission in contravention of the Constitution is invalid****. Article 3 places an obligation upon every person to respect, uphold and defend the Constitution.* (emphasis added).

50. As demonstrated above, ministerial responsibility is a constitutional convention that Ministers remain accountable to Parliament and Courts for the actions of the executive arm of Government.

51. Chapter 9 of the Constitution is on the Executive. Articles 129 and 130 provide as follows: -

> *129. Principles of executive authority*
>
> *(1) Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution.*

(2) Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.

130. The National Executive

(1) The national executive of the Republic comprises the President, the Deputy President and the rest of the Cabinet.

(2) The composition of the national executive shall reflect the regional and ethnic diversity of the people of Kenya.

52. On the exercise of the executive authority, Article 132(3) provides as follows: -

(3) The President shall—

(a) Chair Cabinet meetings;

(b) direct and co-ordinate the functions of ministries and government departments; and

(c) by a decision published in the Gazette, assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any Act of Parliament.

53. Section 4 of the State Corporations Act, Cap. 446 of the Laws of Kenya (hereinafter referred to as '***the Corporations Act'***) provides for assignment of ministerial responsibility in State corporations. It states that: -

The President shall assign ministerial responsibility for any state corporation and matters relating thereto to the Vice-President and the several Ministers as the President may by directions in writing determine.

54. Further, Section 36(1) of **Interpretation and General Provisions Act**, Cap. 2 of the Laws of Kenya provides as follows: -

Where by an Act the exercise of a power or the performance of a duty is conferred upon or is vested in the President, the President may, by order, transfer the exercise of that power or the performance of that duty to a Minister.

55. The above demonstrates that ministerial responsibility ***is a derivate exercise of executive authority*** by Cabinet Secretaries. The assignment of ministerial responsibility arises in two ways. First, when expressly provided for in the Constitution or an Act of Parliament. I will refer this mode of assignment to as '**Ministerial responsibility by Constitution or statute'**. The second way arises when neither the Constitution nor any law provides for the assignment. In that case it is the President who is constitutionally and statutorily called upon to assign such responsibility. I will refer to such mode of assignment to as '**Ministerial responsibility by Executive Order'**.

56. The first category of assignment of ministerial responsibility, that is, ministerial responsibility by Constitution or statute, is variously depicted in the Constitution and Acts of Parliament. When the Constitution or a statute assigns ministerial responsibility, it will expressly name the responsible Cabinet Secretary. For instance: -

(i) Section 2 of the **Crops Act**, No. 16 of 2013 places ministerial responsibility on the Cabinet Secretary for the time being responsible for matters relating to agriculture;

(ii) Section 2 of the **Alcoholic Drinks Control Act**, No. 4 of 2010 places ministerial responsibility on the Minister for the time being responsible for matters relating to provincial administration;

(iii) Section 2 of the **Anti-Doping Act**, No. 5 of 2016 places ministerial responsibility on the Cabinet Secretary for the time being responsible for matters relating to sports;

(iv) Section 2 of the **Cooperative College of Kenya Act**, No. 6 of 1995 places ministerial responsibility on the Minister for the time being responsible for matters relating to co-operative development;

(v) Section 2 of the **Customs and Excise Act,** Cap. 472 places ministerial responsibility on the Cabinet Secretary for the time being responsible for matters relating to finance;

(vi) Section 2 of the **Data Protection Act,** No. 24 of 2019 places ministerial responsibility on the Cabinet Secretary for the time being responsible for matters relating to information, communication and technology;

(vii) Section 2 of the **Independent Policing Oversight Authority Act,** No. 35 of 2011 places ministerial responsibility on the Cabinet Secretary for the time being responsible for matters relating to the police;

(viii) Section 2 of the **Kenya Law Reform Commission Act,** No. 19 of 2013 places ministerial responsibility on the Cabinet Secretary for the time being responsible for matters relating to law reform;

(ix) Section 2 of the **Kenya Maritime Authority Act,** No. 5 of 2006 places ministerial responsibility on the Minister for the time being responsible for matters relating to Maritime Transport;

(x) Section 2 of the **Kenya Medical Supplies Authority Act,** No. 20 of 2013 places ministerial responsibility on the Cabinet Secretary for the time being responsible for matters relating to medical supplies;

(xi) Section 2 of the **Meat Control Act,** Cap. 356 places ministerial responsibility on the Minister for the time being responsible for matters relating to veterinary services;

(xii) Section 2 of the **National Construction Authority Act,** No. 41 of 2011 places ministerial responsibility on the Minister for the time being responsible for matters relating to public works;

(xiii) Section 2 of the **National Land Commission Act,** No. 5 of 2012 places ministerial responsibility on the Cabinet Secretary for the time being responsible for matters relating to land;

(xiv) Section 2 of the **Public Service Commission Act,** No. 10 of 2017 places ministerial responsibility on the Cabinet Secretary for the time being responsible for matters relating to public service;

57. As said, the second category of assignment of ministerial responsibility by Executive Order arises when neither the Constitution nor any statute assigns such responsibility. In that case the President, in exercise of executive authority, is under a duty to accordingly assign such responsibility. In discharging that duty, the Constitution and the law calls upon the President to act, but within the Constitution and the law. Any act in transgression of the Constitution and the law must, without doubt, be sanctioned.

58. The Petitioner's main contention in this Petition is that the President erred in issuing the Executive Order without first ensuring that the KMC Act is amended so as to allow for the re-assignment of the ministerial responsibility from the Ministry of Agriculture, Livestock, Fisheries and Irrigation to the Ministry of Defence.

59. The Petitioner pleads in paragraphs 35 and 38 of the Petition as follows: -

35. Whereas the President pursuant to **Article 132(3)(b**) has authority to **direct** and **coordinate** the **functions of the ministries** and **government departments,** the said authority does not extend transfer of government institutions established by a statute without having due regard to the established mechanisms in the said statutes or triggering amendments to the statute in consideration.

38. The Kenya Meat Commission is established by the Kenya Meat Commission Act (Chapter 363 Laws of Kenya) and the President ought to trigger relevant amendments to the said Act before reassigning or reorganizing the Kenya Meat Commission.

60. The above paragraphs are also reproduced in paragraphs 7 and 8 of the Affidavit in support of the Petition sworn by Nelson Andayi Havi.

