REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 236 OF 2018

IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 27(1), 27(3), 27(8), 131(2), 132(2)(f), 159, 165, 232, 233, 234, 249, 258, 259AND 260 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE PUBLIC OFFICERS ETHICS ACT NO. 4 OF 2003 AND THE PUBLIC SERVICES (VALUES AND PRINCIPLES) ACT NO. 1A OF 2015

AND

IN THE MATTER OF THE APPOINTMENT BY THE PRESIDENT AND CABINET SECRETARIES OF THE REPUBLIC OF KENYA OF PERSONS TO VARIOUS OFFICES IN THE PUBLIC SERVICE

BETWEEN

KATIBA INSTITUTE...1ST PETITIONER

AFRICA CENTRE FOR OPEN GOVERNANCE................2ND PETITIONER

-VERSUS-

THE HON. ATTORNEY GENERAL....................................1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION............................2ND RESPONDENT

AND

JULIUS WAWERU KARANGI & 128 OTHERS.......INTERESTED PARTIES

JUDGMENT

1. Katiba Institute and Centre for Open Governance, (herein after The Petitioners), brought a Petition dated 29th June, 2018 against the Hon. Attorney General and the Public Service Commission, (herein the Respondents). The Petition challenges the appointment of the 129 Interested Parties named in the petition, to positions of either chairpersons or members of boards in Parastatals and State Corporations.

2. The petition seeks the following reliefs:

> **a. A declaration that appointments to state corporations and agencies are appointments in the public service and must adhere to Articles 10(2)(c), 27(3) and 232(2)(g)-(i) of the Constitution.**
>
> **b. A declaration that Article 234(2)(a)(ii) of the Constitution confers the Public Service Commission and no other person or body with the power to make appointments for chairpersons and board members of state corporations and agencies save for those expressly excluded by Article 234(3) and (4) of the Constitution.**

c. A declaration that the appointments to various state corporations and agencies by the President and the Cabinet Secretaries of 5th and 7th June, 2018 which are notified in Kenya Gazette Notice Numbers 5569 to 5621 and 5622 to 5623 are unconstitutional for breach of Articles 2(2), 10(2)(c), 27(3), 232(2)(g)-(i) and 234(2)(a)(ii) of the Constitution and are hence invalid.

d. A declaration that all those Sections enumerated under paragraph 16 of the petition are unconstitutional because they violate Articles 2(2), 10(2)(c), 27(3), 232(2)(g)-(i) and 234(2)(a)(ii) of the Constitution.

e. A declaration that the Public Service Commission is in dereliction of its constitutional duty for failing to undertake the appointments to various positions of chairpersons and board members of state corporations and agencies and for acquiescing to the action of the President and Cabinet Secretaries making the appointments enumerated under paragraph 12 of the petition and hence it has violated Articles 2(1), 3(1), 10, 234(2)(a)(ii) & (d), and 249 of the Constitution.

f. An order quashing all those appointments notified in Kenya Gazette Notice Numbers 5569 to 5621 of June 5th, 2018 and Numbers 5622 to 5623 of June 7th, 2018.

g. An order that those provisions enumerated under paragraph 16 of the petition are unconstitutional and void.

h. Costs of the petition.

i. Any such other orders as this Honourable Court shall deem fit.

3. The facts leading to the present petition, are that on the 5th and 7th June, 2018, the President and Cabinet Secretaries appointed the Interested Parties vide Gazette Notice Nos. ***5569 to 5621 of June 5th, 2018 and 5622 to 5623 of June 7th, 2018***, to various positions either as chairpersons or members of boards of Parastatals and State Corporations.

4. The Petitioners argue that there is no record that there were any advertisements in respect of vacancies to the positions, or any record to indicate the criteria applied for the appointments or qualifications of the individuals selected to those positions.

5. The Petitioners further argue that there is no known record that the 2nd Respondent was in any way involved in the selection and appointment of those individuals. It is the Petitioners' case that the provisions under which the appointments were made are unconstitutional. The impugned provisions are:

a. Sections 6(d)(iii) and 8 of the National Social Security Fund Act No. 45 of 2013;

b. Section 16 (2)(g) of the Investment Promotion Act No. 6 of 2004;

c. Section 6(1)(e) of the State Corporation Act Cap. 446 Laws of Kenya;

d. Paragraph 4(1)(e) of the Kenya Leather Development Council Order 2011; (Legal Notice No. 114 of 2011)

e. Section 10(1)(e) of the Environmental Management and Co-ordination Act (No. 8 of 1999);

f. Section 9(1) of the Forest Conservation and Management Act (No. 34 of 2016);

g. Section 6(1) of the State Corporation Act Cap. 446 Laws of Kenya;

h. Paragraph 6(1)(g) of the Kenya Water Towers Agency Order, 2012;

i. Paragraph 2(h) of the Moi Teaching and Referral Hospital Board Order 1998;

j. Section 9(1) of the Science, Technology and Innovation Act (No. 28 of 2013);

k. Section 6(2)(a) of the Cancer Prevention and Control Act (No. 15 of 2012);

l. Section 9(1) of the Kenya Medical Training College Act (Cap. 261) Laws of Kenya;

m. Paragraph 5(1(a))(f) of the Kenya Animal Genetic Resource Centre Order 2011; (Legal Notice 110 of 2011)

n. Sections 3(2)(b) of the National Cereals and Produce Board Act Cap. 338;

o. Paragraph 1 of the Schedule to the Irrigation Act Cap. 347;

p. Section 5(2)(k) of the Pest Control Products Board Act Cap. 346;

q. Section 5(1)(a) and (b) of the Agricultural Development Corporation Act Cap. 444;

r. Section 8(1) (d) of the Kenya Plant Health Inspectorate Service Act No. 54 of 2012;

s. Section 3(2) of the Housing Act Cap. 117;

t. Section 7(1)(h) of the Kenya Roads Board Act No. 7 of 1999;

u. Section 4(f) of the Kenya Railways Corporation Act Cap. 397;

v. Section 4(f) of the Kenya Ports Authority Act Cap. 391;

w. Section 13(1)(g) of the Civil Aviation Act (No. 21 of 2013);

x. Section 10(1)(d) of the Energy Act No. 12 of 2006;

y. Section 4(1)(b) of the Non-Governmental Organizations Co-ordination Act (No. 19 of 1990);

z. Section 6(1)(h) and (i) of the National Authority for the Campaign against Alcohol and Drug Abuse Act (No. 14 of 2012);

aa. Section 3B of the Insurance Act Cap. 487;

bb. Section 7(1)(a) and (d) of the Kenya Deposit Insurance Act (No. 10 of 2012);

cc. Section 5(3)(b) of the Capital Markets Act Cap. 485A;

dd. Section 4(1)(i) of the Coast Development Authority Act Cap. 449;

ee. Section 49(1)(h) of the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009;

ff. Section 4(a) of the Kenya Railways Corporation Act Cap. 397;

gg. Section 4(a) of the Kenya Ports Authority Act Cap. 391;

hh. Section 9(1), 9(1) (a), (b)(c) (d) (e)and (g) of the Forest Conservation and Management Act; (No. 34 of 2016)

ii. Section 6(1)(a) of the Kenya Trade Network Agency Order 2010;

jj. Section 6(1) of the Kenya Trade Network Agency Order 2010;

kk. Paragraph 5(1)(a) of the Kenya Animal Genetics Resource Centre Order;(Legal Notice No. 110 of 2011)

ll. Section 5(1)(a) of the Statistics Act No. 4 of 2006;

mm. Section 7(1)(a) of the Kenya Roads Board Act No. 7 of 1999;

nn. Paragraph 5(1)(f) of the State Corporations Act Cap. 446; Kenya Animal Resource Centre Order 2011;

oo. Section 6(f) of the Retirement Benefits Act No. 93 of 1997; and

pp. Section 4(f) of the Kenya Ports Authority Act Cap. 391.

