Okoiti & another v Public Service Commission & 73 others; Law Society of Kenya & another (Interested Parties) (Petition 33 & 42 of 2018 (Consolidated)) [2021] KEHC 464 (KLR) (Constitutional and Human Rights) (20 April 2021) (Judgment)

Okiya Omtatah Okoiti & another v Public Service Commission & 73 others; Law Society of Kenya & another (Interested parties) [2021] eKLR

Neutral citation: [2021] KEHC 464 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 33 & 42 OF 2018 (CONSOLIDATED)

AC MRIMA, J

APRIL 20, 2021

BETWEEN

OKIYA OMTATAH OKOITI ..... 1ST PETITIONER

KENYA HUMAN RIGHTS COMMISSION ..... 2ND PETITIONER

AND

PUBLIC SERVICE COMMISSION ..... 1ST RESPONDENT

ATTONEY GENERAL ..... 2ND RESPONDENT

SPEAKER OF THE NATIONAL ASSEMBLY ..... 3RD RESPONDENT

COLLETA SUDA ..... 4TH RESPONDENT

GIDEON MUNG'ARO ..... 5TH RESPONDENT

MOHAMMED IBRAHIM ELMI ..... 6TH RESPONDENT

JOHN MUSONIK ..... 7TH RESPONDENT

HASSAN NOOR HASSAN ..... 8TH RESPONDENT

KEN OBURA ..... 9TH RESPONDENT

ABDUL BAHARI ..... 10TH RESPONDENT

RACHEL SHEBESH ..... 11TH RESPONDENT

SIMON KACHAPIN ..... 12TH RESPONDENT

RASHID AMAN ..... 13TH RESPONDENT

ANDREW K TUIMUR ..... 14TH RESPONDENT

PATRICK NTUTU ..... 15TH RESPONDENT

NELSON GAICHUHIE ..... 16TH RESPONDENT

CHRIS OBURE ..... 17TH RESPONDENT

WINNIE GUCHU ..... 18TH RESPONDENT

ABABU NAMWAMBA ..... 19TH RESPONDENT

HUSSEIN DADO ..... 20TH RESPONDENT

KEVIT DESAI ..... 21ST RESPONDENT

JULIUS MUIA ..... 22ND RESPONDENT

SAFINA KWEKWE ..... 23RD RESPONDENT

NELSON MARWA ..... 24TH RESPONDENT

MACHARIA KAMAU ..... 25TH RESPONDENT

JOSEPH WAIRAGU IRUNGU ..... 26TH RESPONDENT

HARRY KIMUTAI ..... 27TH RESPONDENT

HAMADI BOGA ..... 28TH RESPONDENT

JOHN OMENGE ..... 29TH RESPONDENT

PETER TUM ..... 30TH RESPONDENT

ALFRED CHERUIYOT ..... 31ST RESPONDENT

MARGARET MWAKEMA ..... 32ND RESPONDENT

ZAINAB HUSSEIN ..... 33RD RESPONDENT

SUSAN KOMEN ..... 34TH RESPONDENT

JEROME OCHIENG ..... 35TH RESPONDENT

CHARLES HINGA MWAURA ..... 36TH RESPONDENT

COLLETA SUDA ..... 37TH RESPONDENT

LILIAN OMOLO ..... 38TH RESPONDENT

ANDREW KAMAU NG'ANG'A ..... 39TH RESPONDENT

MICHAEL POWON ..... 40TH RESPONDENT

TOROME SAITOTI ..... 41ST RESPONDENT

CHRIS KIPTOO ..... 42ND RESPONDENT

CHARLES SUNKULI ..... 43RD RESPONDENT

BETTY MAINA ..... 44TH RESPONDENT

FATUMA HIRSI ..... 45TH RESPONDENT

PAUL MARINGA ..... 46TH RESPONDENT

JULIUS KORIR ..... 47TH RESPONDENT

NANCY KARIGITHU ..... 48TH RESPONDENT

KAMAU THUGGE ..... 49TH RESPONDENT

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KARANJA KIBICHO ..... 51ST RESPONDENT

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RICHARD LESIYAMPE ..... 53RD RESPONDENT

IBRAHIM A MOHAMED ..... 54TH RESPONDENT

FRED SIGOR ..... 55TH RESPONDENT

PETER KABERIA ..... 56TH RESPONDENT

JOSPHETTA MUKOBE ..... 57TH RESPONDENT

JOE OKUDO ..... 58TH RESPONDENT

BELIO KIPSANG ..... 59TH RESPONDENT

JAPHETH MICHENI NTIBA ..... 60TH RESPONDENT

NICHOLAS MURAGURI ..... 61ST RESPONDENT

SUSAN MOCHACHE ..... 62ND RESPONDENT

AMINA MOHAMED ..... 63RD RESPONDENT

SICILY KARIUKI ..... 64TH RESPONDENT

FRED MATIANG'I ..... 65TH RESPONDENT

EUGENE WAMALWA ..... 66TH RESPONDENT

ADAN MOHAMMED ..... 67TH RESPONDENT

MWANGI KIUNJURI ..... 68TH RESPONDENT

NAJIB BALALA ..... 69TH RESPONDENT

JAMES MACHARIA ..... 70TH RESPONDENT

JOSEPH MUCHERU ..... 71ST RESPONDENT

HENRY ROTICH ..... 72ND RESPONDENT

CHARLES KETER ..... 73RD RESPONDENT

RACHEL OMAMO ..... 74TH RESPONDENT

AND

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

KATIBA INSTITUTE ..... INTERESTED PARTY

The process of appointment of Chief Administrative Secretaries, Permanent Secretaries and certain Cabinet Secretaries was unconstitutional.

Reported by Beryl Ikamari

Jurisdiction *- jurisdiction of the High Court - jurisdiction to interpret the Constitution - whether the High Court could hear and determine a constitutional petition about the constitutionality of the appointment of Cabinet Secretaries, permanent secretaries and chief administrative secretaries - Constitution of Kenya, 2010, article 165(3).*

Constitutional Law *- Executive - powers of the President - creation of offices in the public service - procedure related to the creation of an office in the public service at the President's initiative - whether the office of Chief Administrative Secretaries was an office in the Public Service and not an office in the Executive and whether the office was procedurally created - Constitution of Kenya, 2010, articles 47, 132(4)(a), 152, 153, 201 and 232; Public Service Commission Act, No 13 of 2012, sections 27, 30 and 47.*

Constitutional Law *- Executive - powers of the President - powers to appoint Permanent Secretaries and Chief Administrative Secretaries - applicable procedure - recommendation by the Public Service Commission and approval by the National Assembly - claim that there had been a failure to appoint through a transparent, competitive, merit-based process that met public participation requirements and included advertisement of vacancies and interviews - whether the appointment of Permanent Secretaries and Chief Administrative Secretaries was constitutional - Constitution of Kenya, 2010, articles 10, 73(2)(a) and 232; Public Service Commission Act, No 13 of 2012, sections 47, 36 and 37.*

Constitutional Law *- Executive - presidential appointments - cabinet secretaries and permanent secretaries - re-appointment and re-designation of dockets - whether it was mandatory for Cabinet Secretaries and Permanent Secretaries serving in a President's first term in office to be subjected to fresh vetting before the National Assembly if they were to continue serving upon the re-election of the President for a second term - whether when the docket of a Cabinet Secretary changed, from one ministry to another, there was a need for fresh vetting and approval from the National Assembly - Constitution of Kenya, 2010, article 132(3)(b); Parliamentary Approval Act, No 33 of 2011, section 7.*

Constitutional Law *- national values and principles - progressive realization principle - claim that the Cabinet as constituted did not meet the constitutional requirements of gender balance and inclusion of persons with disabilities, the youth and the minorities and the marginalized - what were the factors to be considered in applying the progressive realization principle?*

Brief facts

Petition No 33 of 2018 was consolidated with Petition No 42 of 2018 and both petitions challenged the constitutionality of the appointment of Chief Administrative Secretaries (CASs), Principal Secretaries (PSs) and Cabinet Secretaries (CSs). The petitioners averred that there had been a failure to vet some of the CSs that had served in the Cabinet in the President's first term in office and it was necessary for fresh vetting to be undertaken after the President's re-election for a second term. They explained that some of those CSs had served in one ministerial position and were transferred to a different ministerial position without being vetted afresh by the National Assembly for their new posts.

The petitioners also argued that the creation of the position of CAS required a constitutional amendment and that the President lacked the legal capacity to create offices outside the public service or the Constitution. They added that the creation of the offices of the CASs as assistants to CSs went contrary to article 152 and 153 of the Constitution of Kenya, 2010 (Constitution). The petitioners further stated that it was unconstitutional for PSs as constitutional office holders to report to CASs, who were not holders of constitutional offices.

The petitioners also challenged the decision to have the President handpick, nominate and appoint persons as Principal Secretaries, without those persons being identified and recommended by the Public Service

Commission (PSC) through a competitive, merit-based and transparent recruitment process and without being vetted by the National Assembly. They also questioned the constitutionality of the appointment of CASs without them being subjected to a competitive and merit-based recruitment process.

The petitioners further challenged the constitutionality of the composition of the Cabinet as there was a failure to include persons with disabilities and the youth, minorities and marginalized groups and also a failure to have a gender balance.

The petitioners sought various reliefs from the court. They included orders to compel the beneficiaries of the impugned appointments to refund to the State all payments made to them in the form of salaries, allowances and benefits. They also wanted orders for vacancies to be announced in the office of PS in all Government ministries and for a competitive, merit-based recruitment process to be undertaken for the vacancies.

Issues

i. Whether the High Court had jurisdiction to entertain a petition that challenged the constitutionality of the appointment of Cabinet Secretaries, Permanent Secretaries and Chief Administrative Secretaries.

ii. Whether the office of the Chief Administrative Secretary was an office in the public service and not an office in the Executive and whether its creation as such violated articles 152 and 153 of the Constitution.

iii. Whether the appointment of persons into the office of Chief Administrative Secretary and also the office of Permanent Secretary was done in a manner that was legal and constitutional in light of legal requirements on advertisement of the vacancies in the offices, interviews and public participation.

iv. Whether the President could appoint Principal Secretaries and Chief Administrative Secretaries who were not recommended for appointment by the Public Service Commission and approved by the National Assembly.

v. Whether Cabinet Secretaries and Principal Secretaries who served in the first term of the President could continue to serve in the second term of the President upon re-election without fresh vetting by the National Assembly.

vi. What were the factors to be considered in applying the progressive realization principle?

Held

1. The amendment of the petition in Petition No 33 of 2018 was allowed by the court on May 23, 2018. The court gave the petitioner 14 days to file and serve the amended petition. There was a delay in filing and serving the amended petition but that delay was excusable.
2. Rule 30 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 allowed the court to extend the time limit under the rules or by a decision of the court. The parties had sufficiently responded to the amended petition and article 159(2)(d) of the Constitution required the court to do substantive justice without having undue regard to procedural technicalities. The respondents did not suffer prejudice as a result of the delay in filing and serving the amended petition. Under the circumstances, the court deemed the amended petition to be properly on record.
3. The preliminary objection, raised by the 3rd respondent on grounds that there were pending approval proceedings at the National Assembly, had been overtaken by events. The proceedings at the National Assembly had been concluded.
4. The contention that the court lacked jurisdiction over some of the respondents, who were sued in their personal capacities and had since left public service, was not sustainable as some of the prayers sought included a refund of all salaries, benefits and allowances earned by those respondents.
5. The consolidated petitions raised serious issues which called for the interpretation of the Constitution and such interpretation was within the mandate granted to the High Court under article 165(3) of the Constitution. The court had jurisdiction to deal with the consolidated petitions.

6. Articles 20(4) and 259(1) of the Constitution provided guidance on the manner in which the Constitution would be interpreted. In interpreting the Bill of Rights, under article 20(4) of the Constitution, the court was required to uphold values that underlay an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights. Article 259(1) of the Constitution, commanded courts to interpret the Constitution in a manner that promoted its purposes, values and principles, advanced the rule of law, human rights and fundamental freedoms in the Bill of Rights, permitted the development of the law and contributed to good governance.
7. The jurisprudence of the courts showed that while interpreting the Constitution, one was required to favour a purposive approach as opposed to formalism. Additionally, the Constitution was to be interpreted in a holistic manner, within its context and in its spirit. A contextual analysis of a constitutional provision meant reading the provision alongside other provisions of the Constitution so as to maintain a rational explication of what the Constitution had to be taken to mean in light of its history, the issues in dispute and the prevailing circumstances. The entire Constitution had to be read as an integrated whole and no one particular provision could destroy the other but each would sustain the rest.
8. Chapter II of the repealed constitution provided for the Executive which was comprised of the President, the Vice-President, the Prime Minister, two Deputy Prime Ministers, Ministers and Assistant Ministers. Section 19(1) of the repealed constitution permitted the President to appoint Assistant Ministers from among the members of the National Assembly to assist the President, Vice-President and Ministers in the performance of their duties.
9. During the constitution-making process that led to the promulgation of the Constitution of Kenya, 2010, the composition of the Executive was a contested matter. The people's cry was that the Executive was too bloated with unnecessary offices including the office of the Assistant Minister.
10. Under article 130 of the Constitution, the National Executive comprised of the President, the Deputy President and the rest of the Cabinet. Its composition had to reflect the regional and ethnic diversity of the people of Kenya. Under article 152(1) of the Constitution, the Cabinet consisted of the President, the Deputy President, the Attorney-General and not fewer than fourteen and not more than twenty-two CSs.
11. Government ministries in Kenya comprised of State Departments. Article 155(1) of the Constitution created the office of the PS who was in charge of the administration of a State department.
12. In creating the office of CAS for every ministry, the office of the President wrote to the PSC on January 23, 2018 for the PSC's concurrence. The PSC wrote a letter dated January 24, 2018 in which it concurred with the proposal and made its recommendation. From the correspondence, it was apparent that the office of the CAS was an office in the public service. The CAS reported directly to the CS and only performed administrative duties assigned by the CS.
13. The position of PS was not the senior most position in the public service for three reasons. That allegation on seniority was made by the petitioner without evidentiary support and no constitutional provision was cited to support that position. Secondly, the Constitution and the Public Service Commission Act permitted the President to establish any office in the public service upon the recommendation by PSC. Thirdly, the position of the Head of the Public Service was a public service position that had to be the senior most position in the public service.
14. The office of CAS as established was an office in the public service but not an office in the National Executive. Both the PS and CAS directly reported to the CS. It could generally be deemed that the two positions of CAS and PS were at par. A PS and CAS enjoyed more or less similar status in Government. Both positions were positions in public service. The distinction was that a PS was a constitutional office holder while a CAS was not.

15. Article 132(4)(a) of the Constitution provided *inter alia* that the President could establish an office in the public service in accordance with the recommendation of the PSC. In undertaking such a task, the President and the PSC had to comply with the Constitution. That was the calling provided for in articles 3 and 10 of the Constitution. Additionally, section 4 of the Public Service Commission Act provided that in fulfilling its mandate, the PSC had to be guided by the national values and principles of governance under article 10 of the Constitution and to also give effect to the national values and principles of public service article 232 of the Constitution.
16. The procedure for the establishment of an office in the public service was provided for under Part IV of the Public Service Commission Act. There were three ways in which such an office could be established. The first was by the President under article 132(4)(a) of the Constitution. The second was by an authorized officer of a public body under section 27(1) of the Public Service Commission Act and the third way was by the PSC under section 29 of the Public Service Commission Act.
17. The office of the CAS was a public service office created by the President. The President asked for the concurrence of the PSC in the creation of that office and he obtained it. The PSC made recommendations about the creation of the office of CAS. The recommendations of the PSC were a central step in the process of establishing the office.
18. The letter requesting for the recommendation of the PSC in setting up the office of CAS was a two-page letter that fell short of the legal threshold set under sections 27 and 30 of the Public Service Commission Act: -
    a. it did not indicate the financial implications of setting up the office;
    b. it did not give details on the existing authorized establishment, the level of grading proposed, the qualifications of the holders of the proposed office and whether the proposed office would occasion unfair competition in the public body; and
    c. it did not contain a statement verifying that the conditions set out in section 27(1) of the Public Service Commission Act had been met.
19. After receiving the letter from the President's office, the PSC should have noted any deficiencies in it and requested for information so as to assist it in arriving at its recommendation. It could be the case that the PSC already had the information it needed but nonetheless the law required that the information should be availed. The PSC, therefore, had the option of requesting for such information either from the office of the President or from the relevant bodies as established under the Constitution and the law. On the issue of public finance and expenditure, the appropriate body to consult was the Salaries and Remuneration Commission (SRC).
20. The position of CAS was a senior Government position in the public service and it had a significant impact on the national compensation bill. Therefore, the input of the SRC with respect to the creation of the office was mandatory. One of the things that did not receive input when the office of CAS was created was its effect on the national compensation bill.
21. Among the requirements under sections 27 and 30 of the Public Service Commission Act that was not complied with in the creation of the office of CAS, were the supply of comprehensive plans informed by the relevant public body, workload analysis, information on the currently authorized establishment, level of grading, designation, extra posts required and evidence of optimum utilization of existing posts and supply of information showing that the creation of the new office including its level of grading, qualification and remuneration would not disadvantage similar offices in the public service or occasion unfair competition for staff among public bodies.
22. The decision by PSC in recommending the establishment of the office of the CAS contravened articles 201 and 232 of the Constitution as well as sections 27 and 30 of the Public Service Act.
23. Public participation and transparency were some of the national values and principles of governance provided for in article 10 of the Constitution. Public participation referred to the processes of engaging the public or a representative sector while developing laws and formulating policies that affected them.

Public participation was required in financial matters under article 201(a) of the Constitution and it was also one of the values and principles of public service under article 232(1) of the Constitution.

24. Requiring an entity to subject its internal operational decisions to public participation was unreasonable. It was a tall order which would definitely forestall the operations of such entity. That could not have, by any standard, been the constitutionally desired-effect under articles 10 and 47 of the Constitution. It was the impugned recommendation that yielded the establishment of the office of the CAS. The office of the CAS was a senior office in public service and was created in all the Government ministries in Kenya. The office was graded in group U and the holders were State officers who were well remunerated and enjoyed an array of other State benefits. The office, therefore, impacted on the public finance. The decision, hence, transcended the borders of the PSC into the arena of, and had a significant effect on the Kenyan tax payers and the public. That, was a decision which ought to have been preceded by public participation.

25. The recommendation by the PSC to the President to establish the office of the CAS in each ministry contravened articles 10, 132(4)(a), 201(a), 232(1) and 234(2)(c) of the Constitution for want of public participation. The decision also contravened sections 27 and 30 of the Public Service Commission Act, section 3(b) of the Public Service (Values and Principles) Act and section 10 of the Ethics Act.