61. The Petitioner's position that the President was to first seek the amendment of the KMC Act applies in instances where the assignment is by way of '*Ministerial responsibility by Constitution or statute'*. However, this matter rests on the second scenario where the parent statute does not assign any ministerial responsibility to a Cabinet Secretary. That is the case of ministerial responsibility by Executive Order.

62. I have further perused the Constitution and the KMC Act. Both do not assign the ministerial responsibility to any Cabinet Secretary. The KMC Act also does not define the Minister it severally refers to. This is therefore a case of assignment of ministerial responsibility by executive order as opposed to assignment of ministerial responsibility by Constitution or statute. The issue of amendment to the KMC Act does not hence arise in the circumstances of this case.

63. I must reiterate that where the Constitution or a statute expressly assigns ministerial responsibility to a particular Cabinet Secretary then the President can only re-assign that ministerial responsibility to another Ministry or Cabinet Secretary after necessary amendments are made. Anything short of that leads to an illegality.

64. The upshot is that the issue must be settled in the negative.

(c) Whether the re-assignment of ministerial responsibility from the Ministry of Agriculture, Livestock, Fisheries and Irrigation to the Ministry of Defence is arbitrary and amount to commercializing the Ministry of Defence:

65. The Petitioner further challenges the decision to re-assign the ministerial responsibility as arbitrary and amounting to commercializing the Ministry of Defence.

66. On arbitrariness, the Petitioner submits that whereas Article 132(3) of the Constitution confers prerogative upon the President of, i*nter alia,* directing and coordinating functions of the Ministries and Government departments and including assigning responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, that power must be exercised in accordance with the Constitution and the law. In determining whether or not the power has been exercised in accordance with the Constitution, this Court must do so in a manner that promotes its purposes, values and principles and upholds the spirit of the Constitution.

67. Buttressing the argument, the Petitioner referred to the High Court in ***George Bala v Attorney General [2017] eKLR*** *at para 85* stated as follows***;***

85. ….. As was held in the above case, when the law proceeds to impose on the executive legally prescribed duties and responsibilities, the performance of which depends upon the enhancing or handling of public interest, the political officers of the executive must act consistent and according to the laws of the land and since the performance of certain duties and responsibilities is dependent upon individual rights and responsibilities, there is a duty to act consistently with and according to the law. If a public officer fails to so act, and their failure harms the interests of the public and rights of individual citizens, their actions and omissions are subject to judicial review.

68. On the legality of exercise of public power, the Petitioner relied on ***Affordable Medicines Trust and Others v Minister of Health and Others [at para 18] [2005] ZACC 3; 2006 (3) SA 247 (CC) at paras 49, 75 and 77***, where Ncgobo CJ held thus: -

> *The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.*

69. Submitting that the means or procedure adopted by the President in exercising public power is unprocedural and creates arbitrariness, the Petitioner referred to a decision of the South African Constitutional Court in ***Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others 2018 (5) SA 349 (CC)*** where the Court held as follows: -

> *[55] While there may be an overlap between arbitrariness and rationality these are separate concepts against which the exercise of public power is tested. Arbitrariness is established by the absence of reasons or reasons which do not justify the action taken. Rationality does not speak to justification of the action but to a different issue. Rationality seeks to determine the link between the purpose and the means chosen to achieve such purpose. It is a standard lower than arbitrariness. All that is required for rationality to be satisfied is the connection between the means and the purpose.*

70. Underscoring this Court's duty to protect the integrity of the Constitution, the Petitioner referred to the South African Constitutional Court in ***Minister of Health and Others vs. Treatment Action Campaign and Others* (2002) 5 LRC 216**, **248** where the Court at paragraph 99 held that: -

> *The primary duty of Courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by the Constitution itself.*

71. On rationality of public decisions, the Petitioner submits that the High Court in ***Thirdway Alliance Kenya & another v Head of the Public Service-Joseph Kinyua & 2 others; Martin Kimani & 15 others (Interested Parties) [2020] eKLR*** cited the South African *decision in Pharmaceutical Manufacturers Association of SA and another: In re Ex parte President of the Republic of South Africa and others 2000 (2) SA 1CC.)* where the Court held that rationality was a "*minimum threshold requirement applicable to the exercise of all public power."*

72. The High Court further held that "*the time has now come for our courts to take a clear and unambiguous position on the matter. It is my view that our Constitution requires a new approach and that new approach is the test of proportionality. What is proportionality? It is the legal doctrine of constitutional adjudication that states that all laws enacted by the legislature and all actions taken by any arm of the state, which impact a constitutional right, ought to go no further than is necessary to achieve the objective in view."*

73. In sum, the Petitioner contends that the Executive Order ought to be legally countered on account of arbitrariness.

74. On the argument that the decision amounts to commercializing of the Ministry of Defence, the Petitioner asserts that Section 8(1) of KMC Act establishes the Commission with the ability to conduct commercial business on livestock related products which power is inconsistent with the provisions of Section 8 of the Kenya Defense Forces Act which does not include conducting income generating business for the Republic of Kenya.

75. The Petitioner asserts that the functions of the Commission as enumerated in the KMC Act do not in any way have any nexus to the defence and sovereignty of the Republic of Kenya so as to guarantee the supervision of the statutory activities of the Commission by the Ministry of Defence and Kenya Defence Forces.

76. It is further pleaded that the Cabinet Secretary for Defence, by virtue of Section 10 of the Kenya Defence Forces Act, No. 25 of 2012 has specific roles with relation to defence and cannot not supervise statutory functions of the Commission.

77. It is reiterated that the Executive Order purports to assign commercial and or income generating activities of the Commission to the Ministry of Defence and the Kenya Defence Forces which goes against the letter and the spirit of the National Defence Policy which only allows the Ministry of Defence and Kenya Defence Forces to engage in national economic development activities and national industrial development activities without engaging in income generating activities as stipulated in the KMC Act.

78. It is contended that the Executive Order offends the institutional and structural duties of Ministries. The Executive Order violates the Constitution and is unconstitutional, unlawful, illegal, unprocedural, null and void *ab initio*.

79. The foregoing is reiterated in the Petitioner's submissions.

80. On the strength of the Grounds of Opposition and the Replying Affidavit sworn by Hon. Peter Munya, the Respondents and the 1st Interested Party, through the Honourable Attorney General, aver that the Executive Order is constitutional and within well-defined legal parameters. They further aver that the Petitioner failed to lay any admissible evidence before Court in support of the Petition.