6. The Petition is supported by the affidavits sworn by **Waikwa Wanyoike** and **Gladwell Otieno** on 29th June, 2018.

7. The Petitioners argue that the constitutionality of the above provisions was at the time of filing this Petition, the subject of Constitutional Petition No. 331 of 2016. That Petition has since been determined. The Petitioners state that the only organ mandated to appoint and dismiss public officers is the 2nd Respondent, which is also obligated to adhere to the requirements under Articles 10 and 232 of the Constitution.

8. The Petitioners aver that the Constitution, the Public Officer Ethics Act, No. 4 of 2003, as well as the Public Service (Values & Principles) Act, 2015, stipulate that Parastatals and State corporations fall within the purview of public offices and, therefore, any appointments made to those offices ought to comply with the Constitution and the above statutes.

9. According to the Petitioners, the impugned appointments of the chairpersons and members of boards of the various Parastatals and State Corporations ought to have been undertaken by the 2nd Respondent. They maintain that any statutory or legal provisions which confer power

on any other person to make such appointments other than the 2nd Respondent, is inconsistent with Articles 10 and 232 of the Constitution.

10. The Petitioners also challenge the impugned provisions on the premise that they contradict section 22 of the Public Officer Ethics Act and Section 10 of the Public Service (Values and Principles) Act, on the process of recruitment and appointment of persons to Parastatals and State Corporations.

11. It is also the Petitioners' argument that in making the impugned appointments, the President and Cabinet acted unconstitutionally, *ultra vires* their authority and therefore encroached on the powers vested in the 2nd Respondent. Additionally, the Petitioners fault the 2nd Respondent for acquiescing to the said appointments and in so doing, disregarded its constitutional mandate in contravention of Articles 2(1), 3(1), 10 and 249 of the Constitution.

Respondents' responses

12. The Respondents opposed this petition through a replying affidavit sworn by **Joseph K Kinyua**, Head of Public Service, on 12th November 2018. He deposes that contrary to the averments made in the petition, the appointments were made in conformity with the Constitution and the applicable statutes. He contends that Article 234(2)(a) of the Constitution is clear that the powers bestowed on the 2nd respondent are subject to the Constitution and legislation.

13. The Respondents state that the functions of the 2nd Respondent do not override but are subject to other relevant constitutional provisions and statutes, including those particularized in paragraph 16 of the petition. It is the Respondents' contention that the appointments by the President and Cabinet Secretaries were made in compliance with constitutional requirements, namely; fair competition and merit through deliberate and progressive reforms guided by **Mwongozo Code of Governance for State Corporations, 2015** (herein **Mwongozo)**. According to the Respondents, applicability of fair competition and merit in the appointments must be evaluated as against the process leading to the formation of the State Corporations and the **Mwongozo**.

14. It is again the Respondents' contention that Parastatals and State Corporations are critical in the government's achievements in service delivery hence the impugned provisions grant autonomy to the President and his cabinet to select persons who will best deliver the objectives and targets of those corporations. For that reason, selection of the persons to appoint requires considerations such as, ability to attract strategic partnerships for the entities and to deal with political issues and players. They contend, therefore, that getting suitable persons may entail head-hunting.

15. The 2nd Respondent separately filed grounds of opposition dated 9th November 2020. stating that:

> 1. The Constitution at Article 234(2)(a) gives the 2nd respondent the mandate, among others, to appoint persons in the public service, subject to the Constitution and existing legislation.
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> 2. The State Corporation Act and the several impugned legislations expressly vest the President and Cabinet Secretaries with powers to make appointments of Chairpersons and Members of the Board of State Corporations.
>
> 3. The several impugned legislations are still in force and therefore the appointments being challenged were made legally and within the law.
>
> 4. The several impugned legislative provisions enjoy a presumption of constitutionality until it is refuted and to justify unconstitutionality there must be a clear and unequivocal breach of the Constitution.
>
> 5. The allegations of unconstitutionality as alleged by the Petitioners are negated by the provisions of Article 234(2)(a) of the Constitution that contemplate appointments of persons in the public service through existing legislation, among them, the several impugned legislations.
>
> 6. The existing legal framework on establishment and appointments of Chairpersons and Members of the Board of the State Corporations is in tandem with the internationally accepted standards in corporate governance of State Corporations (State-owned Enterprises) which recognizes the State as the shareholder to own and control State Corporations (State-owned Enterprises) in trust for the public and in the public interest.
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> 7. The selection, appointment and removal of members of Boards of Directors of State Corporations would fall within the special category of employees envisioned by the court in **Tom Luusa Munyasya & Another v Governor, Makueni County & Another** [2014] eKLR.

Interested Parties' responses

16. The 35th to 39th and 122nd Interested Parties' filed grounds of opposition dated 5th February 2019. They state that:

> 1. The President is empowered to appoint the Chairman and the Cabinet Secretaries are empowered to appoint members of the Boards of State Corporations under Section 6(1)(a) and (e) of the State Corporations Act as read together with Article 234(2)(a)(ii) of the Constitution of Kenya, 2010.
>
> 2. Section 6(1)(a) and (e) of the State Corporations Act is constitutional in so far as it is construed together with Article 234(2)(a)(ii)

of the Constitution of Kenya, 2010 and the appointments of the 35th, 36th, 37th, 38th, 39th and 122nd interested parties made pursuant thereto are lawful.

3. The President and the Cabinet Secretary have the power to make appointments pursuant to the doctrine of Presidential and/or Executive prerogative.

4. The said interested parties comprise of youth, men and women with the requisite and suitable qualifications, reflect the diverse ethnic communities of Kenya and have different skill sets to provide leadership to the Corporation.

5. The principle of proportionality militates against the grant of the drastic orders sought in so far as proportionality is a principle relating to public policy consideration and requiring the court or an administrative authority, in exercising its discretion to maintain a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and purpose which it pursues based on the following tests:

a. The balancing test which requires a balancing of the ends which an official decision attempts to achieve against the means applied to achieve them. This requires an identification of the ends and purposes sought by the official decisions. In addition, it requires an identification of the means employed to achieve those ends, a task which frequently involves as assessment of the decision upon affected persons.

b. The necessity test which requires that where a particular objective can be achieved by more than one available means, the least harmful of these means should be adopted to achieve a particular objective. This aspect of proportionality requires public bodies to adopt those regulatory measures which cause minimum injury to an individual or community.

c. The suitability test requires authorities to employ means which are appropriate to the accomplishment of a given law, and which are not in themselves incapable of implementation or unlawful.

6. Courts of law appreciate and are wary of the retrospective application of their decisions and their unintended consequences.

7. The petition is an abuse of the process of the court in so far as it seeks to litigate the same issues as are in Petition No. 331 of 2016 first filed in court and which is undetermined.

8. The petition does not meet the threshold set by the Supreme Court for the grant of the prayers sought.

17. On their part, the 78th to 81st and 129th Interested Parties, filed a replying affidavit sworn by **Cyril S. Wayong'o** on 28th November, 2018. The deponent states *inter alia*, that the 78th to 81st Interested Parties were legitimately and lawfully recruited into the Board of the Kenya Civil Aviation Authority **(KCAA)** to serve a three (3)-year term.

