



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**THE CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 68 OF 2016**

**IN THE MATTER OF ARTICLE 232 OF THE CONSTITUTION OF THE REPUBLIC OF  
KENYA**

**AND**

**IN THE MATTER OF THE UNIVERSITIES ACT, 2012**

**AND**

**IN THE MATTER OF ALLEGED INCONSISTENCY OF SECTION 36 (1) OF THE  
UNIVERSITIES ACT, 2012 WITH ARTICLE 232 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF THE DELEGATION OF PUBLIC SERVICE COMMISSION HUMAN  
RESOURCE FUNCTIONS TO THE CABINET SECRETARY (REVISED AUGUST 2015)**

**BETWEEN**

**ELGEYO MARAKWET CIVIL SOCIETY**

**ORGANIZATION NETWORK..... PETITIONER**

**VERSUS**

**MINISTRY OF EDUCATION,**

**SCIENCE AND TECHNOLOGY.....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF EDUCATION,**

**SCIENCE AND TECHNOLOGY.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

**Introduction**

1. The Petitioner, **Elgeyo Marakwet Civil Society Organization Network**, is described in this petition as an umbrella network of civil society organizations registered and operating in Elgeyo Marakwet County whose core mandate is to protect human rights and ensure good governance and fairness across the country.
2. The 1<sup>st</sup> Respondent, **Ministry of Education, Science and Technology**, (hereinafter referred to as “the Ministry”) is a governmental ministry mandated under Articles 43, 53, 54, 55, 56, 57 and 59 of the Constitution to *inter alia*, formulate and actualize national policies and programmes that help Kenyans access quality and affordable, primary education, post-primary, higher education and academic research.
3. The 2<sup>nd</sup> Respondent is the Cabinet Secretary in charge of the Ministry for Education, Science and Technology, in the Ministry (hereinafter referred to as “the CS”) and is responsible for matters relating *inter alia* to University education.
4. The 3<sup>rd</sup> Respondent is the Attorney General of the Republic of Kenya and the Principal Legal Adviser to the Government of Kenya pursuant to Article 156(4) of the Constitution of the Republic of Kenya.
5. According to the Petitioner, on 19<sup>th</sup> September 2014, the Employment and Labour Relations Court (hereinafter referred to “the E&LR Court”) (**Honourable Mr Justice Mathew N. Nduma**) delivered a judgement in petition 33 of 2013 declaring that the University Council for Jomo Kenyatta University of Agriculture and Technology (hereinafter referred to as “the University” or “JKUAT”) was not properly constituted and issued an order of mandamus directing the CS to commence the recruitment process of members of the JKUAT council in accordance with the law. Pursuant to the said judgement, the CS then made an advertisers statement on the appointment of governing councils in all public universities and constituent university colleges communicating the Ministry’s decision to ensure compliance with the said judgement across all public universities and constituent university colleges.
6. It was pleaded that on 5<sup>th</sup> February, 2016, the CS through the Ministry published an advertisement in the *Daily Nation* inviting applications to fill the positions of the Public Universities or constituent colleges’ nine council members affecting Twenty One (21) institutions of higher learning. However according to the Petitioner, this act was in direct contravention of the provisions of Article 234 of the Constitution. It was the Petitioner’s case that the CS’s actions and pronouncements aforesaid egregiously violated the interests of the incumbent council members thereby causing anxiety and uncertainty in the operations and management of the affected institutions in the following respects:
  - a. The CS’s acts of advertising for the said positions was *ultra vires* hence a further illegality was being perpetrated as the purported avenue was in direct contravention of the provisions of Article 232 of the Constitution.
  - b. The Public Service Commission is the only mandated commission involved in the establishment and abolishment of offices in the public service as well as appointing and subsequently confirming persons to hold or act in those offices.
7. To the Petitioner, the **Public Service Commission** (hereinafter referred to as “the Commission”) donates its powers relating to human resource to the Cabinet Secretary and that in the delegation of the said functions (pursuant to the August 2015 revised guidelines), the CS is charged with the authority to appoint in writing members of the Ministerial Human Resource Management Advisory Committee and the Ministerial Performance Management Committee and to further approve the recommendations of the said committees. However, the said guidelines are silent on the appointment of Public Universities and Constituent colleges’ council members.
8. It was contended that in direct inconsistency with Article 234 of the Constitution, section 36(1) of

