**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 167 OF 2016**

**IN THE MATTER OF ARTICLE 22(1)**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 10, 47, 73, 159, 172, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**MICHAEL OSUNDWA SAKWA...…….....…….... …….PETITIONER**

**-VERSUS-**

**CHIEF JUSTICE AND PRESIDENT OF THE SUPREME COURT OF KENYA….1ST RESPONDENT**

**JUDICIAL SERVICE COMMISSION…….....….....…..2ND RESPONDENT**

**AND**

**KENYA MAGISTRATES AND JUDGES ASSOCIATION….....1ST INTERESTED PARTY**

**LAW SOCIETY OF KENYA…….…….....2ND INTERESTED PARTY**

**THE PRINCIPAL JUDGE, THE HIGH COURT OF KENYA…….....3RD INTERESTED PARTY**

**AHMEDNASIR ABDULAHI…….....4TH INTERESTED PARTY**

**JUDGEMENT**

## The Parties

1. The Petitioner herein is an Advocate of the High Court of Kenya.

2. The 1st Respondent, the **Chief Justice** and President of the Supreme Court of Kenya, is the Head of the

Judiciary and the Chairman of the Judicial Service Commission appointed under Article 166 (1) (a) of the Constitution of Kenya.

3. The 2nd Respondent, the **Judicial Service Commission** (hereinafter referred to as "the Commission"), is a constitutional Commission established under Article 171 of the Constitution of Kenya and whose functions as set out under Article 171 (1) (b) of The Constitution of Kenya include the review and making of recommendations on the conditions of service of Judges.

4. The 1st Interested Party, **the Kenya Magistrates and Judges Association**, (hereinafter referred to as "the KMJA" or "the Association") is an Association of Magistrates and Judges registered under section 10 of the ***Societies Act***, Cap. 108 of the Laws of Kenya.

5. The 2nd Interested Party, the **Law Society of Kenya**, (hereinafter referred to as "the LSK" or "the Society") is a society of Advocates established under section 3 of the ***Law Society of Kenya Act***, Cap. 18 of the Laws of Kenya.

6. The 3rd interested party, the Principal Judge of the High Court, is the administrative head of the High Court, pursuant to Article 165(2) of the Constitution.

**The Petition**

7. At the time of the filing of this Petition, the holder of the Office of Chief Justice and President of the Supreme Court of Kenya was **Dr. Willy Munyoki Mutunga**, who according to the petition was born on the 16th day of June, 1946 and was due for retirement on the 16th day of June, 2016.

8. It was pleaded that in October, 2010 way before the advertisement for recruitment of the Chief Justice and President of the Supreme Court, **Mr. Abdullahi Ahmednasir Maalim**, who would later be elected as the Law Society of Kenya representative to the Judicial Service Commission prequalified **Dr. Mutunga** as most suitable candidate for the office and **Dr. Mutunga** was appointed Chief Justice and President of the Supreme Court of Kenya in June, 2011 in a process that the petitioner pleaded was widely perceived to have been influenced and controlled by **Mr. Ahmednasir**. In the petitioner's view, it was a widely held public view and perception that **Dr. Mutunga** was beholden to **Mr. Ahmednasir** to whom he owed his appointment and acted on his instructions and directions, including the transfer of Judges.

9. The Petitioner further pleaded that there was a widely held public view confirmed by **Dr. Mutunga** and **Mr. Ahmednasir** that the entire judiciary was corrupt and was held hostage by cartels. In the Petitioner's averment, **Mr. Ahmednasir** was believed to be part of the cartel as he acted for **Judicial Service Commission** together with **Hon. Paul Kibugi Muite** and **Issa Muathe Mansur** and the 3 were believed to determine and direct the affairs of the **Judicial Service Commission** whilst at the same time appearing before Judges who serve under the directions of the **Judicial Service Commission**.

10. It was pleaded that the Petitioner jointly acts with **Havi & Company Advocates**, in H.C.C.C. 55 of 2012, - **Manchester Outfitters Limited –vs- Pravin Galot & 3 others** which was pending for hearing before **Honourable Messrs. Justice Fred Ochieng**, **Eric Ogola** and **Olga Sewe Akech**. The hearing of the said case, according to the petitioner commenced on the 5th day of November 2012 and had not proceeded beyond the testimony of the first witness taken to completion on the 27th day of March 2014, on account of the elevation of **Honourable Mr. Justice Daniel Musinga** to the Court of Appeal, the transfer of **Honourable Mr. Justice Kanyi Kimondo** to Eldoret High Court and the transfer of **Honourable Lady Justice Jacqueline Kamau** to Voi High Court.