18. The deponent also states that the Petitioners' argument that the 2nd Respondent is the body mandated to appoint officers to the Board of statutory corporations is misleading. According to him, Article 234(2) of the Constitution mandates the 2nd Respondent to establish and abolish offices in the public service, as well as to appoint persons to hold positions in such offices.

19. It is the averment of the deponent that since the office of the board of directors is created under the Civil Aviation Act, it is not the mandate of the 2nd Respondent to recommend or appoint persons to hold positions in the board. The deponent goes on to state that the Civil Aviation Act in no way mandates or assigns functions or powers to the 2nd Respondent in respect to the KCAA. It is also the averment of the deponent that the KCAA does not fall in the category of a public office or public service under Article 260 of the Constitution.

20. The deponent states that in any case, the aforementioned interested parties were recruited from amongst the most qualified candidates and in tandem with the provisions of the Civil Aviation Act. He further states that the appointment of the Interested Parties was in fact a re-appointment as opposed to a fresh appointment process, the said Interested Parties having previously served a three (3)-year term period from the year 2015. According to the deponent, there was no requirement to have the positions advertised. It is the deponent's contention, that the Petitioners are not entitled to the orders sought in their petition, He urges that the same be dismissed with costs.

21. The 85th and 86th Interested Parties filed grounds of opposition dated 15th October, 2018, raising the following grounds:

1. The petition is misplaced and lacking in capacity as it is based on the wrong interpretation of the Constitution and the law.

2.The Constitution of Kenya, 2010 at Article 93 establishes Parliament which shall perform its respective functions in accordance with the Constitution.

3. The role of Parliament as provided for under Article 94 of the Constitution is to enact legislation which legislation shall expressly specify the purpose and objectives for which that authority is conferred.

4. Pursuant to Article 94 above, Parliament enacted the Energy Act and section 4 of the Act establishes the Energy Regulatory Commission.

5. Section 10(1) of the Energy Act provides that the management of the Commission shall vest in the Commissioners, where at paragraph (d) five Commissioners shall be appointed by the Minister to represent the private sector in general.

6. Section 10(2) of the Energy Act provides for the qualification for appointment pursuant to Section 10(1) above.

7. Pursuant to Section 10(1) and 10(2) of the Energy Act, the Minister responsible for energy vide Gazette Notice No. 5595 June, 2018 appointed the 85th and 86th interested parties herein.

8. The appointment was conducted in accordance with the law and the Constitution.

9. The Petitioners have failed to establish a breach of the law and the Constitution pursuant to the appointment of the 85th and 86th interested parties and thus no orders can be issued against them.

10. The 85th and 86th Interested Parties for the reasons afore-stated oppose the petition as an abuse of the court process and with no basis in law and seek for its dismissal with costs to the 85th and 86th interested parties.

Submissions by the Parties

22. The petition was canvassed by way of written submissions which were highlighted by the parties' respective advocates.

a. Petitioners' submissions

23. In their submissions dated 31st October, 2018, the Petitioners have identified a number of issues for determination. First, whether the positions of chairpersons and board members in Parastatals and State Corporations are offices in public service. On this, the Petitioners submit in the affirmative, within the meaning of the Constitution. They cite the decision in ***Rogers Mogaka v George Onyango Oloo & 2 Others (2015) eKLR,*** where the court held that the Respondent in that case was a public officer on account of him being the chairperson of the Lake Basin Development Authority and, therefore, he was subject to constitutional and statutory provisions that barred a public officer from being an official of a political party.

24. Second, on whether appointments of the Interested Parties were done in accordance with Articles 2(1), 10, 73(1), 232(1), 233 and 234 of the Constitution, the Petitioners argue that no attempt was made at ensuring fair competition or merit in the appointments. In the absence of any indication that such principles were complied with, they urge the Court to find that the actions of the President and his Cabinet Secretaries violated the provisions of Article 232(2)(g) of the Constitution as read with Section 10 of the Public Service (Values and Principles) Act and, therefore, should nullify the appointments.

25. Third, the Petitioners submit that the President and Cabinet Secretaries, as appointing authorities, usurped the mandate of the 2nd Respondent. They argue that both the Constitution and the Public Service Commission Act provide for the mandate of the 2nd Respondent, to appoint persons in all State Corporations and, therefore, the appointments in question, having been made by persons other than the 2nd Respondent, are irregular, unconstitutional and invalid.

26. Fourth, on whether the various provisions of law providing for the powers and mode of appointment to Parastatals and State Corporations are constitutional, the Petitioners submit that the Court should have regard not only to the purpose of an Act of Parliament but also to its effect. They rely on the decisions in ***Institute of Social Accountability & Another v National Assembly & 4 Others (2015) eKLR*** and ***R v Big Drug Mart Ltd (1985) 1 S.C.R 295*****.**

27. The Petitioners contend that the impugned provisions are unconstitutional for the reason that they permit the appointment of chairpersons and board members of Parastatals and State Corporations in contravention of the provisions of Articles 232 and 234 (2)(a)(i) and (ii) of the Constitution as read with Section 33 of the Public Service Act 2017. They also argue that the provisions omit the requirement of fair competition and merit as a basis for appointments. The Petitioners hold the view that the impugned provisions are inconsistent with the Constitution and ought to be declared unconstitutional and invalid. **Mr. Ochiel**, emphasized that the Constitution ought to be read and interpreted holistically and that the challenged provisions are offensive to the Constitution and the other statutes referred to, and should be struck down.

b. The 1st Respondent's submissions

28. The 1st Respondent filed written submissions dated 30th September, 2020, and identified five (5) issues for determination. On whether positions in Parastatals and State corporations are offices in public service, the 1st Respondent has answered in the negative. He submits that Parastatals and State Corporations are not offices in the public service as defined under Article 260 of the Constitution. In his view, Parastatals and State Corporations are not offices in the public service since they are not offices established under the Constitution and officers appointed to those offices do not perform functions within a commission, office, agency or other body established under the Constitution.

29. The 1st Respondent relies on the decision in ***Federation of Women Lawyers Kenya (FIDA) v Attorney General & Another (2018) eKLR***, where the court held that "**in interpreting constitutional rights, close scrutiny should be given to the language of the constitution itself in ascertaining the underlying meaning and purpose of the provision in question."** The 1st Respondent also cites the decision in ***Association of Retirement Benefits Scheme v Attorney General & 3 others (2017) eKLR***, where the Court stated that; **"…the Privy Council while interpreting the Constitution of Bermuda stated that a constitutional order is a document sui generis to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation.**"

30. It is the 1st Respondent's submission that since State Corporations are not offices in public service, it follows that the 2nd Respondent is not the body mandated to make appointments of their board members or officials. In that regard, the 1st Respondent urges the court to be guided by the decision in the case of ***Elgeyo Marakwet Civil Society Organization Network v Ministry of Education, Science and Technology (2016) eKLR*** where the court upon considering the question of whether members of the council of a public university or constituent college hold office in the public service, held that such members neither hold office in the National or County Government nor do they perform functions within a commission, office or agency or other body established under the constitution, since public universities are not established under the Constitution and consequently, do not hold offices in the public service.

31. On whether the 2nd Respondent has power to appoint chairpersons and members of boards of State Corporations, the 1st Respondent argues that since the State Corporations Act empowers the President and Cabinet Secretaries to appoint the board members and officials of State Corporations. This, he argues, shows that the mandate of the 2nd Respondent is limited, hence it has no power to establish or abolish State Corporations, or to appoint the aforementioned persons.