81. It is deponed that Article 132 of the Constitution as read with Section 4 of the State Corporations Act is the basis on which the Executive Order was issued. It is also contended that the impugned transfer is purely an internal administrative function within the President's mandate.

82. Hon. Peter Munya further deponed that the transfer of the ministerial responsibility is not arbitrary. He deponed that the transfer was made on sound grounds and in recognition of the fact that the disciplined forces in general collectively form the single largest consumer of the Commission's meat and meat products. That, the Ministry of Defence possess technical and operational capacity and linkages for in-house and commercial exploitation of livestock products to the overall growth of the livestock sector hence benefitting farmers in Kenya. It is further deponed that the transfer of the ministerial responsibility will ensure operational efficiency thereby enabling large scale catering facilities prioritize their purchases through the Commission as part of the efforts to diversify the Commission's client base.

83. The transfer of the ministerial responsibility is further explained to be purely for administrative purposes and that the KMC Act remains the governing document for the execution of operations of the Commission in accordance with its mandate. The impugned transfer is also aimed at continuing the Commission's modernization programme which started in 2017/2018 aimed at reclaiming its space in both local and international export markets.

84. It is submitted that the Executive Order was issued by the President pursuant to Article 132(3) of the Constitution in organising Government in a bid to ensure efficient service delivery.

85. The Respondents also submit that the function of directing and co-ordinating the functions of ministries and government departments, involves organising various offices and facets of those ministries

including but not limited to various state departments.

86. The Respondents captured verbatim in their submissions the provisions of **the KMC Act** on the establishment and objectives of the Commission and the provisions of the Kenya Defence Forces Act, No. 25 of 2012 (hereinafter referred to as '**the Forces Act'**) on the powers of the President and the functions of the Cabinet Secretary. The Respondents equally reproduced the provisions of the Corporations Act on the definition of a State Corporation, the establishment of State Corporations and the assignment of ministerial responsibility to State Corporations in Kenya.

87. The Respondents also submit that since the Petitioner has admitted that the President has powers under the Constitution and the law to assign ministerial responsibility in Government, the Petitioner remain under a duty to provide any cogent grounds and reasons to warrant judicial intervention in the manner in which the constitutional mandate was executed, a duty which the Petitioner failed to discharge.

88. Riding on the principle of separation of powers, the Respondents contend that the doctrine is a constitutional principle that discourages the concentration of power in any one particular organ of government so as to avoid any interference with or assumption of the roles of one arm of Government by the other. The Supreme Court decision in ***Speaker of the Senate & Another vs Attorney General & 4 others Advisory Opinion Reference 2 of 2013 [2013] eKLR*** was referred to *in extenso* where the Court urged on judicial restraint in upholding the said constitutional principle. The decisions in ***Centre for Rights Education and Awareness & 2 Others vs Speaker of the National Assembly & 6 Others [2017] eKLR*** and ***Trusted Society of Human Rights Alliance & 2 Others vs the A.G. & 2 Others*** were also referred to in further support to the submission.

89. It is submitted that the Petitioner has misapprehended and misunderstood the concept of ministerial responsibility and the provisions of the Forces Act which provides for the functions of the Kenya Defence Forces and not the Ministry of Defence, which Ministry, is an administrative unit under the Office of the President as per Article 132 of the Constitution.

90. Furthermore, it is also argued that the Petitioner has not adduced any evidence of arbitrariness, abuse of power, illegality and unconstitutionality of the actions of the President in issuance of the Executive Order. All in all, it is submitted that the Petitioner failed to discharge the burden of proof under Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya as well as having failed to present any evidence at all to support their claim of unconstitutionality or that the Executive acted *ultra-vires*.

91. In its disposition, the 2nd Interested Party contends that the Petitioner's claim is hypothetical and falls short of proving any violation of the Constitution and the law. It is deponed that the President exercised his powers as vested under Article 132 of the Constitution, Section 4 of the Corporations Act and Section 10(d) of the Forces Act in assigning ministerial responsibility of the Commission, vide the Executive Order, unto the Ministry of Defence.

92. The 2nd Interested Party deny the assertion that assigning of the ministerial responsibility amounts to commercialization of the Kenya Defence Forces since the Kenya Defence Forces is a distinct entity from the Ministry of Defence. Further, the financial management of the Commission is governed by statute and the impugned assignment does not affect the financial management of the Commission.

93. The 2nd Interested Party called for a holistic approach in the interpretation of the Constitution and urged the Court to avoid an interpretation which will be self-destroying.

94. In its submissions, the 2nd Interested Party posits that the accurate distillation of the relevant jurisprudence on the subject is an analysis of Articles 129, 132 and 241 of the Constitution, Section 10(d) of the Forces Act and Sections 2 and 4 of the Corporations Act *vis-à-vis* the 'imaginary question' arising from the Petition of a statutory procedure under the KMC Act that the President 'ought' to have adhered to. It is also submitted that Article 255 of the Constitution has no relevance in these proceedings whereas Section 8 of the KMC Act was repealed by Act No. 17 of 2006, s. 104.

95. It is submitted that the 2nd Interested Party is a Government Ministry comprising both the Military and the Civilian components capable of undertaking the assigned functions. It is further submitted that the Kenya Defence Forces is a creation of the Constitution whose ministerial responsibility lie with the Ministry of Defence. Article 241(7) of the Constitution creates the Defence Council to oversee the day to day running of the Kenya Defence Forces. As such, the roles of the Kenya Defence Forces and the 2nd Interested Party are distinct.

96. In its further persuasion against the Petition, the 2nd Interested Party submits that the Cabinet Secretary of the 2nd Interested Party is empowered under Section 10(d) of the Forces Act as may be delegated by the President and the National Assembly to engage in any other duties including the re-assigned ministerial responsibility over the 1st Interested Party.

97. The 2nd Interested Party also submits that the Petition is merely hypothetical seeking to engage the Court in a public stint. There is no evidence of the alleged contravention adduced and as such the Petition, which is an abuse of the Court process, ought to fail. The decisions in ***Republic vs. DPP & 2 Others exparte Edwin Harold Dayan Dande & 3 Others, JR No. 3331 of 2011, (2018) eKLR, Durity vs. AG (2002) UKPC 20*** and ***Booth Irrigation Ltd (No. 2) HC Misc. Application No. 1052 of 2004*** were cited in support of the submission.

