



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 244 OF 2017**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 20, 25, 47, 50,**

**93, 95, 159, 160, 165, 171, 172, 249, 250, 252, 253,**

**258 & 259 OF THE CONSTITUTION OF KENYA, 2010.**

**IN THE MATTER OF SECTIONS 14, 19, 22 & 30 OF THE JUDICIAL**

**SERVICE ACT, NO. 1 OF 2011 LAWS OF KENYA.**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, ACT NO. 4 OF 2015**

**IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 25,**

**47, 50 AND 250(9) OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**JUDICIAL SERVICE COMMISSION.....PETITIONER**

**VERSUS**

**NATIONAL ASSEMBLY.....1<sup>ST</sup>RESPONDENT**

**ETHICS & ANTI-CORRUPTION COMMISSION....2<sup>ND</sup>RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

**The Petition**

1. According to the Petitioner, the **Judicial Service Commission** (hereinafter referred to as “the Commission”) it is the body mandated by law to *inter alia* promote and facilitate the independence and accountability of the judiciary, the efficient, effective and transparent administration of justice. It was pleaded that the Petitioner is a policy making institution and integral part of one arm of the three co-equal parts of the national government and in its constitutional role, it safeguards and promotes the independence of the Judiciary.

2. To adequately carry out its mandate, it was pleaded that the **Judicial Service Act** (hereinafter referred to as “the Act”) confers power upon the Petitioner to perform some of its functions necessary to the day to day management of the judicial service through delegation to committees with a quorum of three (3) commissioners and provides that the Chairperson shall convene a meeting of the Commission, whose quorum is six members, at least once every three months and may convene a special meeting within seven days of receipt of a written requisition signed by at least three (3) members, convene a special meeting. However, in cognizance of the heavy constitutional mandate of the Petitioner, the Act allows the Commission to hold such number of meetings, in such a manner as the Commission shall consider necessary for the discharge of its functions.

3. It was disclosed that the Commission has since its inception mainly worked through its Committees in accordance with the clear provisions of the Act and that each Committee elects its chairperson who then has the responsibility of convening meetings. However, the Chief Justice does not sit or convene any of the Committee meetings and the Chief Justice as the Chairperson convenes meetings of the full Commission. It was revealed that in the period under review, the Petitioner had established three Committees, namely, the Finance and Administration Committee, the Human Resources Committee and the Legal Technical Committee. In addition, the Commission established ad-hoc panels for purposes of Court visits throughout the country.

4. It was pleaded that Following the dismissal of the former Chief Registrar of the Judiciary, **Gladys Boss Shollei** by the Petitioner on grounds of financial impropriety on her part, the Public Accounts Committee of the National Assembly (hereinafter referred to as “the PAC”) requested the Auditor General to carry out a financial audit of the Petitioner herein for the years **2011/2012** and **2012/2013**. It was pleaded that the core mandate of the PAC as stipulated under **Standing Order 205(2)** of the National Assembly is oversight on the expenditure of public funds by Ministries/Government Departments, Constitutional Commissions and Independent Offices to ensure value for money, optimal application of public funds and adherence to government financial regulations and procedures.

5. In this case the request for the audit touched on the payment of sitting allowances to the Petitioner’s members and the financial impropriety of Kshs. 2,207,400,000.00 alleged to have been presided over for by the Chief Registrar of the Judiciary. The Auditor General then presented his Report to the PAC in May 2014. Subsequently, the PAC held a total of twelve (12) meetings during which it interrogated twenty five (25) witnesses, including two former members and a current member of the Commission on the audit issues raised by the Auditor General.

6. It was averred that following the witness interviews, the PAC made findings *inter alia* that:

- i. The Petitioner allegedly sanctioned irregular payment of Kshs. 9, 800, 000.00 in allowances to non-commissioners who attended JSC meetings;
- ii. The Petitioner also allegedly sanctioned irregular payment of Kshs. 1, 600, 000.00 to commissioners who attended meetings that had not been properly constituted in accordance with section 22(5) of the Act;
- iii. Although the Petitioner sometimes kept minutes, some were not confirmed, casting aspersion as to their authenticity, creativity and reliability.

7. It was pleaded that in regard to culpability, the PAC found *inter alia* as follows:

- i. The Petitioner exceeded its powers by purporting to approve payments to various suppliers, thereby going beyond its oversight mandate to delve into operation issues of the Judiciary;
- ii. In a meeting held on 28<sup>th</sup> August 2013, the Petitioner’s Finance and Administration Committee approved payment to twelve (12) suppliers amounting to Kshs. 51,815,435.00 and ought to be held responsible for by-passing financial management procedures and directing approval of payments irregularly thus occasioning losses;

iii. The Petitioner went ahead to directly procure offices at Mayfair Centre and instructed the then Registrar of the High Court to effect the transaction and that rent for the premises was paid upfront two years before occupation in the sum of Kshs. 7,392,000.00; and

iv. Some of the meetings of the Petitioner were not properly constituted in accordance with section 22(5) of the **Judicial Service Act, 2011** yet the Commissioners went ahead to approve Kshs. 1,600,000.00 in allowances to themselves which irregularly paid allowances should be recovered from the affected commissioners.