32. The third issue is whether the President and Cabinet Secretaries are the proper appointing authorities for chairpersons and members of boards of State Corporations. The 1st Respondent submits that executive power of the President provided under Article 132(4)(a) of the Constitution is not exhaustive. In his view, national legislations could grant additional authority to the President to carry out certain additional functions. For that reason, he argues, the State Corporations Act and the other statutes giving power to the President or his cabinet to make appointments, are all statutes envisaged by Article 132(4) of the Constitution, and, therefore, the President and Cabinet Secretaries have the mandate to make the appointments.

33. To buttress this argument, the 1st Respondent cites the decision in ***John Harun Mwau v Attorney General (2015) eKLR,*** where the court stated that for the Court to order the President to exercise his discretion in a particular way or to certain officers, would be similar to taking away discretion that is bestowed only in the President.

34. The 1st Respondent also, cites the decision in ***National Conservative Forum v Attorney General (2013) eKR,*** where the Court stated that "*courts are concerned only with the power to enact statutes, not with their wisdom…For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government.*"

35. On whether the impugned provisions pursuant to which the appointments were made are unconstitutional, the 1st Respondent contends, *inter alia*, that the provisions of Article 132(4) were designed and intended to provide liberty for relevant state officials such as the President and members of the cabinet to have authority to make key appointments in State Corporations that would enable them and the government to deliver on the promises made to the public. According to the 1st Respondent, the provisions of the State Corporations Act are not unconstitutional or *ultra vires* the Constitution in the absence of a limiting provision in the Constitution itself.

36. The 1st Respondent further contends that Article 132(4)(a) of the Constitution envisages additional authority being conferred to the President to perform executive functions such as appointments to State Corporations as functions authorized in national legislations. The 1st Respondent maintains that the impugned appointments were regularly made and are consistent with the Constitution.

37. It is the 1st Respondent's view, that the authority conferred on the President is also designed to enable the government to function effectively, and the exercise of authority conferred by those statutes neither renders the statutes nor the exercise of the power conferred thereby unconstitutional. He relies on ***Tom Luusa Munyasya & Another v Governor, Makueni County & Another (2014) eKLR,*** where the Court stated that the office of the President and his Deputy are political offices discharging political mandates and accountable to the electorate and are, therefore, granted the discretion to appoint the persons to execute those policies.

38. The fifth and last issue is whether the executive authority of appointment was exercised in accordance with the dictates of the Constitution. The 1st Respondent submits that in recognition of the need to observe the principles of public service under Article 232, the President in conjunction with the 2nd Respondent, established a code of governance for State Corporations, **"Mwongozo."** to ensure that the management of State Corporations is aligned with Articles 10, 73 and 232 of the Constitution, as well as the principles set out in Chapter 6 of the Constitution.

39. In the view of the 1st Respondent, the Petitioners have not alleged that any of the persons appointed lacked the required qualifications, competence or had serious integrity issues. They have also not shown that the President, or the Cabinet Secretaries failed to act in accordance with the Constitution or that the impugned appointments fell below the standard set by the Constitution. The 1st Respondent contends that it has provided evidence that all appointments were undertaken in accordance with the criteria set in **Mwongozo** which complies with constitutional dictates of merit. The 1st Respondent also argues that the persons appointed were sourced from a database maintained by the 2nd Respondent and other government institutions. Accordingly, the 1st Respondent submits that the evidentiary burden shifted to the Petitioners to show with respect to each specific appointment, either non-compliance with the criteria set in **Mwongozo** and/or the Constitution, but they did not.

40. The above arguments were restated in the oral highlights by **Mr. Nyaburi** advocate on behalf of both the 1st and 2nd respondents.

2nd Respondent's submissions

41. The 2nd Respondent filed written submissions dated 9th November 2020 which are in all respects, similar to those of the 1st Respondent and we see no need to regurgitate them.

The 33rd Interested Party's submissions

42. Mr. Mueka, counsel for the 33rd Interested Party, did inform the court that they did not file any submissions. He associated himself with the grounds of oppositions, submissions and authorities of the 1st and 2nd Respondents. He also stated that he was relying on their grounds of opposition dated 9th November 2018 and filed on 6th December 2018. We have, however, not been able to trace the 33rd Interested Party's grounds of opposition on record.

43. Mr. Mueka adds that the 33rd Interested Party was appointed on 6th June, 2018 for a term of three (3) years which were set to lapse in June, 2021. He argues that if the petition is allowed, the decision will have an impact on the larger Kenyan community as well. He relies on the decision in ***Okiya Omtatah Okoiti v President of Kenya & 4 others [2019] eKLR*** for the argument that nullifying appointments already made would have grave ripple effect on the economy and management of the State Corporations.

Submissions by the 35th to 39th and 122nd Interested Parties

44. The 35th to 39th and 122nd Interested Parties filed written submissions dated 14th October, 2020. They identified and submitted on three issues.

45. On whether the President and Cabinet Secretaries had authority to appoint them as chairperson and board members of State Corporations, they contend that their respective appointments to the National Oil Corporation of Kenya were made in compliance with the provisions of Article 232 of the Constitution on principles and values in public service, and were made to reflect ethnic diversity in Kenya, at the prerogative of the President and his Cabinet Secretaries.

46. They further contend that the 2nd Respondent could not undertake any appointments of such nature where the relevant legislation designates a separate appointing authority, as is the case here. It is their submission that since Article 132(4)(a) of the Constitution gives the President authority to perform any executive function stipulated in national legislation, both the President and his Cabinet Secretaries had authority to make the appointment.

47. The second issue is whether their appointments were competitive and whether that was a requirement for appointment. The 35th to 39th and 122nd Interested Parties rely on ***Tom Luusa Munyasya & Anor v Governor, Makueni County & Another (supra)*** to argue that the appointments are hinged on the political mandate of the President and his Cabinet Secretaries, who ought to have some form of royal prerogative in determining who to appoint.

48. The third and final issue is whether the principle of proportionality ought to apply in the present case. The 35th to 39th and 122nd Interested Parties argue in the affirmative. They contend that this principle calls for a balancing of a decision arrived at and the impact of that decision. They cite the decision in ***Jacqueline Okuta & another v Attorney General & 2 others [2017] eKLR,*** that limitation of a constitutional right will be constitutionally permissible, if it is designated for a proper purpose; the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; and the measures undertaken are necessary in that there are no alternative measures that may achieve the same purpose with a lesser degree of limitation.

49. The 35th to 39th and 122nd Interested Parties submit that in arriving at a decision on the petition, the Court ought to apply the principle of proportionality by considering the overarching effects of nullifying the appointments.

Submissions by the 78th to 81st and 129th Interested Parties

50. The 78th to 81st and 129th Interested Parties filed written submissions dated 23rd October, 2020, and identified three (3) issues for determination.

51. The first issue is whether it is the 2nd Respondent's mandate to appoint board members of State Corporations. Just like the Respondents and other Interested Parties, they submit that the chairperson and board members of State Corporations are not persons in the public service and, therefore, the 2nd respondent has no mandate to make the appointment.

52. They reiterated the averments in the replying affidavit of Cyril S. Wayong'o, adding that the Civil Aviation Act enjoys the presumption of constitutionality. In their view, since the Petitioners have not sought to declare its clauses unconstitutional, it follows that the court cannot and should not declare their appointments unconstitutional. We note however that the Petitioners challenge section 13(1)(g) of the Act, thus this argument is un-ingenious.