26. The impugned recommendation was an administrative decision because it was a decision that affected Kenyan taxpayers and the general public. It failed to conform to the requirements of article 47 of the Constitution and the Fair Administrative Action Act. At a minimum, to meet the relevant constitutional and statutory threshold, the PSC had to give notice of the intended recommendation to the public, accord an opportunity to the public to be heard and give reasons for the impugned recommendation. The PSC did not do that. For that reason, the impugned recommendation infringed on article 47(1) of the Constitution.

27. Article 132(2) of the Constitution gave the President the power to nominate and appoint PSs and any other State or public officers whom the Constitution required or empowered the President to appoint or dismiss, subject to the approval of the National Assembly. Under article 155(3)(a) of the Constitution, the President had to nominate a person for appointment as a PS from among persons recommended by the PSC with the approval of the National Assembly. Under section 47 of the Public Service Commission Act, there were provisions on the applicable procedures for the recommendation of persons for the position of PS by the PSC for nomination by the President.

28. CASs were State officers in the public service and their appointment was to be done by the President upon recommendation by the PSC. The procedure applicable to the appointment of a PS under section 47 of the Public Service Commission Act was *mutatis mutandis* applicable to the appointment of a CAS.

29. A careful consideration of the procedure provided for under section 47 of the Public Service Commission Act on the recommendation for appointment of PSs showed that it was not comprehensive and other relevant provisions of the Public Service Commission Act, the Constitution and the law were applicable. For example, sections 36 and 37 of the Public Service Commission Act were applicable - section 36 provided the criteria for appointment and promotion, and section 37 provided the advertisement of vacancies.

30. By placing the national values and principles of governance provided under article 10 of the Constitution and the various provisions of the Public Service Commission Act side by side, it was not difficult to note that the various processes provided for in the Public Service Commission Act were aimed at upholding the constitutional requirements. For instance, the need for advertisement of positions in the public service enhanced transparency, the rule of law and procedural integrity.

31. Advertisements for the position of PS were placed in the print media on August 18, 2017 but there were no indications that there were advertisements for the position of CAS. The failure to advertise

the position of CAS was at the very least an infringement of article 10 of the Constitution and section 37 of the Public Service Commission Act.

32. Section 47(4) of the Public Service Commission Act stated that where a nominee or nominees were rejected by the President, the PSC had to recommend a fresh list of nominees from those interviewed by the PSC. The implication in the provision was that the PSC could only recommend a nominee where it had interviewed that nominee. Such interviews enhanced transparency and integrity of the process and also provided an opportunity for public participation. The interviews were also an opportunity to test the integrity, competence and suitability of a candidate pursuant to article 73(2)(a) of the Constitution. There was no evidence that persons appointed as PSs and CASs were interviewed by the PSC and there was no evidence that they were approved by the National Assembly. The persons who were appropriately appointed to the positions of PSs and CASs were only those who:-
    1. applied for such positions once PSC advertises vacancies;
    2. were shortlisted by the PSC;
    3. were interviewed by the PSC;
    4. were recommended for nomination for appointment by the PSC;
    5. were nominated by the President for such positions;
    6. were approved by the National Assembly; and
    7. were appointed into the offices of the PSs and CASs by the President.
33. Section 7 of the Parliamentary Approval Act provided three issues for consideration in relation to any nomination:-
    1. the procedure used to arrive at the nominee;
    2. any constitutional or statutory requirements relating to the office in question; and
    3. the suitability of the nominee for the appointment proposed having regard to whether the nominee's abilities, experience and qualities met the needs of the body to which the nomination was being made.
34. The vetting process undertaken for the purposes of approving nominees was not cosmetic; it was a serious and mandatory process in which the National Assembly ensured that there was compliance with the Constitution and the law in the appointment.
35. PSs and CASs had to be recommended for appointment by the PSC and could only be appointed into office by the President with the approval of the National Assembly.
36. The tenure of office of persons directly nominated for appointment by the President would end with the tenure of the President. Such persons included CSs. Upon re-election for a second term, the President would have to comply with the process of nomination and approval provided under the Constitution and the law. However, where an appointment was done under terms where a State organ recommended the appointee for nomination by the President and the appointee was duly approved by the National Assembly and eventually appointed by the President, such an appointee's tenure of office was not terminated by the end of the President's tenure of office, the re-election of the President or any exit from office by the President. The reason was that such an appointee underwent a more rigorous process for appointment as compared to an appointee that was directly nominated by the President. There was no discrimination arising from such a position against those directly nominated by the President because there was a justification as to why and when an appointee's tenure of office was tied to the President's tenure of office.
37. The tenure of office of a CS was tied to the tenure of the President who appointed the CS but the tenure of a PS was not tied to the tenure of the President who appointed the PS unless the provision on tenure of office expressly stated so. Therefore, a CS serving in office, had to be approved by the National Assembly afresh where the President was re-elected for a second term.
38. Under article 132(3)(b) of the Constitution, the President had the discretion to direct and coordinate the functions of ministries and Government departments. That discretion included the re-assignment

of the CSs and PSs. The re-assignment of a CS or a PS by a sitting President was neither unconstitutional nor contrary to the law.

39. When applying the progressive realization principle there were three important considerations. Article 81(b) of the Constitution on the two-thirds gender principle was about the election of members into public bodies. The issue in question was about appointments in public bodies. Secondly, any mandatory obligation that involved protracted measures, legislative actions, policy-making or the conception of plans for the attainment of a particular goal, was not necessarily inconsistent with the progressive realization of a goal. Thirdly, the word 'shall' would only translate into an immediate command where the task in question was a cut-and-dried one, executed as it was without further molding or preparation, and where the subject was inherently disposable by action emanating from a single agency.

40. The nominations and appointments were made by a single agency; the President. The appointments did not involve protracted measures, legislative actions, policy-making or conception of plans to be attained. They were simply appointments into public offices. Therefore, the realization of rights related to the appointments translated into an immediate command.

41. Unless it could sufficiently be demonstrated that the appointments could not possibly be made in favour of qualified women, youths, persons living with disabilities, minorities and marginalized groups, the appointing authority had to comply with the constitutional calling. In case of a failure to appoint such categories of persons, the appointing authority had to show that there were no suitably qualified persons falling in the given category.

42. All appointments into public offices had to be done in strict conformity with the Constitution and the law unless otherwise legally permissible.

Petition partly allowed; each party to bear its own costs.

Orders

i. *Claims that the court had no jurisdiction to deal with the consolidated petitions, that the creation of the office of the CAS in the public service infringed articles 152 and 153 of the Constitution, that the tenure of office of a PS was tied to the term of office of the President who appointed the PS and that the President had no powers to re-assign a CS or a PS without the approval of the National Assembly were not proved and were dismissed.*

ii. *The claim that the processes towards the establishment of the Office of the CAS were in contravention of articles 10, 47, 132(4)(a), 201(a), 232(1) and 234(2)(c) of the Constitution as well as sections 27 and 30 of the Public Service Commission Act succeeded. The court declared the Office of the CAS unconstitutional.*

iii. *The claim that a CS who served in the first term of the President (which President was re-elected for a second term) had to be approved by the National Assembly so as to continue to serve as a CS in the second term of the President succeeded. Such contravened article 132(2) of the Constitution and sections 3 and 7 of the Public Appointments (Parliamentary Approval) Act. As such, any CS who served during the first term of President Kenyatta and continued to serve as a CS during the second term without having been approved by the National Assembly upon the President's re-election was in office in contravention of the Constitution.*

iv. *The claim that a PS could only be appointed into office upon such a person being shortlisted, interviewed, recommended for nomination by the PSC to the President and on approval by the National Assembly succeeded. Any contrary appointment contravened articles 10, 27, 41(1), 47 and 155 of the Constitution as well as sections 3 and 7 of the Public Appointments (Parliamentary Approval) Act and section 27 of the Public Service Commission Act. Therefore, any serving PS who was not either shortlisted, interviewed, recommended for nomination by the PSC to the President or approved by the National Assembly was in office in contravention of the Constitution and the law.*

v. *As a result of passage of time since the filing of the petitions herein in 2018, and for purposes of consideration of further reliefs, if any, the Attorney General was to, within 30 days of the judgment, file in the matter an affidavit giving, inter alia, the following details: -*
    1. *The members of the Cabinet in January 2018.*
    2. *The current members of the Cabinet.*
    3. *The gender, age and ethnicity of the current CSs and PSs.*
    4. *The time and manner in which the current CSs and PSs were appointed.*
    5. *Whether any serving CS or PS suffers any disability.*

vi. *Given the potential of orders (ii), (iii) and (iv) to disrupt the orderly operations of the ministries and in view of the state of the covid-19 pandemic in Kenya further to the processes involved in recruiting CSs and PSs and the re-organization of the ministries in the absence of the Chief Administrative Officers or the regularization thereof, the effect of orders (ii), (iii) and (iv) was suspended for the period when Kenya was battling to contain the covid-19 pandemic or such a period as the court could later determine in order to afford the respondents an opportunity to regularize the situation.*

vii. *Once declared by the Government that the covid-19 pandemic curve was flattened, the Deputy Registrar of the court had to schedule the matter for mention on the basis of priority.*

Citations

Cases

Kenya

1. *Center for Rights Education and Awareness & anothers v John Harun Mwau & 6 others* Civil Appeal 74 & 82 of 2012; [2012] KECA 249 (KLR) - (Explained)
2. *Centre for Rights Education & Awareness (CREW) & 8 others v Attorney General & another* Petition 208 & 207 of 2012; [2012] KEHC 2894 (KLR) - (Mentioned)
3. *Communication Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2015] KESC 13 (KLR) - (Explained)
4. *Community Advocacy and Awareness Trust & 8 others v Attorney General & 6 others* Constitutional Application 243 of 2011; [2012] KEHC 5981 (KLR) - (Followed)
5. *Consumer Federation of Kenya (COFEK) v Public Service Commission & another* Petition 263 of 2013; [2013] KEHC 6360 (KLR) - (Mentioned)
6. *Dida, Mohammed Abduba v Debate Media Limited & another* Civil Appeal 238 of 2017; [2018] KECA 642 (KLR) - (Explained)
7. *Hassan, Athmani v Paul Masinde Simidi & another* Civil Appeal 195 of 2016; [2019] KECA 107 (KLR) - (Explained)
8. *In the Matter of the National Land Commission* Advisory Opinions Application 2 of 2014; [2015] KESC 3 (KLR) - (Applied)
9. *In the Matter of Kenya National Commission on Human Rights* Reference 1 of 2014; [2014] KESC 33 (KLR) - (Explained)
10. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] 2 KLR 32 - (Explained)
11. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] KESC 5 (KLR); [2012] 3 KLR 718 - (Explained)
12. *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* Civil Appeal 224 of 2017; [2017] KECA 436 (KLR) - (Mentioned)
13. *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 7 others* Civil Appeal 224 of 2017; [2017] KECA 436 (KLR) - (Explained)
14. *Judicial Service Comission v Mbalu Mutava & another* Civil Appeal 52 of 2014; [2015] KECA 741 (KLR) - (Explained)

15. *Kamuru, Marilyn Muthoni & 2 others v Attorney General & another* Petition 566 of 2012; [2016] KEHC 8370 (KLR) - (Followed)
16. *Katiba Institute & 3 others v Attorney General & 2 others* Constitutional Petition 548 of 2017 - (Mentioned)
17. *Kenya Youth Parliament & 2 others v Attorney General & 2 others* Constitutional Petition 101 of 2011; [2012] KEHC 5436 (KLR) - (Explained)
18. *Kosgei, Sharack & another v Governor of Nakuru County & 2 others* Constitutional Petition 67 of 2014; [2016] KEHC 4629 (KLR) - (Mentioned)
19. *Law Society of Kenya v Attorney General & 10 others* Constitutional Petition 3 of 2016 - (Mentioned)
20. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Explained)
21. *Matagei, Felix Kiprono v Attorney General & 3 others* Petition 61 of 2016; [2016] KEHC 8095 (KLR) - (Mentioned)
22. *Mate & another v Wambora & another* Petition 32 of 2014; [2017] KESC 1 (KLR) - (Explained)
23. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)
24. *Minister for Internal Security and Provincial Administration v Centre for Rights Education and Awareness (CREAW) & 8 others* Civil Appeal 218 of 2012; [2013] KECA 7 (KLR) - (Mentioned)
25. *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* Petition 3 of 2018; [2021] KESC 34 (KLR) - (Followed)
26. *Muigua, David Kariuki v Attorney General & another* Petition 161 of 2011; [2012] KEHC 3516 (KLR) - (Applied)
27. *Mulindi, Albert v Public Service Commission (PSC) & another* Miscellaneous Petition 233 of 2013; [2013] KEHC 6143 (KLR) - (Mentioned)
28. *Mureithi, Benson Riitho (Suing On His Behalf and on Behalf of the General Public) v JW Wakhungu Cabinet Secretary Ministry of Environment, Water and Natural Resources & another* Petition 19 of 2014; [2014] KEHC 7650 (KLR) - (Applied)
29. *Mwau, John Harun v Andrew Mulei & 3 others* Miscellaneous Application 186 of 2006; [2009] KEHC 3681 (KLR) - (Mentioned)
30. *National Gender and Equality Commission (NGEC) v Independent Electoral and Boundaries Commission (IEBC) & 3 others* Petition 409 of 2017; [2018] KEHC 9074 (KLR) - (Applied)
31. *Northern Nomadic Disabled Person's Organization (NONDO) v Governor County Government of Garissa & another* Constitutional Petition 4 of 2013; [2013] KEHC 467 (KLR) - (Followed)
32. *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property and Information Technology (Proposed Amicus Curiae)* Constitutional Petition 56, 58 & 59 of 2019; [2019] KEHC 11259 (KLR) - (Followed)
33. *Okoiti, Okiya Omtatah v Joseph Kinyua, Public Service Commission & another* Petition 51 of 2018; [2018] KEELRC 1750 (KLR) - (Explained)
34. *Omtatah, Okiya v Joseph Kinyua & another* Petition 24 of 2018; [2018] KEELRC 1657 (KLR) - (Mentioned)
35. *Outa, Fredrick Otieno v Jaren Odoyo Okello & 3 others* Petition No 6 of 2014; [2017] KESC 25 (KLR) - (Mentioned)
36. *Ramogi, William Odhiambo & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* Constitutional Petition 159 of 2018 & Petition 201 of 2019 (Consolidated); [2020] KEHC 10266 (KLR) - (Explained)
37. *Republic v Chief Justice of Kenya & 6 others ex-parte Ole Keiwua* [2010] 1 KLR 428 - (Mentioned)
38. *Republic v Fazul Mahamed & 3 others ex-parte Okiya Omtatah Okoiti* Miscellaneous Civil Application 617 of 2017; [2018] KEHC 9435 (KLR) - (Explained)

39. *Sirma, Musa Cherutich v Independent Electoral and Boundaries Commission & 2 others* Petition 13 of 2018; [2019] KESC 64 (KLR) - (Mentioned)
40. *Speaker of the National Assembly v Centre for Rights Education and Awareness & 7 others* Civil Appeal 148 of 2017; [2019] KECA 655 (KLR) - (Mentioned)
41. *Speaker of the National Assembly v Karume* Civil Application 92 of 1992; [1992] KECA 42 (KLR); [1992] KLR 21; [2008] 1 KLR (EP) 825 - (Explained)
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2. *Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC) - (Explained)
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2. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya Sub Leg) rule 30 - (Interpreted)
3. Constitution of Kenya (Repealed) sections 19(1); 22 - (Interpreted)
4. Employment Act (cap 226) sections 5(8)(c); 13 - (Interpreted)
5. Employment and Labour Relations Court Act (cap 8E) section 12(2)(4)- (Interpreted)
6. Fair Administrative Action Act (cap 7L) sections 2, 3, 4, 5 - (Interpreted)
7. Interpretation and General Provisions Act (cap 2) section 51 - (Interpreted)
8. Leadership and Integrity Act (cap 185C) sections 3, 4(1); 7; 8; 9; 10(a)(b); 11; 24- (Interpreted)
9. Public Appointments(Parliamentary Approval) Act (cap 7F) section 3 - (Interpreted)
10. Public Officer Ethics Act (cap 185B) section 10 - (Interpreted)
11. Public Service (Values and Principles) Act (cap 185A) In general - (Cited)
12. Public Service Commission Act (cap 185) sections 27, 30, 36, 37, 47 - (Interpreted)
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1. Commonwealth (Latimer House) Principles on the Accountability of and the Relationship Between the three Branches of Government, 2004

2. Convention on the Rights of Persons with Disabilities (CRPD), 2006

3. International Covenant on Civil and Political Rights (ICCPR), 1966

4. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966

Advocates

Ndege for the 2nd petitioner

Mbarak for the 3rd respondent

Kimani Kiragu Senior Counsel and *Kiarie* for rest of the respondents

Mutemi for the 1st interested party

Kinama for the 2nd interested party

JUDGMENT

Introduction:

1. There are two petitions in this matter. The first one is Nairobi High Court Constitutional Petition No 33 of 2018. It is filed by Okiya Omtatah Okoiti, a public spirited individual and a human rights defender. The petition mainly challenges the constitutionality of the position of the Chief Administrative Secretaries and the appointment of the holders of those offices. It also challenges the appointment of Cabinet Secretaries and Principal Secretaries on several fronts.

2. The second petition is Nairobi High Court Constitutional Petition No 42 of 2018. It is filed by the Kenya Human Rights Commission, a Non-Governmental Organization having interest in human rights centred governance in Kenya. In the main, the petition challenges the composition of the Cabinet on the grounds that the Cabinet does not meet the constitutional gender balance, does not contain the 5% of the persons living with disabilities as well as lacking in youth, minority and marginalized groups. The same fate visits the appointment of the Principal Secretaries and the Chief Administrative Secretaries.

3. The petitions were heard by way of written arguments. Counsel further tendered oral highlights and the matter was reserved for judgment.

4. I will hereinafter refer to the two petitions as 'the consolidated petitions'.

The Consolidated Petitions:

5. The petitioners plead that on January 26, 2018, the President of the Republic of Kenya, announced names of persons he had nominated and/or appointed to serve as Cabinet Secretaries, Principal Secretaries and Chief Administrative Secretaries.

6. The petitioners further plead that the appointments were in contravention of the Constitution and the law. Such appointments include those of the 4th to 20th respondents who were appointed by the President into the Office of Chief Administrative Secretary, the 21st to 36th respondents who were appointed to the office of Principal Secretary, the 37th to 62nd respondents who were re-appointed to or retained by the President in the position of Principal Secretary and the 63rd to 74th respondents were

re-appointed by the President to or retained in the office of the Cabinet Secretary. The 37th to 74th respondents served in the first term of office of the President and are still serving in the second term of office of the President.