11. It was further pleaded that the Petitioner jointly acts with **Havi & Company Advocates** in H.C.C.C. No. 46 of 2015, - **Tatu City Limited & 3 others –vs- Stephen Jennings & 6 others** which was pending for hearing before **Honourable Mr. Justice Charles Mutungi Kariuki** of the Commercial & Admiralty Division of the High Court of Kenya.

12. It was pleaded that **Messrs. Ahmednasir and Issa**, who act for the 2nd Respondent appear for the Defendants in H.C.C.C. No. 46 of 2015 and are embroiled in a contest of legal representation for the 1st and 2nd Plaintiffs therein with **Havi & Company Advocates**. According to the petitioner, **Honourable Mr. Justice Charles Mutungi Kariuki** took over the conduct of H.C.C.C. No. 46 of 2015 from **Honourable Mr. Justice Eric Ogola** on the 15th day of November, 2015 after persistent attempts by **Messrs. Ahmednasir and Issa** to disqualify the Judge from hearing the matter.

13. The Petitioner disclosed that he is a Defendant in H.C.C.C. No. 230 of 2015, H.C.C.C. No. 237 of 2015 and H.C.C.C. No. 238 of 2015 - **Kofinaf Company Limited & another –vs- Nahashon Ngige Nyagah & Others** currently pending before **Honourable Mr. Justice Charles Mutungi Kariuki** while **Mr. Ahmednasir** appears for the Plaintiffs in H.C.C.C. No. 230 of 2015, H.C.C.C. No. 237 of 2015 and H.C.C.C. No. 238 of 2015 and together with **Mr. Tom Macharia**, are embroiled in a contest of legal representation for the 19th and 16th Defendants therein with **Havi & Company Advocates**. It was averred that **Honourable Mr. Justice Charles Mutungi Kariuki** took over the conduct of H.C.C.C. No. 230 of 2015, H.C.C.C. No. 237 of 2015 and H.C.C.C. No. 238 of 2015 from **Honourable Mr. Francis Gikonyo** on the 17th day of September, 2015. However, **Messrs. Ahmednasir**, **Issa** and **Macharia** have been reluctant to have H.C.C.C. No. 46 of 2015, H.C.C.C. No. 230 of 2015, H.C.C.C. No. 237 of 2015 and H.C.C.C. No. 238 of 2015 proceed for hearing before **Honourable Mr. Justice Charles Mutungi Kariuki** and have deployed numerous delay tactics and technical objections to derail the hearing, the last being an application intended to disqualify the Judge from hearing the matter. To the petitioner, **Messrs. Ahmednasir**, **Issa** and **Macharia**'s actions indicate that they prefer the said cases to be handled by a judge of their choice other than **Honourable Messrs. Justice Eric Ogola** and **Charles Mutungi Kariuki**.

14. It was pleaded that there are several other matters before **Honourable Messrs. Justices Eric Ogola and Charles Mutungi Kariuki** which **Mr. Ahmednasir** has not been comfortable with the said Judges' handling of the matters, an indicator that he would prefer a Judge of his choice other than the two Judges.

15. It was pleaded that following the imminent retirement of **Dr Mutunga**, on the 16th day of June, 2016 and **Mr. Ahmednasir** indicated his choice for **Dr. Mutunga's** successor. As a result, the Judicial Service Commission challenged amendments to the ***Judicial Service Act***, Cap. 185B which allowed the President the final say in the appointment of the Chief Justice, largely due to the views and recommendations of **Mr. Ahmednasir**. To the petitioner, it was clear that **Mr. Ahmednasir** would have wanted to control the appointment of **Dr. Mutunga's** successor as he did in 2010-2011.

16. It was pleaded that the Judiciary Transformation Framework 2012-2016 (hereinafter referred to as "JTF") together with the Judiciary Transfer Policy Guideline for Judicial Officers (hereinafter referred to as "the Transfer Policy") regulate the transfer of Judges and *inter alia* require that ordinary transfer be effected only after a Judge has served in a station for 3 years and that the transfer be effected by the 30th day of September of the year of end of tenure of the Judge's at the station. In the petitioner's view, the timing indicated hereinabove is intended to enable the Judge on transfer complete matters and applications pending before him or her in order that he/she may commence duty at the next station in January of the year subsequent to the annual transfer chain.

17. It was however pleaded that on the 15th day of April, 2016, the Chief Justice in total disregard of The Constitution of Kenya, ***Judicial Service Act***, Cap. 185B, ***The High Court (Organization and Administration) Act***, No. 27 of 2015, the Judiciary Transformation Framework 2012-2016 and the Judiciary Transfer Policy & Guidelines for Judicial Officers, transferred 105 Judges of the High Court and directed that the said Judges report to the new stations by the 2nd day of June, 2016. To the petitioner, the said action was intended to or would pre-empt any such lawful annual ordinary transfer of Judges due for the 30th day of September, 2016 when **Dr. Mutunga** would have left office.