8. The Commission pleaded that the PAC subsequently made *inter alia* the following recommendations (Recommendations 3 and 18 respectively):

i. The various Commissioners of the Judicial Service Commission must take personal responsibility for allowances paid to them for attending meetings that were convened without the knowledge and approval of the Chief Justice. An audit of all such meetings should be undertaken and the responsible Commissioners surcharged; and

ii. Members of the Finance and Administration Committee of the JSC: Commissioners **SmokinWanjala, Mohamed Warsame, Ahmednasir Abdullahi, Rev. Samuel Kobia, Christine Mango** and **Emily Ominde** should be individually investigated for their roles in some of the financial improprieties and irregularities at the JSC.

9. On February 16<sup>th</sup> 2016, the National Assembly adopted the Public Accounts Committee Report on the Judicial Service Commission (JSC) and the Judiciary Special Audit Report of May 2014 (hereinafter referred to as “the Report”) with recommendations proposed by two members of the National Assembly in November 2015.

10. According to the Commission, the Committees and Panels discharged their mandates and tabled reports, which were considered, deliberated and adopted with or without amendments at meetings of the full Commission and records were kept and availed to the Parliamentary Service Commission. However, the PAC Report is premised on an incomplete audit of the Petitioner’s transactions in the financial years 2011/2012 and 2012/2013, when the Petitioner was embarking on its transformative mandate and it was necessary for the Petitioner to hold such number of meetings as was necessary to enable it effectively discharge its functions. It was further contended that in the period under review, the Public Service Commission was in charge of determining the remuneration and allowances of members of the Commission as the Salaries and Remuneration Commission was not operational. However, the PSC did not place a cap on the number of meetings that the members of the Judicial Service Commission could convene in appreciation of the heavy mandate bestowed upon the Petitioner.

11. As regards the Recommendation 3 of the PAC Report which proposed that various Commissioners of the Judicial Service Commission should take personal responsibility for allowances paid to them for attending meetings that were convened without the knowledge and approval of the Chief Justice, it was the Commission’s case that the recommendation ignored the documentary evidence tendered and was made on the basis of the false and erroneous assumption that the Chief Justice has to convene all the meetings including those of committees. Further, there was no evidence tendered before the PAC that any of the meetings were convened without the knowledge of the Chief Justice or irregular in any way. The recommendation was therefore erroneous and irrational.

12. The Commission averred that all full meetings of the Commission were convened by notice as required under section 22(1) of the **Judicial Service Act, 2011**. In regard to the committee meetings of the Commission, the same were convened by the respective Committee chairpersons with the requisite quorum. Further, as required by law under section 23 of the **Judicial Service Act, 2011**, a record of all proceedings of every meeting was kept and further, as is practice, the Commissioners would sign an attendance register for all the meetings they attended, which attendance register would form a reference point for payment of sitting allowances, provided that the meetings reached the required quorum.

13. It was confirmed that all the meetings of the Commission have minutes that show the attendance, deliberations, recommendations and resolutions of said meetings. This was confirmed by the Chief Registrar of the Judiciary, **Ms. Anne Amadi**, who tendered uncontroverted evidence to the PAC that a review of the minutes' books indicated that from 2011 to late 2012, the Petitioner's minutes were kept in one book, being minutes of the Committees and minutes for the full Commission. She further testified that from 2013 onwards, minutes were kept in a sequential manner in separate books. It was accordingly averred that the conclusion by the PAC that Commissioners of the Petitioner attended unauthorized meetings was unsupported by any evidence and the recommendation to surcharge the said Commissioners for the allowances earned was therefore absurd in view of the evidence tendered before the Committee since all allowances earned by the Commissioners were lawful and regular. However, the Report by the Public Accounts Committee completely ignored the evidence tendered and consequently made erroneous conclusions and findings.

14. With regard to Recommendation 18 of the PAC Report that members of the Finance and Administration Committee of the JSC: Commissioners **Smokin Wanjala, Mohamed Warsame, Ahmednasir Abdullahi, Rev. Samuel Kobia, Christine Mango and Emily Ominde** should be individually investigated for their roles in some of the alleged financial improprieties and irregularities at the JSC, it was contended that the recommendation was without any factual or legal basis as the Public Accounts Committee ignored and or failed to take into consideration that the six Commissioners as members of the Finance and Administration Committee did not direct or approve any of the alleged payments. The Commissioners only reviewed the claims for payment of pending bills by service providers to determine if they were genuine. At the time under review, the Chief Registrar of the Judiciary had been suspended and the Commission was discharging its mandate under Article 171 of the Constitution and section 29(1) of the *Judicial Service Act*.

15. It was disclosed that in the preface to its Report, the PAC cited Article 226(5) of the Constitution as the basis for holding each individual Accounting Officer and other Public Officers directly and personally liable for any loss of public funds under their watch. The said Article provides that

***“if the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.”***

16. According to the Commission, there was no basis for seeking refuge under Article 226(5) of the Constitution in making the recommendations that were not anchored on any credible evidence and that had ignored all the evidence tendered by the Commission and the Judiciary. To the Commission, whereas Article 250(9) of the Constitution confers constitutional immunity to Commissioners and holders of Independent Offices for actions and decisions taken in good faith in the performance of a function of their constitutional offices, this was violated by the recommendations of the Public Accounts Committee.