7. As a result, the petitioners sought several reliefs. In Petition No 33 of 2018 the reliefs sought are as follows: -

(i) A declaration that:

a. The 1st and 2nd respondents have threatened and violated the *Constitution of Kenya 2010*; sections 27 and 30 of the *Public Service Commission Act, 2017*; sections 3, 4 and 5 of the *Fair Administrative Action Act, 2017*; and sections 3, 4(1), 7, 8, 9, 10(a) & (b), 11 and 24 of the *Leadership and Integrity Act, 2012*.

a1. Cabinet secretaries and principal secretaries are not transferable from one term of the President to another, and persons serving in those offices in one term must be vetted afresh by the National Assembly for performance while in office before they can be reappointed to serve in a President's second term.

a2. Since principal secretaries and cabinet secretaries are vetted for skills and knowledge that make then suitable to serve in particular ministries and state departments the President cannot reassign them in substantive capacities to other ministries unless they are vetted and approved by parliament for the same.

a3. Chief Administrative Secretaries are political appointees who are not part of the public service but of the Executive as Assistant Cabinet Secretaries.

a4. The creation of the position of Chief Administrative Secretary requires an amendment to the Constitution.

a5. The President and the Public Service Commission have no capacity in law to create offices outside the public service or in the Constitution.

a6. The Office of Chief Administrative Secretary is unconstitutional and, therefore, invalid, null and void to the extent that it purports to amend the basic structure of the Executive arm of Government by creating assistants to Cabinet Secretaries contrary to articles 152 and 153 of the *Constitution*.

a7. The Office of Chief Administrative Secretary is unconstitutional and, therefore, invalid, null and void to the extent that it purports to create a mechanism whereby principal secretaries, who are constitutional office holders,report to chief administrative secretaries, who are not holders of constitutional offices.

b. The creation of the position of Chief Administrative Secretary in all Government ministries by the 1st respondent President in consultation with the 2nd 1st respondent is invalid, null and void *ab initio* and of no legal effect.

c. The decision by the 1st respondent President to handpick, and nominate and appoint persons to be principal secretaries without their being identified and recommended by the Public Service Commission through a competitive and merit based transparent recruitment process, and/or without their being vetted and approved by Parliament, is invalid, null and void *ab initio* and of no legal effect.

d. The appointment by the 1st respondent president, of persons to be administrative secretaries without the 2nd 1st respondent subjecting them to a competitive and merit based recruitment process,is invalid, null and void *ab initio* and of no legal effect.

e. Cabinet secretaries are not transferable from one presidential term to another, and all nominees must be vetted afresh by the National Assembly when appointed to serve in a president's second term.

(ii) An order:

a. Quashing the creation by the 1st respondent President, in consultation with the 2nd 1st respondent, of the position office of Chief Administrative Secretary in all Government ministries.

b. Quashing the 1st respondent's impugned handpicking, nomination, and appointment by the President of persons the 21st to 62nd respondents to be principal secretaries; the appointment by the President of persons the 4th to 21st respondents to be chief administrative secretaries;and 63rd to 73rd respondents to be cabinet secretaries as announced by the 1st respondent President in its his statement released to the public on January 26, 2018.

c. Compelling the 4th to 73rd respondents, who are the beneficiaries of the impugned appointments, to refund to the State all payments made to them in form of salaries, allowances and benefits.

d. Compelling the 2nd 1st respondent to announce vacancies in the office of Principal Secretary in all Government ministries, and to proceed to competitively recruit and recommend to the Presidentpersons for appointment as Principal Secretary.

e. Compelling the 1st respondentPresident to submit all its his nominees to the offices of Principal Secretary and Cabinet Secretary for vetting by the National Assembly irrespective of whether or not they served in his first term.

f. Compelling the 1st and 2nd respondents to pay the costs of this suit.

(iii) Any other relief the court may deem just to grant.

8. The prayers sought in Petition No 42 of 2018 are: -

1. A declaration that the President's nomination of Cabinet Secretaries does not meet the constitutional gender balance threshold as provided in article 27 of the *Constitution of Kenya*.

2. A declaration that by not nominating 55 of the persons with disabilities into the Cabinet, President has contravened articles 54(2) of the *Constitution* of Kenya.

3. A declaration that the President's Appointment contravened article 55(b) and 56(a) by not including the youth and the minority and marginalized groups.

4. An order of *certiorari* to bring into this honourable court and quash the nominations of the Cabinet Secretaries and Principal Secretaries by the His Excellency the President by statement released on January 26, 2018 to the Public.

5. An order of *certiorari* to bring into this honourable court and quash the creation of the office and nomination of the Chief Administrative Secretaries by his Excellency the President by statement released on January 26, 2018 to the public.

6. An order of *certiorari* to bring into this honourable court and quash the Gazettement and Publication of Cabinet Secretaries to be vetted by the Parliamentary Committee on appointments on January 31, 2018.

7. An order of *mandamus* directing the present to nominate Cabinet Secretaries and Principal Secretaries in accordance with the articles 27, 54, 55 and 56 of the *Contitution of Kenya, 2010*.

8. Any other relied the court may deem fit and just to grant.

9. The consolidated petitions were supported by the Law Society of Kenya (1st interested party) and Katiba Institute (the 2nd interested party).

10. The petitioners and the interested parties filed written submissions.

The Responses:

11. The consolidated petitions were opposed by the respondents.

12. The 1st, 2nd, 4th to 74th respondents were represented by the Hon Attorney General. They relied on a preliminary objection dated November 27, 2018 and three affidavits. They are a replying affidavit sworn by Dr.Alice A Otwala (Mrs), CBS, the CEO/Secretary in the 1st respondent, on February 13, 2018, a Further Affidavit sworn by Simon Rotich, EBS Acting Secretary in the 1st respondent on April 2, 2019 and a further affidavit sworn by Winnie Guchu, the Chief Administrative Secretary, State Law Office, on June 26, 2020.

13. These respondents also relied on two sets of written submissions. They are dated March 4, 2019 and October 25, 2019 respectively. They also filed a List and Digest of Authorities dated March 4, 2019.

14. The 3rd respondent, the Speaker of the National Assembly, also filed a preliminary objection. It is dated February 13, 2018. It also relied on a replying affidavit sworn by Michael Sialaiand written submissions dated October 12, 2018.

15. The respondents variously denied any violation of the Constitution and the law. They posit how the impugned actions were constitutionally and the legally

Issues for Determination:

16. I have carefully considered the consolidated petitions, the responses thereto, the parties' submissions and the decisions referred to.

17. I discern the following issues for determination: -

(i) Whether this court has jurisdiction to entertain the consolidated petitions;

(ii) Whether the creation of the Office of the Chief Administrative Secretary is contrary to articles 152 and 153 of the *Constitution*in so far it is not an office within the public service but an office in the Executive;

(iii) If the answer to (ii) above is in the negative, whether the Office of the Chief Administrative Secretary was properly created within the constitutional and statutory framework;

(iv) Whether the President can nominate and/or appoint Principal Secretaries and Chief Administrative Secretaries who are not recommended for appointment by the Public Service Commission and approved by the National Assembly"

(v) Whether Cabinet Secretaries and Principal Secretaries who serve in the first term of the President can continue to serve in the second term of the Presidency without vetting by the National Assembly;

(vi) Whether the Cabinet constituted by the President in January 2018 complied with the constitutional requirements, if any, on gender balance and the inclusion of persons with disabilities, the youth and the minority and marginalized;

(vii) What remedies, if any, should issue"

18. I will deal with each of the issues.

(a) Whether this court has jurisdiction to entertain the consolidated Petitions:

19. The 1st, 2nd, 4th to 74th respondents filed a preliminary objection dated November 27, 2018. The essence of the objection is the alleged filing of the amended Petition without the requisite leave of the court. As such, the respondents contend that such a pleading is improperly on record and ought to be struck out with costs.

20. The 3rd respondent, the Speaker of the National Assembly, also filed a preliminary objection. It is dated February 13, 2018. The objection is to the effect that under the doctrine of separation of powers and the principles enunciated by the Court of Appeal in Civil Appeal No 157 of 2009 *John Harun Mwau v Dr Andrew Mulei & others* and the Supreme Court in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] eKLR this court lacks jurisdiction to entertain the consolidated petitions pending the conclusion of the parliamentary proceedings with respect to the approval of the various nominees for public office forwarded to the National Assembly by the President which were by then underway.

21. From the record, this court made an order allowing the amendment of the Petition in Petition No 33 of 2018. That was on May 23, 2018. The petitioner was given 14 days within which to file and serve the amended petition. The petitioner did not comply with the timeline given by the court. Instead, he filed the amended petition on September 4, 2018. That was a period of around three months later.

22. The petitioners and the interested parties did not address this issue. Be that as it may, this court finds the delay excusable. I say so on three reasons. The first one is the effect of rule 30 of The *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*. The rule allows a court to extend time limited by the rules or by any decision of the court. The second reason is that all the parties sufficiently responded to the amended petition. The other reason is the effect of article 159(2)(d) of the *Constitution*. The provision vouches for substantive justice instead of determination of matters based on procedural technicalities.

23. The cumulative effect of the foregoing is that the respondents did not suffer any prejudice or injustice as a result of the late filing of the amended petition. This court, therefore, deems the amended petition dated August 11, 2018 and filed on September 4, 2018 to be properly so on record. (See the Supreme Court in *Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others* [2019] eKLR).

24. I will now turn to the preliminary objection by the 3rd respondent. To me, it appears that the objection is overtaken by events. That is because the objection is primarily based on the pendency of the approval proceedings which were by then being undertaken by the National Assembly. As at now, those proceedings were long concluded and appointments duly made by the President.

25. Before I come to the end of this discussion, there is an issue which is raised by the respondents worth dealing with. It is the submission that the respondents were sued in their personal capacities and since some of them left public service, then no orders can be made against them. It is argued that the court lacks jurisdiction to deal with any issues raised against such respondents. The decisions in *JNK v WN & another* [2015] eKLRand *National Gender and Equality Commission v IEBC & 3 others* [2018] eKLR were cited in support of the position.

26. I have considered the consolidated petitions. One of the prayers sought in Petition No 33 of 2018 is an order 'Compelling the 4th to 73rd respondents, who are the beneficiaries of the impugned appointments, to refund to the State all payments made to them in form of salaries, allowances and benefits.'

27. With such a prayer, it matters not whether the affected respondents are no longer in public service. As long as the respondents were at one point in time holders of the impugned offices, they are properly enjoined in these proceedings since there are specific prayers against them. I also note that there is no contention that the affected respondents were not served with court process. Infact, all respondents are duly represented by counsel. The submission must, therefore, fail.

28. Without much ado, I must point that the consolidated petitions raise serious constitutional issues. This court has already framed the issues for determination. The totality of the issues calls for the interpretation of the Constitution and determination as to whether the Constitution was variously contravened by the respondents. Such is the mandate of the High Court granted under article 165(3) of the *Constitution*. Needless to say, the jurisdiction of this court has been dealt with by superior courts times without number. A decision which readily comes to the fore is the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others* [2012] eKLR.

29. In the end, I find that this court has the jurisdiction to deal with the consolidated petitions. The preliminary objections dated November 27, 2018 and February 13, 2018 respectively be and are hereby dismissed.

(b) Whether the creation of the Office of the Chief Administrative Secretary is contrary to articles 152 and 153 of the *Constitution* in so far it is not an office within the public service but an office in the Executive:

30. It is the 1st petitioner's case that pursuant to article 155 of the *Constitution*, the position of Principal Secretary is the highest office in the public service. The position interfaces with the political office of Cabinet Secretary (hereinafter referred to as 'the CS') established at article 152(1)(d) of the *Constitution*. In this case, it is argued that, the position of Chief Administrative Secretary (hereinafter referred to as 'the CAS') is illegally created and placed between the two constitutional offices: being just below the office of Cabinet Secretaries, but above that of Principal Secretaries.

31. It is further argued that the CASs are designated to "broadly be responsible for helping the Cabinet Secretary to better coordinate the running of the affairs of their respective ministries" and as such they are political appointees who are not part of the public service but of the Executive as Assistant Cabinet Secretaries. Their appointment is for the purely political goal of realizing "a government that reflects the diversity of our nation."

32. The 1st petitioner contend that the office of CAS, being an Assistant Cabinet Secretary, is higher in rank to the office of the Principal Secretary (hereinafter referred to as 'the PS'). It is further contended that since the office of the PS is the senior most office in the public service, then the office of CAS cannot be alleged to be an office in the public service. Such an office is one in the national executive.

33. It is also argued that as the office of CAS is an office in the national executive, then the office changes the structure of the executive as provided for in the Constitution. Such change in the structure of the national executive can only be undertaken on the amendment of the Constitution. It is further contended that article 132(4)(a) of the *Constitution* does not empower the Public Service Commission (hereinafter referred to as 'the PSC') to recommend to the President the creation of constitutional offices, or of offices whose holders are for all practical purposes constitutional office holders. The provision only allows for the creation of offices in the public service. Hence, it can only be used to create offices below that of the PS.

34. The 1st petitioner also argues that under article 260 of the *Constitution* the public service is a distinct entity from both the political entities known as the national government and the county government.

35. The 1st petitioner vehemently submits that the structures of the national government and the county governments are prescribed, respectively, in chapter nine and chapter eleven of the Constitution and they cannot be changed without amending the Constitution pursuant to articles 255, 256 and 257.

36. As a result of the foregoing, it is submitted that the President contravened both the Constitution and statute by purporting to have established "a new position in government, the position of Chief Administrative Secretary in all our ministries."The creation of the position of CAS amounts to the unconstitutional exercise of state authority and in deliberate and contemptuous violation of the national values and principles of governance guaranteed by articles 10(2), 129(2), and 131(2) (a) & (e). The same is invalid and of no legal effect to the extent that it is a direct threat to the supremacy of the Constitution guaranteed by article 2(1) & (2) as well as the sovereignty of the people guaranteed under article 1(1) of the Constitution. The decision to create the position of CAS in the national executive and not in the public service, is invalid, null and void *ab initio*.

37. The 2nd petitioner also confronted the manner in which the Office of the CAS was created. It argued that there was no public participation in the process. The 2nd petitioner, therefore, did not address itself on whether the impugned position contravened articles 152 and 153 of the *Constitution* in so far it is not an office within the public service but an office in the Executive.

38. The 1st interested party supported the 1st petitioner's submission that the office of the CAS is unconstitutional. It is submitted that history does not support the creation of the position as it is. The 1st interested party posits that the former Constitution provided for the position of Assistant Ministers whose main mandate was to assist the Ministers. During the constitutional making process, there was a lot of public outcry that the office of the Assistant Minister among others were unnecessary as they bloated the Government and were a burden to the tax payers. The matter was addressed at length during the public debates and eventually the position of the Assistant Ministers was abolished.

39. The 1st interested party further submits that the Constitution under article 152 is extremely restrictive on the composition of the Cabinet. It prescribes a minimum of 14 and a maximum of 22 CSs. It is argued that there is no room for any other office between the positions of CS and PS.

40. The 1st interested party perceives the office of the CAS as superior to that of the PS. As such, its creation called for the amendment of the Constitution. The effect of the office of the CAS is that the PS, a constitutional office holder, reports to the CAS, a non-constitutional office holder.

41. It is the further submission of the 1st interested party that article 132(4) of the *Constitution* has nothing to do with the creation of offices in the executive, but is limited to creation of offices in the public service. Such offices must be lower to that of a PS. It is also posited that the above explains why there

was no controversy when the President created the position of an 'Adviser'in some ministries and in his own office.

42. The 1st interested party equates the creation of the office of the CAS to what it describes as highly unconstitutional and an impossible scenario. The creation of the impugned office of the CAS is akin to, for instance, where the President liaises with the PSC to create the position of the Office of a Senior Deputy President over and above the office of the Deputy President.

43. The decisions in *Tinyefuza v AG*, Constitutional Appeal No 1 of 1996 (1997 UGCC3), CORD v AG & others [2016] eKLR and Law Society of Kenya v AG & others [2014] eKLR were referred to in buttressing the position.

44. Like the 2nd petitioner, the 2nd interested party, as well, did not address the issue as to whether the creation of the office of the CAS is contrary to articles 152 and 153 of the *Constitution* in so far it is not an office within the public service but an office in the executive. The 2nd interested party instead dealt with the constitutionality of the creation of the office of the CAS in light of *inter alia* articles 10, 47(1), 132(4), 135, 153, 155, 232(1) and 234 of the *Constitution*.

45. The respondents were resolute that the creation of the office of the CAS is both constitutional and lawful.

46. The PSC through the replying affidavit sworn by Dr Alice A Otwala (Mrs) deponed that on January 23, 2018, it received a request from the office of the President for the establishment of the position of CAS in each Ministry pursuant to article 132(4)(a) of the *Constitution*.

47. PSC considered the request in line with sections 27 and 30 of the *Public Service Act* (hereinafter referred to as 'the PSC Act'). It then recommended the creation of the position of CAS in each ministry. PSC communicated the decision to the office of the President on January 24, 2018.

48. Winnie Guchu, a CAS in the State Law Office, deponed on the duties of the CASs and why the position of a CAS is so critical in aiding the CSs deliver on their mandates.

49. It is also submitted that the CASs deal with administrative duties and that there is no conflict of duties between the CS and the CASs.

50. The respondents referred to *Felix Kiprono Matagei v Attorney General & 3 others* [2016] eKLR and *Fredrick Otieno Outa v Jared Odoyo* [2014] eKLR in support of the position that the office of the CAS was properly established and in line with the Constitution and the law.

51. The respondents further relied on *Republic v El Mann* (1967) EA 357, *Republic v Chief Justice of Kenya & others exparte Moijo Mataiya ole Keiwua* [2012] 2 EA 313and *Sebaggala v Attorney General and others* (1995-1998) EA 295 in urging this court to adopt a holistic interpretation of the Constitution.

52. The foregoing is the parties' positions on the issue. Upon further consideration of the parties' submissions against the issue at hand, this court will address three sub-issues in settling the main issue.

53. The sub-issues are a brief look at the manner in which the Constitution is to be interpreted; the place of an Assistant Minister in the Constitution which was repealed by the promulgation of the current Constitution (hereinafter referred to as 'the former Constitution') and lastly the intended place of the office of the CAS as created.

54. As regards the interpretation of the Constitution, suffice to say that the *Constitution* itself gives guidelines on how it ought to be interpreted. That is in articles 20(4) and 259(1).

55. Article 20(4) requires courts while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights. Article 259(1) command courts to interpret the *Constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.