18. It was averred that at the time of the transfer of the Judges, **Honourable Mr. Justice Charles Kariuki** had served at the Commercial & Admiralty Division of High Court of Kenya Nairobi (Milimani

High Court) for less than 8 months and that there were many other Judges at the Milimani High Court with pending matters and applications or matters and application fixed for hearing between then and the 2nd day of June, 2016 as well as thereafter up to the end of the year.

19. As a result of the said decision, all Judges at the Milimani High Court affected by the transfer directed that they would not continue the hearing of any pending matters or applications before them and that the matters and applications ought to be mentioned before the Presiding Judge of the respective Divisions for reallocation to Judges who would take over from them with effect from the 2nd day of June, 2016.

20. It was disclosed that Honourable **Mr. Justice Eric Ogola** had been transferred to Machakos High Court and the hearing in H.C.C.C. No. 55 of 2012 will not proceed until a replacement Judge was allocated the matter while Honourable **Mr. Justice Charles Mutungi Kariuki** had now been transferred to Kakamega High Court and the hearing of H.C.C.C. No. 46 of 2015, H.C.C.C. No. 230 of 2015, H.C.C.C. No. 237 of 2015 and H.C.C.C. No. 238 of 2015 would not proceed until a replacement Judge was allocated the matters. It was pleaded that as a result of the developments indicated hereinabove, there would be no hearing of any matters or applications already listed before the Judges affected by the transfer until after the reallocation of the matters and applications to Judges who would take over from them with effect from the 2nd day of June, 2016. This state of affairs, according to the petitioner would lead to a backlog of cases and delay in the hearing of matters and applications pending or scheduled for hearing before various divisions of the High Court occasioning loss to litigants and Advocates.

21. It was pleaded that the 1st Respondent's decision made on the 15th day of April, 2016 contravenes the national values and principles of governance set out under Article 10 (2) (c) of The Constitution of Kenya on good governance, integrity, transparency and accountability for the following reasons:-

a. The transfer did not promote and uphold honesty and integrity in the operations of the 1st and the 2nd Respondent and does not give fulfilment to all values essential for the discharge of judicial functions as required by section 4(f) of the ***Judicial Service Act***, Cap. 185B of the Laws of Kenya.

b. The transfer would not afford the affected Judicial Officers the 3 months statutory period required for effective hand-over set under section 13 of ***The High Court (Organization and Administration) Act*** No.27 of 2015;

c. The transfer resulted in the undue disruption and delay in the delivery of justice for the reason that the matters and applications heard in part before the affected Judges would have to commence afresh or only after the typing of proceedings;

d. The transfer would result in a build-up of case backlog;

e. The transfer was not in conformity with Pillars 1 and 2 of the Judiciary Transformation Framework 2012-2016 on the expeditious delivery of justice and Transformative Leadership, Organisational Culture and Professional and Motivated Staff respectively;

f. The transfer breached the objective of the transfer policy to provide smooth, predictable and equitable rotation of Judicial Officers to minimize undue disruption to the administration of justice and to the lives of Judicial Officers;

g. The transfer breached the objective of the transfer policy to give adequate notice so that Judicial Officers dispense with their present workload and organize family affairs including schooling arrangements for any children they may have;

h. The transfer breached the objective of the transfer policy which aims to infuse openness and transparency, predictability, fairness and process, equity, objectivity, orderliness, integrity and human compassion in the transfer of Judicial Officers;

i. The transfer breached the general provisions of the transfer policy that the 1st Respondent must act in accordance with the said policy save for exceptions therein;

j. The transfer breached the general provisions of the transfer policy that the normal approximate tenure of posting for each Judicial Officer shall be 3 years save for extreme hardship stations;

k. The transfer breached the criteria for eligibility for ordinary transfer of Judicial Officers which requires that such transfer be effected only after 3 years service in a station; and,

l. The transfer breached the criteria for timing of annual ordinary transfers, which require that ordinary transfers of Judicial Officers shall be effected the 30th day of September every year, and that the Judicial Officers transferred in the annual chain shall be required to report to their new stations in January of the following year.