98. The 2nd Interested Party further submits that the constitutional and statutory provisions allegedly violated are not presented. On the strength of ***Centre for Rights Education and Awareness & Another vs John Harun Mwau & 6 Others (2012) eKLR*** and ***USIU vs. Attorney General and Another (2012) eKLR*** this Court is urged to avoid an interpretation which will result in absurdity and instead take a holistic approach which will yield in settling greater societal needs for the country.

99. The principle that a Petitioner ought to demonstrate with some degree of precision the right or Article of the Constitution that it alleges has been violated, the manner it has been violated, and the relief it seeks for that violation is by now well settled. The Courts in ***Anarita Karimi Njeru vs Republic (1976- 80) 1 KLR 1272*** and ***Trusted Society of Human Rights Alliance vs Attorney General and Others Petition No.229 of 2012*** addressed the issue in detail. That is the incidence of burden as provided for in Section 108 of the Evidence Act, Cap. 80 of the Laws of Kenya.

100. There is also the issue of discharging the burden of proof under Sections 107(1), (2) and 109 of the Evidence Act. The provisions state as follows: -

> *107. (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*
>
> and
>
> *109. <u>Proof of particular fact</u>*
>
> *The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

101. The Supreme Court in ***Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR*** addressed the issue of the burden of proof on a Petitioner in a Constitutional petition. The Court stated as follows: -

> *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 vs. 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.

102. For the Petitioner to succeed in this issue, the specific provisions of the Constitution alleged to have been contravened and the manifestation of contravention or infringement must be pleaded and proved in order to sustain the contention that the transfer of ministerial responsibility from the Ministry of Ministry of Agriculture, Livestock, Fisheries and Irrigation to the Ministry of Defence is arbitrary and amounts to commercialization of the Ministry of Defence.

103. The Petitioner admits that the President has the executive authority under Article 132(3) of the Constitution to co-ordinate the affairs of Government. It, however, contends that the exercise of such authority in this case was arbitrary and amounts to commercialization of the Ministry of Defence by dint of Section 8 of the KMC Act.

104. I will, first, deal with the sub-issue as to whether the impugned re-assignment amounts to commercialization of the Ministry of Defence.

105. I have carefully perused the KMC Act. It is true that Section 8 of the KMC Act was repealed by the enactment of Act No. 17 of 2006, s. 104. The repealed Section 8 however provided as follows: -

8.Powers of Commission

1) In addition to any other powers conferred by this Act the Commission shall have power—

a. to acquire, erect, construct, establish and maintain abattoirs, meat works, ice and refrigerating works and cold storage concerns and to operate the same for the purpose of slaughtering cattle and smallstock, preparing hides and processing by-products and chilling, freezing, canning and storing beef, mutton, poultry and other meat foods and products and eggs whether for export or for consumption within the Colony;

b. to carry on the business, on a wholesale basis of butchers, dealers and merchants in livestock and the carcasses, fresh products, hides, skins and offal thereof and in poultry, ice and any other chilled, frozen or fresh foods, "and of" manufacturers and general dealers, and to enter into any contracts for the purchase, sale and supply of, and to purchase, sell and supply any such things as aforesaid by wholesale:

Provided that the Commission in carrying on the business of butchers on a wholesale basis, may not sell meat except to—

i. a retailer for the purpose of resale; or

ii. a hospital, hotel, boarding-house, restaurant, school or club; or

iii. a person buying in quantities of not less than two thousand pounds in weight in any one week or in quantities of not less than twenty-five thousand pounds in weight in any one year.

c. to carry on the business of importers and exporters of live cattle, sheep, goats and poultry, and to import and export carcasses of cattle, sheep, goats and poultry whether in a frozen state or otherwise;

d. to make contracts and give and enter into suretyships or guarantees in connexion with any part or portion of the business or objects of the Commission, and to modify or rescind the same;

e. to enter into, renew, cancel or abandon any arrangements with any government or authority, local or otherwise, that may seem conducive to the Commission's objects, and to obtain from any such government or authority, any rights, privileges and concessions which the Commission may think it desirable to obtain, and to carry out, exercise and comply with any such arrangements, rights, privileges. and concessions;

f. to purchase, take on lease or in exchange, hire or otherwise acquire any property, movable or immovable, and any rights or privileges which the Commission may think necessary or convenient with reference to any of its objects, or the acquisition of which may seem calculated to facilitate the realization of any securities held by the Commission, or to prevent or diminish any apprehended loss or liability;

g. subject to the approval of the Governor in Council, to invest and deal with any moneys of the Commission not immediately required by the Commission in and upon such investments and securities as are allowed by law for the investment of trust funds and in such manner as the Commission may think fit, and from time to time to vary or realize such investments;

h. with the prior approval of the Member, to raise moneys by way of loan in such amounts, by such methods and for such purposes as the Member may approve, and to redeem the same;

i. to draw, accept, endorse, discount, execute and issue bills of exchange, promissory notes, bills of lading, warrants and other negotiable or transferable instruments or securities;

j. to construct, maintain, alter and improve any building, work, machinery and plant necessary or convenient for the purpose of its business;

k. to carry on the business of warehousemen, to acquire or construct bonded or other warehouse or stores, and to control, work, manage, let or dispose of the same or any part thereof;

l. to work or otherwise beneficially use, and with the sanction of the Member to exchange, let, sell or hypothecate any of the property, rights, privileges, machinery or plant of the Commission acquired or constructed for use in connexion with the powers hereby conferred;

m. with the consent of the Member to purchase, lease, maintain and develop land required by the Commission for holding cattle and smallstock;

n. subject to the approval of the Governor in Council and to such terms and conditions as the Governor in Council may impose, to sell, transfer or make over the property and undertaking of the Commission to any public company limited by shares formed under the provisions of the Companies Act, 1933, or any Ordinance superseding the same or to any other company, or corporation or society formed under the provisions of the Co-operative Societies Act, 1945, or any other Act for the purpose of taking over the property and undertaking of the Commission;

o. with the consent of the Governor in Council and subject to such conditions as the Governor in Council may impose, to borrow money by the issue of shares, stock, debentures or debenture stock in the manner hereinafter provided, for all or any of the following purposes, that is to say—

i. the repayment of loans raised under the powers conferred by paragraph (h) of this

sub-section or of Treasury advances obtained under section 11 of this Act or of both such loans and advances;

ii. the provision of working capital or additional working capital

iii. the redemption of any shares, stock, debentures or debenture stock, which the Commission is required or enabled to redeem;

iv. any other expenditure properly chargeable to capital account

p. with the consent of the Governor in Council to create and issue shares, stock, debentures or debenture stock (whether non-interest bearing or otherwise) for the purpose of enabling the Commission to raise any money which they are empowered under this Act to borrow by the issue of shares, stock, debentures or debenture stock, and to charge such shares, stock, debentures or debenture stock and the interest thereon on the undertaking and revenues and the whole or any specified part of the property of the Commission;

q. in the discretion of the Commission and subject to the consent of the Member; to pay ex gratia compensation to any person damnified by the exercise by the Commission of powers conferred by this Act; and

r. to do all lawful things incidental or conducive to the exercise or enjoyment of the rights, interests and powers conferred upon it by this Act.