56. Courts have also rendered how the Constitution ought to be interpreted. The Supreme Court in a ruling rendered on December 21, 2011 in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR discussed the need for courts, while interpreting the Constitution, to favour a purposive approach as opposed to formalism. The court stated as under: -

> (86) .... The rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in article 10, in chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the courts.
>
> (87) In article 259(1) the *Constitution* lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance." Article 20 requires the courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.
>
> (88) ..... Article 10 states clearly the values and principles of the Constitution, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.
>
> (89) It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation.

57. On the principle of holistic interpretation of the Constitution, the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2015] eKLR affirmed the holistic interpretation principle by stating that:

> This court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit.

58. The meaning of holistic interpretation of the Constitution was addressed by the Supreme Court in *In the Matter of the Kenya National Human Rights Commission*, Sup Ct Advisory Opinion Reference No 1 of 2012; [2014] eKLR. The court at paragraph 26 stated as follows: -

...But what is meant by a holistic interpretation of the Constitution" It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.

59. In a ugandan case in *Tinyefuza v Attorney General*, [1997] UGCC 3 (25 April 1997) the court was of the firm position that the Constitution should be read as an integrated whole. The court observed as follows: -

.... the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.....

60. In *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR, the Court of Appeal summarized the various principles of constitutional interpretation as follows:

(21) .... Before the High Court embarked on the interpretation of the contentious provisions of the Constitution, it restated the relevant principles of interpretation of the Constitution as extracted from case law thus: -· that as provided by article 259 the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.· that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.· that the Constitution must be interpreted broadly, liberally and purposively so as to avoid "the austerity of tabulated legalism.· that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).

These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statues which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.

61. Whereas there are many other relevant and captivating decisions on constitutional interpretation, I choose to hold it here for now. The above brief discussion on constitutional interpretation shall henceforth guide this court as it deals with the consolidated petitions.

62. I will now deal with the place of an Assistant Minister in the former Constitution. The reason for dealing with this sub-issue is the contention that the office of the CAS is akin to that of an Assistant Minister in the former Constitution.

63. Chapter II of the former Constitution provided for the Executive. In the former Constitution, the Executive was comprised of the President, the Vice-President, the Prime Minister, two Deputy Prime Ministers, Ministers and Assistant Ministers.

64. Section 19(1) of the *former Constitution* permitted the President to appoint Assistant Ministers from among the members of the National Assembly to assist the President, Vice-President and Ministers in the performance of their duties. Section 22 thereof created the office of a Permanent Secretary in the public service.

65. Resulting from the foregoing, it is true that the position of an Assistant Minister was one within the national executive structure.

66. On the place of the office of the CAS as created, it is not lost to this court that the composition of the national executive was one of the hotly contested matters during the constitutional-making process. The people's cry was that the national executive was too bloated with unnecessary offices including the office of an Assistant Minister.

67. At the promulgation of the current *Constitution*, Kenyans adopted the Executive structure which is in Chapter Nine. Article 130 of the *Constitution* provides for the National Executive as follows: -

    (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.

68. Article 152(1) of the *Constitution* creates the Cabinet as follows: -

    The Cabinet consists of—

    (a) the President;

    (b) the Deputy President;

    (c) the Attorney-General; and

    (d) not fewer than fourteen and not more than twenty-two Cabinet Secretaries.

69. In Kenya, therefore, the national executive is comprised of only the President, the Deputy President, the Attorney-General and the CSs.

70. As earlier stated, in this matter, it is argued that the office of the CAS is an office in the national executive and not an office within the public service. The basis of the argument is that under the current constitutional architecture, the PS is the senior most position in the public service and given that the office of the CAS is one above that of the PS and just below that of a CS, then it is not an office in the public service but one in the national executive.

71. Government ministries in Kenya comprise of State Departments. Article 155(1) of the Constitution creates the office of the PS. Under article 155(2) the PS is in charge of the administration of a State Department.

72. Turning to the office of CAS, I will briefly look at the events that preceded the creation of that office in this matter. The office of the President wrote to the PSC on January 23, 2018requesting for concurrence for the establishment of the CAS in every ministry. The correspondence proposed that: -

> The Chief Administrative Secretary will be responsible and reporting to the Cabinet Secretary, and shall only perform such administrative functions as may be delegated by the Cabinet Secretary form time to time, including and not limited to: -
>
> i) Providing liaison with the National Assembly and Senate;
>
> (ii) Providing liaison with County Governments on matters of concurrent mandate;
>
> (iii) Providing liaison with cities and municipalities on matter so common interest;
>
> (iv) Providing inter-ministerial/sectorial co-ordination;
>
> (v) Representing the Cabinet Secretary at any meeting as instructed by the Cabinet Secretary.

73. Responding to the request, the PSC in a letter dated January 24, 2018 concurred with the proposal and recommended *inter alia* as follows: -

> It is recommended that the post be graded at Job Group 'U' and the appointed officers to enter at the mid-point of the salary scale.

74. Upon the concurrence by the PSC, the President established the positions.

75. From the correspondences exchanged between the Office of the President and the PSC, it is gathered that both parties dealt with a case of establishment of the office of the CAS in the public service. The correspondences openly so speak for themselves. As stated earlier, the CAS is responsible and reports directly to the CS. Further, the CAS only performs administrative duties as assigned by the CS.

76. In giving its concurrence to the creation of the position of CAS in the public service, the PSC agreed to the functions of the office of the CAS as proposed by the Office of the President. The PSC eventually graded the office of CAS in the public service and within Job Group 'U'. The salaries of the persons holding such position were to start at the mid-point of the salary band.

77. As to whether the position of the PS is the senior most position in the public service, I must say that this Court is not so convinced for three reasons. The first reason is that apart from making the averments, there is no evidence on the record in support thereof. No constitutional or statutory provision was cited in the submission. The second reason is that the Constitution and the PSC Act permits the President to establish any office in the public service upon the recommendation by PSC.

78. The third reason is that there exists the position of The Head of Public Service in the public service. The position was created by the President upon the recommendation by PSC. From its title, the position of The Head of Public Service must be the senior most one in the public service. I must add that the constitutionality of the position of the Head of Public Service was contested in Nairobi Employment and Labour Relations Court Petition No 24 of 2018 *Okiya Omtatah v Joseph Kinyua & another* [2018] eKLR. The Court (Justice Abuodha, JN) found that the position was created within the constitutional and statutory parameters. The court dismissed the petition on June 29, 2018.

79. Having said so, I find that the office of the CAS, as currently established, is intended and is created within the public service. It is not an office within the national executive.

80. Before I come to the end of the discussion herein, it is important to ascertain the status of the holder of the office of the CAS.

81. The CAS is intended to directly assist the CS. A CAS reports to the CS and not to a PS. In Government practise, an officer can only report to an officer who is next senior to him or her. It is the case that a PS also administratively reports to the CS and not to the CAS. Therefore, both the PS and the CAS report directly to the CS. It can hence be generally deemed that the two positions, that is that of the PS and the CAS, are at par.

82. This court, therefore, finds that a PS and a CAS enjoy a more or less similar status in government. As such, a PS and a CAS are both State officers whose positions are in the public service. The outstanding distinction however is that a PS is a constitutional office holder whereas a CAS is not.

83. In the end, this court finds that the position of the CAS as established is a position in the public service and not one in the national executive. The issue is answered in the negative.

(c) If the answer to (b) above is in the negative, whether the Office of the Chief Administrative Secretary was properly created within the constitutional and statutory framework:

84. The 1st petitioner contend that even by assuming that it was possible to create the office of CAS, it is submitted that the process of creating the impugned office was a nullity in law to the extent that it was shrouded in secrecy. Further and in particular, the process was not transparent and there was no public participation contrary to the express constitutional anchoring of the principle of participatory democracy over and above representative democracy.

85. Contrary to articles 10(2)(a) and 47(1), as read with 129 and 131(2)(a) of the *Constitution*, it is submitted that there was no adherence to the rule of law to the extent that the President created the office in disregard of the basic structure of the Constitution which creates the office of Cabinet Secretary (article 152(1)(d)) and that of Principal Secretary (article 155(1)), with no office in between.

86. The 1st petitioner also contends that contrary to articles 249(1)(c) of the Constitution, the PSC failed to promote constitutionalism to the extent that it aided the President to create the position of CAS contrary to the Constitution. It is submitted that there is no evidence demonstrating that the President and the PSC created the office of CAS pursuant to article 132(4)(a) of the *Constitution* as read together with sections 27 and 30 of the PSC Act which require compliance with the elaborate the procedure laid out in Part IV of the Act.

87. It is the 1st petitioner's further contention that by creating the office of CAS without consideration for the costs of manning and running it, articles 201(a), (c) & (d) and 232(b) of the Constitution, which categorically provides that public resources shall be used in a prudent, responsible, efficient, effective and economic way were violated. At the time when the country's ballooning wage bill is a matter of grave concern, no consideration was given to the cost of running the new offices of CAS in all Government Ministries.

88. From the foregoing, it is submitted that the creation in government of the office of CAS by the President and the PSC was done in secrecy outside the law, and had no consideration for both statute and the basic structure and express provisions of the Constitution, hence, the office is unconstitutional and, therefore, invalid, null and void.

89. It is further submitted that reliance on only article 130(2) of the *Constitution* to create the office of the CAS cannot fly under the Constitution since the diversity balance must be realized without changing the structure of the National Executive as prescribed in Chapter Nine of the Constitution.

90. It is contended that if it is to be taken that the office of the CAS could still be created in the public service then it can only be created under the mandate of the PSC, appointees to the office ought to have been but were not subjected to an objective merit based, competitive and inclusive recruitment process, to ensure that those appointed to the office of the CAS merit the appointment, are competent, or have the relevant skills for the positions for which they were handpicked and appointed to by the President.

91. It is submitted that the office of CAS was filled outside the structures of article 232 and 234(2)(c) and section 46 of the PSC Act which underpin among others, the constitutional requirement of fair competition and merit as the basis of appointment, in all cases where the commission is required by the Constitution or legislation to nominate or recommend a person for appointment.

92. The 1st petitioner further revisited the purpose why Kenyans wanted a departure from the former Public Service Commission to a vibrant and responsible one for the recruitment of public officers whose processes would be transparent, merit based and competitive.

93. It is further the 1st petitioner's case that appointees to the public service must be vetted and approved by the PSC in a fair, transparent, competitive, and merit-based process that takes into account the diversities of Kenya's communities as prescribed, inter alia, in articles 10, 232 and 234 of the *Constitution*. And, where the President creates offices in the Public Service, nothing excludes those appointed to those offices, especially at the very senior levels from being subjected to the national values and principles of governance in articles 10, 27, 73(2(a), and 232 of the *Constitution*.

94. The 1st petitioner reiterated that the 4th to the 20th respondents are individuals the President handpicked and appointed to the impugned office of the CAS without the involvement of the PSC and without their being vetted by the National Assembly.

95. It is submitted that it is not only the creation of offices in the public service by the President which must be constitutional; even the appointment of persons into those offices after they are created must equally be constitutional. Under article 232, the appointment of officers to the public service must be through a transparent process, and based on fair competition and merit. Moreover, the foregoing constitutional provisions are replicated and further bolstered in the *Public Service (Values and Principles) Act 2015*.

96. The court was further urged to draw negative inference on the failure by the 2nd respondent, the PSC, in not filing any evidence about its position on the issues raised in the petition or the role it played in the appointments of persons to the position of CAS.

97. It is reiterated that article 234(2)(a)(ii) which gives the power to the PSC to recruit and appoint persons to fill positions in public service was violated in the appointment of holders to the office of the CAS.

98. The 1st petitioner submits that any appointments to the public service made by the President without subjecting the appointees to a fair, open, competitive, merit based, and inclusive process, and without involving the 1st respondent, as required by the Constitution, is antithetical to the Constitution and it is, therefore, invalid, null and void.

99. Lastly, it is argued that, even if the office of CAS is a political office in government exempted from the mandate of the PSC, such as that of CS, then the President ought to have subjected his nominees for the position CAS to the National Assembly for approval pursuant to article 132(2) of the Constitution and section 3 of the *Public Appointments (Parliamentary Approval) Act, 2011*.

100. The 2nd petitioner supports the submissions by the 1st petitioner. It contends that the creation of the office of the CAS is unconstitutional in that it infringes article 10(2)(a) and article 232(1)(d) of the *Constitution* as well as sections 27 and 30 of the *PSC Act*. It is further contended that creation of the office of the CAS did not take into regard the ballooning national wage bill and that it is largely a duplication of the functions of the Principal Secretaries.

101. The 2nd petitioner submits that most people appointed to the position of the CAS are persons who were loyal to the Jubilee Party in the preceding General Elections, which casts doubt as to whether the office was established in the spirit of the *Constitution* and the law.

102. The 1st interested party only addressed itself to the constitutionality of the office of CAS as far as it is an office in the national executive and not in the public service.

103. The 2nd interested party echoed the position of the petitioners. It is submitted that article 132(4) of the *Constitution* is instructive on the creation of an office in the public service. The provision gives the President the discretion to create an office in the public service. However, this discretion is subject to the recommendation of the PSC.

104. It is submitted that although the provision states that the discretion of the President is exercised on recommendation of the PSC, it must be read together with article 234(1) and (2) of the Constitution which enshrines the functions and powers of the PSC. In addition, article 132(4) must be read together with sections 27 and 30 of the *PSC Act*.

105. Article 132(4) of the *Constitution* is very clear that the starting point is that the PSC is subject to the Constitution and the law, meaning it cannot perform functions that are not prescribed under the Constitution and the law. In addition, article 234 of the Constitution must be read together with section 30(2) of the PSC Act to establish the powers of the PSC establishment of an office in the public service.

106. The 2nd interested party further states that section 30(2) of the *Constitution* provides that the President starts exercising his discretion in establishing an office for public service by firstly requesting in writing the PSC to make such a recommendation of the establishment of the said body. This requirement in writing is in line with article 135 of the *Constitution* that the decision of the President must be in writing and signed and sealed.

107. It is also submitted that an additional requirement to the letter written by the President to the PSC requiring the establishment of the office is further provided in section 27(2) which reads that:

> The written request for establishment of an office shall include a statement by the respective authorized officer verifying that the conditions in subsection (1) have been met.

108. The 2nd interested party submits that a harmonized interpretation of articles 132(4), 135 and 234(1) of the *Constitution,* which provide for the constitutional procedures for the establishment of a public office as read together with sections 27(1) and (2) and 30(2) of the *PSC Act* require that the President and the PSC must follow the procedure laid down in the *Constitution* and the law.

109. The procedure in law whenever the President wishes to exercise his/her discretion and establish a public office was reiterated at length by the 2nd interested party. The President must comply with certain conditions.

110. Upon examining the conditions, the PSC must exercise its discretion before recommending the establishment of the public office. It is submitted that the discretion by PSC cannot be exercised whimsically but in consideration of the constitutional and legislative tenets. In this instance

constitutionalism and the rule of law are key when the executive and independent commissions exercise their discretion.

111. The 2nd interested party also submits that the further constitutional imperatives to be considered include article 232(2)(c) of the *Constitution* which provides that the PSC must promote the values and principles mentioned in articles 10 and 232 throughout public service and article 232(2)(e) which provides that the PSC must ensure the public service is efficient and effective.

112. The national values and principles of governance which the PSC must uphold when interpreting and applying the *Constitution* and the law as per article 10 of the *Constitution*, with regards to determining the recommendations on the establishment of public office are the rule of law, good governance, transparency, integrity and accountability.

113. With respect to the values and principles of public service which must be adhered to as enshrined in article 232(1), such include the efficient, effective and economic use of resources transparency and provision to the public of timely and accurate information, accountability for administrative acts and fair competition and merit as the basis for appointments and promotions.

114. It is submitted that the failure by the President and the PSC to observe the Constitution and the law with respect to the establishment of a public office is in breach of the rule of law. The 2nd interested party submits that there is no evidence that has been put forth by the PSC or the Attorney General to show that the President provided the written statement containing the conditions relevant before the new office of CAS was established. The AG and PSC only presented a mere aversion in an affidavit stating that the PSC had followed the procedure under the law but failed to attach any evidence showing the written request from the President to the PSC with the conditions they had considered before requesting establishment of the office. If the law was followed, it would be easy for the PSC to attach all the relevant documents showing the procedures that were followed. Failure to abide by the law is therefore contrary to the constitutional principles of the rule of law, good governance and an efficient and effective public service.

115. The 2nd interested party argues that the appointment of CAS is contrary to articles 201(a), (c) and (d) and 232(1)(b) of the *Constitution* in respect to the principles of public finance and the values and principles of public service which includes the efficient, effective and economic use of resources.

116. It is 2nd interested party's case that generally, the Constitution anticipates that any power that it confers upon any institutional person will be exercised in a responsible way and in consideration of prudent use of resources. That, the President's failure to present before the PSC a statement providing the financial implications of appointing 13 CASs while the *Constitution* already provides for the CSs and PSs in articles 153 and 155 of the Constitution to carry out different functions within the different ministries was in contravention of the principles of public finance under articles 201 and 232 of the *Constitution*.

117. The respondents vehemently oppose the positions taken by the petitioners and the Interested Parties.

118. I have already captured the position of the 1st, 2nd, 4th to 74th respondents in the manner the office of the CAS was established. That was in the preceding issues and through the affidavits of Dr Alice A Otwala (Mrs) and that of Winnie Guchu.

119. The 3rd respondent did not deal with the issue at hand.

120. At the core of the discussion in this issue is the manner or procedure adopted by the respondents in establishing the position of the CAS in the public service.

121. The procedure for establishing an office in public service has its basis in the Constitution and law.

122. Article 132(4)(a) of the *Constitution* provides that 'thePresident may perform any other executive function provided for in this Constitution or in national legislation and, except as otherwise provided for in this Constitution, may establish an office in the public service in accordance with the recommendation of the Public Service Commission'.

123. In undertaking such duties, the President and the PSC must comply with the *Constitution*. That is the calling in articles 3 and 10 of the *Constitution*. 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 v 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).

124. Underscoring this court's duty to protect the integrity of the Constitution, the South African Constitutional Court in *Minister of Health and others v Treatment Action Campaign and others* (2002) 5 LRC 216, 248 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.

125. Asserting the legality of exercise of public power, the South African Constitutional Court in Affordable *Medicines Trust and theors v Minister of Health and others* [at para 18][2005] ZACC 3; 2006 (3) SA 247 (CC) at paras 49, 75 and 77 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.

126. And, in *Kenya Youth Parliament & 2 others v Attorney General* [2012] eKLR the High Court (Mwera, Warsame and Mwilu, JJ (as they then were) dealt with how an appointment into a public office ought to be conducted within the Constitution and the law. The ccourt stated as follows: -

> ... this court clothed with the jurisdiction as earlier stated, would not hesitate to nullify and revoke an appointment that violates the spirit and letter of the Constitution ....