17. Further, in its findings, the PAC concluded that in its sitting of 28<sup>th</sup> August 2013, the Petitioner's Finance and Administration Committee approved payment to twelve (12) suppliers amounting to Kshs. 51,815,435.00. However, no evidence of any approval was tendered before the PAC and this finding was therefore not based on any evidence. On the contrary, evidence was tendered to show that the pending bills and contracts were reviewed to ensure there was no loss of public funds in settlement of the pending bills.

18. According to the Commission, the recommendation against the six Commissioners was not part of the report compiled by the Public Accounts Committee and tabled before the National Assembly but was inserted by way of an amendment proposed by **Honourable Samuel Chepkonga and Kangata** in November 2015. Therefore the recommendation does not flow from the findings in the report and has no legal or factual basis. The Commissioners were never called to appear before the Committee before the adverse recommendations were made.

19. It was the Commission's case that the amendments made on the floor of the house were actuated by ulterior motives as the **Hon. Samuel Chepkonga** was the Chairman of the Justice and Legal Affairs

Committee of the National Assembly, which had sought to punish the members of the Finance and Administration Committee for recommending the suspension of **Gladys Boss Shollei**.

20. It was the Commission's case that as the attempt to appoint a Tribunal for removal of members of the Commission as contrived by the Justice and Legal Affairs Committee had been quashed by the High court in **Constitutional Petition No. 518 of 2013**, the two Honourable Members abused their privilege in recommending the investigation and prosecution of the Commissioners to settle scores. This was an unlawful and unconstitutional exercise of the oversight mandate of the National Assembly.

21. Further, the PAC's finding that the Petitioner went ahead to directly procure the offices at Mayfair Centre for which rent was paid upfront two years before occupation to the tune of Kshs. 7,392,000.00 was contrary to the evidence tendered and the finding by the PAC in its report that the former Chief Registrar of the Judiciary, the Accounting Officer of the Judiciary, personally accepted the offer to lease the offices at Mayfair Centre. In the Commission's view, it can be discerned that the recommendation to have the six Commissioners investigated by the 2<sup>nd</sup> Respondent was as a consequence of the recommendations as members of the Finance and Administration Committee, a lawful committee of the Petitioner, which recommendations and reports were adopted by the full Commission. There is therefore no basis for making any recommendations against the individual commissioners for the corporate decisions of the Commission.

22. It was averred that the PAC denied the six Commissioners of the Finance and Administration Committee a fair hearing as envisaged by Article 47 of the Constitution by not giving the six Commissioners an opportunity to be heard in relation to the recommendation as there were no allegations made against them before the PAC or by the Auditor General in his report. However, the 2<sup>nd</sup> Respondent has despite evidence being tendered insisted on acting on and implementing the unlawful recommendations of the Public Accounts Committee of the National Assembly.

23. It was the Commission's case that the decision of the PAC in Recommendation 3 of its Report that the Commissioners of the Petitioner ought to take personal responsibility and be surcharged for allowances paid to them for attending meetings that were convened without the knowledge and approval of the Chief Justice was unreasonable and irrational in view of the express provisions of the **Judicial Service Act**. Further, the decision of the PAC and the recommendation of the Public Accounts Committee as approved by the National Assembly seeks to curtail the constitutional mandate of the Petitioner and therefore violates Article 171 and 250(9) of the Constitution.

24. On the other hand the decision of the PAC in Recommendation 18 of its Report that members of the Finance and Administration Committee of the JSC: Commissioners **Smokin Wanjala, Mohamed Warsame, Ahmednasir Abdullahi, Rev. Samuel Kobia, Christine Mango and Emily Ominde** should be individually investigated was made to achieve an ulterior purpose and therefore lacks any constitutional validity since the decision and recommendation violates Article 250(9) of the Constitution hence was invalid under article 2(4) of the Constitution.

25. According to the Commission, the decision of the PAC is therefore not only irrational but also unreasonable on the basis of the fact that there were no specific allegations of improprieties and irregularities allegedly committed by the individual Commissioners and neither was any evidence to this end presented to and analysed by the PAC to support such allegations. Further, the decision of the PAC is not supported by any evidence and it is not clear from the Report how the PAC reached a finding that the individual commissioners ought to be investigated by the 2<sup>nd</sup> Respondent for their roles in some of the financial improprieties and irregularities at the Petitioner.

26. In addition, it was averred that the PAC did not give the Commissioners an opportunity to be heard in regard to the allegations levelled against them and condemned them unheard, contrary to Article 47 of the Constitution.

27. It was therefore the Commission's case that the decisions of the PAC in Recommendations 3 and 18 of the 1<sup>st</sup> Respondent's Public Accounts Committee Report on Judicial Service Commission (JSC) and

the Judiciary Special Audit Report of May, 2014 as adopted by the 1<sup>st</sup> Respondent on 16<sup>th</sup> February 2016, are therefore *ultra vires* Article 95(5) of the Constitution and irrational given they were arrived at following material factual errors on the PAC's part and in the absence of any evidence to support the same and therefore ought to be quashed by this Honourable Court.