22. It was the petitioner's case that the decision made on the 15th day of April, 2016 was not taken in consultation with the 2nd Respondent and the Interested Parties as required by the Article 10(2)(a) and 172(1)(b) of The Constitution of Kenya and contravened the Petitioner's right to fair administrative action set out under Article 47(1) & (3)(b) of The Constitution of Kenya for the following reasons:-

a. The transfer would not result in the expeditious, efficient and reasonable determination of the matters or applications already listed before the Judges affected by the transfer until after the reallocation of the matters and applications to Judges who will take over from them with effect from the 2nd day of June, 2016; and,

b. The transfer would not promote efficient administration and determination of the matters or applications already listed before the Judges affected by the transfer until after the reallocation of the matters and applications to Judges who would take over from them with effect from the 2nd day of June, 2016;

23. It was pleaded that the 1st Respondent's said decision contravenes the responsibilities of leadership set out under Article 73 (1) (a) (b) (2) (b) – (e) of The Constitution of Kenya on the authority assigned to a State Officer and guiding principles of leadership and integrity for the following reasons:-

a. The transfer is inconsistent with the purposes and objects of The Constitution of Kenya because it hinders the expeditious, efficient and reasonable disposal of matters pending in Court;

b. The transfer did not demonstrate respect for the people or bring honour to the dignity of the 1st Respondent's office in so far as the same was perceived to have been effected for the interests of cartels controlling the Judiciary before he left office;

c. The transfer did not promote public confidence in the integrity of the 1st Respondent's office in so far as the same was perceived to have been influenced by ulterior motives intended to ensure last delivery of favours to the cartel controlling the Judiciary before the Chief Justice left office;

d. The 1st Respondent breached the public trust and purported to rule the people other than serve them in disregarding statutory requirements and policy guidelines that govern the transfer of Judicial Officers;

e. The circumstances surrounding the making of the decision indicate lack of objectivity, influence, favouritism, improper motive for the reason that some Judicial Officers due for transfer had not been transferred and others not due for transfer had been transferred;

f. The transfer manifested lack of public interest, honesty and declaration of personal interests that may conflict with public duties in the 1st Respondent's exercise of his powers and duties in view of

his relationship with **Mr. Ahmednasir**; and,

g. The transfer manifested the 1st Respondent's lack of accountability to the public for decision and actions made in so far as the same are made prior to the time set out in the Transfer Policy to enable the 1st Respondent assist the cartels to whom he was beholden before he left office on the 16th day of June, 2016 upon attaining his retirement age.

24. These averments were expounded by way of supporting affidavits in which the petitioner reiterated the foregoing and added that since the Judiciary Transformation Framework 2012-2016 and the Judiciary Transfer Policy & Guidelines for Judicial Officers form the basis upon which the Chief Justice exercises the statutory power of transfer of Judicial Officers, the Chief Justice cannot claim absolute statutory powers in disregard of the two documents. It was deposed that the Chief Justice had confirmed in writing, in several publications in ***The Nairobi Law Monthly*** that he would uphold constitutional values and the polices set out in the Judiciary Transformation Framework 2012-2016 and the Judiciary Transfer Policy & Guidelines for Judicial Officers and to uphold the Constitution by affirming participation of stakeholders. In the petitioner's view, it was the legitimate expectation of all Kenyans that the 1st and 2nd Respondents would honour their constitutional, statutory and policy duties and commitments on the transfer of Judicial Officers.

25.The petitioner disputed the 1st Respondent's claim that he was not beholden to **Mr. Ahmednasir Abdullahi Maalim** in decisions made by him and the Judicial Service Commission ("JSC") and averred that the 1st and 2nd Respondents had continuously used **Mr. Ahmednasir's *The Nairobi Law Monthly*** to publicize their agenda, plans and strategies, most of which were determined by the publications.

26. It was the petitioner's belief that the 1st and 2nd Respondents and some judges positively or negatively affected in the transfer in dispute are beholden to **Mr. Ahmednasir** or are independent of him, depending on how matters before them are handled. It was the petitioner's case that it was shocking that **Mr. Ahmednasir**, in conjunction with **Hon. Paul Muite**, and **Messrs. Erick Kyalo Mutua** and **Dennis Mosota**, all formerly of LSK set up an award for rewarding Judges in cash, for exemplary performance yet they appear before the said Judges. To him, the Respondents' and the Interested Parties' failure to admonish **Mr. Ahmednasir** in his influence over the Judiciary lends more credence to the petitioner's apprehension that the decision for the transfer of Judges was influenced by ulterior motives, notwithstanding its illegality.

27. In the petitioner's view the Chief Justice was not taking an early retirement but was retiring as required by law, after turning 70 years.

28. In his submissions the petitioner, through his learned counsel, **Mr Havi** who appeared with **Miss Kasera**, contended that the power of transfer of Judges is given to the 1st Respondent by section 13 of the ***High Court (Organization and Administration Act*** No. 27 of 2015.