127. 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 v The Attorney*

General & others case(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.

128. Article 129 of the *Constitution* is on the principles of executive authority. It provides as follows: -

(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.

129. Chapter 13 of the *Constitution* is on the public service. Article 232 provides for the values and principles of public service as follows: -

1. The values and principles of public service include—

(a) high standards of professional ethics;

(b) efficient, effective and economic use of resources;

(c) responsive, prompt, effective, impartial and equitable provision of services;

(d) involvement of the people in the process of policy making;

(e) accountability for administrative acts;

(f) transparency and provision to the public of timely, accurate information;

(g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;

(h) representation of Kenya's diverse communities; and

(i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—

(i) men and women;

(ii) the members of all ethnic groups; and (iii) persons with disabilities.

(2) The values and principles of public service apply to public service in—

(a) all State organs in both levels of government; and

(b) all State corporations.

(3) Parliament shall enact legislation to give full effect to this article.

130. The legislation contemplated under sub-article 3 includes the *Public Service (Values and Principles) Act*, No 1A of 2015(hereinafter referred to as 'the Values and Principles Act') and the Public Officer Ethics Act, No 4 of 2003 (hereinafter referred to as 'the Ethics Act').

131. Article 233 of the *Constitution* establishes the PSC. Article 234 of the Constitution provides the functions and powers of the PSC as follows: -

(1) The functions and powers of the Commission are as set out in this article.

(2) The Commission shall—

(a) subject to this Constitution and legislation—

(i) establish and abolish offices in the public service; and

(ii) appoint persons to hold or act in those offices, and to confirm appointments;

(b) exercise disciplinary control over and remove persons holding or acting in those offices;

(c) promote the values and principles referred to in articles 10 and 232 throughout the public service;

(d) investigate, monitor and evaluate the organisation, administration and personnel practices of the public service;

(e) ensure that the public service is efficient and effective;

(f) develop human resources in the public service;

(g) review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service;

(h) evaluate and report to the President and Parliament on the extent to which the values and principles referred to in articles 10 and 232 are complied with in the public service;

(i) hear and determine appeals in respect of county governments' public service; and

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

(3) Clauses (1) and (2) shall not apply to any of the following offices in the public service—

(a) State offices;

(b) an office of high commissioner, ambassador or other diplomatic or consular representative of the Republic;

(c) an office or position subject to—

(i) the Parliamentary Service Commission;

(ii) the Judicial Service Commission;

(iii) the Teachers Service Commission;

(iv) the National Police Service Commission; or

(d) an office in the service of a county government, except as contemplated in clause (2)(i).

(4) The Commission shall not appoint a person under clause (2) to hold or actin any office on the personal staff of the President or a retired President, except with the consent of the President or retired President.

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

132. Under article 234(2)(a)(i) the PSC has powers to establish and abolish offices in the public service. Article 234(2)(c) calls upon the PSC to promote the values and principles referred to in articles 10 and 232 of the *Constitution* throughout the public service.

133. Due to the humongous nature of the functions of the PSC, the PSC Act was enacted in order to aid the PSC in discharging its duties. The preamble of the PSC Act states that it is a legislation to make further provision as to the functions, powers and the administration of the PSC established under article 233 of the *Constitution* and to also give effect to article 234 of the *Constitution* and for connected purposes.

134. Section 4 of the PSC Act provides that the PSC 'shall in fulfilling its mandate, be guided by the national values and principles of governance in article 10 of the Constitution and the values and principles of public service in article 232 of the *Constitution*.'

135. The foregoing sufficiently settles the fact that the President and the PSC must adhere to the Constitution and the law in the establishment of any office in the public service.

136. Returning to the procedure for establishment of an office in public service, the PSC Act, further to article 132(4)(a) of the *Constitution*, provides for other procedural requirements. Part IV of the PSC is on Establishment and Abolition of Offices in the Public Service.

137. Given the centrality of Part IV of the PSC Act in the process, I will reproduce the same save for section 28 which deals with abolition of a public office. The other sections of Part IV states as follows: -

25. This Part shall apply in the exercise of the Commission constitutional function to establish and abolish offices in the public service under article234(2)(a) of the Constitution.

26. For the purpose of this Part, "establishment of offices in the public service" means the determination and creation of the number and kinds of offices in the public service.

27.

(1) The Commission may establish an office in the public service after receipt of a written request by an authorized officer of a public body if the Commission is satisfied that —

(a) the request is based on comprehensive plans informed by the public body workload analysis;

(b) the financial implications of creating the office are indicated;

(c) the office to be created relates to or supports the core functions of the public body;

(d) the office to be created is to be domiciled in the requesting public body;

(e) information on the current authorized establishment, level of grading, designation, extra posts required and evidence of optimum utilization of existing posts has been submitted;

(f) the office including its level of grading, qualification and remuneration shall not disadvantage similar offices in the public service or occasion unfair competition for staff among public bodies; and

(g) the functions of the office to be established are consistent with the Constitution or any other legislation.

(2) The written request for establishment of an office shall include a statement by the respective authorized officer verifying that the conditions in subsection (1) have been met.

28. .....

29

(1) Subject to the provisions of this part, the Commission may on its own motion establish or abolish any office in the public service.

(2) The Commission shall, before establishing or abolishing an office under subsection (1), give the authorized officer of the concerned public body an opportunity to make representation in respect of the action to be taken under subsection (1).

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

30.

(1) Where the President, under article 132(4)(a) of the Constitution, requests the Commission to recommend the establishment of an office in the public service, the Commission shall act in accordance with the conditions provided for in this Part.

(2) Where the President considers it necessary to establish an office in the public service under article 132(4)(a) of the Constitution, a request to the Commission for recommendation for establishment of an office shall be in writing.

138. There are, therefore, three ways in which an office may be established in the public service. The first way is by the President under article 132(4)(a) of the *Constitution*. The second way is by an authorized officer of a public body under section 27(1) of the PSC Act and the third way is by the PSC on its own motion under section 29 of the PSC Act. In this matter, the establishment of the impugned public office of the CAS was by the President.

139. For ease of this discussion and as a recap, I will briefly restate the procedure followed in the establishment of the office of the CAS as rendered by the Respondents. The account is brief.

140. The Office of the President wrote to the PSC on January 23, 2018 requesting for concurrence for the establishment of the CAS in every ministry. Responding to the request, the PSC in a letter dated January 24, 2018 concurred with the proposal and recommended that the post of the CAS be graded at Job Group 'U' and the appointed officers to enter at the mid-point of the salary scale.

141. Upon the concurrence by the PSC, the President created the positions.

142. The recommendation by the PSC for the establishment of the position of the CAS in the public service is one of the most central steps in the process. I say so because the President cannot on his own motion create any office in the public service without the recommendation from the PSC. The recommendation is hence a formal decision of the PSC.

143. I have carefully considered the correspondences exchanged between the Office of the President and the PSC. The letter requesting for the recommendation for the creation of the office of the CAS is a two-page one. It is under the hand of the Head of Public Service. The letter did not have any enclosures thereto.

144. I have further compared the contents of the said letter to the provisions of sections 27 and 30 of the PSC Act. The letter reveals that the request failed to attain the threshold set in law in some aspects. First, the financial implications of creating the office were not indicated. Second, there was no information on the then existing authorized establishment, the level of grading, qualifications of holders of the office and whether the office shall occasion unfair competition in the public body. Third, there was no statement verifying that the conditions in section 27(1) of the *PSC Act* had been met.

145. Having received the request aforesaid, and noting the deficiencies therein, it was incumbent upon the PSC to ensure that the information required was availed to itself so as to aid it in arriving at the recommendation.

146. From the nature of the intended position of the CAS and the information required to be availed, it can be the case that most of the information required was within the PSC. Nevertheless, the law required that such information be availed.

147. Even if this court is to arrive at the finding that the information required under sections 27 and 30 of the PSC Act was within the PSC, such a presumption may not apply in respect to the information on the financial implications of creating the office of the CAS.

148. The PSC, therefore, had the option of either requesting for such information either from the Office of the President or from the relevant bodies as established under the *Constitution* and the law. On the issue of public finance and expenditure the appropriate body to have been consulted was the Salaries and Remuneration Commission(hereinafter referred to as 'SRC').

149. Due to the place of SRC in matters public finance, I will briefly address some key aspects of the institution of SRC. Article 230(1) of the *Constitution* establishes the SRC. article 230(4) of the *Constitution* provides for the powers and functions of the SRC as under: -

(a) set and regularly review the remuneration and benefits of all State officers; and

(b) advise the national and county governments on the remuneration and benefits of all other public officers.

150. Article 230(5) of the *Constitution* enumerates the principles guiding SRC in discharging its mandate. They are as follows: -

(a) the need to ensure that the total public compensation bill is fiscally sustainable;

(b) the need to ensure that the public services are able to attract and retain the skills required to execute their functions;

(c) the need to recognise productivity and performance; and

(d) transparency and fairness.

151. SRC is also guided by the *Salaries and Remuneration Commission Act* (hereinafter referred to as 'SRC Act'). The SRC Act makes further provisions on the powers and functions of the SRC.

152. As one of the mandates of SRC is to ensure that the total public compensation billremain fiscally sustainable, it then goes without say that the involvement of SRC in the process of establishment of the office of the CAS was constitutionally-inevitable. In other words, the information on the financial implication in creating the office of the CAS could only be availed by SRC. The requirement for such financial information was therefore a mandatory constitutional step. It was only SRC to vouch for the financial impact on the national compensation bill in creating the office of the CAS.

153. Further, article 201 of the *Constitution* provides the principles guiding all aspects of public finance in Kenya. The principles includeopenness and accountability, including public participation in financial matters; that the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations and that public money shall be used in a prudent and responsible way. These principles are among those which could have been considered by SRC in arriving at its position on the issue.

154. Having said so, it is without any doubt that the position of CAS in every ministry was finally created. These are senior Government positions in the public service. The holders of such positions are State

officers. There is no doubt that such positions have a significant impact on the national compensation bill. As said, the input of the SRC was mandatory.

155. In this case, therefore, PSC recommended the establishment of the office of the CAS in each Government ministry without, *inter alia*, the input on the effect of creating such positions on the national compensation bill. Further, some other requirements under section 27 and 30 of the *PSC Act* were not complied with. They include the failure to supply comprehensive plans informed by the public body's workload analysis, the failure to supply information on the current authorized establishment, level of grading, designation, extra posts required and evidence of optimum utilization of existing posts and the failure to supply information that the office including its level of grading, qualification and remuneration shall not disadvantage similar offices in the public service or occasion unfair competition for staff among public bodies.

156. As a result, the decision by PSC in recommending the establishment of the office of the CAS contravened article 201 and 232 of the *Constitution* as well as sections 27 and 30 of the *PSC Act*.

157. There is another contention on the level of transparency and public participation required in creating an office in the public service on the part of the PSC. The petitioners assert that PSC ought to have undertaken public participation before making the impugned recommendation.

158. Public participation and transparency are some of the national values and principles of governance in article 10 of the *Constitution*. It can be argued that public participation is one way of enhancing transparency.

159. The subject of public participation has been dealt with by courts over time and is now well settled. 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 v The Attorney General & others* case (supra) comprehensively dealt with the issue as follows: -

> 119. Courts have also dealt with the concepts of public participation and stakeholders' consultation or engagement. The High Court in *Robert N Gakuru & others v Governor Kiambu County & 3 others* [2014] eKLR while referring to the South African decision in *Doctors for Life International v 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 v 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) v 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 v 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.

160. Further to article 10 of the *Constitution* calling for public participation, article 201(a) of the *Constitution* expressly calls for public participation in financial matters. Article 232(1) of the *Constitution* also vouches for public participation as one of the values and principles of public service. Article 234(2)(c) of the *Constitution* commands PSC to promote the values and principles referred to in articles 10 and 232 of the *Constitution* throughout the public service; which principles include public participation.

161. Apart from the *Constitution*, statutory enactments have, on an equal measure, vouched for public participation in the public service. There is the preamble to the *PSC Act* which provides *inter alia* that the Act is aimed at giving effect to article 234 of the *Constitution*. The *Values and Principles Act* is an Act of Parliament aimed at giving effect to the provisions of article 232 of the *Constitution* regarding the values and principles of public service. Section 3 of the *Values and Principles Act* provides for the objects of the Act which includes public participation in the promotion of the values and principles of, and policy making by, the public service.

162. The Ethics Act is an Act of Parliament to advance the ethics of public officers by providing for a Code of Conduct and Ethics for public officers and requiring financial declarations from certain public officers. Section 10 thereof calls upon a public officer to carry out his/her duties in accordance with the law and not to violate the Constitution.

163. From the foregoing provisions of the Constitution and the law, there is no doubt that PSC, as a public body, must undertake public participation in some of its undertakings. The striking issue is which of those undertakings are to be subjected to public participation.

164. The threshold for deciding which undertakings must undergo public participation in public bodies was discussed in Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with Constitutional Petition No 201 of 2019 *William Odhiambo Ramogi & 3 others v The Attorney General & others* case (*supra*) as follows: -

129. We will now consider the first two issues together, that is, whether a public authority undertaking statutory functions authorized by its parent statute is obligated to engage in public participation and/or stakeholders' engagement while carrying out those functions and if so, to what extent.

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.

(emphasis added).

165. The above threshold applies in this matter. Therefore, in the event this court finds that the recommendation by the PSC to the President to establish the office of the CAS in each ministry was an internal operational decision, then the requirement for public participation does not arise. However, if this court finds that although the impugned recommendation was an operational decision, its effect transcended the borders of the PSC into the arena of, and had a significant effect on the major sector players, stakeholders and/or the public, then the need for public participation crystalized.

166. It is the impugned recommendation that yielded the establishment of the office of the CAS. As demonstrated above, the office of the CAS is a senior office in public service and was created in all the Government ministries in Kenya. The office was graded in Group U and the holders are State officers who are well remunerated and enjoy an array of other State benefits. The office, therefore, impacted on the public finance. The decision, hence, transcended the borders of the PSC into the arena of, and has a significant effect on the Kenyan tax payers and the public. That, was a decision which ought to have been preceded by public participation.

167. I must, however, indicate that the manner in which PSC would have undertaken the public participation exercise remain the sole responsibility of PSC. The only qualification remains that the process must meet the expected constitutional and statutory parameters.

168. In this matter, PSC received the request on January 23, 2018 and gave its recommendation on the following day; that is on January 24, 2018. The record has no evidence that PSC undertook any form of public participation.

169. It is on the foregoing basis that this Court finds that the recommendation by the PSC to the President to establish the office of the CAS in each ministry further contravened articles 10, 132(4)(a), 201(a), 232(1) and 234(2)(c) of the *Constitution* for want of public participation. The decision also variously contravened section 27 and 30 of the *PSC Act*, section 3(b) of The Values and Principles Act and section 10 of the *Ethics Act*.

170. The impugned recommendation is, also, for the same reasons, a violation of article 47 of the *Constitution*. The respondents did not demonstrate if they took any steps towards complying with

article 47 of the *Constitution* and the *Fair Administrative Actions Act* in arriving at the decision to recommend the creation of the office of the CAS.

171. Article 47 of the *Constitution*. Sub-articles (1), (2) and (3) provides as follows: -

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

172. The *Fair Administrative Actions Act* No 4 of 2015 is the legislation that was contemplated under article 47(3). Section 5(1) thereof provides that: -

(1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall—

(a) issue a public notice of the proposed administrative action inviting public views in that regard;

(b) consider all views submitted in relation to the matter before taking the administrative action;

(c) consider all relevant and materials facts; and

(d) where the administrator proceeds to take the administrative action proposed in the notice—

(i) give reasons for the decision of administrative action as taken;

(ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and

(iii) specify the manner and period within which such appeal shall be lodged.

173. Section 2 of the *Fair Administrative Act* defines an 'administrative action'and an 'administrator' as follows: -

'administrative action' includes -

(i) The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

'administrator' means 'a person who takes an administrative action or who makes an administrative decision'.

174. The Court of Appeal in Civil Appeal 52 of 2014 *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR dealt with the provisions of article 47 of the *Constitution*. The court held thus: -

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of *ultra vires* from which administrative law under the common law was developed.

175. In *President of the Republic of South Africa and others v South African Rugby Football Union and others* CCT16/98) 2000 (1) SA 1the South African Constitutional Court ring-fenced the importance of fair administrative action as a constitutional right. The court while referring to section 33 of the *South African Constitution* which is similar to article 47 of the Kenyan Constitution stated as follows: -

Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...

176. In *Republic v Fazul Mahamed & 3 others ex-parte Okiya Omtatah Okoiti* [2018] eKLR the High Court had the following to say:

25. In *John Wachiuri t/a Githakwa Graceland & Wandumbi Bar & 50 others v The County Government of Nyeri & another* the court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature.

These are: -

a. Illegality- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond it powers.

b. Fairness- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.

c. Irrationality and proportionality- The courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute irrationality" or perversity on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in Associated Provincial Picture Houses Ltd v Wednesbury Corporation: -

> If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere....but to prove a case of that kind would require something overwhelming....

177. Deriving from the foregoing, there is a basis for finding that the impugned recommendation is an administrative action for the reason that the decision affected the Kenyan tax payers and the general public. Such, is a decision which must pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.

178. The impugned recommendation did not, therefore, conform to the requirements of article 47 of the *Constitution* and the *Fair Administrative Actions Act*. At the minimum, to meet the constitutional and statutory threshold, PSC had to do the following: -

a. Give notice of the intended recommendation to the public;

b. Accord an opportunity to the public to be heard on the question; and

c. Give reasons for the impugned recommendation.

179. PSC did not undertake any of the above. It is for this reason that the impugned recommendation infringes article 47(1) of the Constitution and the Fair Administrative Actions Act.

(d) Whether His Excellency the President can nominate and/or appoint Principal Secretaries and Chief Administrative Secretaries who are not recommended for appointment by the Public Service Commission and approved by the National Assembly:

180. It is pleaded by the 1st petitioner that the 4th to the 20th respondents are individuals the President appointed into the office of the CAS without the involvement of the PSC and the approval of the National Assembly. It is further pleaded that the 4th to the 21st to the 36th respondents are individuals the President appointed into the office of the PS without the involvement of the PSC and the approval of the National Assembly.

181. The 1st petitioner contends that although the Chief Executive Officer of PSC deponed that PSC advertised the vacancies for the PSs and received 2,190 applications out of which it shortlisted 184 candidates, and recommended 144 for nomination and appointment by the President, the 1st petitioner holds that the entire process, save for the advertisement of vacancies, was invalid. The process, it is argued, contravened articles 10, 27, 41(1), 47, 131(2)(a), 132(1)(c)(i) and (ii), 155 and 232 of the *Constitution*. It is further argued that the process also infringed the PSC Act and section 7 of the *Public Appointments (Parliamentary Approval) Act, 2011*.