- the **Universities Act, 2012** (hereinafter referred to as “the Act”) while purporting to donate the authority to appoint Public Universities and/or constituent universities’ council members to the Cabinet Secretary, in its totality fails to address and/or establish any mechanisms for the appointment of the said council members. It was however the Petitioner’s view that members of the Public Universities and/or constituent colleges council members being, by dint of their functions, public officers can only be sourced, interviewed, recruited and recommended for appointment by the Commission.
9. It was therefore contended by the Petitioner that the CS acted *ultra vires* and in contravention of article 232 and 234 of the Constitution by inviting applications to fill the positions of the Public Universities or constituent colleges nine council members affecting Twenty One (21) institutions of higher learning. To the Petitioner, as a result of the contemptuous and capricious acts of the 2<sup>nd</sup> Respondent, the Petitioner as well as other affected members of the public are highly apprehensive of the fact that the tenure of the incumbent council members shall continue being illegally interrupted and further that the appointees of the Cabinet secretary shall be in furtherance of an illegal act. It was the Petitioner’s position that unless the Court urgently intervenes to stop the illegality already commenced, members of the public shall stand to lose immensely as the current process as it is, is vulnerable to political abuse which may include but not limited to rewarding of political cronies to the detriment of the members of the public’s right to proper governance.
10. In sum, the Petitioner averred that the conduct of the Respondents aforesaid with respect to the advertisements and purported invitations for applications is unconstitutional, arbitrary, oppressive, capricious, unfair and unreasonable and has and continues to violate the incumbent council members’ right to govern and manage the institutions as mandated by the Act.
11. The Petitioner contended that since the publishing of the advertisement, the incumbent council members have been and are still helpless and management operations in the affected institutions have stalled considering that the Respondents are government apparatus complete with executive protection.
12. The Petitioner therefore sought the following orders:
- a. **This Honourable Court be pleased to declare that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ acts to advertise the council members’ positions were irregular, unprocedural and unconstitutional;**
  - b. **This Honourable Court be pleased to issue stay orders against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent’s acts of reconstitution of the councils of the affected public universities and constituent university colleges and the incumbent members of the councils to continue holding office pending the establishment of due process and laid down procedures by the Public Service Commission;**
  - c. **This Honourable Court be pleased to find and hold that section 36(1) of the *Universities Act* is inconsistent with Article 232 of the Constitution of Kenya, 2010;**
  - d. **The costs consequent upon this Petition be borne by the Respondents;**
  - e. **This Honourable Court do make any such other or further Orders as it may deem just and expedient in the circumstances in enforcing violation of fundamental rights of the Petitioner.**
13. It was submitted on behalf of the Applicant that the Constitution under Article 260 defines public service as “*the collectivity of all individuals, other than State Officers, performing a function within a State Organ*” while a State organ means “*a commission, office, agency or other body established under this Constitution.*” A public officer, on the other hand is defined thereunder as “*an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the consolidated fund or directly out of money provided by parliament.*” According to the Petitioner section 2(f) of the **Public Officers Ethics Act** defines the term public officer as “*...any officer, employee or member,*

- including an unpaid, part-time or temporary officer, employee or member, of a public university.”*
14. It was submitted that all universities are state corporations which basically survive on monetary allocations as approved in the national budget by Parliament and that amongst the key tasks of this allocation is the payment of remuneration to the universities staff as well as other benefits provided to other officials who oversee the day to day running of the institutions. However, members of the university councils are entitled to allowances only which are payable directly to them by the universities which are derived from the monies allocated to them by Parliament. In this respect, the Petitioner relied on the decision of **Rika, J** in **National Union of Water and Sewerage Employees vs. Mathira Water and Sanitation Company Ltd & 2 Others [2013] KLR** in which the learned Judge held that:
- “a Public Officer executed government functions, not for profit or personal interest. His position is created by the Constitution; Act of Parliament; or of Municipality or other legally constituted bodies. The functions and powers of the Public Officer are defined and executed through the law. The Public Officer is employed to execute government functions and therefore, remunerated directly from the consolidated fund or money authorised by Parliament.”**
15. It was submitted that since university council members offer services to the public, they are public officers by dint of the definition in the Constitution as read with the ***Public Officer Ethics Act***.
16. On the unconstitutionality of section 36(1) of the ***Universities Act, 2012***, it was submitted that the universities councils are established under section 35 of the Act and section 2 thereof defines a “University Council” as the governing body of the University. It was contended that whereas the Act process of appointment of council members in private universities are clearly stipulated, the position is not the same as in cases of public universities. Based on Articles 232, 233 and 234 of the Constitution, it was submitted that the powers of establishing and abolishing offices in the public service and to appoint persons to hold or act in those offices and to confine appointments vests in the Commission. Though the Commission is empowered to delegate some of its functions, the Petitioner submitted that the only function delegated to the CS were human resource powers and functions. In the Petitioner’s view, the failure to have different bodies involved in the procurement process for the recruitment of public officers is a clear infringement of the Constitution as fair competition is one of the principles that govern the Commission under Article 232(g). To the Petitioner, the Respondents’ actions are an affront to the provisions of section 4 of the Public Service Commission Act, Articles 10 and 232(1) of the Constitution with respect to principles of good governance, integrity, transparency and accountability. It was therefore submitted that the said actions constitute breach of the fundamental rights and freedoms enshrined in the Constitution.
17. It was submitted that whereas in the Judgement of the E&LR Court, the CS was directed to commence the recruitment of the members of the University’s Council in accordance with the law, the judgement never bestowed upon the CS the powers to actually proceed and make appointments arbitrarily but in accordance with the law. The Petitioner submitted that an illegal act however good the intention it may have can never be used to cure another subsisting illegality.
18. The Petitioner asserted that only the Commission has the power to advertise for the positions of the members of the University’s Council, recruit, select and place the successful candidates and the CS’s is to simply appoint the successful candidates to hold the said office for the gazetted period.
19. It was therefore submitted that since section 36(1) of the Act contravenes Article 234 of the Constitution, the said section ought to be declared null and void.