29. According to the petitioner, the Act does not provide the guidelines for the 1st Respondent's exercise of the power to transfer of Judges but only emphasizes that the power of transfer is exercisable for the purpose of promoting effective, prompt and efficient discharge of judicial services. It however directs that a judge shall report to the new duty station within 3 months from the date on which he or she was notified of the transfer.

30. In the petitioner's submissions, the guidelines for the exercise of the power of transfer of Judges are contained in JTF and the Transfer Policy.

31. It was submitted that special transfers are defined at page 366 as those effected on medical grounds, academic grounds, appointment to special functions, swapping of posts, and security reasons.

32. According to the petitioner, the transfer of Judges effected on 15th April, 2016 was based upon the

following statement by the 1st Respondent:-

> ***"In exercise of powers conferred to me under Section 13 of the High Court (Organization and Administration) Act, 2015, and in compliance with the 'Transfer Policy and Guidelines for Judicial Officers and Judges of the High Courts and Court of Equal Status', I have made the following transfers and deployment of Judges of the High Court of Kenya, Employment and Labour Relations Court, and Environment and Land Court. These transfers take effect from 2nd June, 2016."***

33. It was the petitioner's view that there is no dispute that this decision was in the nature of an ordinary transfer of Judges and that the transfer was to be effected in the annual chain on the 30th day of September and to take effect in January of the following year. Whereas the 1st Respondent claimed that he had acted in compliance with the Transfer Policy the decision to transfer was however not effected according to the Transfer Policy.

34. It was submitted that whereas the Respondents and the 3rd Interested Party are all categorical in their response on this breach that the **Judiciary Transfer Policy and Guidelines for Judicial Officers** are formulated under the provisions of the ***High Court (Organization and Administrative) Act No. 27 of 2015,*** is an internal policy document hence cannot override, supersede and triumph over an express provision of an Act of Parliament. Whereas the 3rd Respondent justified the transfers of the Judges on the claim that all affected Judges had served for 3 years in their stations and were due for transfer, the petitioner submitted that no explanation whatsoever, was made in respect to **Honourable Mr. Justice Charles Mutungi Kariuki** who had been at the Commercial & Admiralty Division in Milimani Law Courts for less than 8 months.

35. Citing Article 159 (1) of the Constitution which underscores that judicial authority is derived from the people and is to be exercised by the courts and tribunals established by or under this Constitution as well as Article 161 (2)(2) (a) which establishes the office of the 1st Respondent as the Head of Judiciary, it was submitted that the responsibility of ensuring that the Judiciary is run and managed in accordance with the will of the people, rests on the shoulders of the 1st Respondent who is obliged to uphold National Values and Principles of Governance as set out in Article 10 of the Constitution and to take into account national values and principles of governance in the making or implementation of public policy decisions. Amongst the values, according to the petitioner, are, participation of people, social justice, inclusiveness, equality, good governance, integrity, transparency and accountability.

36. To the petitioner, the transfer of judges is an administrative function exercised by the 1st Respondent under section 13 of ***The High Court (Organization and Administration) Act***, No. 27 of 2015. Since the 1st Respondent swore to implement the JTF and the Transfer Policy as a requirement of Article 159 of the Constitution, it was submitted that his actions to the contrary cannot be justified as the Respondents were bound to follow the Transfer Policy in the transfer of Judges. Based on **Justice Amraphael Mbogholi Msagha –vs- Chief Justice of the Republic of Kenya & 7 others (2006) eKLR** at page 23, it was submitted that the 1st Respondent cannot abrogate his constitutional duty on implementation of policy by claiming that the transfer of Judges is a mere ministerial duty. He also relied on **Republic –vs- Deputy Inspector General of National Police & 32 others (2013) eKLR** for the position that a transfer effected in disregard of the law is null and void *ab initio*. Further reliance was placed on **Richard Bwogo Birir –vs- Narok County Government & 2 others (2014) eKLR** and **Narok County Government & another vs Richard Bwogo Birir & another (2015) eKLR**, to the effect that all statutory powers given to a State/Public Officer must be exercised in accordance with the law and for the benefit of the people.

37. With respect to guidelines on transfer of judges, the petitioner cited **Vyas, Yash** (1992) ***The Independence of the Judiciary***, "Third World Legal Studies: Vol 11, Article 6 appearing at pages 138 to 141 in particular, page 139, where is it stated that:-

> **"However, safeguards, such as consultation with the Chief Justice, transfer only in public**

**interest and judicial review may insulate against the arbitrary use of the power of transfer by the executive."**

38. In this case, it was submitted that the 1st Respondent acted not only against public interest but actively breached the Constitution and the Transfer Policy in the making of the decision dated 15th April, 2016 and the said decision ought to be declared unconstitutional, unlawful, null and void *ab initio*.