53. The next issue is whether the principle of *pleasure doctrine* would apply to the present circumstances. The 78th to 81st and 129th Interested Parties argue that the pleasure doctrine is a legal principle under English jurisprudence whereby persons hold office at the pleasure of the Crown, hence public officers in her Majesty's service, could not challenge their dismissal from office through the judicial process, but could only initiate other remedial measures.

54. On the basis of the above principle, they argue that the 2nd Respondent has no mandate to appoint them as chairperson and board members of KCAA. In their view, the mandate to make the appointment vests on the President and Cabinet Secretaries and which authority is unfettered. They cited a number of English decisions on the *pleasure doctrine.*

55. In respect to the last issue; whether the rational basis principle applies in the circumstances of this petition, they contend that the principle essentially determines whether a reasonable person would have reached the same conclusion based on the same set of facts. They rely on ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR.***

56. The 78th to 81st and 129th Interested Parties maintain that theirs were re-appointments and their second term is set to lapse in the year 2021. They submit that failure to appoint a board of directors at the earliest opportunity would have resulted in the blacklisting of KCAA. It is their case that they were legally appointed by the relevant appointing authorities.

57. The Respondents and Interested Parties are united in urging this Court to dismiss the petition.

Analysis and determination

58. We have considered respective parties' arguments and the decisions relied on. We have distilled the following issues for determination, namely;

> **1. Whether positions in Parastatals and State Corporations are offices in the Public Service;**
>
> **2. Who should make the appointments;**
>
> **3. Whether the statutory provisions on appointments are unconstitutional**
>
> **4. Reliefs to grant**

Whether positions in Parastatals and State Corporations are offices in the Public Service.

59. The Petitioners argue that positions in Parastatals and State Corporations are positions in the public service within the meaning of the Constitution. They rely on the decision in ***Rogers Mogaka v George Onyango Oloo & 2 Others (supra).*** In that case, the Respondent, a public officer by virtue of being chairperson of the Lake Basin Development Authority, was adjudged to be a public officer and subject to constitutional and statutory provisions that barred a public officer from holding office in a Political Party.

60. The Respondents and Interested Parties contend that these are not positions in the public service as defined in Article 260 of the Constitution, in that they are not offices, commissions, agencies or other bodies established under the Constitution. They rely on, among other decisions, the case of ***Elgeyo Marakwet Civil Society Organization Network v Ministry of Education, Science and Technology (supra)***. In that case, the issue was whether members of the council of a public university or constituent college held offices in the public service. It was held that such members neither hold office in the national or county government, nor do they perform functions within a commission, office or agency or other body established under the Constitution, since public universities are not established under the Constitution.

61. This issue is not new. It was the subject of this Court's consideration and determination between the same Petitioners and respondents in **Katiba Institute & Another v Attorney General & Another, (Nairobi High Court Petition No. 331 of 2016) [2020] eKLR.** The Petitioners in that petition are the same as in the present petition. The Respondents are also the same. Only some of the Interested Parties are different. Just like in that petition, the challenge here is directed at appointments of chairpersons and board members to Parastatals and State Corporations.

62. This Court considered the above issue, the Constitution and applicable statutes and made a determination that positions of chairpersons and board members in Parastatals and State Corporations are not offices in the public service. The Court applied a two pronged test. First, the definitional test under Article 260 of the Constitution, sections 2 of Public Officer Ethics Act and The Public Service Commission Act, and stated:

> [52]. On the first test, we are of the considered view, that state corporations and parastatals are not offices in the public service, because they are neither offices in the national government nor county government as defined by the Constitution. The Constitution is also clear that to be a public service, there must be the collectivity of individuals who are performing a function within a commission, office, agency or other body established under the Constitution, except state officers. More importantly, state corporations and parastatals are not offices established under the Constitution.

63. The second test the court applied was that of remuneration. On this, the Court again considered the Constitution and in particular the requirement that remuneration and benefits of public officers be directly payable from the Consolidated Fund or out of money provided by Parliament. The court determined that the benefits payable to state corporations and parastatals are not drawn from the Consolidated Fund or from money directly provided by Parliament. the Court concluded:

> [67]. Regarding remuneration and benefits, our reading of the law is that this is not directly drawn from the Consolidated Fund or directly provided by Parliament. Under **section 11** of the State Corporations Act, state corporations are required to prepare and submit to the line minister and the Treasury for approval, yearly estimates of their revenue and expenditure accompanied by proposals for funding of the projects they are to undertake, or implement during the financial year. This is testimony to the fact that state corporations and parastatals generate their own revenue for expenditure, and their funding is not necessarily wholly provided for by Parliament.

64. The Court concluded, a view we still hold, that positions of chairpersons and members of boards of State Corporations and Parastatals are not offices in the public service. In arriving at this conclusion we are further guided by the decision of the Supreme Court in ***Fredrick Otieno Outa v Jared Odoyo Okello & 4 others [2014] eKLR,*** where the Court stated that the proper meaning of public officer is that the person concerned is either a State officer or any other person who holds public office within the national government, county government, or public service or, a person holding such an office is sustained in terms of remuneration and benefits, from the public exchequer.

65. We see no reason to differ from that holding. We therefore find and hold that positions in Parastatals and State Corporations are not positions in the public service.

Who should make the appointments

66. The second issue for determination is who should make the appointments to the positions of chairpersons and board members of Parastatals and State Corporations. The Petitioners argued that the President and Cabinet Secretaries usurped the mandate of the 2nd Respondent when they appointed the Interested Parties. It is their case that both the Constitution and the Public Service Commission Act confer the mandate of appointing persons to those positions on the 2nd Respondent. They rely on Article 234 of the Constitution and section 33 of the Public Service Commission Act.

67. The Respondents and Interested Parties maintain that it is the President and Cabinet Secretaries who have the mandate to make the appointments as required by the various statutes. They also argue that executive authority conferred to the President by Article 132(4)(a) of the Constitution is not exhaustive. In their view, national legislations grant additional authority to the President to carry out other functions, and it is for that reason, the State Corporations Act and the other statutes give authority to the President and Cabinet Secretaries to make the appointments in question.

68. We have considered the respective parties' arguments on this issue. Having determined that positions in Parastatals and State Corporations are not positions in public service, the 2nd Respondent would not have mandate to make the appointments. Just like the first issue, this issue was also determined in ***Katiba Institute & Another v Attorney General & Another*** (***supra***), where this Court stated:

> [75] We have already held that positions in state corporations and parastatals are not positions in the public service. That being our view, we are not persuaded by the petitioners' argument that the impugned appointments should have been made by the 2nd respondent. Whereas the 2nd respondent is the institution responsible for establishing and abolishing offices in the public service; appointing persons to hold or act in those offices, and to confirm the appointments or dismiss holders thereof, appointments to positions in state corporations and parastatals, can only be made pursuant to provisions in the statutes establishing those bodies.
>
> [76] We are cognizant of the fact that the Constitution confers on the President in **Article 132(4)(a)**, powers to perform any other executive function provided for in the Constitution or in national legislation. The impugned provisions are national legislations which give the President power to appoint persons to positions of chairpersons or members of boards in respective state corporations and parastatals. Where national legislation provides that an appointment be made by the President, the appointment can only be made as provided for and not as the petitioners urged.

69. The Court further stated:

> [78] The petitioners' argument that cabinet secretaries could not make the impugned appointments must suffer the same fate. The appointments were made pursuant to statutory provisions in statutes establishing those state corporations and parastatals. It is difficulty to agree with the petitioners that the appointments could only be made by the 2nd respondent when the law requires they be made by cabinet secretaries.