### **Respondents’ Case**

20. On behalf of the Respondents the following grounds of opposition were filed:
1. **THAT** the 1<sup>st</sup> and 2<sup>nd</sup> Respondents action of commencing the recruitment process for members of the universities and constituent collages governing councils are in tandem with the judgment of the Court in **Petition No. 33 of 2013 - Joseph Mberia & Anor-vs- The**

**Cabinet Secretary Ministry of Education, Science & Technology**

2. **THAT** Section 36 (1) (a) and (c) of the Universities Act No. 42 of 2012 empowers the 2<sup>nd</sup> Respondent to appoint the Chairperson of the Council of a Public University or Constituent Collage together with five other members through an open process.
  3. **THAT** the Universities Act No. 42 of 2012 has not been declared unconstitutional by any Court and as such its salient provisions on powers donated to the 2<sup>nd</sup> Respondent are valid and lawful.
  4. **THAT** it is crystal clear from a reading of Article 260 of the Constitution that the members of the University Councils are not Public Officers and therefore their recruitment cannot fall within the province of the Public Service Commission.
  5. **THAT** Article 234 of the Constitution only relates to the functions and powers of the Public Service Commission and can therefore not affect members of the University Councils that the 2<sup>nd</sup> Respondent is recruiting.
  6. **THAT** the Petition and the Notice of Motion have not met the threshold for the grant of conservatory orders as held by the Supreme Court in Gatirau Peter Munya-Vs-Dickson Mwenda Githinji & Others (SCK Petition No. 2 of 2013)
  7. **THAT** the prayers in the Notice of Motion Application and Petition if granted would amount to stopping the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from complying with a lawful Court order issued in Petition No. 33 of 2013 Joseph Mberia & Anor-vs- The Cabinet Secretary Ministry of Education, Science & Technology.
  8. **THAT** the prayers in the Notice of Motion Application and Petition if granted would stop the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from performing their statutory duties.
  9. **THAT** the Notice of Motion Application and the Petition are misguided attempts by the Petitioners and other like-minded people to arm twist the Respondents into bowing to their demands despite the existence of a lawful Court order.
  10. **THAT** the Petition and the Notice of Motion Application are otherwise incompetent, misconceived, misplaced and are an abuse of the process of this Honourable Court as the Petitioner's rights and fundamental freedoms have not been breached in any manner.
21. The Respondents also filed a replying affidavit in which it was averred that the Ministry, through the task force on the alignment of the Higher Education sector with the Constitution developed the Universities Bill to harmonize the various Acts of Parliament governing the Universities Sector into one coherent Act in order to create a unified legal environment for better governance and management of the institutions. It was contended that upon the enactment of the Act the membership of a Public University or a Constituent Collage was limited to nine members with five who were independent and the Chairperson appointed through an open process.
22. It was averred that on or about 19<sup>th</sup> September, 2014 the **Hon. Mr. Justice Nduma Nderi**, the Principal Judge of the Industrial Court of Kenya delivered his judgment in Petition No. 33 of 2013 - Joseph Mberia & Anor-vs- The Cabinet Secretary Ministry of Education, Science & Technology where he *inter alia* held that the University Council for the Jomo Kenyatta University of Agriculture & Technology was not properly constituted and ordered the 2<sup>nd</sup> Respondent herein to commence the recruitment process of members of the Jomo Kenyatta University of Agriculture & Technology in accordance with the law. According to the Respondents, the current members of council for all the Public Universities with the exception of Jomo Kenyatta University of Agriculture & Technology were not appointed in an open process and as required by the salient provisions of the Act.
23. The Respondents averred that on or about 5<sup>th</sup> February, 2016 the CS through the Ministry placed an advertisement in the Daily Nation newspaper inviting applications to fill the positions of Public Universities and Constituent Collages council members in an open manner and in compliance with the Act. To the Respondents, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have power under section 36 of the Act to conduct interviews for the position of Council members of Public Universities and Constituent Collages and appoint the successful applicants. In was therefore the Respondents' case that the act of advertising the positions of council members cannot be said to be *ultra vires* vis-à-vis the provisions of Article 232 of the Constitution since the Respondents were acting within the powers donated to them by a valid Act of Parliament.

24. The Respondents' view was that the Petition was premised on a self-serving and selfish interpretation of the Constitution to wit that members of Public Universities and Constituent Collages Council are public officers and therefore the role of recruiting them falls within the mandate of the Commission. It was however the Respondents' contention that a reading of Article 260 of the Constitution reveals that the members of the Public Universities and Constituent Collages Council are not public officers and therefore the Commission does not have any role to play in their recruitment.
25. While appreciating that it is trite law that the Constitution is the supreme law and any other law that is inconsistent with the provisions of the Constitution is null and void *ab initio*, the Respondents however averred that Article 260 of the Constitution has clearly defined who a public officer is and therefore the definition of a public officer at section 2 of the **Public Officer Ethics Act** cannot be relied on. To the Respondents, Article 234 of the Constitution relates to the functions and powers of the Commission and therefore does not affect the members of the Public Universities and Constituent Collages Council who are not public officers. To them, serving as a member of the Public Universities and Constituent Collages Council does not constitute a formal employment by the Government and that Articles 232 and 234 of the Constitution only provide for the establishment and the functions of the Commission which does not include appointment of members of the Councils.
26. It was the Respondents' case that their actions are in good faith and in compliance with the provisions of the Constitution and a lawful Court judgment in **Petition No. 33 of 2013 Joseph Mberia & Anor-vs- The Cabinet Secretary Ministry of Education, Science & Technology.**
27. It was contended that since the said advertisement stated that the current serving members of Public Universities and Constituent Collages Council were free to apply for the positions, the Petitioner's allegations that they are helpless was untrue.
28. It was further contended that the Petition is incompetent, misconceived, misplaced and was an abuse of the process of the Court as the Petitioner's rights and fundamental freedoms had not been breached in any manner.
29. It was submitted on behalf of the Respondents that the Petitioner herein has not annexed any documentation in the Petition to prove that it is a registered organization recognized in law, yet in order to institute proceedings as in the present Petition, the entity must have the legal capacity to institute proceedings before the Court. In support of this submission the Respondents relied on **Kituo Cha Sheria-vs-John Ndirangu Kariuki & Anor [2013] eKLR** where **Kimondo, J** held that:

**“That is apt in the present circumstances. From a legal standpoint, the entity known as Kituo Cha Sheria exists only in the internal Constitution of the Legal Advice Centre. The edition of the constitution annexed to the replying affidavit is undated. It ends abruptly at page 11. The execution pages are not attached. It was not even clear whether it was similar to the constitutive instruments and documents presented for registration in 1993 before the Non-Governmental Organizations Co-ordination Board. In the Petition at paragraph 1, the Petitioner, Kituo Cha Sheria, describes itself as a “non-governmental organization”. There is no evidence of such registration. The entity so registered is the Legal Advice Centre. I readily find that Kituo Cha Sheria is not a party at all but a mere name. It is not illegal. But it can only maintain an action in that name through the officials named in the Constitution of the Legal Advice Centre or any other person nominated by its board...the legal capacity of a party of a party to institute proceedings in Court is not a technical matter or one of form. It is not a simple misdescription of names as obtained in the case of A.N Phakey-Vs-World Wide Agencies Ltd [1948] Vol XV EACA 1. Far from it, it is a substantive matter in law that cannot be accommodated within the latitude of Article 159 (2) (d) of the Constitution...”**

30. According to the Respondents, lack of legal capacity is not a technical question or a question of form but rather a question of substance that cannot be accommodated within the provisions of Article 159 (d) (2) of the Constitution and reliance was placed on **Kituo Cha Sheria-vs-John Ndirangu Kariuki & Anor** (supra) where the Court added that:

**“The incompetence of the present Petitioner to sue is not then a simple technical matter. As I have stated earlier, it cannot be cured by the provisions of Article 159 2(d) of the Constitution or Rule 4 of the Petition Rules. The failure to bring an action by a recognized juridical person is one of law and substance. It goes to the root of the Petition. The substratum upon which the Petition has been brought is thus compromised completely.”**

31. It was therefore submitted that the Petitioner is not a person as contemplated by Article 258 of the Constitution and is incompetent to institute these proceedings hence this petition ought to be dismissed with costs to the Respondents on a preliminary point.
32. With respect to the merits of the petition it was submitted that the actions of the Respondents are informed by their quest to ensure that all the Councils for the Public Universities and their Constituent Collages comply with the Constitutional requirements and the salient provisions of the Act. The Respondents reiterated that in its decision the E&LR Court held that the Council of JKUAT was not properly constituted and ordered the Respondents herein to start the recruitment process in accordance with the provisions of the Act and the Constitution. To the Respondents, they simply complied with the said decision and also saw it fit to extend the process to all the other Public Universities and their Constituent Collages so that they would all be in compliance with the said court order. It was therefore submitted that the actions of the Respondents were well intentioned and that the Commission is not involved in the recruitment process.
33. On the issue whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have power in law to advertise for the position of the council members of Public Universities and Constituent Collages and to conduct interviews for the said positions, it was submitted that section 36 of the Act is clear that the said Respondents have power to recruit members of Council for Public Universities and Constituent Collages.
34. It was therefore submitted that as the Act clearly donates the power to recruit the Council members for the Public Universities and the Constituent Collages to the Cabinet Secretary, the action of advertising for interviews to fill the position of the Council members was done by the Respondents because they had power given to them by a valid Act of Parliament.
35. With respect to the allegation that section 36(1) of the Act is unconstitutional on grounds that it contravenes the provisions of Article 232 of the Constitution, the Respondents relied on **Moses Munyendo & 908 Others-vs- The Attorney General & Anor [2013] eKLR** and submitted that the Respondents in advertising for the recruitment of the Council members for Public Universities and Constituent Collages was only fulfilling a lawful Court Order in other Public Universities whose Councils were not recruited in accordance with the law and that if they do not recruit as directed by the Court in other Public Universities, other cases would definitely be filed by the disgruntled staff in the other public Universities. It was therefore asserted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have power in law to advertise for the position of the council members of Public Universities and Constituent Collages and to conduct interviews for the said positions, a position held by the Industrial Court.
36. On the issue whether the council members of Public Universities and Constituent Collages are Public Officers within the meaning of Article 260 of the Constitution, it was submitted that council members of Public Universities and Constituent Collages are not Public Officers within the meaning of Article 260 of the Constitution.
37. From the foregoing, it was submitted that from the definitions in the Constitution, members of Council for Public Universities and Constituent Collages are not public officers because the office of the Council member are not offices within a State Organ. State Organs, it was contended include a commission, office, agency or other body established under the Constitution. However as Public Universities and Constituent Collages are not Commissions, Offices, Agencies neither are they creatures of the Constitution, it was submitted that the members of Council are not public officers. To the Respondents, the Commission as established under Article 233 of the Constitution and its powers as listed at Article 234 only relates to public officers. It is therefore our submission that the Commission cannot play any part in recruitment of the members of Council for Public Universities as alleged by the Petitioners.
38. Whereas the Respondents appreciated that section 2 of the ***Public Officer Ethics Act*** defines a Public Officer as any officer, employee or member including an unpaid part time or temporary officer, employee or member of a public university, they contended that the Constitution is the Supreme law of Kenya and any other law that is inconsistent with the Constitution is relegated to