39. The Petitioner therefore sought the following orders:

**1. A declaration be and is hereby issued that the transfer of Judges effected in the decision made by the 1st Respondent on the 15th day of April, 2016 is unconstitutional, unlawful, null and void *ab initio*.**

**2. A conservatory order be and is hereby issued staying the implementation and enforcement of the decision made by the 1st Respondent on the 15th day of April, 2016 transferring 105 Judges.**

**3. Or that such other Order (s) as this Honourable Court shall deem fit.**

**Respondents' Case**

40. The Respondents opposed the application.

41. According to them, the Petition is marred with personal discontents and preconceptions which have no legal basis whatsoever for invoking the Court's intervention. It was their view that amounts to utter disregard of the courts precious time and as such an abuse of court process and therefore incompetent and bad in law.

42. It was averred that Article 1(1) and (3) (c) of the Constitution of Kenya, 2010 sanctions and or delegates the sovereign power of the people to be exercised by Judiciary and independent tribunals while Article 161 (2) of the Constitution of Kenya 2010 establishes the office of the Chief Justice, who is the head of the judiciary.

43. The Respondents averred that the 1st Respondent was appointed as the Chief Justice and President of the Supreme Court strictly in accordance to section 24 to the Sixth Schedule of the Constitution of Kenya 2010 and that the process that led to his appointment was competitive and transparent in that the President, subject to ***National Accord and Reconciliation Act***, and after consultation with the Prime Minister and with the approval of the National Assembly, which upon intense interrogation of the 1st Respondent duly approved his appointment. It was therefore ingenious for the Petitioner to claim that the appointment as the Chief Justice and President of the Supreme Court of Kenya was doctored by any person, more so one **Ahmednasir Abdullahi**.

44. The Respondents asserted advice the Petitioner if he had any naysaying to the 1st Respondent's appointment as the Chief Justice, to follow other avenues which have been put into place for of addressing this and refrain from abusing court process and the Honorable Court's time and resources. It was disclosed that the 1st Respondent like all judges in Kenyan Courts is competent and privy to the national values and principles, Bangalore Principles of judicial conduct and other provisions of the law, and furthermore has taken oath of office so as to administer justice to the people of Kenya without fear or favor.

45. It was averred that the 2nd Respondent herein, the Judicial Service Commission, has the function of reviewing and making recommendations on the conditions of service of the judges, judicial officers, and staff of the judiciary, as stipulated under Article 172 (1) (b) (i) and (ii) of the Constitution of Kenya 2010. To the Respondents, the transfer of judges as envisaged under Part III of the ***Judicial Service Act, No. 1 of 2011*** provides for the criteria to be considered when transferring judicial officers and under this

section, regard shall be given to the efficiency of the Judiciary and, in considering public officers for promotion, merit and ability shall be taken into account as well as seniority, experience and official qualifications. Further to the foregoing, the Judicial Service Commission does not have any mandate to transfer judges. All it does is review and recommend their conditions of service hence the Commission's name should be struck out of the Petition since it does not transfer of judges.

46. Based on section 13(1) of the ***High Court (Organization And Administration) Act No. 27 of 2015*****,** it was contended that the mandate to transfer High Court Judges therefore lies squarely with the Chief Justice and the President of the Supreme Court of Kenya, and that the 1st Respondent is not required to consult and or inform the 2nd respondent of its decision to transfer judges. To the Respondents, a policy cannot override and triumph over an express provision of an Act of Parliament. It was emphasized that part VII of the **Judiciary Transfer Policy & Guidelines for Judicial Officers** gives discretion to the Chief Justice to transfer judges notwithstanding the specific provisions in the policy so as to foster efficient, effective and fair administration of justice and the interests of the Judiciary. In this case, the transfer of judges the 1st Respondent took into account the new High Court posts which were geared towards bringing justice closer to the people and that indeed the transfer of Judges will lead to clearing of case backlog as opposed to creating a backlog of cases as alluded to by the Petitioner, which indeed is in accordance to the Constitution of Kenya, 2010.

47. It was averred that the 1st respondent is not in charge of allocation of specific cases to be handled by judges, but rather the Presiding Judge of the respective Division, who is independent by dint of Article 160 of the Constitution of Kenya 2010. It is therefore foolhardy for the petitioner to state that the 1st Respondent was contemplating the allocation of files to certain Judges. In addition, the transfer of judges was not intended to pre-empt the posting of judges prior to the 1st Respondent's early retirement, which was entirely voluntary.