182. Unlike the case of the PSs, the 1st petitioner contends that PSC never advertised the positions of the CAS at all. Apart from recommending the establishment of the office of the CAS in the public service, PSC did nothing more. The holders of the office of the CAS were, therefore, singlehandedly appointed by the President into office contrary to articles 10, 27, 47, 73(1), 129, 131(2)(a), 132(2), 232, 233, 234(2)(c) and 236 of the Constitution as well as section 46 of the PSC Act and section 3 of the *Public Appointments (Parliamentary Approval) Act, 2011*.

183. It is further contended that the processes towards the appointment of the PSs and the CASs violated the Constitution and statutory law and settled national practice, by being opaque and secretive, and for not providing for and facilitating public participation. He further contends that the list of applicants was not advertised and publicised and as such that denied Kenyans the chance to know who had applied. It is also contended that no open and transparent interviews were held.

184. The decision in *Benson Riitho Mureithi v J W Wakhungu & 2 others* [2014] eKLR was referred to in support of the position that appointments into public service must be constitutional.

185. The 2nd petitioner supports the position taken by the 1st petitioner.

186. The 1st interested party did not address itself on this issue in its submissions.

187. The 2nd interested party joined hands with the petitioners in contending that that the nomination by the President, the approval by the National Assembly and the appointment of persons as Principal Secretaries and Chief Administrative Secretaries was not done in accordance with fair competition and merit and this was in contravention of articles 73(2)(a), 155(3)(a) and 232(1)(g) of the *Constitution* as read with sections 3, 4,5 of the *Fair Administrative Actions Act*, sections 3, 4(1), 7, 8, 9, 10 (a) and (b), 11 and 24 of the *Leadership and Integrity Act, 2012* and section 10 of the *Public Service (Values and Principles) Act*. Further that the approval of all the CSs without vetting all of them at the National Assembly was contrary to the *Constitution*.

188. The 2nd interested party further argues that one of the guiding principles of leadership and integrity under article 73(2)(a) of the *Constitution* include "selection on the basis of personal integrity, competence and suitability, or election in free and fair elections."This provision is read together with the *Leadership and Integrity Act, 2012* (hereinafter referred to as 'the Leadership Act') which has several provisions which require for fair competition and merit to be conducted before appointing persons into state and public office.

189. Reference was made to section 3 of the Leadership Act which provides for the principles that State officers must respect which include those set out in articles 10 (national values and principles of governance), 73 (principles of leadership and integrity) and 232 (values and principles of the public service of the Constitution. Section 7 of the *Leadership Act* is titled "rule of law" and stipulates that State officers must respect and abide by the Constitution and the law and must perform their duties in accordance with the law. Section 8 provides that the authority and responsibility placed on a State office is a public trust that must be exercised in the best interest of the people of Kenya. Section 9 states that a State Officer shall be responsible for the reasonably foreseeable consequences of his or her actions and omissions form the discharge of their office duties and section 10(a) and (b) requires that state officers must carry out their duties efficiently and honestly and in a transparent and accountable manner and this must be to the best of their abilities.

190. Sections 11 and 24 of the *Leadership Act* were also referred to.

191. It is further argued that article 232(1)(g) of the *Constitution* encapsulates the values and principles of public service which includes fair competition and merit as the basis for appointment and promotions and this is read together with section 10 of the *Public Service (Values and Principles) Act* No 1 A of 2015, which provides which expressly provides for the requirement of fair competition and merit in appointments and promotions.

192. The 2nd interested party also submits that no evidence has been adduced to show that there was fair competition and merit in the appointment of the CASs. It further submits that neither the PSC nor the AG have presented evidence to show the court the copies of communication to the public by way of advertisement of the availability of the CAS position and what the job description of the position is, a list of persons who have applied for the positions, receipts stamped application letters or e-profiles applications as well as copies of curriculum vitaes of those that applied for the various CAS positions, interview notes, score sheets or any other records generated by the panellists who interviewed or assessed or offer letters from the PSC to the successful CAS candidates.

193. It is further submitted that it is clear that the appointments into the CASs positions was not done in accordance with the Constitution and the law with regards to adherence to fair competition and merit in the nominations as well as the appointments. It is further submitted that even though the President can nominate persons for appointments, the discretion must be done in accordance with the law and further the approval by the PSC must be in accordance with the law.

194. The 2nd interested party referred to several decisions in which courts have analysed the reason for inclusion of the requirement of fair competition and merit in appointments. They are *Community Advocacy and Awareness Trust v Attorney General* [2012] eKLR, *Consumer Federation of Kenya (COFEK) v Attorney General* [2012] eKLR and *David Kariuki Muigua v Attorney General* No 161 of 2011.

195. There is a further argument that the provision of the establishment of the office of the CASs with the recommendation of the PSC is also another level of checks and balances created by the Constitution with an independent Constitution. Similarly checks and balances were in place for the approval of nominations for appointments of CSs by the National Assembly. The importance of checks and balances and separation of powers was highlighted in the Supreme Court Advisory Opinion of *In the Matter of the National Land Commission* [2015] eKLR (*NLC*case).

196. The 2nd interested party submits that courts have also outlined the independence of commissions and the role of checks and balances of independent commissions. Reference was made to *Communications Commission of Kenya and 5 others v Royal Media Services & 5 others*, Sup Ct Petition Nos 14, 14A, 14B and 14C of 2014; [2014] eKLR (CCK)where the court considered the meaning of independence.

197. It is also submitted that section 36 of the PSC which is a normative derivative of article 234 of the Constitution *Principle v of the Commonwealth (Latimer House) Principles on the Accountability of and the Relationship Between the Three Branches of Government, 2004* provides for merit and integrity in appointments of public office.

198. On the judicial review of the procedural propriety of appointments process, the Court of Appeal decision in *Mumo Matemu* (*supra*) and in *Democratic Alliance v President of South Africa* [2012] ZACC 24 were referred to.

199. The 2nd interested party contends that contrary to the foregoing, there was neither merit nor fair competition in the selection and appointment of the CAS and it is not contended that they were appointed and selected through fair competition and merit as required by articles 10 and 232 of the *Constitution*. It is further argued that the theory of a holistic interpretation of the Constitution mainstreamed by the Supreme Court requires this court to take into account, alongside a consideration of the text and other provisions in question, non-legal phenomenon such as Kenya's historical, economic, social, cultural, and politicalas held *In the Matter of the Kenya National Human Rights Commission* [2014] eKLR at 26.

200. On the historical perspective, the 2nd interested party referred to chapter 13.6 (Public Service) of chapter 13 dedicated to Organs of Government in the Final Report of the Constitution of Kenya Review Commission (CKRC) 210, 213-214. It further submits that in the constitution making process, Kenyans told the Commission of their desire for a PSC that is an independent body and has no political appointments so as to strength the PSC's management and discipline roles. In the end, CKRC recommended the establishment of an independent PSC.

201. The 2nd interested party, therefore, submits that from the foregoing historical account Kenyans desired for a Public Service that was fully delinked from the political actors, especially in regard to recruitment and appointment. This purpose has clearly been articulated in all the normative derivative statutory

provisions seeking to implement the constitutional provisions on public service, including the *Public Service (Values and Principles) Act, 2015* and the *Public Service Commission Act*.

202. This court is, hence, urged to consequently take judicial notice of and give effect to the concerns of Kenyans on the unequal and opaque appointments to the office of CAS by the political elite under the previous constitutional order. In line with the preambular aspiration for a government based on human rights, equality, and social justice. Article 27(3) guarantees every person the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Similarly, under article 232(1)(i) the values and principles of public service include affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of men and women; the members of all ethnic groups; and persons with disabilities.

203. In this case, it is submitted, there was no attempt at fair competition or merit in the appointment of the CASs to public office. There is no evidence that any of the positions enumerated in the Petition were advertised for – transparency requirement; that numerous candidates were considered for each respective position – the competition and merit requirement; or that those appointed were subjected to fitness or integrity tests. It is submitted further that both the Constitution and the *Public Service (Values and Principles) Act, 2015* elevate fair competition and merit in public appointments to core values of the public service. Where these minimum requirements are not met, the Constitution is violated, unless it can be shown – through methodical and clear evidence – that the exceptions in article 232(2)(h) and (i) as read with section 10(2) of the Act applies. In this case, no claim is made that the failure to adhere to fair competition or merit was linked to any constitutionally protected equality or diversity goal such as an affirmative action.

204. In the end, it is submitted that HE the President and the PSC failed to consider fair competition and merit in appointments of CASs as required under the Constitution and the law.

205. With an exception of the 3rd respondent who did not deal with this issue, the rest of the respondents aver that on August 18, 2017 the PSC advertised the positions of the PSs pursuant to article 155(3)(a) of the *Constitution* and section 47 of the PSC Act. That, PSC received 2,190 applications and developed a short-listing criteria. PSC then shortlisted suitable candidates. In a resolution of the PSC made on November 15, 2017 PSC recommended 184 persons who had been shortlisted to the President for appointment as PSs, subject to further vetting as may be appropriate.

206. In their submissions, the respondents argue that article 115 of the Constitution and the PSC Act does not require advertisement of shortlisted candidates, public participation or interviews before submission of the nominated candidates to HE the President for appointment. It is further argued that the PSC, as one of the constitutional commissions is independent and ought to be allowed to regulate its own processes. It is also argued that public participation is to be undertaken by the National Assembly.

207. The respondents urged this court to find that the prayers sought in the consolidated petitions are against public interest.

208. In buttressing the foregoing, the respondents relied on *Shadrack Kosgei & another v Governor of Nakuru county & 2 others* [2016] eKLR, Kenya Youth Parliament & 2 others v Attorney General [2012] eKLR, *Trusted Society of Human Rights Alliance vs Attorney General & 2 others* [2012] eKLR, *Albert Mulindi v Public Service Commission & another* [2013] eKLR, *Katiba Institute v Attorney General & 6 others* [2018] eKLR and *Consumer Federation of Kenya (COFEK) v Public Service Commission & another* [2013] eKLR.

209. Article 155(1) of the *Constitution* establishes the office of a PS as an office in the public service. In this judgment, I have, as well, found that the office of the CAS, as contemplated by the respondents, is also an office in the public service.

210. Article 132(2) of the *Constitution* gives the President the power to nominate and appoint PSs and any other State or public officers whom the Constitution requires or empowers the President to appoint or dismiss, subject to the approval of the National Assembly. Such officers include the Cabinet Secretaries, the Attorney-General, the Secretary to the Cabinet, Principal Secretaries, High Commissioners, Ambassadors and Diplomatic and Consular representatives and any other State or public officer whom the President can appoint and dismiss under the Constitution.

211. A look at the above officers reveals two categories of officers. The first category comprises of officers who are directly nominated by the President and upon approval by the National Assembly appointed into office. Such include the Attorney-General, the Cabinet Secretaries and the Secretary to the Cabinet.

212. The officers in the second category are appointed into office through a different process. Such officers are to be, in the first instance, recommended for nomination to the President by a State organ. The President then nominates them and seeks the approval of the National Assembly before appointing them into office. They include the PSs, High Commissioners, Ambassadors and Diplomatic and Consular representatives and any other State or public officer whom the President can appoint and dismiss under the Constitution (in this case the CASs).

213. Article 155(3)(a) of the *Constitution*, in particular, provides that the President shall only nominate a person for appointment as a PS from among persons recommended by the PSC and with the approval of the National Assembly.

214. In the preceding issues, this court has, in great length dealt with the various constitutional and statutory provisions guiding the affairs of public service and the institutions thereunder which includes the PSC. I need not rehash the same.

215. Constitutionally speaking, the starting point on the appointment of a person into the office of a PS is the recommendation by the PSC.

216. Whereas on one hand the Constitution does not expressly prescribe the process for recommendation of persons for nomination by the President, on the other hand, section 47 of the *PSC Act* provides for the procedure for persons to be recommended by PSC for nomination by the President.

217. Section 47 of the *PSC Act* provides as follows: -

> (1) This section applies to the recommendation of persons for nomination by the President for appointment as Principal Secretary under article 155(3)(a) of the Constitution.
>
> (2) A person is eligible for appointment as a Principal Secretary if the person-
>
> (i) is a citizen of Kenya;
>
> (ii) holds a degree from a university recognized in Kenya;
>
> (iii) has at least ten years relevant professional experience, five years of which should have been in a leadership position or at a top management level in the public service or private sector;
>
> (iv) possesses general knowledge of the organization and functions of Government;

(v) demonstrates an understanding of the goals, policies and developmental objectives of the nation;

(vi) has demonstrable leadership and management capacity including knowledge of financial management and strategic people management; and

(vii) meets the requirements of chapter six of the Constitution.

(3) The Commission shall, in making the recommendations under this section, submit to the President a list of nominees for appointment, paying attention to inclusiveness in terms of gender, Kenya diverse communities, persons with disabilities and the youth.

(4) In case of a rejection of a nominee or nominees by the President, the Commission shall recommend a fresh list of nominees from those interviewed by the Commission.

218. This court notes that section 47 of the *PSC Act* is specific to PSs. However, it has been demonstrated in one of the preceding issues that the office of the CAS is one established under the public service and that it is a state office within the meaning of article 260 of the Constitution. Like the PSs, the CASs are also State officers whose offices are in the public service. They both report directly to the CSs. As such, pursuant to article 132(2)(f) of the Constitution, the appointment of a CAS is to be made by the President upon recommendation by the PSC.

219. Having said so, I find and hold that the procedure in section 47 of the *PSC Act* for recommending persons to be nominated by the President applicable to PSs apply *mutatis mutandis* to the CASs.

220. A careful consideration of the procedure under section 47 of the *PSC Act* reveal that the procedure is not comprehensive and/or self-executing. As a result, other relevant provisions of the *PSC Act*, the *Constitution* and the law ought to apply.

221. Some of the relevant provisions include sections 36 and 37 of the *PSC Act*. The provisions state as follows: -

36. Criteria for appointment and promotion:

(1) This section applies to the recommendation of persons for nomination by the President for appointment as Principal Secretary under article 155(3)(a) of the Constitution.

(2) A person is eligible for appointment as a Principal Secretary if the person-

(i) is a citizen of Kenya;

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

(iii) has at least ten years relevant professional experience, five years of which should have been in a leadership position or at a top management level in the public service or private sector;

(iv) possesses general knowledge of the organization and functions of Government;

(v) demonstrates an understanding of the goals, policies and developmental objectives of the nation;

(vi) has demonstrable leadership and management capacity including knowledge of financial management and strategic people management; and

(vii) meets the requirements of chapter six of the Constitution.

(3) The Commission shall, in making the recommendations under this section, submit to the President a list of nominees for appointment, paying attention to inclusiveness in terms of gender, Kenya diverse communities, persons with disabilities and the youth.

(4) In case of a rejection of a nominee or nominees by the President, the Commission shall recommend a fresh list of nominees from t36.

(1). In selecting candidates for appointment or promotions, the Commission or other lawful appointing authority shall have regard to —

(a) merit, equity, aptitude and suitability;

(b) the prescribed qualifications for holding in the office;

(c) the efficiency of the public service;

(d) the provable experience and demonstrable milestones attained by the candidate; and

(e) the personal integrity of the candidate.

(2) For the purposes of this section, "merit" in regard to a person means, the person —

(a) has the abilities, aptitude, skills, qualifications, knowledge, experience and personal qualities relevant to the carrying out of the duties in question;

(b) has potential for development; and

(c) meets the criteria set out in subsection (1).

(3) In making appointments or promotions, the Commission or authorized officer are bound by the constitutional principles which require that —

(a) no applicant or candidate is discriminated on any ground;

(b) no one gender constitutes more than two thirds of those appointed;

(c) at least five percent of the appointments constitute persons with disabilities;

(d) there is proportionate representation of all ethnic communities; and

(e) the youth are appointed.

(4) For purposes of ensuring representation of the diverse Kenyan Communities in the public service, the Commission or authorized officer shall, where necessary, adopt affirmative action measures in line with articles 27(6) and 56(c) of the Constitution.

(5) Where the Commission or other authorized officer prescribes a standard application form for submitting applications for employment, the Commission or other lawful appointing authority shall ensure that the form meets the requirements of this Act.

(6) Where an expatriate is to be appointed to a position that falls within the Commission jurisdiction, the Commission shall approve such an appointment.

(7) The Commission shall approve the appointment of an expatriate only where the expertise sought is not locally available.

37. Advertisement of vacancies:

(1) Where a vacancy in a public office is to be filled, the Commission or authorized officer shall invite applications by advertising the vacancy in the Commission website, at least one daily newspaper of nationwide coverage, the radio and other modes of communication, so as to reach as wide a population of potential applicants as possible.

(2) The Commission or an authorised officer shall ensure that an invitation for application does not discriminate against any person.

(3) The advertisements in subsection (1) shall be conducted in an efficient and effective manner so as to ensure that the applicants, including persons who for any reason have been or may be disadvantaged, have an equal opportunity to apply for the advertised positions.

(4) An advertisement inviting applications to fill any vacancy in a public office shall provide for —

(a) the title and rank of the public office;

(b) the public body in which the office is tenable;

(c) the background and context of the work, where necessary;

(d) the terms of employment;

(e) the applicable remuneration including salary, allowances and other benefits;

(f) the prescribed qualifications applicable, including any desired previous achievements;

(g) the core duties of the office;

(h) the expected deliverables of the office;

(i) the supervision, accountability and reporting arrangements;

(j) any added advantage applicable;

(k) the mode and deadline of transmitting the application;

(l) any consideration that may occasion disqualification; and

(m) any consideration of equity or affirmative action.

222. Further and of paramount importance is the calling in sections 3 and 4 of the *PSC Act*. The provisions call upon, *inter alia*, the PSC to adhere to articles 155(3)(a), 158(3), 234(2)(a), 234(3) and 252(1) of the *Constitution* and that in fulfilling its mandate, the PSC, be guided by the national values and principles of governance in article 10 of the Constitution and the values and principles of public service in article 232 of the Constitution.

223. It cannot be lost that several provisions of the *PSC Act* derive directly or otherwise from the Constitution. That is well depicted in, among others, sections 36, 37 and 47 of the *PSC Act*. As a result, PSC must adhere to the Constitution and the law.

224. Article 10 of the Constitution provides the national values and principles of governance. Key among them and of direct relevance to the issue at hand, are the rule of law, participation of the people, transparency, integrity and accountability.

225. By placing the said national values and principles of governance and the various provisions of the *PSC Act* side by side, it is not difficult to note that the various processes provided for in the PSC Act are aimed at upholding the said constitutional requirements. For instance, the need for advertisement of positions in the public service enhances transparency, the rule of law and procedural integrity. Further, placing an advertisement on the names of all the applicants and those shortlisted to be interviewed and calling for any relevant information on those due for interviews are great steps towards attaining a full realization of the national values and principles of governance in article 10 of the Constitution more so on transparency and integrity of the processes.