- the back banner and cannot be used a reference point. This Court was therefore urged to rely on the clear definitions of who a public officer is as per the provisions of Article 260 of the Constitution.
39. On the issue whether section 36(1) of the **Universities Act** is inconsistent with Article 232 of the Constitution, it was submitted that the said section cannot be inconsistent with Article 232 of the Constitution since members of the Council for Public Universities and Constituent Colleges are not public officers and therefore the Respondents are not bound by the provisions of Article 232 of the Constitution on values and principles of public service. The aforementioned notwithstanding, it was the Respondents' case that the Petitioners had failed to demonstrate to the required standards that any of the principles of public service had been violated by the Respondents.
40. The Respondents therefore submitted that the instant petition was misconceived due to the fact that the allegations made by the Petitioner against the Respondents were baseless and unsupported with any evidence and prayed that the same be dismissed with costs.

### **Determinations**

41. I have considered the petition, the affidavits both in support of and in opposition to the petition.
42. As a preliminary issue, it was contended that the petitioner herein has no locus to institute these proceedings. According to the Respondents, the Petitioner has not annexed any documentation in the Petition to prove that it is a registered organization recognized in law, yet in order to institute proceedings as in the present Petition, the entity must have the legal capacity to institute proceedings before the Court.
43. On this issue, it was held in **Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010** as follows:

**“Over time, the English Courts started to deviate and depart from their contextual application of the law and adopted a more liberal and purposeful approach. They held that it would be a grave lacuna in the system of public law if a pressure group or even a single spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The strict rule of *locus standi* applicable to private litigation is relaxed and a broad rule is evolved which gives *locus standi* to any member of public acting *bona fide* and having sufficient interest in instituting an action for redressal of public wrong or public injury by a person who is not a mere busybody or a meddlesome interloper; since the dominant object of Public Interest Litigation is to ensure observation of the provision of the constitution or the law which can be best achieved to advance the cause of the Community or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration, but acting, *bona fide* and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion like *action popularis* of Roman Law whereby any citizen could bring such an action in respect of public delict. Standing will be granted on the basis of public interest litigation where the petition is *bona fide* and evidently for the public good and where the Court can provide an effective remedy...In Kenya the Court has emphatically stated that what gives *locus standi* is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population. The court equally has recognised that organisations have rights similar to that of individual private member of the public. A new dawn was then ushered in and the dominion of Private Law and its restrictive approach was dealt a final blow. A new window of opportunity emerged in the area of Public Law and shackles of inhibition in the name of *locus standi* were broken and the law was liberalised and a purposeful approach took the driving seat in the area of Public Law. In human rights cases, public interest litigation, including lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the preconditions of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed at the altar of technicality. The court has vast powers under section 60 of the Constitution of Kenya, to do justice without technical restrictions and restraints; and procedures and reliefs have to**

be moulded according to the facts and circumstances of each case and each situation. It is the fitness of things and in the interest of justice and the public good that litigation on constitutionality, entrenched fundamental rights, and broad public interest protection, has to be viewed. Narrow pure legalism for the sake of legalism will not do. We cannot uphold technicality only to allow a clandestine activity through the net of judicial vigilance in the garb of legality. Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated. As part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right to access to justice entails a liberal approach to the question of *locus standi*. Accordingly in constitutional questions, human right cases, public interest litigation and class actions, the ordinary rules of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In these types of cases, any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused or to a defined class of persons represented, or for a contravention of the Constitution, or injury to the nation. In such cases the court will not assist such a public-spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception...”

44. The Court continued:

“In the interest of the realisation of effective and meaningful human rights, the common law position in regard to *locus standi* has to change in public interest litigation. Many people whose fundamental rights are violated may not actually be in a position to approach the Court for relief, for instance, because they are unsophisticated and indigent, which in effect means that they are incapable of enforcing their fundamental rights, which remain merely on paper. Bearing this in mind, where large numbers of persons are affected in this way, there is merit in one person or organisation being able to approach the court on behalf of all those persons whose rights are allegedly infringed. This means that human rights become accessible to the metaphorical man or woman in the street. Accessibility to justice is fundamental to rendering the Constitution legitimate. In this sense, a broad approach to *locus standi* is required to fulfil the Constitutional court’s mandate to uphold the Constitution as this would ensure that Constitutional rights enjoy the full measure of protection to which they are entitled.”

45. Similarly, in Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012 the Court of Appeal stated at page 16 as follows:

“Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for *locus standi* that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1<sup>st</sup> respondent had the *locus standi* to file the petition. Apart from this, we agree with the superior court below that the standard guide for *locus standi* must remain the command in Article 258 of the Constitution.”