28. The Commission therefore prayed for:

- a. A Declaration that Commissioners of the Judicial Service Commission are not personally liable for any acts done in good faith in the performance of their constitutional mandate under Article 171 of the Constitution and the Judicial Service Act.**
- b. A Declaration the decision of the of the National Assembly of 11<sup>th</sup> February 2016 adopting the Report of the Public Accounts Committee PAC in Recommendation 3 of its Report that members of the Judicial Service Commission ought to take personal responsibility and be surcharged for allowances paid to them contravenes Article 249 and 253 of the Constitution and is therefore null and void.**
- c. A Declaration that the decision of the Public Accounts Committee in Recommendation 18 of its Report recommending that members of the Finance and Administration Committee of the JSC: Commissioners Smokin Wanjala, Mohamed Warsame, Ahmednasir Abdullahi, Rev. Samuel Kobia, Christine Mango and Emily Ominde should be individually by the 2<sup>nd</sup> Respondent violates Articles 250 (9) and 253 of the Constitution and is therefore null and void.**
- d. A Declaration that the decision of the National Assembly of 16<sup>th</sup> February 2016 adopting the Report of the Public Accounts Committee in Recommendation 18 was made in violation of Article 47 of the Constitution and is therefore null and void.**
- e. A Declaration that the decision of the National Assembly of 16<sup>th</sup> February 2016 adopting the Report of the Public Accounts Committee PAC is ultra vires the oversight mandate of the National Assembly under Article 95(5) of the Constitution and therefore null and void.**
- f. A Declaration that the decision of the National Assembly to investigate members of the Finance and Administration Committee of the JSC: Commissioners Smokin Wanjala, Mohamed Warsame, Ahmednasir Abdullahi, Rev. Samuel Kobia, Christine Mango and Emily Ominde is actuated by ill motives and is an attempt to circumvent the judgment of the High Court in and therefore null and void.**
- g. A Declaration that the decision by the 2<sup>nd</sup> Respondent to act on the recommendations of the 1<sup>st</sup> Respondent violates Article 2(4) and 10 of the Constitution.**
- h. An Order of Certiorari do issue to remove into this Honourable Court and quash the decision of the 1<sup>st</sup> Respondent as contained Recommendations 3 and 18 of the 1<sup>st</sup> Respondent's Public Accounts Committee Report on Judicial Service Commission (JSC) and the Judiciary Special Audit Report of May, 2014 as adopted by the 1<sup>st</sup> Respondent on 16<sup>th</sup> February 2016.**
- i. An Order of Prohibition do issue restraining the 2<sup>nd</sup> Respondent from investigating the members of the Petitioner's Finance and Administration Committee: Smokin Wanjala, Mohamed Warsame, Ahmednasir Abdullahi, Rev. Samuel Kobia, Christine Mango and Emily Ominde as recommended by the National Assembly Public Accounts Committee Report on Judicial Service Commission (JSC) and the Judiciary Special Audit Report of May, 2014 as adopted on 16<sup>th</sup> February 2016.**

**j. This Honourable Court be pleased to issue any other appropriate orders or reliefs as it may deem fit and just.**

**k. Costs of the Petition**

**Applicant's Application**

29. By a Motion on Notice dated 24<sup>th</sup> May, 2017, the Petitioner sought *inter alia* an order that the court certifies that the Petition raises substantial issues of law for the Petition to be referred to the Chief Justice to empanel a bench of an unequal number of judges to hear the Petition.

30. It is this prayer that is the subject of this ruling.

31. It was submitted on behalf of the Petitioner that the criteria for determining certification under the provisions of Article 165(4) is now settled in law and reference was made to **Martin Nyaga Wambora and Others vs. Speaker County Assembly of Embu and 4 Others and Amicus [2014] eKLR.**

32. Reference was also made to **Law Society of Kenya vs. Attorney General & 10 Others [2016] eKLR**, where **Lenaola, J** (as he then was) made similar findings, while with respect to the issue of public importance reference was made to **Kalpana H Rawal vs. Judicial Service Commission & 3 Others [2015] eKLR.**

33. As regards the term “substantial question of law” the Petitioner referred to the Supreme Court of India’s decision in **Sir. Chunilal .V. Mehta and Sons Ltd vs. Century Spinning Manufacturing Co. Ltd 1962 SC 134.**

34. According to the Petitioner, in determining whether the Petition raises a substantial issue or issues of law for determination, the Court ought to consider the Petition as a whole and in particular the issues framed for determination which issues are:

***i) Whether the decision of the PAC in Recommendation 3 of its Report that the Commissioners of the Petitioner ought to take personal responsibility and be surcharged for allowances paid to them for attending regular meetings violates Article 171, 249 and 250(9) of the Constitution?***

***ii) Whether the decision of the PAC in Recommendation 18 of its Report recommending that members of the Finance and Administration Committee of the JSC: Commissioners Smokin Wanjala, Mohamed Warsame, Ahmednasir Abdullahi, Rev. Samuel Kobia, Christine Mango and Emily Ominde should be individually investigated for actions and decisions taken by the Commissioners in good faith in the performance of their mandate as members of the Finance and Administration Committee violates Article 253 of the Constitution?***