226. This court shall now apply the various constitutional and statutory requirements to the processes undertaken by PSC in recommending the persons for nomination as PSs and CASs.

227. There is no doubt that PSC advertised for the positions of the PSs. That was through advertisements placed in the print media on August 18, 2017. There is, however, no indication that there was alike advertisement for the positions of CASs.

228. The failure to advertise the positions of the CASs is, at the very least, a direct infringement of article 10 of the Constitution and section 37 of the PSC Act.

229. There is the other sub-issue as to whether PSC ought to have conducted interviews. Counsel and parties are sharply divided. The respondents contend that there is no requirement for conducting interviews on the part of the PSC in recommending the persons for nomination as PSs, and by extension, CASs under any law.

230. The answer to the contention is found in section 47(4) of the *PSC Act* which states that: -

> In case of a rejection of a nominee or nominees by the President, the Commission shall recommend a fresh list of nominees from those interviewed by the Commission.(emphasis added)

231. From the reading of the above section, PSC can only recommend persons to the President whom it has interviewed. The need for PSC to conduct interviews cannot be gainsaid. Such interviews enhance transparency and integrity of the process and also accords an opportunity for public participation. Interviews also accord an opportunity to test the integrity, competence and suitability of the candidate pursuant to *inter alia* article 73(2)(a) of the *Constitution*.

232. Upon conducting the interviews, the PSC is further called upon to make the recommendations on the basis of many other constitutional and statutory parameters including gender parity, regional balance among others.

233. In this case, there is no evidence that any of the persons appointed as PSs and CASs were interviewed by PSC.

234. There is also no evidence that the persons who were appointed as PSs and CASs were approved by the National Assembly.

235. It is, therefore, the finding of this court that the persons who are appropriately appointed to the positions of PSs and CASs are only those who: -

(i) apply for such positions once PSC advertises vacancies;

(ii) are shortlisted by the PSC;

(iii) are interviewed by the PSC;

(iv) are recommended for nomination for appointment by the PSC;

(v) are nominated by the President for such positions;

(vi) are approved by the National Assembly; and

(vii) are appointed into the offices of the PSs and CASs by the President.

236. At this point, I must fully associate myself with the court in *Community Advocacy and Awareness Trust v Attorney General* [2012] eKLR where at paragraph 73 the court emphatically stated thus: -

> ... August 27, 2010 ushered in a new regime of appointments to public office. Whereas the past was characterized by open corruption, tribalism, nepotism, favoritism, scrapping the barrel and political patronage, the new dispensation requires a break from the past. The Constitution signifies that the end of 'jobs for the boys' era. Article 10 sets out the values that must be infused in every decision making process including that of making appointments. (emphasis added).

237. In the end, I find and hold that any appointment of the PSs and CASs which did not comply with the foregoing procedure infringes articles 10, 73(2)(a), 155(3)(a) and 232(1)(g) of the *Constitution* as read with sections 36, 37 and 47 of the *PSC Act*.

(e) Whether Cabinet Secretaries and Principal Secretaries who serve in the first term of the President can continue serving in the subsequent term of the Presidency without vetting by the National Assembly and whether a serving Cabinet Secretary or a Principal Secretary can be re-assigned without the approval of the National Assembly:

238. The 1st petitioner put a spirited fight for this issue to be answered in the negative. He contends that the President's appointees for CSs and PSs must, respectively, and pursuant to articles 132(a), 52(2), 132(d) as read with 155(3)(b) of the *Constitution* go through mandatory vetting and approval by the National Assembly before assuming office during the second term of the President. In part, the purpose of the vetting is to ensure selection on the basis of personal integrity, competence and suitability pursuant to article 73(2)(a) of the *Constitution*.

239. The 1st petitioner argues that CSs are appointed to specific cabinet positions and not into the Cabinet. He further argues that article 152(5) as read together with 132(2)(a) allows the President to only appoint a CS and a PS with the approval of the National Assembly.

240. It is further argued that during the vetting, section 7 of the *Public Appointments (Parliamentary Approval) Act*, No 33 of 2011(hereinafter referred to as 'the Parliamentary Approval Act') provides for issues for consideration during vetting by Parliament.

241. The 1st petitioner further argues that the President nominates a person for consideration for appointment to a specific ministry as a CS, then the person is vetted by the National Assembly for personal integrity, competence and suitability (article 73(2)(a)) for that particular position not for general membership of the Cabinet and, upon approval, the person is appointed to the specific post as

a CS. Further, section 7(c) of the *Parliamentary Approval) Act*, expressly attaches the vetting not just to the person but also to the office in the Cabinet to which a person is nominated for appointment to.

242. It is submitted that the purpose for parliamentary vetting and approval is to gauge the personal integrity, competence and suitability of persons nominated for appointment by the President to hold those portfolios. And just like the President must be vetted at elections for his second term, so are the President's nominees to be vetted and approved by the new Parliament. Further, since it is the new Parliament that approves the President's new Cabinet and supervises it, it cannot be validly held that the vetting by the exited Parliament is transferable to the new one. And, also, there is need to audit the nominees for their performance under the ended Presidential term.

243. The 1st petitioner also argues that given the very high threshold under article 152(6 to 10) for removal of a CS, the same cannot be relied upon for purposes of auditing the performance of a CS. He contends that the Constitution does not provide for the re-appointment of CSs or PSs. The Constitution only provides for appointments and not for their re-appointment. To underscore the fact that there is no provision in law for the President to make re-appointments, the Parliamentary Approval Act does not at all provide a mechanism for considering re-appointments by the President.

244. The 1st petitioner cautions that although section 51 of the *Interpretation and General Provisions Act* provide that the power to appoint includes the power to reappoint, the provision has a proviso; which states that, 'unless a contrary intention appears.'

245. The 1st petitioner further submits that the re-appointment of the CSs and PSs is a contrary intention since article 142(1) provides that the President's term of office last during the time one is sworn in ends when the person next elected President in accordance with article 136(2)(a) is sworn in.

246. It is argued that under article 134(1)(a) while a presidential election is being held the incumbent President exercises limited powers of temporary incumbency. Such a person cannot nominate, appoint or dismiss a CS or any other State or public officers. It the follows that even an incumbent President's powers to constitute the Cabinet are terminated on election day to await for the incoming President, irrespective of whether the incumbent will be reelected and given a fresh mandate.

247. Under the fresh mandate, the re-elected President cannot purport to have powers to revive and extend the appointments he made and which expired with his first term. He must make new appointments as provided under the law, including the CSs with the approval of the National Assembly and, for PSs, with the recommendation of the PSC.

248. The 1st petitioner argues that the state of affairs is best captured in relation to County Governments during transition, where at article 198 of the *Constitution* expressly states that 'While an election is being held to constitute a county assembly under this chapter, the executive committee of the county, as last constituted remains competent to perform administrative functions until a new executive committee is constituted after the election.'

249. Further, since elective governments are term-based, it is equally wrong for the Respondents to claim that the appointment of CSs and PSs who serve in those Governments is not term-based. Simply put, a river does not flow higher than its source.

250. It is further argued that there is no constitutional exemption for parliamentary approval of the so-called re-appointed or re-assigned or retained CSs who transition from one presidential term to another. All Presidential appointees must be vetted by and be accountable to the Parliament in session. The new Parliament must be given the opportunity to vet all the CSs and all PSs the President appoints in his new term.

251. The 1st petitioner further argues that CSs and PSs who were retained by the President in his second term in office did not undergo vetting and approval by the National Assembly as required under Section 3 of the Parliamentary Approval Act. It is contended that CSs and PSs are not transferable from one term of the President to another, and must be vetted afresh between terms by the National Assembly for performance while in office before they can be reappointed to serve in a President's second term.

252. On re-designation of a CS or a PS, it is submitted further that since the CSs and PSs are vetted for skills and knowledge that make then competent and suitable to serve in particular ministries and state departments the President cannot reassign them in substantive capacities to other ministries unless they are re-vetted and approved by Parliament for the same.

253. The 2nd petitioner and the 1st interested party did not address themselves to this issue.

254. The 2nd interested party agreed with the 1st petitioner that under article 152(2) of the Constitution the serving CSs and PSs ought to be re-vetted by the National Assembly. The decisions in *Marilyn Muthoni Kamuru v Attorney General*, *Kenya Youth Parliament v Attorney General* (2012) eKLR and *Mumo Matemu v Trusted Society of Human Rights Alliance* (2013) eKLR were cited in support of the position.

255. The respondents submits that whereas the appointment of CSs and PSs must, in the first instance, be approved by the National Assembly, there is no legal requirement for such approval on any re-assignment. The court was urged to note that the interpretation favoured by the petitioners and the interested parties has no basis in the Constitution and the law. It is submitted that the Constitution is not an empty vessel to be filled by litigants' wishes, but a sacred document whose interpretation must comply with settled principles of interpretation.

256. The respondents further submit that if any complaints arise against a sitting CS or PS then the same ought to be dealt with under chapter 6 of the *Constitution* as well as the *Leadership Act.* It is argued that the petitioners are seeking to remove the CSs from office through a backdoor instead of complying with articles 152(4)(b) and 152(5)(b) of the *Constitution*.

257. The respondents call upon the court to decline the invitation by the petitioners and the interested parties. They referred to some decisions on the interpretation of the Constitution in support of their argument. Those decisions are already captured in the preceding parts of this judgment.

258. The 3rd respondent submit that the National Assembly fully complied with the required gender rule in that 9 names of persons to be appointed as CSs were sent to the National Assembly for approval. Out of the 9 persons, 6 were men and 3 women. The respondent submits that it hence complied with the gender rule.

259. It is argued that the mandate of the National Assembly extends to only conducting the approval proceedings. In this case, it is submitted that the 3rd respondent discharged its duty under the *Constitution* and the law in approving the 9 nominees for appointment into the offices of CSs.

260. The first sub-issue is whether the CSs and PSs who serve in the first term of office of the President and who continue to serve in the second term of the President ought to be re-vetted by the National Assembly upon the re-election of the President into the second and final term of office.

261. Article 142 of the *Constitution* provides for the term of the President as follows: -

(1) The President shall hold office for a term beginning on the date on which the President was sworn in, and ending when the person next elected President in accordance with article 136(2)(a) is sworn in.

(2) A person shall not hold office as President for more than two terms.

262. Article 136(2)(a) of the *Constitution* provides as follows: -

An election of the President shall be held—

(a) on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year; or (b) in the circumstances contemplated in article 146.

263. A President can hold office for only two terms. The *Constitution* defines a term to mean the period between the date on which the President is sworn in and when the person next elected as President on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year; is sworn in.

264. The President-elect must be sworn-in pursuant to article 141 of the *Constitution* before assuming office. The requirement to swear-in the President-elect remains even when the person is re-elected as the President for the second and final term. Upon being sworn-in, the President fully assumes the Presidency.

265. It is vehemently argued that when the re-elected President assumes office for the second term, the CSs and PSs who served in the President's first term must be subjected to the approval process in the National Assembly if they are to serve in the second term of the President. The argument is countered on an equal measure.

266. The *Parliamentary Approval Act* was enacted to provide for procedures for parliamentary approval of constitutional and statutory appointments and for connected purposes.

267. Section 7 of the *Parliamentary Approval Act* provides three issues for consideration in relation to any nomination. They are (i) the procedure used to arrive at the nominee; (ii) any constitutional or statutory requirements relating to the office in question; and (iii) the suitability of the nominee for the appointment proposed having regard to whether the nominee's abilities, experience and qualities meet the needs of the body to which nomination is being made.

268. Upon approval for appointment by the National Assembly, the candidate is eventual appointed into office by the President.

269. At this point I must fully associate myself with the court in *Marilyn Muthoni Kamuru v The Attorney General* case (*supra*) on the role of the National Assembly in vetting the nominees. The vetting process is not cosmetic. It is a serious and mandatory constitutional process in which the National Assembly must ensure that the nomination process complies with the Constitution and the law. The vetting process in the National Assembly, therefore, acts a serious check and balance in the entire recruitment exercise.

270. I have already found that the PSs and CASs are among those persons who are in the second category in the analysis on article 132(2) of the *Constitution*. The PSs and CASs must be recommended for nomination by the PSC and can only be appointed into office by the President with the approval of the National Assembly. I have also expounded on the persons falling within the first category.

271. A holistic and purposive interpretation of the various provisions of the *Constitution* and the law on this sub-issue (on whether the CSs and PSs who serve in the first term of office of the President and who continue to serve in the second term of the President ought to be re-vetted by the National Assembly upon the re-election of the President into the second and final term of office) favours an approach that the tenure of office of the persons in the first category, that is those who are directly nominated for appointment by the President, should be tied to the single term of that President.

272. It, therefore, means that the tenure of office of a CS ends at the same time as the term of the President who appoints the CS. In the event the President wishes to have a particular CS continue to serve as such during the President's second term, then the President has to comply with the process of nomination and approval provided for the Constitution and the law.

273. The second category of persons are those who were recommended for nomination by a State organ, nominated by the President, approved by the National Assembly and eventually appointed by the President. These persons do not relinquish their positions when the President completes the first term and is re-elected for a second term or the President completes the second term and leaves office.

274. There must be a justifiable reason for such a differentiation. The reason is in the manner in which the persons in the two categories are nominated for approval by the National Assembly. The persons falling under the second category must, in the first instance, be subjected to a process towards their nominations. For instance, in the case of the PSs, they must apply to the PSC. Upon shortlisted, they must attend interviews. They must succeed in the interviews. Even after succeeding in the interviews, still a person may not be recommended for nomination to the President by dint of the other constitutional requirements including gender, regional balance, among others.

275. The persons in the second category undergo a more rigorous process before appointment than those who fall in the first category and who are directly nominated by the President. Since those in the first category enjoy the exemption at the instance of the sitting President, then their terms of office are pegged to the current and single term of office of the sitting President.

276. Subjecting the tenure of office of those in the second category to the current and single term of office of the sitting President will no doubt be discriminatory. However, it is not lost to this court that public officers serve definite tenures of office.

277. It is the position of this court that unless specifically provided for, the persons within the two categories cannot be treated in the same manner.

278. The position in law that differential treatment is not discrimination was discussed at length in a Multi-Judge bench in *Petition 56, 58 & 59 of 2019 (Consolidated)*, *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)* [2020] eKLR.

279. The court considered whether differential treatment amounts to violation the right to equality and non-discrimination as guaranteed under article 27 of the *Constitution*. The Learned Judges made reference to various decisions and observed as follows: -

> 983. The precise meaning and implication of the right to equality and non-discrimination has been the subject of numerous judicial decisions in this and other jurisdictions. In its decision in *Jacqueline Okeyo Manani & 5 others v Attorney General & another* (*supra*) the High Court stated as follows with respect to what amounts to discrimination:
>
> > 26. *Black's Law Dictionary*, 9th Edition defines "discrimination" as (1)" the effect of a law or established practice that confers privileges on a certain class because of race, age sex, nationality, religion or hardship" (2) "Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured".
> >
> > 27. In the case of *Peter K Waweru v Republic* [2006] eKLR, the court stated of discrimination thus: -

Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."(emphasis)

28. From the above definition, discrimination, simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups. Article 27 of the *Constitution* prohibits any form of discrimination stating that. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law, and that (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

29. The Constitution advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination. Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim.

30. In this regard, the court stated in the case of *Nyarangi & 3 others v Attorney General* [2008] KLR 688 referring to the repealed constitution; "discrimination that is forbidden by the constitution involves an element of unfavourable bias. Thus, firstly unfavourable bias must be shown by the complainant; and secondly, the bias must be based on the grounds set in the constitutional definition of the word "discriminatory" in section 82 of the Constitution.

984. It is thus recognised that it is lawful to accord different treatment to different categories of persons if the circumstances so dictate. Such differentiation, however, does not amount to the discrimination that is prohibited by the Constitution. In *John Harun Mwau v Independent Electoral and Boundaries Commission & another* (*supra*), the court observed that:

It must be clear that a person alleging a violation of article 27 of the Constitution must establish that because of the distinction made between the claimant and others, the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of the constitution.

985. When faced with a contention that there is a differentiation in legislation and that such differentiation is discriminatory, what the court has to consider is whether the law does indeed differentiate between different persons; if it does, whether such differentiation amounts to discrimination, and whether such discrimination is unfair. In *EG & 7 others v Attorney General;*

DKM & 9 others (Interested Parties); Katiba Institute & another: Petition 150 & 234 of 2016 (Consolidated) the court held that:

> 288. From the above definition, it is safe to state that the Constitution only prohibits unfair discrimination. In our view, unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization."

986. In *Harksen v Lane NO and others* (*supra*) the court observed that the test for determining whether a claim based on unfair discrimination should succeed was as follows:

> (a) Does the provision differentiate between people or categories of people" If so, does the differentiation bear a rational connection to a legitimate purpose" If it does not, then there is a violation of the constitution. Even if it does bear a rational connection, it might nevertheless amount to discrimination.
>
> (b) Does the differentiation amount to unfair discrimination" This requires a two-stage analysis: -
>
> (i) Firstly, does the differentiation amount to 'discrimination'" If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
>
> (ii) If the differentiation amounts to 'discrimination,' does it amount to 'unfair discrimination'" If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation...
>
> (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.

988. It must also be noted, as observed by Mativo J in *Mohammed Abduba Dida v Debate Media Limited & another* (*supra*) that:

> It is not every differentiation that amounts to discrimination. Consequently, it is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination. (emphasis added).

280. Having said so, suffice to say that CSs fall within the persons in the first category whereas the PSs are among those in the second category. It, hence, means, on one hand, that the tenure of a CS is tied to that of the President who appointed that CS, and on the other hand, the tenure of a PS is not tied to that of the President who appointed that PS unless the provision on the tenure of office expressly so states.

281. The position of the CSs is akin to that of the County Executive Committee Members in the Counties under article 198 of the Constitution. The provision states that: -

While an election is being held to constitute a county assembly under this Chapter, the executive committee of the county, as last constituted remains competent to perform administrative functions until a new executive committee is constituted after the election.

282. This court now finds that a CS who serves in the first term of the President (which President is re-elected for a second term) must be approved by the National Assembly so as to continue to serve as a CS in the second term of the President. Any derogation thereof infringes article 132(2) of the Constitution and section 3 of the Parliamentary Approval Act. The court further finds that, unlike the CS, the tenure of office of a PS is not tied to the term of office of the President who appoints the PS.