46. Article 258 of the Constitution provides as follows:

(1) Every person has the right to institute court proceedings, claiming that this Constitution

*has been contravened, or is threatened with contravention.*

*(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—*

- (a) a person acting on behalf of another person who cannot act in their own name;*
- (b) a person acting as a member of, or in the interest of, a group or class of persons;*
- (c) a person acting in the public interest; or*
- (d) an association acting in the interest of one or more of its members.*

47. Long before the promulgation of the current Constitution, it was held in Shah Vershi Devji & Co. Ltd vs. The Transport Licencing Board Nairobi HCMC No. 89 of 1969 [1970 EA 631; [1971] EA 289 that:

**“Section 70 of the Constitution of Kenya itself creates no rights but merely gives a list of the rights and freedoms which are protected by other sections of Chapter V of the Constitution. It may be helpful in interpreting any ambiguous expressions in later sections of Chapter V. The word “person” is defined in section 123 as including “any body of persons corporate or unincorporated. Thus, a company is a “person” within the meaning of Chapter V of the constitution which is headed “Protection of Fundamental Rights and Freedoms of the Individual” and would be entitled to all the rights and freedoms given to a “person” which it is capable of enjoying. The word “individual” can be misunderstood. It is not defined in the Constitution nor in the Interpretation and General Provisions Act (Cap 2). But the meaning of it in the context in which it is used is clear. If a right or freedom is given to a “person” and is, from its nature, capable of being enjoyed by a “corporation” then a “corporation” can claim it although it is included in the list of rights and freedoms of the individual”. The word “individual” like the word “person”, does, where the context so requires include a corporation. The word must be construed as extending, not merely to what is commonly referred to as an individual person, but to a company or corporation. Supposing the right to be given by a special Act of Parliament to a limited company, it seems impossible to suppose that they would not be within the word “individual”. “Individual” seems to be any legal person who is not the general public.”**

48. The function of standing was also dealt with by Nyamu, J (as he then was) in Mureithi & 2 Others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443 as follows:

**“The function of standing rules include: to restrict access to judicial review; to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the Government. Such litigants do not exist in real life – if they did the requirement for leave would take care of this; to prevent the conduct of Government business being unduly hampered and delayed by excessive litigation; to reduce the risk that civil servants will behave in over cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in affairs of others...Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law...The other reason is that although initially it was feared that the relaxation of standing would open floodgates of**

litigation and overwhelm the Courts this has in fact not happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue....Under the English Order 53 now replaced in that country since 1977 and which applies to us by virtue of the Law Reform Act Cap 26 the test of locus standi is that a person is aggrieved. After 1977 the test is whether the applicant has sufficient interest in the matter to which the application relates. The statutory phrase “person aggrieved” was treated as a question of fact – “grievances are not to be measured in pounds and pence”...Although under statute our test is that of sufficient interest my view is that the horse has bolted and has left the stable – it would be difficult to restrain the great achievements in this area, which achievements have been attained on a case to case basis. It will be equally difficult to restrain the public spirited citizen or well organised and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think Courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, if course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the test of sufficient interest...”

49.This definition is now incorporated in Article 260 of the Constitution which defines a “person” as including “a company, association or other body of persons whether incorporated or unincorporated”. By employing the word “includes”, it means that the descriptions therein are not conclusive.

50.What comes from the foregoing is that the Courts have moved away from the strict interpretation of the *locus standi* rule in public law litigation that reached its peak in Maathai vs. Kenya Times Media Trust Ltd [1989] KLR 267 where **Dugdale, J** held that only the Attorney General could sue on behalf of the public. It is now clear from the current constitutional dispensation that the Court ought to interpret the rule relating to *locus standi* liberally so as not to lock out persons with genuine grievances from accessing the seat of justice.

51.In *Mureithi Case* (supra) the learned Judge proceeded:

**“In my view the Courts must resist the temptation to try and contain judicial review in a straight jacket. Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them...The applicants are members of a Kikuyu clan which contends that during the Mau Mau war (colonial emergency) in 1955 their clan land was unlawfully acquired because the then colonial Governor and subsequently the presidents of the Independent Kenya Nation did not have the power to alienate clan or trust land for private purpose or at all. In terms of Order 53 they are “persons directly affected”. I find no basis for giving those words a different meaning to that set out in the case law above. The Court has to adopt a purposive interpretation. I have no hesitation in finding that the clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they allege was clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this Court. Moreover in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan.”**

52.It is therefore clear that over time the issue of standing, particularly in public law litigation has been greatly relaxed and in our case the Constitution has opened the doors of the Courts very wide to welcome any person who has *bona fide* grounds that the Constitution has been or is threatened

with contravention to approach the Court for an appropriate relief. In fact, since Article 3(1) of the Constitution places an obligation on every person to respect, uphold and defend the Constitution, the invitation to approach the Court for redress as long as the person holds *bona fide* grounds for believing that the Constitution is under threat ought to be welcome. I must however hasten to add that the liberal interpretation does not mean that the rule on *locus standi* is no longer relevant in constitutional petitions. Where it is clear that the Petitioner has completely no business in bringing the matter to Court to permit such proceedings to be litigated would amount to the Court itself abetting abuse of its process.

53. In this case the Petitioner describes itself as a registered umbrella network of civil society organizations. It in substance brings these proceedings based on the allegation of unconstitutionality of a provision of a statute. It further contends that certain provisions of the Constitution have been or are threatened with violation. In light of such allegations I cannot fault the Petitioner for instituting these proceedings and I hold that it was within his right to commence these proceedings. As to whether his case is merited is another matter. *Locus standi* is a totally different thing from the merits of the petitioner's case.

54. According to the Respondents, since the CS's action was based on a Court order, the said action ought not to be questioned. However, what the judge directed in **Joseph Mberia & Anor-vs- The Cabinet Secretary Ministry of Education, Science & Technology** (supra) was that the Cabinet Secretary for Education, Science and Technology do commence the recruitment process of members of JKUAT Council in accordance with the law. The Cabinet Secretary was therefore not given a blank cheque in carrying out the recruitment process. It follows that if the process is not being carried out in accordance with the law, the CS cannot fall back on the said decision and claim that his actions cannot be questioned.