***iii) Whether the decision of the PAC in Recommendation 18 is unlawful, irrational and unreasonable on the basis that there were no specific allegations against the individual Commissioners and neither were the Commissioners given an opportunity to be heard in violation of Article 47 of the Constitution and the Fair Administrative Action Act?***

***iv) Whether the decisions of the PAC in Recommendations 3 and 18 of the 1<sup>st</sup> Respondent's Public Accounts Committee Report on Judicial Service Commission (JSC) and the Judiciary Special Audit Report of May, 2014 as adopted by the National Assembly was contrary to the oversight mandate under Article 95(5) of the Constitution.***

***v) Whether in ignoring the evidence tendered and explanations given the 2<sup>nd</sup> Respondent in acting on the Recommendations of the Public Accounts Committee is violating Articles 79 and 249 of the Constitution by purporting to investigate the members of the Petitioner on the basis of the flawed and unlawful recommendations?***

**vi) Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are acting in breach of Articles 3,10 and 73 of the Constitution?**

35. In the Petitioner's view, the Petition herein touches on the doctrine of separation of powers and the relationship between the three co-equal arms of government and state organs in the performance of their respective duties under the Constitution. In particular, it calls for an inquiry into the oversight role played by the National Assembly and the limitations imposed by the Constitution with regard to oversight of independent offices and commissions. The Petitioner's case is that the National Assembly having failed to remove the six Commissioners pursuant to a contrived Petition that was filed before it, it has changed tact once again and recommended investigations to be instituted against members of the same committee.

36. According to the Commission, the allegations of impropriety have been made against commissioners who were never summoned to appear before the National Assembly and have been condemned unheard. The issue for determination is whether in discharging its constitutional mandate of oversight, the National Assembly has disregarded and violated the fundamental rights of the commissioners and abused its constitutional privileges and power to settle scores and circumvent the judgment of this Honourable Court in Petition No. **518 of 2013**. The issues raised in the Petition are therefore not simple but complex.

37. In the Petitioner's view, the Petition raises complex but fundamental issues that need to be addressed to safeguard the independence and integrity of the Petitioner as a constitutional commission and seeks to limit the constitutional overreach on the part of the National Assembly. The Petition therefore meets the test and criteria set by this Court for certification. The issues are not free from difficulty and call for an uneven bench to revisit the vexed issue and doctrine of separation of powers and the limits of oversight as contemplated under the Constitution.

38. It was the Commission's view that it is not impossible to imagine the spectacle and damage to the stature and standing of the Judicial Service Commission and Judiciary if senior judges of the Supreme Court; Court of Appeal and High Court were to be subjected to frivolous investigations and proceedings founded on an illegality and an attempt to cut down to size the Judicial Service Commission. In its view the recommendations made in the report interfere with the independence of the Judiciary, independence of the Judicial Service Commission and an abuse of the mandate conferred by **Article 171** of the Constitution.

39. It was further contended that the Petitioner will be inviting the court to consider the effect of the judgement in **Petition 518 of 2013** and the attempt by the National Assembly to unfairly depict the distinguished members of the JSC as corrupt without having afforded them a hearing. The Petitioner will also be inviting the court to determine whether by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents disregarding the explanations and documentary evidence tendered by the Petitioner they violated the Constitution and were actuated by ulterior motives.

40. The Petitioner will also seek to persuade the court that the recommendations cited in the PAC report are founded on a misapprehension and complete misunderstanding of the mandate of the JSC on how the Petitioner discharges its constitutional mandate. Section 19(4) of the **Judicial Service Act** allows the JSC to act through committees without seeking the approval or sanction of the Chief Justice.

41. It was contended that whereas an erroneous recommendation *per se* would not make the constitutional issues substantial, where the National Assembly ignores the explanations given and documents tendered by a constitutional commission, and proceeds to make recommendations for institution of criminal proceedings and surcharging of its members, then the issue raises a legitimate public interest query whether this is a deliberate attempt to target members of an independent commission and subject them to investigation by the state machinery.

42. In the Petitioner's submission, where a matter raises seriously contested issues and where the said issues are complex and require a multi-faceted approach to the interpretation of the Constitution and applicable statutes, an expanded bench would most likely deliver a firm decision. The issues raised by the Petitioner are weighty in nature and have generated a lot of public interest.

43. It was therefore the Petitioner's assertion that the instant Petition indeed raises substantial questions of law as contemplated under Articles 165(4) of the constitution and therefore justifies the empanelling of a bench of an uneven number of judges by the Chief justice to hear and determine.

### **1<sup>st</sup> Respondent's Case**

44. On the part of the 1<sup>st</sup> Respondent, the Court was informed that it was supporting the application.

### **2<sup>nd</sup> Respondent's Case**

45. The 2<sup>nd</sup> Respondent, the Ethics and Anti Corruption Commission (hereinafter referred to as "the EACC") on its part opposed the application.

46. According to the EACC, in determining whether the petition should be heard by an uneven number of Judges, the Court must satisfy itself that the conditions set in Article 165(4) of the Constitution are met and in this respect references was made to **Martin Nyaga Wambora and Others vs. Speaker County Assembly of Embu and 4 Others and Amicus [2014] eKLR**. The EACC also relied on **Amos Kiumo & 2 Others vs. Cabinet Secretary Ministry of Interior & Coordination of National Government & 3 Others [2014] KLR**, **Hon. Chemututi and 3 Others vs. The Attorney General and 3 Others Milimani Petition No. 307 of 2014** and **Okiya Omtatah Okoiti vs. Independent Electoral and Boundaries Commission & 3 Others [2016] eKLR**.