2) Every decision or action made or taken by the Commission in the exercise of the powers conferred upon it by this Act which relates to either of the following matters shall only be made or taken subject to the approval of the Member—

a. the construction or acquisition of any major buildings, works, machinery or plant;

b. The extension of its business into any new area or any new undertaking.

3) The prices to be paid by the Commission for slaughter stock, other than slaughter stock purchased by the Commission on a liveweight basis, shall be such as may from time to time be fixed or agreed under section 8 of the Agriculture Act (Cap. 318) and the method of disposal of carcass meat on a wholesale basis to butchers shall be either—

a. By direct sale at such prices as may from time to time be fixed by the Minister on the advice of the Commission; or

b. By auction on such terms and conditions as the Minister may from time to time specify.

4) The Commission may from time to time delegate to its Managing Commissioner, either generally or specially, such powers as to it may seem necessary or convenient.

5) The dividends or interest payable on any shares, stock, debentures or debenture stock issued pursuant to paragraph (q) of sub-section (1) of this section shall be at such rate as the Governor in Council may specify."

106. I have also perused Chapter 14 of the Constitution on national security and the Forces Act. **Article 241** of the Constitution establishes the *Kenya Defence Forces* and the *Defence Council*.

107. Article 241(3) provides the duties of the Kenya Defence Forces as follows: -

(a) are responsible for the defence and protection of the sovereignty and territorial integrity of the Republic;

(b) shall assist and cooperate with other authorities in situations of emergency or disaster, and report to the National Assembly whenever deployed in such circumstances; and

(c) may be deployed to restore peace in any part of Kenya affected by unrest or instability only with the approval of the National Assembly.

108. The **Defence Council,** and not the Cabinet Secretary for the time being responsible for matters relating to defence, is responsible for the overall policy, control and supervision of the Kenya Defence Forces and performs any other functions prescribed by national legislation.

109. The Forces Act is an Act of Parliament to provide for the functions, organization and administration of the Kenya Defence Forces pursuant to Articles 232 and 239(6) of the Constitution; to give effect to Article 241 and other relevant Articles of the Constitution, to provide for disciplinary matters, and for connected purposes. Article 232 is on the values and principles of public service. Article 239(6) calls upon Parliament to enact legislation to provide for the functions, organization and administration of the national security organs.

110. Section 10 of the Forces Act provides for the functions of the Cabinet Secretary for the time being responsible for matters relating to defence. The functions are as follows: -

(a) be the principal adviser to the President on matters relating to defence policy;

(b) ensure the development of the defence policy;

(c) advise the President and National Assembly on any matter relating to the Defence Forces;

(d) ***perform such functions as may be delegated by the President and National Assembly;***

(e) be appraised of the construction and maintenance of all Defence Forces establishments and works;

(f) where appropriate, commission research relating to the defence of Kenya;

(g) monitor compliance with policies and directions issued to the Chief of the Defence Forces and report thereon to the President and National Assembly;

(h) submit an annual report, in writing, to the President and National Assembly which shall include –

(i) the work and accomplishment of the Ministry, the Services and the Defence Council during the period covered by the Report;

(ii) the expenditure of the Ministry and the Services by the Principal Secretary in the Ministry; and

(iii) such other recommendations as he or she may consider appropriate.

(i) ***any other lawful function as may be assigned to the Cabinet Secretary by the President or any other written law.***

111. It is, therefore, the Defence Council, and not the Ministry of Defence or the Cabinet Secretary for the time being responsible for matters relating to defence, which is responsible for the overall policy, control and supervision of the Kenya Defence Forces. Further, the statutory assignment of the ministerial responsibility in the Forces Act to the Cabinet Secretary for the time being responsible for matters relating to defence does not in any way interfere with the functions of the Defence Council.

112. In this matter, the Petitioner has not demonstrated how the re-assignment of the ministerial responsibility by the Executive Order will interfere with the functions of the Defence Council. Infact, the thrust of Petitioner's contention is based on Section 8 of the KMC Act which provision was repealed by the enactment of Act No. 17 of 2006, s. 104.

113. I have considered the issue as to whether the impugned re-assignment will amount to commercialization of the Ministry of Defence. From the foregoing analysis, I find that the functions of the Cabinet Secretary for the time being responsible for matters relating to defence do not in any way deal with the overall policy, control and supervision of the Kenya Defence Forces or the Defence Council. It is the Defence Council which is a distinct entity under Article 241 of the Constitution which exercise absolute control and supervision of the Kenya Defence Forces.

114. It is also clear that under Section 10 of the Forces Act the Cabinet Secretary for the time being responsible for matters relating to defence may be assigned other functions by the President or any written law. Needless to say, such duties, unless otherwise demonstrated, may include exercising ministerial responsibility over a State Corporation.

115. I hence find and hold that the Petitioner has not sufficiently demonstrated, whether under the Constitution, the law or any settled practice, how the impugned re-assignment will amount to commercialization of the Ministry of Defence.

116. I will now deal with the concept of arbitrariness. The Court of Appeal in ***Malindi Civil Appeal 56 of 2014 Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR*** made reference to the **Black's Law Dictionary 8th Edition** that defined arbitrariness in the following manner: -

> in it connotes a decision or an action that is based on individual discretion, informed by prejudice or preference, rather than reason or facts.

117. The High Court in ***Civil Suit No. 3 of 2006 Kasimu Sharifu Mohamed vs. Timbi Limited [2011] eKLR*** referred to Oxford Advanced Learner's Dictionary A. S. Horby Sixth Edition Edited by Sally Wehmeiner which defines the term 'arbitrary in the following way: -

> the term arbitrary in the ordinary English language means an action or decision not seeming to be based on a reason, system and sometimes, seeming unfair.