55. The next issue is whether members of the council of a public university or constituent college of such a university are public officers. In support of this position the Respondents reproduced Article 260 of the Constitution provides as follows:

- a. ***Public office- means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are paid directly from the consolidated fund or directly out of money provided by Parliament.***
- b. ***Public service-means the collectivity of all individuals, other than State officers, performing a function within a State organ***
- c. ***State Organ- means a commission, office, agency or other body established under this Constitution.***
- d. ***“public officer” means—***

***(a) any State officer; or***

***(b) any person, other than a State Officer, who holds a public office***

56. It follows that for one to be a “public officer” in accordance with the said Article, apart from State officers, one must be holding a public office in that he is holding an office in the national government, a county government or the public service, and his remuneration and benefits must be paid directly from the consolidated fund or directly out of money provided by Parliament. It is not disputed that members of the council of a public university or constituent college of such a university are paid remuneration from money provided by Parliament since under Article 206(3) “money shall not be withdrawn from any national public fund other than the Consolidated Fund, unless the withdrawal of the money has been authorised by an Act of Parliament.” It is however clear that members of the council of a public university or constituent college of such a university neither hold office in the National Government nor in the County Government. Accordingly, the next issue for determination is whether they hold office in the public service. This begs the question whether the said persons perform a function of a State organ in the sense that they perform a function within a commission, office, agency or other body established under the Constitution. The said members do perform their functions within public universities. However public universities are not established under the Constitution.

57. The Petitioner however relied on section 2 of the ***Public Officer Ethics Act*** which defines a Public

Officer as any officer, employee or member including an unpaid part time or temporary officer, employee or member of a public university. It is however important to note that the definition of “public officer” under the said Act is restricted to the same Act since the preamble to section 2 of the Act is specific and states that “in this Act”. Therefore when it comes to the provisions of the Constitution, the term “public officer” must be interpreted in accordance with the definition assigned to it by the Constitution. An Act of Parliament, in my view, cannot and should not be interpreted in such a way as to expand the Constitutional provisions unless such expansion is contemplated by the Constitution itself.

58. It follows that for the purposes of the Constitution, members of the council of a public university or constituent college of such a university are not public officers and their appointments can only be undertaken in accordance with the specific Acts of Parliament under which the Universities are established. In effect Article 232 of the Constitution does not apply to appointments of members of the council of a public university or constituent college of such a university. In this case, section 36 of the *Universities Act, 2012* provides as follows:

1. ***The council of a public university or constituent college of such a university shall consist of nine persons appointed by the Cabinet Secretary as follows—***
  - a. ***Chairperson;***
  - b. ***The Principal Secretary in the Ministry for the time being responsible for the University.***
  - c. ***The Principal Secretary in the Ministry for the time being responsible for Finance***
  - d. ***Five members appointed by the Cabinet Secretary through an open process; and***
  - e. ***the Vice-Chancellor or, in the case of a constituent college, the Principal of such college who shall be an ex officio member of the Council.***

59. It is clear that apart from the persons who sit in the said councils of a public universities or constituent college of such a universities by virtue of their offices, the five members to be appointed by the Cabinet Secretary are to be appointed through an open process. It follows that in effecting the appointments of the said five persons, the Cabinet Secretary is bound to adhere to the Constitutional provisions such as the national values and principles of governance under Article 10 as read with Article 129 of the Constitution.

60. Having found that Article 232 of the Constitution is inapplicable to the appointment of the members of the council of a public university or constituent college of such a university, it follows section 36(1) of the *Universities Act, 2012* cannot be said to be unconstitutional on that score.

61. I associate myself with the position adopted by **Majanja, J** in **Moses Munyendo & 908 Others- vs- The Attorney General & Anor** (supra) that:

“Whether the policies pursued by the Acts are proper or not is not a matter for the court but one for the legislature. In *Commission for the Implementation of the Constitution v Parliament of Kenya and 2 Others* Nairobi Petition No 454 of 2012 [2013] eKLR, the issue for consideration was whether the *Leadership and Integrity Act, No. 19 of 2012* fell short of the threshold required by the Constitution for effective legislation. The court observed thus; “[63][The question]..... Whether to have a “one stop-shop” or have a various public entities involved in the implementation of Chapter Six under the umbrella of EACC is a matter for the legislative policy. Attractive and weighty arguments can be marshaled for either position but it is not a matter in which the Court should delve into unless the Constitution is contravened. As was stated by court in *Mount Kenya Bottlers Limited & 3 others v Attorney General and Others, Nairobi Petition No. 72 of 2011 [2012] eKLR*, “it must be upheld and as Wiles J. stated in *Lee v Bude in Torrington Rly (1871) L.R. 6*, the Courts cannot act as “regents” over what is done in Parliament because such an authority does not exist.” The Court further noted that, “[69] Declaring a statute as unconstitutional, needless to say is a serious issue with deep-seated ramifications and the court should not be overly enthusiastic in pronouncing so unless clear grounds known in law have been clearly established.” I agree and adopt these sentiments and I decline the petitioners’ entreaty to wade into the policy morass of whether the Acts are appropriate for this country (emphasis mine)”

62. This, in my view was the position adopted by **Mumbi Ngugi, J** in **National Conservative Forum vs. Attorney General [2013] eKLR** where the learned Judge expressed herself as follows:

“...if I may borrow the words of the dissenting opinion in the United States Supreme Court case of *U.S. v. Butler* 297 U.S. 1 (1936):

‘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’.