70. We agree with that reasoning, and we have no difficulty in concluding that appointments to Parastatals and State Corporations can only be made by the President or Cabinet Secretaries as contemplated by the respective statutes. We so hold with respect to this petition.

Whether the statutory provisions on appointments are unconstitutional

71. We turn to consider whether the statutory provisions on which the appointments were made are unconstitutional. The Petitioners argue that the provisions are unconstitutional because they permit the President and Cabinet Secretaries to make the appointments in contravention of Articles 232 and 234 (2)(a)(i) and (ii) of the Constitution as read with section 33 of the Public Service Commission Act. They further argue that the provisions also omit the requirement of fair competition and merit as the basis for appointments. For those reasons, the Petitioners argue, the provisions are inconsistent with the Constitution.

72. The Respondents and Interested Parties maintain that the provisions are constitutional. They contend, *inter alia*, that Article 132(4) of the Constitution is intended to provide liberty for the President and Cabinet Secretaries to make key appointments in Parastatals and State Corporations that would enable the government deliver on the promises it made to the public. It is their case, therefore, that the impugned provisions are not unconstitutional.

73. We have considered this issue and the arguments for and against. The Petitioners' case is that the provisions on the appointments contravene the Constitution for two reasons. First, that they provide for appointment by the President and Cabinet Secretaries and second, that they do not provide for fair competition and merit as the basis for appointment, contrary to the Constitution. We must point out here that we have already determined on who should make the appointments. The only issue, therefore, is whether the provisions fail the constitutional test of validity for not providing for open, transparent, competitive and merit based appointment.

74. Before deciding this issue, we briefly consider the principles applicable in determining constitutionality or other wise of a statute or statutory provision.

75. The starting point should be **Article 2(4)** of the Constitution, which provides that any law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. There are also general principles that have been developed by Courts over the years on which constitutionality of statutes or statutory provisions may be tested.

76. There is a general, but rebuttable presumption that a statute or its provision is constitutional and the burden is on the person alleging unconstitutionality to prove that the statute or provision is unconstitutional.

77. In **Charanju Lal v Union of India** [1950] SCR 869, the Supreme Court of India opined that it must be assumed that the legislature understands and appreciates the needs of the people, and that the laws it enacts are directed to the problems which are made manifest by experience. The elected representatives assembled in a legislature, therefore enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of constitutionality of an enactment. (See also **Hamdard DawaKhana v Union of India & others [1960] AIR 554** and **Ndynabo v Attorney General of Tanzania *[2001] EA 495.)***

78. In determining constitutionality of a statute, the court must also examine its purpose or effect. Where the purpose of enacting a legislation, or the effect of its implementation results in an unconstitutional purpose or effect, it may lead to nullification of the statute or its provision.

79. In the Ugandan case of ***Olum & Another v Attorney General [2000] UGCC 3; [2002] EA,*** **Okello, JA.** stated:

> **To determine the constitutionality of a section of a statute or Act of Parliament, court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the court has to go further and examine the effect of its implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional.**

80. This position was also stated in ***The Queen v Big M. Drug Mart Ltd, 1986 LRC (Const.) 332,*** the Supreme Court of Canada stated:

> **Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity.**

81. Further, in ***Centre for Rights Education and Awareness(CREW) & another v John Harun Mwau & 6 others***[2012] eKLR, it was observed that in determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned Act, which can be discerned from the intention expressed in the Act itself.

82. With these principles in mind, we now turn to consider the constitutionality of the impugned provisions as pleaded in paragraph 16 of the petition. The provisions fall into two categories; those enacted prior to the Constitution of Kenya 2010 and those enacted after. We will start with the Pre-2010 provisions.

83. In this category, the petition challenges section 16 (2)(g) of the Investment Promotion Act No. 6 of 2004. The section states that the board of the Authority shall consist of six members appointed by the Minister. The section does not provide for the process of identifying suitability and any other criteria for purposes of appointment. It confers absolute discretion on the Cabinet Secretary to make the appointments as he deems fit. This is not what Article 232 of The Constitution as read with section 10 of the Public Service (Values and Principles) Act requires. The provision does not also require any transparency or accountability required under Article 10 of the Constitution. This would ordinarily make the provision unconstitutional.

84. That notwithstanding, we note that the provision was enacted in 2004, prior to the 2010 Constitution. That being the case, section 7 of the Sixth Schedule to the Constitution comes in. The section requires that *"all 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."* It follows, therefore, that the impugned provision, though not in tandem with Articles 232 and 10 of the Constitution as read with section 10 of the Public Service (Values and Principles) Act, it should be read with alterations and adaptations necessary to make it conform with the Constitution. For that reason, we are unable to declare section16(2)(g) of the Investment Promotion Act, unconstitutional.

85. We must, however, emphasize that appointments made pursuant to this provisions must comply with the requirements of open, transparent, competitive and merit, taking into account; gender, ethnicity, diverse communities of Kenya and persons with disabilities as required by Article 232. Short of that, any appointments made in total disregard of the requirements of Articles 232 and 10 would run afoul of the Constitution.

86. We have found that a provision of a statute enacted prior to the 2010 Constitution would not be unconstitutional, merely because it does not comply with the requirements in Articles 232 and 10 of the Constitution as read with section 10 of the Public Service (Values and Principles) Act. This is because the provision has to be read and construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. This finding, therefore, applies to all the other provisions enacted prior to promulgation of the Constitution, which are challenged in this petition.

87. For avoidance of doubt, the provisions are as follows: section 6(1) and 6(1)(e) of The State Corporations Act*;* section 10(1)(e) of the Environmental Management and Co-ordination Act; Paragraph 2(h) of The Moi Teaching and Referral Hospital Board Order, 1998; section 9(1) of The Kenya Medical Training College Act; section 3(2) (b) of the National Cereals and Produce Board Act and section 5(2)(k) of The Pest Control Products Board Act.

88. Other provisions are; section 5(1)(a) and (b) of The Agricultural Development Corporation Act; section 3(2) of The Housing Act; section 7(1)(a) and (h) of The Kenya Roads Board Act; section 4(a) and (f) of The Kenya Railways Corporation Act; section 4(a) and (f) of The Kenya Ports Authority Act; section 4(1)(b) of Non-Governmental Organizations Co-ordination Act; section 3(B),(1),(g) and (h) of The Insurance Act; section 5(1) (a) of The Statistics Act; section 5(3)(b) of The Capital Markets Act; section 4(1)(i) of The Coast Development

Authority Act; section 6(f) of The Retirement Benefits Act and section49(1)(h) of The Proceeds of Crime and Anti-Money Laundering Act.

89. The Petitioners have also challenged the constitutionality of Paragraph 1 of the Schedule to the Irrigation Act, (Cap 347). We note, however, that the Act was repealed by The Irrigation Act, (No. 14 of 2019), which came into commencement on 16th August 2019. That being the case, we cannot deal with a provision that is no longer in existence.

90. The Petitioners have further challenged the constitutionality of section 10 (1)(d) of The Energy Act (No. 12 of 2006). We again have to point out that the Act has been repealed by The Energy Act, (No. 1 of 2019). Consequently, the impugned provision is no longer in existence and, therefore, we say no more.

91. Turning to the second category of the provisions, the Petitioners have challenged several provisions in statutes that were enacted after the promulgation of the Constitution in 2010. They have argued that the provisions do not comply with the principles in Articles 232 and 10 of the Constitution, as read with section 10 of the Public Service (Values and Principles) Act, on the mode of appointment.