118. The Supreme Court of China in ***Sharma Transport vs. Government of A. Palso (2002) 2 SCC 188*** had the occasion to interrogate the meaning and import of the term 'arbitrarily'. The Court observed as follows: -

> The expression 'arbitrarily' means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.

119. The term '*arbitrariness'* had earlier on been defined by the Court (Supreme Court of China) in ***Shrilekha Vidyarthi vs. State of U.P (1991) 1 SCC 212*** when it comprehensively observed as follows;

> The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that be you ever so high,

the laws are above you'. This is what men in power must remember, always.

120. The 2nd Respondent has explained the *rationale* behind the impugned re-assignment. That is well captured in the Replying Affidavit of Hon. Peter Munya, MGH.

121. The explanation by the Respondents on the basis of the Executive Order has not been impugned by the Petitioner.

122. On my part, I find that the purpose of the re-assignment was aptly explained by the 2nd Respondent. By and large, the move is aimed at revamping the performance of the Commission. There is no doubt that any Government of the day is expected to undertake such measures. Further, Article 132(3) of the Constitution and the Corporations Act provide for the President's power to assign ministerial responsibility.

123. Guided by the judicial decisions on arbitrariness on one hand and the facts of this case on the other hand, I find it a tall order to find that the impugned decision to re-assign the responsibility was arbitrary. I say so on the basis of the following reasons: -

(i) The making of the decision is provided for under the Article 132(3) of the Constitution and the Corporations Act;

(ii) There is a basis for undertaking the decision as alluded to in the depositions of the 2nd Respondent and the 2nd Interested Party;

(iii) The decision was not made capriciously.

124. I now return the verdict that the contention by the Petitioner that the re-assignment of the ministerial responsibility from the Ministry of Agriculture, Livestock, Fisheries and Irrigation to the Ministry of Defence amounts to commercializing the Ministry of Defence and that the decision was done arbitrarily is not proved.

(d) Whether the decision to re-assign the ministerial responsibility from the Ministry of Agriculture, Livestock, Fisheries and Irrigation to the Ministry of Defence is in violation of Article 10 of the Constitution for want of public participation:

125. The Petitioner contend that the decision to re-assign the ministerial responsibility from the Ministry of Agriculture, Livestock, Fisheries and Irrigation to the Ministry of Defence was unilaterally made and as not subjected to public participation. It is further contended that the decision affects the operations of the Commission as well as the farmers and other stakeholders hence the need for the processes leading to the making of the decision to be subjected to public opinion.

126. The Respondents and the Interested Parties are of the contrary position. They contend that the decision to re-assign the ministerial responsibility is an internal decision dealing with the organization of Government as sanctioned under the Constitution and the law. To that extent, there was no need of subjecting the processes to public participation as the decision purely deals with the day to day operations of Government.

127. The High Court in ***Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 Others vs. The Attorney General & Others*** (supra) comprehensively dealt with the issue of Article 10 of the Constitution. The Court stated as follows: -

116. Article 10 provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements any public policy

decisions.

117. The Constitution also provided for alignment of the laws then in force at its promulgation. Section 7(1) of the Sixth Schedule states as follows: -

*Any law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution***.**

118. Expounding on Article 10 of the Constitution, the Court of Appeal in ***Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others, Civil Appeal No. 224 of 2017; [2017] eKLR*** held that:

> *In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforced gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1) (a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.*
>
> *Consequently, in this appeal, we make a firm determination that Article 10 (2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.*

119. Courts have also dealt with the concepts of public participation and stakeholders' consultation or engagement. The High Court in ***Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR*** while referring to the South African decision in ***Doctors for Life International vs. Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC*)** adopted the following definition of public participation: -

> *According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process.*

120. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms. At times it may include consultations. The **Black's Law Dictionary** 10th Edition defines '*consultation*' as follows: -

> *The act of asking the advice or opinion of someone. A meeting in which parties consult or confer.*

121. Consultation is, hence, a more robust and pointed approach towards involving a target group. It is often referred to as stakeholders' engagement. Speaking on consultation the Court of Appeal in ***Legal Advice Centre & 2 others v County Government of Mombasa & 4 others [2018] eKLR*** quoted with approval Ngcobo J in ***Matatiele Municipality and Others vs. President of the***

Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) as follows: -

> *…..…The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say….*

122. In a Three-Judge bench the High Court in consolidated ***Constitutional Petition Nos. 305 of 2012, 34 of 2013*** *and* ***12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR*** the Court addressed the concept of consultation in the following manner: -

> *…. A public participation programme, must…show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.*
>
> (emphasis added)

123. Consultation or stakeholders' engagement tends to give more latitude to key sector stakeholders in a given field to take part in the process towards making laws or formulation of administrative decisions which to a large extent impact on them. That is because such key stakeholders are mostly affected by the law, policy or decision in a profound way. Therefore, in appropriate instances a Government agency or a public officer undertaking public participation may have to consider incorporating the aspect of consultation or stakeholders' engagement.

124. The importance of public participation cannot be gainsaid. The Court of Appeal in ***Legal Advice Centre & 2 others v County Government of Mombasa & 4 others*** *(*supra) while dealing with the aspect of public participation in lawmaking process stated as followed: -

> *The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning.*

125. In ***Matatiele Municipality v President of the Republic of South Africa (2) (CCT73/05A)***, the South African Constitutional Court stated as follows: -

> *A commitment to a right to…public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect…*

126. The South African Constitutional Court in ***Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 others, CCT 86/08 [2010] ZACC 5*** discussed the importance of public participation as follows: -

> ***….****engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make*

demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.

127. Facilitation of public participation is key in ensuring legitimacy of the law, decision or policy reached. On the threshold of public participation, the Court of Appeal in ***Legal Advice Centre & 2 others v County Government of Mombasa & 4 others*** (supra) referred to ***Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 others [2017] eKLR*** stated as follows: -

the mechanism used to facilitate public participation namely, through meetings, press conferences, briefing of members of public, structures questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances. We find so taking into account that the 1st respondent has the discretion to choose the medium it deems fit as long as it ensures the widest reach to the members of public and/or interested party.