283. Before I come to the end of this issue, I am reminded of the other sub-issue on whether a President can re-assign CSs and PSs within the term of office of that President. I find that the provisions of article 132(3)(b) of the Constitution adequately gives the President the discretion to direct and co-ordinate the functions of ministries and government departments. The discretion includes the re-assignment of the CSs and PSs.

284. This court holds that the re-assignment of a CS or a PS by a sitting President is neither unconstitutional nor contrary to law.

(f) Whether the Cabinet constituted by His Excellency the President in January 2018 and the Principal Secretaries appointed complied with the constitutional requirements, if any, on gender balance and the inclusion of persons with disabilities, the youth and the minority and marginalized:

285. The 2nd petitioner contends that the President nominated CSs and submitted their names to the National Assembly for vetting and approval, in disregard to articles 27(8) and 54(2) of the *Constitution*. It is further contended that the requirement on the two-thirds gender rule, the five percent of persons with disability, the youth and inclusion of minority and marginalized groups were disregarded.

286. The 2nd interested party supports the 2nd petitioner on the issue. It submitted at length to the effect that the National Assembly failed to protect marginalized groups in its approval of persons for the position of CS, PS and CAS that never met the requirements of the gender rule and representation of the youth and persons with disabilities.

287. As a result, the 2nd interested party submits that articles 10, 27(8), 54(2) and 55(b) were infringed.

288. It is further submitted that the President's nomination and Parliament's inability to correct the impugned decision, tacitly reinforces the insidious stereotypes that impede women's access to political office in Kenya--stereotypes that are damaging to the psyche of Kenyan women and their conceptions of identity and personhood.

289. Relying on *Marilyn Muthoni Kamuru & 2 others v Attorney General & another* [2016] eKLR and *Centre for Rights Education & Awareness (CREW) & 8 others v Attorney General & another,* Petition 207 & 208 of 2012 consolidated with Misc JR Application No. 2012, *Speaker of the National Assembly v Centre for Rights Education and Awareness* Civil Appeal No. 148 of 2017and *Minister for Internal Security and Provincial Administration v Centre For Rights Education & Awareness (Craw) & 8 others*, Civil Appeal No 218 of 2012 the 2nd interested party submits that article 27(8) is not subject of the progressive realisation principle.

290. Relating to persons with disabilities, the 2nd interested party submits that article 54(2) of the *Constitution* mandates the State to ensure "the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with

disabilities." Kenya has also ratified the International Covenant on Civil and Political Rights (ICCPR) on May 1, 1972 and the *Convention of the Rights of Persons with Disabilities* (CRPD) on May 19, 2008 and therefore it forms part of Kenyan law under article 2(6) of the *Constitution*. Articles 25 and 29 respectively of the treaties provide for the right of persons with disabilities to participate in political and public life.

291. The 2nd interested party further submits that the reasoning behind the inclusion of article 54(2) of the Constitution is similar to the *CRPD* and the *ICCPR* whose aim was the inclusion of persons with disabilities in both politics and public life. The new Constitution therefore adds an additional requirement of not only inclusion of persons with disabilities in elective positions but also the requirement of a five percent rule in all appointive offices similar o the two thirds gender rule in article 27(8) of the Constitution. The similarity between article 27(8), 54 and 56 was observed in the High Court case of *National Gender and Equality Commission v Independent Electoral and Boundaries Commission & another* [2013] eKLR where the case the petitioners challenged the process of allocation of party list seats under article 90 of the Constitution for excluding youths, persons with disabilities and women. The court recognized the historical infirmities that led to the inclusion of articles 27(8), 54 and 56 of the Constitution in recognition of the rights of marginalized groups (women, persons with disability and the youth and the duty of the State to ensure that they fully participate.

292. It is also submitted that the High Court in *Northern Nomadic Disabled Person's Organization (Nondo) v Governor County Government of Garissa & another* [2013] eKLR determined the issue whether article 54(2) of the Constitution is to be realized immediately or progressively. It relied on the Supreme Court Advisory Opinion- *In the Matter of the Principle of Gender Representation Advisory* No 2 of 2012 to find that article 54(2) should be progressively realized. The court, however, called upon the State to do more to ensure compliance with the Constitution.

293. On the representation of the youth, it is submitted that article 55(b) of the Constitution provides for the representation of the youth in appointive positions. Therefore, the failure of the National Assembly to appoint nominees who included representatives of the youth was contrary to article 55(b) of the *Constitution*. The National Assembly as part of the State was duty bound to have ensure that the youth are represented in appointive bodies in order for them to adequately participate in the political spheres of life.

294. In the end, it is submitted that none of the appointments of the CS, CAS and PS met the two third gender rule, the 5% rule for representation of persons with disability and the representation of the youth. This is contrary to articles 27(8), 54(2) and 55(b) of the *Constitution*.

295. Having captured the parties' positions, I will now deal with the issue at hand. The issue of composition of membership of State organs has been subject of consideration by the courts since the promulgation of the Constitution. Suffice to note that the Constitution has variously provided for the composition of elective and appointive positions in public service. The challenge has been, for myriad of reasons and excuses, been the implementation.

296. One of the outstanding decisions on the issue is the Supreme Court Advisory Opinion No 2 of 2012 - *In the Matter of the Principle of Gender Representation*. In that matter the court was called upon to advise on whether article 81(b) as read with article 27(4), article 27(6), article 27(8), article 96, article 97, article 98, article 177(1)(b), article 116 and article 125 of the *Constitution* require progressive realization of the enforcement of the one-third gender rule or requires the same to be implemented during the general elections scheduled for March 4, 2013.

297. The court addressed the concept of progressive realisation of the rights as follows: -

(49) The concept of "progressive realization" is not a legal term; it emanates from the word "progress," defined in the *Concise Oxford English Dictionary* as "a gradual movement or development towards a destination." Progressive realization, therefore, connotes a phased-out attainment of an identified goal. The expression gained currency with the adoption of the Universal Declaration of Human Rights in 1948 – and this landmark international instrument stepped up the growth of the "human rights movement," worldwide. The legal milestones in this development were later marked by other instruments: such as the *International Covenant on Civil and Political Rights (ICCPR)*, and the *International Covenant on Economic, Social and Political Rights (ICESCR)*.

(53) We believe that the expression "progressive realization" is neither a stand-alone nor a technical phrase. It simply refers to the gradual or phased-out attainment of a goal – a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the State. The Exact shape of such measures will vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment. Such supportive measures may involve legislative, policy or programme initiatives including affirmative action.

(59) This leads us to the inference that whether a right is to be realized "progressively" or "immediately" is not a self-evident question: it depends on factors such as the language used in the normative safeguard, or in the expression of principle; it depends on the mechanisms provided for attainment of gender-equity; it depends on the nature of the right in question; it depends on the mode of constitution of the public body in question (e.g. appointive or elective; if elective, the mode and control process for the election); it depends on the identity and character of the players who introduce the candidates for appointment or election; it depends on the manner of presenting candidature for election or nomination.

F. Immediate Realization of The Gender-Equity Rule, and for General Elections of March 2013"

(60) The proponents of immediate implementation of the gender-equity rule have placed a premium on the terms of article 81(b) of the Constitution, in particular its adoption of the word "shall":

> "not more than two-thirds of the members of elective public bodies shall be of the same gender."

The assumption made is that the term "shall" connotes a mandatory obligation, so the rule must be enforced immediately. This contention was a factor in the Attorney-General's mind, and he faced it by urging that the word "shall" as applied in articles 81(b) and 27(8) of the Constitution, in fact, bore a "permissive" connotation and, therefore, the one-third gender rule was for progressive realization.

(61) After considerable reflection upon this point, we have come to the conclusion that the expression "progressive realization", as apprehended in the context of the human rights jurisprudence, would signify that there is no mandatory obligation resting upon the State to take particular measures, at a particular time, for the realization of the gender-equity principle, save where a time-frame is prescribed. And any obligation assigned in mandatory terms, but involving protracted measures, legislative actions, policy-making or the conception of plans for the attainment of a particular goal, is not necessarily inconsistent with the progressive realization of a goal. This position does not change, notwithstanding that the word "shall" may

have attended the prescription of the task to be performed by the State. The word "shall" in our perception, will translate to immediate command only where the task in question is a cut-and-dried one, executed as it is without further moulding or preparation, and where the subject is inherently disposable by action emanating from a single agency. But this word "shall" may be used in a different context, to imply the broad obligation which is more institutionally spread-out, and which calls for a chain of actions involving a plurality of agencies; when "shall" is used in this sense, it calls not for immediate action, but for the faithful and responsible discharge of a public obligation; in this sense, the word "shall" incorporates the element of management discretion on the part of the responsible agency or agencies.

(62) The word "shall", in this new dimension, has gained currency in current human rights treaties, essentially to address the tendency on the part of States Parties to resile from their obligations to institute implementation measures. From that analogy, we perceive the word "shall" as an emphasis on the obligation to take appropriate action, in the course of the progressive realization of a right conferred by the Constitution. (emphasis added).

298. There are three important points derived from the said decision. First, the decision dealt with article 81(b) of the *Constitution*. The provision is on election of members into public bodies. However, in this matter, the issue, instead, is appointmentof members into public bodies.

299. Second, the court was clear that any obligation assigned in mandatory terms, but involving protracted measures, legislative actions, policy-making or the conception of plans for the attainment of a particular goal, is not necessarily inconsistent with the progressive realization of a goal. Third, the court further held that the word "shall", will translate to immediate command only where the task in question is a cut-and-dried one, executed as it is without further moulding or preparation, and where the subject is inherently disposable by action emanating from a single agency.

300. The above three points must always guide a court while applying the progressive realization principle. Applying the said points to this case, it is evident that the nominations and appointments are made by a single agency; the President. Further, the appointments do not involve protracted measures, legislative actions, policy-making or the conception of plans to be attained. They are simple appointments into public offices.

301. In that case, therefore, the realization of the rights translates to an immediate command. Since the contention is on appointment and not election, then unless it is sufficiently otherwise demonstrated that the appointments cannot be possibly made, the nominating and appointing authority must comply with the constitutional calling. For instance, in this case if any departure from the Constitution and the law is to be sustained, then the nominating and appointing authority must demonstrate that there were no sufficient or qualified women, youth, persons with disabilities or persons from the minority and marginalized communities for nomination and appointment.

302. The foregoing finding is in consonance with the finding of the High Court on the composition of the Cabinet in *Marilyn Muthoni Kamuru v The Attorney General* case (*supra*).

303. The 3rd respondent contends that it was presented with a list of 9 nominees for the positions of CSs for vetting and approval. Out of the said nominees 3 were women and 6 were men. All the nominees were vetted and approved for appointment. They were eventually variously appointed into office. The approval complied with the gender rule.

304. The averment is not disputed. In that case, the 3rd respondent cannot be faulted.

305. In the end, this court finds that all appointments into public offices must be done in strict conformity with the Constitution and the law unless otherwise legally permissible.

(e) What remedies, if any, should issue

306. The consolidated petitions have partly succeeded. Whereas the petitioners and the interested parties were unable to demonstrate that the office of the CAS is an office in the national executive, that a PS must be approved by the National Assembly to be able to continue to serve in the subsequent term of office of a President and that a President cannot re-assign CSs and PSs during the term of office, they persuaded the court that the court has jurisdiction over this matter, that the manner in which the current office of the CAS is created contravenes the Constitution and the law, that the President cannot nominate and/or appoint persons into the offices of PSs and CASs without the recommendation of the PSC and the approval by the National Assembly, that the tenure of office of a CS is pegged to the current and single term of office of the appointing President and that any appointments into the Cabinet and public service must be undertaken in accordance with the Constitution and the law.

307. The court has also been urged, upon finding that the office of the CAS is unconstitutional or that the holders of the offices of the CS, PS and CAS are in office in contravention of the *Constitution*, to order that the holders of such offices, whether current or former, do refund all the monies they received in terms of salaries and other benefits. I find the request a very tall order. I say so because it is possible for the office of the CAS to be constitutionally and legally created in the public service. Further, the holders of the office of CAS were not involved in establishing the office. Lastly, the CSs, PSs and CASs were appointed by the President as expected under the Constitution and the law.

308. In considering the appropriateness of the remedies herein, this court may be constrained to issue orders in the nature of structural interdicts. This remedy was recently affirmed as an appropriate relief by the Supreme Court of Kenya in Petition No 3 of 2018, *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] eKLR.

309. In the end, therefore, the conclusions and findings of the court are as follows: -

(i) That this court has jurisdiction to determine the petitions.

(ii) That the design of the office of the CAS in this matter is an office in the public office and not an office in the national executive. The intention to create the office of the CAS in the public service did not in any way infringe articles 152 and 153 of the *Constitution*.

(iii) That the establishment of the office of the CAS in the public service and the processes towards the appointment of persons into the Cabinet and the offices of the PS and CAS must comply with the *Constitution* and the law.

(iv) That public bodies exercising statutory authority do not have to engage the public and stakeholders when making decisions purely within their sphere of internal operations (internal operational decisions). However, such public bodies must undertake public participation and stakeholder engagement when making decisions which will affect the public or stakeholders.

(v) That the process in establishing the office of the CAS and the manner in which the processes towards recommending the persons for nomination to the position of PS were undertaken by PSC called for compliance with articles 10, 132(4)(a), 201(a), 232(1) and 234(2)(c) of the *Constitution* as well as the PSC Act as to be subjected to a program of public participation and stakeholder engagement. However, no such public participation and stakeholder engagement was undertaken.

(vi) That the recommendations by the PSC to the President to create the position of a CAS in the public service and to nominate persons as PSs were administrative actions because they affected

the legal rights and interests of the general public. As such they had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness laid out in article 47 of the Constitution and *Fair Administrative Actions Act*.

(vii) That PSC recommended the establishment of the office of the CAS in contravention of article 201 and 232 of the *Constitution* as well as sections 27 and 30 of the *PSC Act* to the extent that there were no comprehensive plans informed by the public body workload analysis, the failure to supply information on the current authorized establishment, level of grading, designation, extra posts required and evidence of optimum utilization of existing posts, the failure to supply information that the office including its level of grading, qualification and remuneration shall not disadvantage similar offices in the public service or occasion unfair competition for staff among public bodies, the failure to supply financial implications of creating the office and the failure to supply a statement confirming compliance with the law.

(viii) That PSC must interview any shortlisted candidate for purposes of filling a vacancy in the public service.

(ix) That the President can only appoint persons to the positions of PSs and CASs upon such persons being shortlisted, interviewed, recommended for nomination for appointment by the PSC and on approval by the National Assembly.

(x) That a CS who serves in the first term of the President (which President is re-elected for a second term) must be approved by the National Assembly so as to continue to serve as a CS in the second term of the President. Any derogation thereof infringes article 132(2) of the *Constitution* and section 3 of the *Parliamentary Approval Act*.

(xi) That the tenure of office of a PS is not tied to the term of office of the President who appoints the PS.

(xii) That the President has powers to re-assign a CS or a PS without the approval of the National Assembly.

Disposition:

310. Resulting from the findings and conclusions, the disposition of the consolidated petitions is as follows: -

a. Claims that this court has no jurisdiction to deal with the consolidated Petitions, that the creation of the office of the Chief Administrative Secretary in the public service infringes articles 152 and 153 of the *Constitution*, that the tenure of office of a Principal Secretary is tied to the term of office of the President who appoints the Principal Secretary and that the President has no powers to re-assign a Cabinet Secretary or a Principal Secretary without the approval of the National Assembly were not proved and are hereby dismissed.

b. The claim that the processes towards the establishment of the Office of the Chief Administrative Secretary were in contravention of articles 10, 47, 132(4)(a), 201(a), 232(1) and 234(2)(c) of the *Constitution* as well as sections 27 and 30 of the *PSC Act* succeeded. The court declares the Office of the Chief Administrative Secretary unconstitutional.

c. The claim that a Cabinet Secretary who serves in the first term of the President (which President is re-elected for a second term) must be approved by the National Assembly so as to continue to serve as a Cabinet Secretary in the second term of the President succeeded. Such contravenes article 132(2) of the *Constitution* and sections 3 and 7 of the *Public Appointments*

(Parliamentary Approval) Act. As such, any Cabinet Secretary who served during the first term of HE President Kenyatta and continues to serve as a Cabinet Secretary during the second term without having been approved by the National Assembly upon the President's re-election is in office in contravention of the Constitution.

d. The claim that a Principal Secretary can only be appointed into office upon such a person being shortlisted, interviewed, recommended for nomination by the Public Service Commission to H.E The President and on approval by the National Assembly succeeded. Any contrary appointment contravenes articles 10, 27, 41(1), 47 and 155 of the *Constitution* as well as sections 3 and 7 of the *Public Appointments (Parliamentary Approval) Act* and section 27 of the Public Service Commission Act. Therefore, any serving Principal Secretary who was not either shortlisted, interviewed, recommended for nomination by the Public Service Commission to H.E The President or approved by the National Assembly is in office in contravention of the Constitution and the law.

e. As a result of passage of time since the filing of the petitions herein in 2018, and for purposes of consideration of further reliefs, if any, the Hon. Attorney General shall, within 30 days of this judgment, file in this matter an Affidavit giving, *inter alia*, the following details: -

   (i) The members of the Cabinet in January 2018.

   (ii) The current members of the Cabinet.

   (iii) The gender, age and ethnicity of the current Cabinet Secretaries and Principal Secretaries.

   (iv) The time and manner in which the current Cabinet Secretaries and Principal Secretaries were appointed.

   (v) Whether any serving Cabinet Secretary or Principal Secretary suffers any disability.

f. Given the potential of orders (b), (c) and (d) above to disrupt the orderly operations of the Ministries and in view of the state of the Covid-19 Pandemic in Kenya further to the processes involved in recruiting Cabinet and Principal Secretaries and the re-organization of the Ministries in the absence of the Chief Administrative Officers or the regularization thereof, the effect of orders (b), (c) and (d) above is hereby suspended for the period when the Country is battling to contain the Covid-19 Pandemic or such a period as this court may later determine in order to afford the Respondents an opportunity to regularize the situation.

g. Once declared by the Government that the Covid-19 Pandemic curve is flattened, the Honourable Deputy Registrar of this court shall schedule this matter for mention on the basis of priority.

h. This being a public interest litigation, each party will bear its own costs.

Those are the orders of this court.

DELIVERED, DATED and SIGNED at NAIROBI this 20th day of April, 2021

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Okiya Omtatah Okoiti, the 1st Petitioner in person.

Mr Ndege, Counsel for the 2nd Petitioner.

Mr Mbarak, Counsel for the 3rd Respondent.

Mr Kimani Kiragu SC and Mr. Kiarie, Counsel for the rest of the Respondents.

Mr Mutemi, Counsel for the 1st Interested Party.

Miss Kinama, Counsel for the 2nd Interested Party.

Elizabeth Wambui – Court Assistant.