92. The first of these provisions is section 6(d) (iii) and section 8 of the National Social Security Fund Act (No. 45 of 2013). Section 6(d)(iii) is on the membership of the board of directors. It provides that the board shall comprise of seven persons appointed by the Cabinet Secretary. One of the three persons to be appointed by the Cabinet Secretary, should be of the opposite gender. They should not be public officers, employees or directors of any public company. They should be appointed by virtue of their knowledge and experience in matters relating to administration of scheme funds, actuarial science, insurance, accounting and auditing or law;

93. It is clear from the reading of section 6(d)(iii) that apart from providing for qualifications and other considerations, there is no requirement for open, transparent, competitive and merit as the basis for appointment, taking into account; among other factors, ethnicity, diverse communities of Kenya and persons with disabilities. It is therefore plain to us, that this provision is inconsistent with the constitutional principles and requirements in Article 232 of the Constitution. In that regard, section 6(d)(iii) fails the constitutional test of validity.

94. Although the Petitioners have also argued that section 8 of the same Act is unconstitutional, we do not find this sustainable. The section deals with tenure of office for members of the board, reappointment and mode of their removal. While reappointment will of course follow the process of appointment, tenure of office for members of the board and the mode of their removal, are not matters that fall under Articles 232 and 10 of the Constitution. We decline the invitation to find the provision unconstitutional on that account.

95. We have considered the rest of the provisions that were enacted after 2010 that have also been challenged in this petition on grounds that they do not comply with Articles 232 and 10 of the Constitution, with regard to appointments.

96. The provisions are as follows: Paragraph 4(1)(e) of The Kenya Leather Development Council Order, 2011; section 9(1) and 9(1)(a)(b)(c)(d)(e)and(g) of The Forest Conservation and Management Act, 2016; Paragraph 6(1)(g) of The Kenya Water Towers Agency Order, 2012**;** section 9(1) of The Science, Technology and Innovation Act, 2013; section 6(2)(a) of Cancer Prevention and Control Act, 2012; section 5(1)(a)and(f) of The Kenya Animal Genetic Resources Centre Order, 2011**;** section 8(1)(d) of the Kenya Plant Health Inspectorate Service Act, 2012 and section 13(1)(g) of Civil Aviation Act, 2013.

97. Similarly challenged for constitutional invalidity are; section 6(1)(h) and (i) of National Authority for the Campaign Against Alcohol and Drug Abuse Act, 2012**;** section 7(1)(a) and (d) of The Kenya Deposit Insurance Act, 2012; section 6(1)(a) of The Kenya Trade Network Agency Order, 2010(LN. 6 2011).

98. We have carefully examined each of the impugned provisions above. Just like section 6(d) (iii) of the National Social Security Fund Act No. 45 of 2013, which we have found not in consonance with the Constitution, the common denominator in a majority of these provisions is that they merely provide for appointments and the person to make such appointments. They do not require open, competitive, transparent and merit as the basis for appointment. This is clearly contrary to Articles 232 and 10 of the Constitution.

99. Just to demonstrate by way of example, Paragraph 6(1)(a) of Kenya Trade Network Order, 2010(L.N 6 of 2011) provides for a non-executive chairman appointed by the President, while paragraph 6(1)(g) provides for appointment of three other members, not being public officers, appointed by the Cabinet Secretary "*by virtue of their knowledge and experience in trade logistics, information communication technology, or finance or administration."*

100. Section 7(1)(a) of The Kenya Deposit Insurance Act, 2012, provides for appointment of a non-executive chairperson by the President on the recommendation of the Cabinet Secretary from amongst the members appointed by the Cabinet Secretary. Paragraph (d) states that the Cabinet Secretary will appoint five members of the board by virtue of *"their knowledge and at least ten years' professional experience in banking, finance, insurance, commerce, law, accountancy or economics."*

101. On the other hand, section 13(1)(a) of the Civil Aviation Act provides for appointment of a chairperson, by the Cabinet Secretary through "*an open and competitive process*". The section does not, however, require that the appointments take into account the other criteria in Article 232 of the Constitution. Section 13 (1) (g) further provides that the Cabinet Secretary is to appoint *"five other persons"*, not being public officers, to be recruited through an open and competitive process from a list of at "*most three qualified persons"*. Two of the persons should have knowledge and experience either in aviation, air transport matters, piloting, aeronautical engineering or any other related field. One other person should have knowledge and experience in aviation law, while another should have knowledge and experience in finance, economics, administration or any other related field. Another person *"shall be a holder of such other qualifications and experience of proven ability in such other fields as the Cabinet Secretary may deem necessary."*

102. It is clear from the example in section 13(1(a) and (g) of the Civil Aviation Act, that the appointment process, though on the face of it, it attempts to comply with Articles 232 and 10 of the Constitution, in the end it only succeeds in making hogwash these Articles, by conferring

absolute discretion on the Cabinet Secretary to appoint at "*most three qualified persons*". Further, the Cabinet Secretary is to appoint a person who "*shall be a holder of such other qualifications and experience of proven ability in such other fields as the Cabinet Secretary may deem necessary.*" Although the provision states that the appointment should be through competition, merit would however, not be the basis for appointment since the Cabinet Secretary still has to appoint persons he/she deems fit. He would even appoint *at most three* qualified persons out of five which means he would still be complying with the provision if he appointed only one qualified person. This, to say the least, is a mockery of the Constitution.

103. Upon giving due consideration to the provisions challenged under this category, the conclusion we come to, is that, except section 9(1)(b)(c)(d) and (e) of Forest Conservation and Management Act, 2016; section 9(1) of Science, Technology and Innovation Act; section 6(1)(b)(c)(d)(e) and (f) of The Kenya Trade Network Agency Order 2010; and section 6(1)(i) of the National Authority for the Campaign against Alcohol and Drug Abuse Act, the rest of the provisions offend Articles 232 and 10 of the Constitution and are, therefore, constitutionally infirm.

Whether the appointments are unconstitutional

104. Having determined the issue of constitutionality of the provisions, the critical issue here is whether the impugned appointments are unconstitutional. The Petitioners' complaint is that the appointments were not made in compliance with the Constitution, Public Officer Ethics Act and Public Service (Values and Principles) Act. In particular, the Petitioners argue that the appointments did not conform with the requirements of transparency, competition and merit.

105. The Respondents and Interested Parties took the view, that the appointments were made in accordance with constitutional dictates. According to them, the appointments were made in recognition of the need to observe the principles of public service under Article 232 of the Constitution, as emphasized in **"Mwongozo",** which was intended to ensure that the management of State Corporations is aligned with Articles 10, 73 and 232 of the Constitution; including the principles set out in Chapter 6 of the Constitution.

106. We have carefully considered the arguments on this issue. The Petitioners' case, as we understand it, is that the appointments were made without taking into account the principles of public service in Article 232, as read with section 10 of the Public Service (Values and Principles) Act. In order to answer this issue, we turn to consider the relevant constitutional and statutory provisions.