47. In the EACC's view the issues raised herein do not constitute complex issues since as was held in **Chepkorir Rehema ( Suing Through Father and Next Friend) & 130 Others vs. Kenya National Examinations Council [2017] eKLR**.

48. It was the EACC's case that the Supreme Court having pronounced itself in its **Advisory Opinion No. 2 of 2013** in respect of the jurisdiction of the Court vis-à-vis other arms of the government, the question of separation of powers and the relationship between the three co-equal arms of government in performance of their duties under the Constitution, the same cannot amount to a substantial question of law within the meaning of Article 165(4) of the Constitution. Similarly the issue of the oversight role played by the National Assembly with regard to independent offices and commissions has been dealt with in **Judicial Service Commission vs. Speaker of the National Assembly & 8 Others [2014] eKLR**.

49. To the EACC the issue of violation of Article 47 of the Constitution and the principles of the rules of natural justice cannot, in light of the numerous decisions on the issues hence cannot be termed as complex.

50. It was submitted that the issues raised in the petition cannot amount to issues that affect the public in genera.

51. It was therefore submitted that the threshold for certifying the matter under Article 165(4) of the Constitution has not been met.

### **Determination**

52. I have considered the submissions made by counsel for the parties herein. The general rule in these sort of matters was laid down by the Court of Appeal in **Peter Nganga Muiruri vs. Credit Bank Limited & Another Civil Appeal No. 203 of 2006** in which the Court held that any single Judge of the High Court in this country has the jurisdiction and power to handle a constitutional question. Therefore the decision whether or not to certify a matter as raising a substantial question of law is an exercise of judicial discretion as opposed to a right. However like all discretion, that power must be exercised judicially and judiciously and not on caprice, whim, likes or dislikes.

53. As has been held by this Court before, the decision whether or not to empanel a bench of more than

one Judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant Constitutional and statutory provisions. Despite appreciably great strides made in the expansion of the Judiciary in the recent past, there is definitely much more to be done with respect to achieving the spirit of Article 48 of the Constitution on access to justice. Accordingly, this Country still does not enjoy the luxury of granting such orders at the whims of the parties. Judicial resources in terms of judicial officers in this country are still very scarce and although the time taken for hearing a petition by a single judge may not be any different from that taken by a bench empanelled pursuant to Article 165(4) of the Constitution, it must be appreciated that the empanelling of such a bench invariably leads to delays in determining cases already in the queue hence worsening the backlog crisis in this country. I with respect associate myself with the position adopted by **Majanja, J** in **Harrison Kinyanjui vs. Attorney General & Another [2012] eKLR** where he held that:

**“the meaning of ‘substantial question’ must take into account the provisions of the Constitution as a whole and the need to dispense justice without delay particularly given specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges.”**

54. I also defer to the decision in **Vadag Establishment vs. Y A Shretta & Another Nairobi High Court (Commercial & Admiralty Division) Misc. High Court Civil Suit No. 559 of 2011** where this Court held:

**“It is also my considered view that a High Court whether constituted by one judge or more than one judge exercise the same jurisdiction and neither decision can be said to be superior to the other. True, two heads are better than one, but in terms of the doctrine of *stare decisis* whether a decision is delivered by one High Court Judge or handed down by a Court comprised of more judges, their precedential value is the same.”**

55. Article 165 of the Constitution provides as follows:

***(1) There is established the High Court, which—***

***(a) shall consist of the number of judges prescribed by an Act of Parliament; and***

***(b) shall be organised and administered in the manner prescribed by an Act of Parliament.***

***(2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.***

***(3) Subject to clause (5), the High Court shall have—***

***(a) unlimited original jurisdiction in criminal and civil matters;***

***(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***

***(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;***

***(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—***

*(i) the question whether any law is inconsistent with or in contravention of this Constitution;*

*(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*

*(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and*

*(iv) a question relating to conflict of laws under Article 191; and*

*(e) any other jurisdiction, original or appellate, conferred on it by legislation.*

**(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.**

56. Therefore the only constitutional provision that expressly permits the constitution of bench of more than one High Court judge is Article 165(4). Under that provision, for the matter to be referred to the Chief Justice for the said purpose the High Court must certify that the matter raises a substantial question of law in the following instances:

**1. Whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; or**

**2. That it involves a question respecting the interpretation of the Constitution and under this is included (i) the question whether any law is inconsistent with or in contravention of the Constitution; (ii) the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution; (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and (iv) a question relating to conflict of laws under Article 191.**

57. Since the determination of such issue is a judicial one, the Court is obliged either on its own motion or on an application of the parties to the cause to identify the issues which in its view raise substantial questions of law. Therefore the mere fact that parties are of the view that the matter falls under Article 165(4) does not necessarily bind the Court in issuing the said certification.