Should a need to reconsider the presence of the International Crimes Act in our statute books arise, assuming that the good and cogent reasons that one hopes informed its enactment no longer exist, that is something that lies within the power and mandate of the legislature which, at the time of its enactment, thought it a wise and necessary legislation to enact. One may have serious reservations about the wisdom of enacting or removing legislation from the statute books to suit the exigencies of the moment, but our democratic processes, as enshrined in the Constitution, have vested in the legislature the power to do that should it be so minded.”

63. In my view, even if the said members were public officers, the mere fact that an Act of Parliament confers upon the Cabinet Secretary the powers to appoint the said persons cannot be declared to be unconstitutional unless that power is not conferred upon the Cabinet Secretary. However, the other constitutional principles will definitely dictate the manner in which the Cabinet Secretary exercises his powers of appointment. This was the position recognized by **Mumbi Ngugi, J in Benson Riitho Mureithi vs. J. W. Wakhungu & 2 others [2014] eKLR** where the learned Judge expressed herself as follows:

“It would appear from the material before the Court that the question of the Interested Party’s suitability for public office was not addressed in accordance with the requirements of the Constitution. The Cabinet Secretary, the 1<sup>st</sup> respondent, had power of appointment under section 51 of the Water Act... At section 2 of the First Schedule to the Act, it is provided that those proposed for appointment as Board members of Water Services Boards must be appointed on the basis of educational qualifications, experience, character and integrity of potential candidates for membership. Similar provisions are contained in section 22 of the Public Officers Ethics Act...The 1<sup>st</sup> respondent, however, had a duty, imposed on her by the people of Kenya, to consider the Interested Party’s suitability under the Constitution, and to make the appointment to the Board in accordance with the dictates of the Constitution...What does the Constitution require with regard to appointments to public office? As already observed, public officers must be appointed on the basis of the criteria set out in Chapter 6. They must also, in addition, be appointed in accordance with the national values and principles set out in Article 10... It has been conceded by Counsel for the respondents, however, that no-one knew or had any inkling that the Interested Party was going to be appointed as Chairman of the Water Services Board; and consequently, there was no opportunity for the petitioner or any other person to seek information about the appointment, or raise objections to the appointment, which objections would be expected to be considered by the Minister, and if found to be valid and sufficient to bar the appointment, the intended appointment ought not to be made...It seems to me therefore that the primary responsibility lay on the 1<sup>st</sup> respondent, and indeed on any other state officer making a similar appointment, to put in place a mechanism for recruitment or appointment of members of Boards of state corporations that would allow for public participation and consideration of the suitability and integrity of potential appointees as the Constitution now demands...It may seem that the Constitution has imposed an irksome and onerous burden on those responsible for making public appointments by requiring that they make the appointments on the basis of clear constitutional criteria; that they allow for public participation; and that those they appoint meet certain integrity and competence standards. This burden, however, is justified by our history and experience, which led the people of Kenya to include an entire chapter on leadership and integrity in the Constitution...In the present case, as the respondents tacitly concede, there are serious unresolved questions with regard to the integrity of the Interested Party which do not appear to have been considered by the 1<sup>st</sup> respondent in making the appointment to the Chairmanship of the Athi Water Services Board. It is the duty of the 1<sup>st</sup> respondent to consider the issues and, in exercise of the powers vested in her office under section 51 of the Water Act, applied in accordance with the Constitution, make a determination of the suitability of the Interested Party under

Chapter 6 of the Constitution...In the premises, this petition succeeds to the extent that the Court finds that the 1<sup>st</sup> respondent failed to act in accordance with the Constitution, and her appointment of the Interested Party as Chairman of the Athi Water Services Board fell below the standard set by the Constitution... In the present case, the Court has found that no inquiry was made with regard to the suitability of the Interested Party under the Constitution, a responsibility that fell on the 1<sup>st</sup> respondent under the provisions of the Water Act as read with section 7 of the 6<sup>th</sup> Schedule to the Constitution. The responsibility still remains to make that inquiry. It is a responsibility that the Court does not deem proper to assume, but should require its proper exercise by the office vested with the authority to exercise it- the 1<sup>st</sup> respondent.”

64. In other words the discretion given to the CS to make the appointment of the said five persons cannot be arbitrarily exercised by must be exercised in accordance with the Constitution and the law. In my view the power given to administrative or executive authorities ought to be properly exercised and must not to be misused or abused. This is so because as elucidated by **Prof Sir William Wade** in his learned work, *Administrative Law*:

“The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of [his property] just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...”

65. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.

### **Summary of Findings**

66. From the foregoing discourse, I find that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to advertise the position of the the members of the council of Jomo Kenyatta University of Agriculture and Technology were not irregular, unprocedural and unconstitutional. I further find that section 36(1) of the *Universities Act, 2012* is neither inconsistent with the Constitution nor unconstitutional.

### **Disposition**

67. It follows that this petition fails and is dismissed but due to the public interest issues generated herein, there will be no order as to costs.

68. It is so ordered.

**Dated at Nairobi this 23<sup>rd</sup> day of June, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Kinyanjui for the Petitioner***

***Cc Mutisya***