107. Article 232(1) of the Constitution contains values and principles of public service. These include; high standards of professional ethics; efficient, effective and economic use of resources; responsive, prompt, effective, impartial and equitable provision of services; involvement of the people in the process of policy making; *accountability of administrative acts;* transparency and provision to the public of timely, accurate information; and *fair competition and merit as the basis of appointment and promotion*; representation of Kenya's diverse communities; and affording adequate and equal opportunities for appointment, training and advancement, at all levels of public service, for both men and women; members of all ethnic groups and persons with disabilities. Sub Article (2) states that the values and principles of public service also apply to *all State corporations.*

108. Parliament was required to enact legislation to give full effect to Article 232. In that respect, Parliament enacted the Public Service (Values and Principles) Act in 2015. The long title to the Act states that it is *"An Act of Parliament to give effect to the provisions of Article 232 of the Constitution regarding the values and principles of public service and for connected purposes."* Section 10 of the Act provides that the public service, a public institution or an authorised officer, shall ensure that *public officers are appointed and promoted on the basis of fair competition and merit.* This should, however, be subject to affirmative action as required by both the Constitution and the Act. Subsection (3) states that each public institution or authorised officer, should develop a system for the provision of relevant information that *promotes fairness and merit in appointments and promotions.*

109. The question that we must answer is: did the appointments comply with the constitutional requirements under Article 232 as read with section 10 of the Public Service (Values and Principles) Act?

110. The Petitioners' argument is simple. It is that the appointments were not open, transparent or based on merit. They also fault the appointments for not taking into account the requirement of accountability. The Respondents and Interested Parties merely stated that the appointments were made on the basis of Article 132(4) of the Constitution and **Mwongozo.**

111. Considering the Respondents' arguments, it is clear to us that there was neither advertisement for vacancies nor were the Interested Parties subjected to interviews before being appointed. Without advertisement and subjecting the interested Parties to interviews, it cannot be said that the requirements of competition and merit were complied with. Similarly, there was no demonstration that the requirements on gender, ethnicity and persons with disabilities were complied with. The reading of Article 232 of the Constitution and section 10 of the Public Service (Values and Principles) Act, are clear that appointments in public service and State corporations should comply with the principles of public service.

112. The Respondents did not even attempt to show that there was any semblance of some form of transparency and accountability in the appointments. There was also no evidence of any form of competition prior to making the appointments. Without complying with transparency, fair competition and merit, the appointments cannot be said to have met the constitutional standard in Article 232(1). It is plain that the President and Cabinet Secretaries made the appointments without regard to the Constitution and the statute; a move that also violated national values and principles of governance in Article 10 of the Constitution.

113. The Respondents and Interested Parties have also argued that the President and Cabinet Secretaries took into account the guidelines in **Mwongozo,** which provide for accountability. In their view, fair competition and merit should be considered in light of the deliberate and progressive reforms the government has undertaken for merit based, inclusive and competitive appointments. They urge the Court to apply the principle of proportionality by considering the overarching effects of nullifying the appointments. They also urge the Court to uphold the pleasure doctrine, a legal principle under English jurisprudence whereby persons hold office at the pleasure of the Crown. They further argue that the principle of rationality applies to this case.

114. We are not persuaded with these arguments. Ours is a constitutional democracy and every person must bear in mind the context and history of Article 232 of the Constitution. During the 2010 Constitution making process, people gave views to the Constitution of Kenya Review Commission (CKRC), on how they wanted public appointments made. These views were captured in the CKRC Final Report which were also contained in the Committee of Experts Report (CoE Report), thus giving birth to Article 232 of the Constitution.

115. The Report summarized the views at paragraph 13.6.5, thus:

> It is clear that what the people were asking for was the re-establishment of the principles of public service, neutrality, impartiality and independence. The people of Kenya wanted to see appointment processes that are transparent and offices that are not only accountable to the people but also capable of guarding public wealth and resources. There was considerable disquiet about the apparent inability of public officers to exercise powers independent of political pressure, and of the fact that appointment procedures even where clearly set out in the law, were often subordinated to demands of patronage. The clear impression being projected was that public service appointments were often based on criteria other than merit, competence or relevant experience.

116. In ***Community Advocacy and Awareness Trust & Others v*** **Attorney General** ***& 6 Others Nairobi Petition No 243 of 2011; [2012] eKLR,*** the Court appreciated the complete shift in the way of doing things ushered in by the Constitution of Kenya 2010, with regard to appointments, stating:

> **"[73] 27th August 2010 ushered in a new regime of appointments to public office. Whereas the past was characterised by open corruption, tribalism, nepotism, favouritism, scrapping the barrel and political patronage, the new dispensation requires a break from the past. The Constitution signifies 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."**

117. We entirely agree with this statement, adopt and apply it to the present case before us.

118. The Respondents had made similar arguments in ***Katiba Institute & Another v Attorney General & Another (supra),*** that appointments had been made in compliance with Article 132(4) of the Constitution and the guidelines in **Mwongozo.** This was despite those appointments not having taken into account the requirements in Article 232, as read with section 10 of the Public Service (Values and Principles) Act.

119. Responding to that argument, this court stated:

> [105]...This argument cannot stand in the face of clear constitutional provisions. The petitioners have not challenged the competence of the persons whose appointments have been questioned. What is challenged is the process through which the appointments were made….[T]hey could not argue that [the] appointments complied with the Constitution.
>
> [106] We must state at the risk of repeating ourselves that the people of Kenya desired that appointments be made in an open, transparent and inclusive manner taking into account, the marginalized and people with disabilities. They deserve no less. They are entitled to their wish as a matter of right and not privilege. It is a constitutional compulsion.

120. We are alive to Article 159(2) of the Constitution which provides that in exercising judicial authority, courts and tribunals shall be guided by certain principles, including protecting and promoting constitutional principles and purposes. Further, Article 259 demands that the Constitution be interpreted in a manner that promotes, among others, its purposes, values and principles, advances the rule of law, the human rights and fundamental freedoms in the Bill Rights. These are some of the values and principles of governance also found in Article 10(2) and which bind all State Organs, State Officers, public officers and all persons, in their daily discharge of duties and functions. These principles cannot be derogated from.

121. In view of the foregoing, the irresistible conclusion we come to, is that the impugned appointments did not comply with the principles in Articles 232 and **10 of the Constitution**. The appointments are, therefore, unconstitutional and invalid.

122. In the end, having considered the petition, the responses and submissions by parties, as well as the Constitution and the law, we make the following orders;

> **a. A declaration is hereby made that the appointments to various Parastatals and State Corporations by the President and the Cabinet Secretaries on 5th and 7th June, 2018 which were notified through Kenya Gazette Notice Numbers 5569 to 5621 and 5622 to 5623, are unconstitutional for violating Articles 10 and 232 of the Constitution and are, therefore, invalid.**
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> **b. A declaration is hereby made that Paragraph 4(1)(e) of The Kenya Leather Development Council Order, 2011; section 9(1)(a) and (g) of the Forest Conservation and Management Act, 2016; Paragraph 6(1)(g) of The Kenya Water Towers Agency Order, 2012; section 6(2)(a) of Cancer Prevention and Control Act, 2012; section 5(1)(a)and(f) of The Kenya Animal Genetic Resources Centre Order, 2011; section 8(1)(d) of Kenya Plant Health Inspectorate Service Act, 2012; section 13(1)(g) of Civil Aviation Act, 2013; section 6(1)(h) of National Authority for the Campaign Against Alcohol and Drug Abuse Act, 2012; section 7(1)(a) and (d) of Kenya Deposit Insurance Act, 2012 and section 6(1)(a) and (g) of Kenya Trade Network Agency Order, 2010(LN. 6 2011), are inconsistent with Articles 10 and 232 of the Constitution and therefore invalid .**
>
> **c. An order is hereby made quashing all the appointments made vide Kenya Gazette Notice Numbers 5569 to 5621 of June 5th, 2018 and Numbers 5622 to 5623 of June 7th, 2018.**
>
> **d. This being a public interest litigation the order we make is that each party shall bear their own costs of the petition.**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY 2021

J. W. LESIIT

JUDGE

E. C. MWITA

JUDGE

L.M. NJUGUNA

JUDGE