128. In ***Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others*** (supra) the Court enumerated the following practical principles in ascertaining whether a reasonable threshold was reached in facilitating public participation: -

a) First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.

b) Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.

c) Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See ***Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012***. *In relevant portion, the Court stated:*

> *"Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them."*

d) Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

e) Fifth, the right of public participation does not guarantee that each individual's views will

be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.

f) Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

128. I will now consider whether the decision to re-assign the ministerial responsibility from the Ministry of Agriculture, Livestock, Fisheries and Irrigation to the Ministry of Defence ought to have been subjected to public participation.

129. The Court in ***Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 Others vs. The Attorney General & Others*** (supra) dealt with the manner in which a state corporation ought to exercise statutory power. The Court defined the requisite threshold as follows: -

133. The manner in which a public body exercises its statutory powers is largely dependent on the resultant effect. This yields two scenarios. The first scenario is when the exercise of the statutory authority only impacts on the normal and ordinary day-to-day operations of the entity. We shall refer to such as the 'internal operational decisions concept'. The second scenario is when the effect of the exercise of the statutory power transcends the borders of the entity into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public.

134. Subjecting the first scenario to public participation is undesirable and will, without a doubt, result to more harm than any intended good. The harm is that public entities will be unable to carry out their functions efficiently as they will be entangled in public participation processes in respect to all their operational decisions. It would likely be impossible for any public entity to satisfactorily discharge its mandate in such circumstances. As long as a decision deals with the internal day-to-day operations of the entity such a decision need not be subjected to public engagement.

135. The issue is not foreign to our Courts. In ***Commission for Human Rights & Justice v Board of Directors, Kenya Ports Authority & 2 Others; Dock Workers Union (Interested Party) [2020] eKLR,*** *the Petitioner claimed that public participation was ignored in the recruitment of the Managing Director of Kenya Ports Authority. In a rejoinder, the Respondents argued that Section 5(1) of the KPA Act mandated the Kenya Ports Authority to appoint the Managing Director. They further argued that Boards of Directors of State corporations are independent and that their decisions are only fettered by the law. It was also argued that public participation had been conducted through representation of board members who were involved in the recruitment process.* ***Rika, J,*** *expressed himself as follows: -*

Should the process of appointment of the Managing Director of the KPA, be equated to the process of making legislation or regulations in public entities? The High Court, in Robert N. Gakuru& Others v. Governor Kiambu County & 3 others [2014] eKLR, held that it behoves County Assemblies, in enacting legislation, to do whatever is reasonable, to ensure that many of their constituents are aware of the intention to enact legislation. The constituents must be exhorted to give their input. Should the level of public participation be the same, in appointment of the Managing Director of a State Corporation? Should the Respondents exhort Kenyans to participate in the process of appointment of the Managing Director? In the respectful view of this Court, appointment of the Managing Director, KPA, is a highly specialized undertaking, which is best discharged by the technocrats comprising the Board, assisted by human resource expert committees as the Board deems fit to appoint. The existing law governing the process of appointment of the

Managing Director KPA leans in favour of technocratic decision-making. Democratic decision-making, involving full-blown public participation may be suitable in the processes of legislation and related political processes, such as the Makueni County Experiment and the BBI, subject matter of Dr. Mutunga's case studies. But technocratic decision-making suits the appointment of CEOs of State Corporations. Even as we promote democratic [people-centric] decision-making processes, we must at the same time promote technocracy, giving some space to those with the skills and expertise to lead the processes, and trusting them to provide technical solutions to society's problems. The Board and the Committees involved in the process are in the view of the Court, well - equipped to give the Country a rational outcome. The Court agrees with the Respondents, that the 1st Respondent is sufficiently representative of stakeholders of the KPA, and the appointment of the Managing Director, is more of a technocratic decision-making process, than a democratic- decision making process. It need not totally open itself up, to the scrutiny of every person. The public is aided by public watchdogs – DCI, EACC, CRB, KRA and HELB – in assessing the antecedents of the applicants. The State Corporations Inspector General is part of the ad hoc committee set up by the 1st Respondent, to evaluate and shortlist applicants. Interviews shall be carried out by the full Board, face to face with the candidates. There are adequate measures taken by the 1st Respondent to ensure the process meets the demands of transparency and accountability to the public.

136. We agree with the Learned Judge. We further find that requiring an entity to subject its internal operational decisions to public participation is unreasonable. It is a tall order which shall definitely forestall the operations of such entity. That could not have, by any standard, been the constitutional desired-effect under Articles 10 and 47.

137. While, as aforesaid, it is imprudent to subject internal operational decisions of a public body to the public policy requirement of Article 10 of the Constitution, the opposite is true of decisions involved in the second scenario: these are operational decisions whose effect transcends the borders of the public body or agency into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public. There is, clearly, ample justification in subjecting the exercise of the statutory power in this scenario to public participation. The primary reason is that the resultant decisions have significant impact on the public and/or stakeholders.

130. Whereas the above decision dealt with a state corporation exercising statutory power, the threshold adopted by the Court apply in the circumstances of this case in equal measure. In other words, a decision taken in exercise of executive authority may have to be subjected to public participation or not depending on its resultant effect. As held in the above case, if the decision '*only impacts on the normal and ordinary day-to-day operations of the entity……Subjecting …. to public participation is undesirable and will, without a doubt, result to more harm than any intended good. The harm is that public entities will be unable to carry out their functions efficiently as they will be entangled in public participation processes in respect to all their operational decisions. It would likely be impossible for any public entity to satisfactorily discharge its mandate in such circumstances. As long as a decision deals with the internal day-to-day operations of the entity such a decision need not be subjected to public engagement.'*

131. The converse is also correct. As held '*the opposite is true of decisions involved in the second scenario: these are operational decisions whose effect transcends the borders of the public body or agency into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public. There is, clearly, ample justification in subjecting the exercise of the statutory power in this scenario to public participation. The primary reason is that the resultant decisions have significant impact on the public and/or stakeholders.'*

132. There is further justification to the position that executive decisions which transcends into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public ought to be subjected to Article 10 of the Constitution. The justification finds refuge in Article 132(3)(c) of the Constitution which requires that any assignment of ministerial responsibility to a Cabinet Secretary ought ***not to be inconsistent with any Act of Parliament***. Therefore, the exercise of the executive power under Article 132(3)(c) of the Constitution is not absolute. The exercise of such authority is subject to the law.