58. According to the above provision, it does not suffice that the matter raises the issue whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or that it raises the issue of interpretation of the Constitution. The Court must go further and satisfy itself that the issue also raises a substantial question of law. Similarly the mere fact that a substantial question of law is disclosed does not suffice unless the issue also arises as to whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or that it raises the issue of interpretation of the Constitution.

59. As to whether this is the case is a matter for judicial determination based on the facts of the particular case and the law involved. This was appreciated in **Community Advocacy Awareness Trust & Others vs. The Attorney General & Others High Court Petition No. 243 of 2011** where it was noted that:

**“The Constitution of Kenya does not define, ‘substantial question of law.’ It is left to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine the matter.”**

60. In that case the Court proceeded to note that the promulgation of the Constitution of Kenya, 2010 brought into being a whole new law that in every respect raises substantial questions of law because the Constitution is new. This Constitution has been recognised by the Supreme Court as being transformative in nature. It has expanded Bill of Rights as set out in Chapter Four, the Citizenship issue in Chapter Three, the Leadership and Integrity issue in Chapter Six and Chapter Eleven dealing with Devolved Government are matters which need constant interpretation by the courts and if every such question were to be determined by a bench of more than one judge, other judicial business would definitely come to a stand still and if that were to happen, then the expectation of the public to have their cases decided expeditiously as provided under Article 159(2) of the Constitution and sections 1A and 1B of the *Civil Procedure Act* would never be realised.

61. In Chunilal V. Mehta vs. Century Spinning and Manufacturing Co. AIR 1962 SC 1314, it was held that:

**“a substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial.”**

62. In Santosh Hazari vs. Purushottam Tiwari (2001) 3 SCC 179 it was held that:

**"A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any *lis*."**

63. The Indian tests for determining whether a matter raises substantial question of law are therefore: (1) whether, directly or indirectly, it affects substantial rights of the parties, or (2) whether the question is of general public importance, or (3) whether it is an open question, in the sense that the issue has not been settled by pronouncement of the Supreme Court or the Privy Council or by the Federal Court, or (4) the issue is not free from difficulty, or (5) it calls for a discussion for alternative view.

64. To my mind the above considerations offer proper guidelines and an insight in determining whether or not a matter raises “a substantial question of law” for the purposes of Article 165(4) of the Constitution.

65. The Court may also consider whether the matter is moot in the sense that the matter raises a novel point; whether the matter is complex; whether the matter by its nature requires a substantial amount of time to be disposed of; the effect of the prayers sought in the petition and the level of public interest generated by the petition.

66. These however are mere examples since the Article employs the word “includes”. Accordingly, the list cannot be exhaustive and the Courts are at liberty to expand the grounds as occasions demand. Even before the promulgation of the current Constitution, it was appreciated in Kibunja vs. Attorney General

**& 12 Others (No. 2) [2002] 2 KLR 6** that:

**“in exercising that discretion, several factors have to be taken into account including, but not limited to the complexity of the case and the issues raised, their nature, their weight, their sensitivity if any, and the public interests in them, if any.”**

67. In my view, the Court must adopt a holistic approach to the matter at hand. In other words, the mere fact that one factor is found to exist does not automatically qualify the matter for certification under Article 165(4) of the Constitution. I therefore associate myself with the position adopted in **Hon. Chemututi and 3 Others vs. The Attorney General and 3 Others Milimani Petition No. 307 of 2014** as cited in **Amos Kiumo & 2 Others vs. Cabinet Secretary Ministry of Interior & Coordination of National Government & 3 Others [2014] KLR** in which it was held that:

**“There must be something more to the substantial question than merely novelty or complexity of the issue before the Court. It may present unique facts not covered by the controlling precedents.”**

68. I also adopt the position in **Okiya Omtatah Okoiti vs. Independent Electoral and Boundaries Commission & 3 Others [2016] eKLR** that:

**“Although factors as the novelty of the question, complexity, public importance of the matter are generally accepted to be some of the indicators of the existence of a substantial question of law, the courts have also indicated that none of these factors is singly decisive and that the list is not exhaustive.”**

69. In this case, the Petitioner contends that there was no evidence tendered before the PAC that any of the meetings were convened without the knowledge of the Chief Justice or were irregular in any way; that the Report by the Public Accounts Committee completely ignored the evidence tendered and consequently made erroneous conclusions and findings; that the findings of the PAC were not based on any evidence. In my view, these issues are matters which the Court routinely deals with either in constitutional petitions or judicial review applications. In other words the Petitioner claims there was no evidence to support the findings in the report, that the PAC failed to consider relevant matters or that it considered irrelevant matters. In my view such issues cannot be the basis of certification under Article 165(4) of the Constitution.

70. It was contended that the decisions of the PAC in recommendations 3 and 18 of the 1<sup>st</sup> Respondent's Public Accounts Committee Report on Judicial Service Commission (JSC) and the Judiciary Special Audit Report of May, 2014 as adopted by the 1<sup>st</sup> Respondent on 16<sup>th</sup> February 2016, are therefore *ultra vires* Article 95(5) of the Constitution and irrational given they were arrived at following material factual errors on the PAC's part. Questions whether a decision are contrary to law in my view are matters which a single judge deals with on a daily basis and it does not require three or more judges to deal with the same.