133. I see another justification. It borrows from the argument which I developed on the concept of *ministerial responsibility by Constitution or statute.* In the discussion, I settled for the position that if the Constitution or a statute assigns ministerial responsibility to a specific Cabinet Secretary then any re-assignment of such responsibility to another Cabinet Secretary must be preceded by appropriate amendments to the Constitution or statute.

134. The position is fortified in that any amendment to the Constitution or statute must be preceded by public participation. Indeed, Courts have variously held that Parliament and County Assemblies must carry out elaborate pubic participation as the case may require. It also depends on the nature of the matter under consideration.

135. The Court of Appeal in ***Nairobi Civil Appeal 200 of 2014 Kiambu County Government & 3 others -vs- Robert N. Gakuru & Others [2017] eKLR*** approved the findings in *High Court Civil Case No. 532 of 2013 Consolidated with Petition Nos. 12, 35, 36, 42 & 72 of 2014 And J.R. Misc. Appln. No. 61 of 2013* where the High Court rejected the contention that *'**the people had elected their representatives in the County Assembly and therefore there was no need for further consultations with them'***.

136. The Court of Appeal highlighted the place of public participation in the following manner: -

> *[20]. The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. The Constitution in Article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation, but does not define or say how it should be implemented. In Article 196, it commands County Assemblies to, inter alia, facilitate public participation and involvement in the legislative and other business of the Assembly and its committees, but again does not say how.*
>
> *[23.] The bottom line is that public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation on the legislation.*

137. Therefore, if any re-assignment of ministerial responsibility provided for by the Constitution or a statute must be subjected to public participation, as the case may be, then even in instances where the Constitution or the law is silent on the assignment of ministerial responsibility, any **re-assignment** of such responsibility must as well be preceded by public participation. The element of public participation must, therefore, be undertaken in any decision re-assigning ministerial responsibility. I say so because re-assigning ministerial responsibility affects an earlier decision which assigned the responsibility to another Cabinet Secretary. The re-assignment cannot hence be done unilaterally. It must be preceded by public participation.

138. The decision to re-assign ministerial responsibility is one which transcends the borders of internal operational decisions in exercise of the executive authority into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public. For instance, if a decision deals with reshuffling of the Cabinet, renaming of ministries and state departments, among like others, then such a decision is purely a decision on the internal operations of the executive and need not to be subjected to public participation.

139. In this case the decision to re-assign the responsibility affected the operations of the Ministry of Agriculture, Livestock, Fisheries and Irrigation. There is evidence that the re-assignment caused the transfer of budgets from the Ministry of Agriculture, Livestock, Fisheries and Irrigation to the Ministry of Defence. Further, the Commission is a State Corporation by dint of Section 2 of the Corporations Act. Section 4(1) of the KMC Act provides that the Commission is a body corporate having perpetual succession and a common seal, and shall have all the powers conferred by the Act. The Commission has a Board of Directors. It has a Chairman and 16 other Board members. The affairs of the Commission are, hence, undertaken in compliance with the Constitution, the KMC Act and any other appropriate laws. The

decision on re-assignment did not seek the input of the Commission or at all. It is reasonably expected that, at least, the Commission and any other major stakeholder, ought to be consulted before the making of the decision.

140. There are various stakeholders involved in the livestock sector. They include the farmers. Those farmers were also not consulted. The stakeholders have all along dealt with the Ministry of Agriculture, Livestock, Fisheries and Irrigation as the parent ministry. They ought to be made aware of any change that affects the ministerial responsibility of the parent ministry.

141. There is no evidence to the effect that there was any attempt to subject the decision to re-assign the ministerial responsibility to the Ministry of Defence to public participation in any way. A decision to re-assign ministerial responsibility from one Ministry to another involves several processes and impacts, not only on the stakeholders but the public at large. Prior to making such a decision, there is need to at least carry out due consultations, if the change is not sanctioned by the Constitution or any statutory amendments like in this case. The decision did not, therefore, pass the test in Article 10 of the Constitution on public participation.

142. From the foregoing, I find and hold that, the decision to re-assign ministerial responsibility over the Commission from the Ministry of Agriculture, Livestock, Fisheries and Irrigation to the Ministry of Defence ought to have been preceded by public participation given that an initial assignment of the responsibility was made to the Ministry of Agriculture, Livestock, Fisheries and Irrigation and that the KMC Act does not vest the ministerial responsibility over the Commission on any Cabinet Secretary.

143. The issue is answered in the affirmative.

(e) Whether the Petition meets the constitutional <u>threshold</u>:

144. This issue has been amply dealt with in the foregoing issues. As a restatement, the Petition meets the constitutional threshold and has partly succeeded as demonstrated above.

145. The issue is answered in the affirmative.

<u>Disposition</u>

140. From the above findings and conclusions, the disposition of the Petition is as follows: -

(a) The claim that the re-assignment of the ministerial responsibility from the Ministry of Agriculture, Livestock, Fisheries and Irrigation to the Ministry of Defence must be preceded by the amendment of the Kenya Meat Commission Act fails and is dismissed.

(b) The claim that decision to re-assign the ministerial responsibility from the Ministry of Agriculture, Livestock, Fisheries and Irrigation to the Ministry of Defence was arbitrary and amounts to commercialization of the Ministry of Defence fails and is dismissed.

(c) The claim that the decision to re-assign the ministerial responsibility from the Ministry of Agriculture, Livestock, Fisheries and Irrigation to the Ministry of Defence is in violation of Article 10 of the Constitution for want of public participation succeeds. This Court declares the said decision constitutionally infirm. The decision is hereby quashed.

(d) As the decision to re-assign the ministerial responsibility from the Ministry of Agriculture, Livestock, Fisheries and Irrigation to the Ministry of Defence was already effected and budgets accordingly moved, in order to accord the Respondents an opportunity to regularize the situation, the effect of Order (c) above is hereby suspended for ninety (90) days.

(e) Each party will bear its own costs.

141. Orders accordingly.

DELIVERED, DATED and **SIGNED** at **NAIROBI** this 15th **day of February 2021.**

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Manwa, Learned Counsel instructed by the firm of Messrs. Otwal & Manwa Associate Advocates for the Petitioner.

Miss Omuom, Learned Senior State Counsel instructed by the Honourable Attorney General for the Respondents and the 1st Interested Party.

Mr. A. M. Mate, Learned Special State Counsel instructed by the Honourable Attorney General to appear for the 2nd Interested Party.

Elizabeth Wamboi – Court Assistant