71. With respect to immunity; the doctrine of separation of powers; the relationship between the three co-equal arms of government and state organs in the performance of their respective duties under the Constitution; and the oversight role played by the National Assembly and the limitations imposed by the Constitution with regard to oversight of independent offices and commissions, it is my view that there are ample authorities on these issues hence the same do not raise any novelty. It is a matter of applying the law to the facts of this petition and arriving at a decision. Simple application of the law to the facts does not require empanelment of an enlarged bench in my view.

72. Similarly with respect to the issue whether the recommendation against the six Commissioners was not part of the report compiled by the Public Accounts Committee and tabled before the National Assembly but was inserted by way of an amendment proposed on the floor of the House is a matter which the Court has had occasion to deal with and cannot therefore be termed as a matter of jurisprudential moment.

73. As for the issue whether Commissioners were afforded an opportunity of being heard or not the law on that issue is now well settled in this jurisdiction and nothing turns on that issue for the purposes of certification under Article 165(4) of the Constitution.

74. It was further contended that as the attempt to appoint a Tribunal for removal of members of the Commission as contrived by the Justice and Legal Affairs Committee had been quashed by the High court in **Constitutional Petition No. 518 of 2013**, the named Members abused their privilege in recommending the investigation and prosecution of the Commissioners to settle scores. In other words the issues that the Petition is raising alleged abuse of power and lack of *bona fides*. I do not see how such issues can be termed as either complex or novel in this age. In my view allegation of violation of Articles 171 and 250(9) of the Constitution or any other Article of the Constitution is a matter which any single Judge ought to deal with.

75. With respect to the effect of the prayers on the public, quite often constitutional matters affect the public in one way or the other. Accordingly that issue alone cannot be the basis for certification as sought herein.

76. In my view, the issues raised herein are matters which this Court routinely deals with and it does not require an enlarged bench for this Court to determine the propriety of the exercise of the Respondent's constitutional or statutory powers.

77. Even if the issues herein were novel, with due respect novelty alone does not qualify the matter as raising a substantial question of law though it is one of the many factors to be considered. In my view the issue is not merely to do with complexity or difficulty of the case in the view of the applicant but ought to be one that turns on cardinal issues of law or of jurisprudential moment. In my view the mere fact that a matter is novel or jurisprudentially challenging does not *ipso facto* elevate it to a substantial question of law for the purposes of Article 165(4) of the Constitution. With due respect any judge worth his or her salt must be prepared to deal with and determine novel questions whether complex or otherwise since the Court cannot abdicate its duty of determining disputes to another organ.

78. I associate myself with the holding by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229** that:

**“A court of law would not be entitled in our view to abdicate its cardinal role of making a determination...No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice...We approve and adopt the principles so ably expressed by both *Lord Roskil* and *Lord Templeman* in the case of *ASHMORE v CORP OF LLOYDS [1992] 2 ALL E.R 486* at page 488 where *Lord Roskil* states:**

**“It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues.”**

**At page 493 of the same case *Lord Templeman* delivered himself thus:**

**...“...The only legitimate expectation of any plaintiff is to receive justice. Justice can only be achieved by assisting the judge.”**

79. This was the position adopted by Nyamu, J in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008]**

**KLR 728** when he expressed himself as follows:

**“In the long run in the interest of the overriding objectives of case management, no group of litigants no matter how privileged are entitled to more judicial time than any other. Judicial time is an expensive resource which must be apportioned fairly to the entire spectrum of the work in the Court. Every file is important. For Courts to continually inspire confidence of the Court users and litigants, they must have a very sharp sense of proportionality, fairness and equity in the allocation of judicial time.”**

80. In my view a High Court Judge ought not to shy away from his constitutional mandate of interpreting and applying the Constitution. Whereas the Constitution permits certain matters to be heard by a numerically enlarged bench, that is an exception to the general legal and constitutional position and it is in my view an option that ought not to be exercised lightly.

81. Whereas this Court appreciates that the decision of an enlarged bench may well be of the same jurisprudential value in terms of precedent or *stare decisis* principles as a decision arrived at by a single High Court judge, the Constitution itself does recognise that in certain circumstances it may be prudent to have a matter which satisfies the constitutional criteria determined by a bench composed of numerically superior judges.

82. In my view the issues raised herein taken individually cannot be the basis for such certification. The Petitioner seems to be of the view that, cumulatively, they justify the said certification. It is however my view that it is not merely the plurality of issues that justify such certification. It is the substance of such holistic consideration that is the determinant factor. Here it is my view that whether taken individually or holistically this petition does not meet the threshold for certification that the matter raises a substantial question of law to warrant reference of the same to the Chief Justice as required under Article 165(4) of the Constitution.

83. In the premises I decline to certify the matter under the said provision.

84. There will be no order as to costs since the 2<sup>nd</sup> Respondent did not comply with this Court’s express directions that parties furnish the Court soft copies of the relevant pleadings and submissions.

85. It is so ordered.

**Dated at Nairobi this 17<sup>th</sup> day of November, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mrs Ahomo for Mr Issa for the Petitioner/Applicant**

**Miss Murugi for the 2<sup>nd</sup> Respondent**

**CA Ooko**