48. The Respondents took the view that under Article 160 (5) of the Constitution of Kenya 2010**,** a member of the judiciary is not liable in any action or suit in respect of anything done or omitted to be done in good faith and in lawful performance of a judicial duty and averred that the petition herein is threadbare and raises no cause of action capable of determination by this Honourable court.

49. It was submitted on behalf of the Respondents by their learned counsel, **Mr Okongo Omogeni, SC**, that Article 1(1) and (3) (c) of the Constitution of Kenya, 2010 recognizes the Sovereign power of the people which power is delegated to various State organs in the exercise of their including, the Judiciary and Independent tribunals and that anchored upon the aforestated delegation, Article 161 (2) of the Constitution of Kenya, 2010 establishes the office of the Chief Justice, who is the head of the judiciary. **Article 165** (1) of the Constitution of Kenya, 2010 establishes the High Court and provides for the position of the Principal Judge while section 5 (1) of the ***Judicial Service Act***, 2011 provides that the Chief Justice is the head of the Judiciary and the President of the Supreme Court and is the link between the Judiciary and the other arms of Government with the powers to exercise general direction and control over the Judiciary. Section 13 (1) of the ***High Court (Organization and Administration) Act No. 27 of 2015*** on the other hand makes provision for the transfer of Judges while the ***Judiciary Transfer Policy and Guidelines for Judicial Officers*** formulated under the provisions of the ***High Court (Organization and Administration) Act No. 27 of 2015.***

50. The Respondents also cited Part VII of the said Transfer Policy.

51. It was submitted that anchored upon the aforestated provisions of the law, it is not in contention that in as far as administration of the judiciary is concerned, the Office of the Chief Justice is empowered by law to administer and organize the judiciary. In this particular instance, the Notice dated 15th April 2016 by the 1st Respondent had the effect of posting judges to the newly created stations of **Kiambu, Nanyuki, Nyamira, Chuka, Lodwar, Kapenguria, Voi and Marsabit** towards efficient, effective and fair administration of justice which is of paramount consideration. The Respondents contended that the creation of the new stations was for purposes of bringing justice closer to the people thus decongesting the Courts surrounding the new stations contrary to the Petitioner's assertion.

52. According to the Respondents, on the Principles that govern the Posting and Transfer policy, The **Judiciary Transfer Policy and Guidelines for Judicial Officers** provides that:

> ***"The Policy shall be based on the following principles:***
>
> ***a. Judicial officers accept, upon appointment, to serve the people of Kenya wherever they may be called upon to serve within the Republic.***
>
> ***b. …….***
>
> ***c. …….***
>
> ***d. ……***
>
> ***e. there are circumstances which may require a judicial office to be transferred to a particular station, even though this may not be in line with the rotation required in the transfer policy.***

53. It was the Respondents' position that in reaching its decision dated 15th April 2016, the 1st Respondent **acted reasonably, in good faith and upon lawful and relevant grounds anchored upon the Constitution and statute Law and most importantly in the public interest for purposes of bringing justice closer to the people and that no iota of evidence was been brought before this Court to show that the 1st respondent acted with malice and *mala fides.*** In this regard, the Respondents argued that due consideration should be given to the provisions of Article 160 (5) of the Constitution of Kenya.

54. It was therefore submitted that the 1st Respondent while exercising his Constitutional discretion was not subject to the direction and/or mandatory consultation/counsel of any body/organ and as such he cannot be found liable for actions that were done in good faith.

55. The Respondents further submitted that towards determining whether the petition herein is arguable and not frivolous, it behoves this honourable Court to also determine whether the Constitutional violations alleged by the petitioner in the Constitutional petition herein dated 27th April 2016 were pleaded with the requisite degree of precision so as to be entertained by this Court. To the Respondents despite being a Constitutional petition, the petition dated 27th April 2016 is marred with numerous allegations against the 1st Respondent and other third parties who are not even parties to the suit. The petitioner claimed that the 1st Respondent is a puppet of one **Mr. Ahmednassir Abdullahi**, reasons whereof the 1st respondent's actions have always been towards **Mr. Ahmednassir Abdullahi** benefit. However, the few Constitutional provisions that have been strewn in the petition albeit haphazardly have only been towards an attempt to breathe life into pleadings that are in themselves incurable. In this regard, the Respondents relied on **S. W. M v G. M. N (2012) eKLR**, in which **Majanja, J** adopted the principle of pleading constitutional infringement with specificity as was explained in ***John Kimani Mwangi v Town Clerk Kangema*** **Nairobi Petition 1039 of 2007 (Unreported) where** the court said this about the requirement of specificity to allegations of constitutional violations:

> ***"Our courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights, they must state the provision of the Constitution allegedly infringed in relation to them, the manner of infringement and the nature and extent of that infringement…The reason for this requirement is two fold; first the respondent must be in a position to know the case to be met so as to prepare and respond to the allegations appropriately. Secondly, the jurisdiction granted by section 84 of the Constitution is a special jurisdiction to enforce specific rights which are defined by each section of the bill of rights. It is not a general jurisdiction to enforce all rights known to man but specific rights defined and protected by the Constitution. It is not sufficient to rely on a broad notion of unconstitutionality but rather point to a specific provision of the Constitution that has been abridged."***

56. On the same point, the Respondents cited the case of **Robert N. Gakuru & Others vs. The Governor of Kiambu County & 3 Others (2014) eKLR,** where the Court while analysing the issue of pleading constitutional violations with specificity held as follows:

> **"It follows therefore, that a breach of any of the rights and freedoms must be specifically pleaded, particulars thereof set out and facts in respect thereof indicated in the Affidavit of a petitioners which the Petitions do not. Hence as it cannot be ascertained what actual right or freedom has been contravened and in what way, the Petitions should fail on the author of the decisions in Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR and Stephen Njuguna & others –vs- Hon. Lewis Nguyai & others, H.c Petition No. 118 of 2011 (UR) where it was held that:**
>
> **"The jurisdiction of the court under Article 22 and 23 of the Constitution is one for enforcement of fundamental rights and freedoms guaranteed under the Bill of Rights. *Each right under the Constitution is specifically defined and has specific contents. It therefore follows that a party who invokes these provisions must set out clearly the sections or provisions he claims have been infringed or violated and show how these sections are infringed in relation to him.* The principle has been established in a long line of cases dating from Anarita K. Njeru vR [No. 1] (Supra)…...I also agree with the respondent that the petitioners' complaints are of a general nature and relate to dissatisfaction in the manner the ESP has been implemented. If this is the case, then, unless there are specific provisions of the Bill of Rights that have been infringed, I consider that the petition is lacking in merit."**

57. In regard to Articles 10(2)(a) of the Constitution of Kenya, it was reiterated that the 1st Respondent in exercising his judicial functions as donated by the Constitution was not under the obligation to consult any of the parties herein, much less the petitioner. It is therefore glaringly evident that this provision does not relate to the petitioner in any way.

58. In regard to **Articles 47 (1) & (3) (b)** of the Constitution of Kenya, the Respondent submitted that the Petitioner's allegation that the transfers by the 1st respondent as effected vide the Notice dated 15th April 2015 will not promote efficient administration and determination of matters already listed before the judges to be transferred, was not supported by evidence that no other judge of the High Court in Nairobi possesses the diligence and exactitude to deliver justice in the manner and form of the two transferred judges. Further, the pre-emptive nature of the Petitioners assertions does not take into account the paramount principle of efficient, effective and fair administration of justice all over Kenya, including the newly created High Court stations and not just in Nairobi.

59. In regard to **Article 73 (1) (a), (b) and (2) (b) to (e)** of the Constitution of Kenya, the Respondents averred that no iota of proof was tendered to show that the transfers by the 1st Respondent lacked objectivity and impartiality and was not geared towards commitment in service to the people.

60. It was therefore the Respondents contention that the petition herein lacks specificity, which renders the petition fatally incompetent and hopeless. This honourable Court has instead been forced to intervene in matters that can only act to embarrass the Court.

61. With respect to judicial immunity under Article 160(5) of the Constitution of Kenya 2010**,** it was submitted that the intention of the Constitution to protect and safeguard judicial officers from being personally culpable for acts they performed in good faith is to enable the officers to perform the functions of the office without fear of being held personally culpable, if acting in good faith, while discharging the functions of the office under the Constitution or the Act. It would thus be against the public interest to sue a judicial officer, who discharged their duty within the limits of the Constitution and statutes and in good faith. The Respondents relied on the case of **Maina Gitonga vs. Catherine Nyawira Maina & Another [2015] eKLR**.

62. The Respondents thus submitted that the Petition herein trifles the doctrine of public interest by not only hindering justice to be delivered to the people of Kenya but also by suing a Judicial officer who

acted within their judicial authority and in good faith and urged the Court to strike out the petition should therefore be struck out and/or dismissed with costs.

**2nd Interested Party's Case**

63. The 2nd interested party herein, the Law Society of Kenya, opposed the petition by way of the following grounds of opposition:

> **1. The Petitioner has failed to discharge the burden of proof in proving the allegations made in support of the Petition.**
>
> **2. The allegations of disruption of delivery of justice based on the transfer of Judges as continued in the decision of 15th April 2016 is baseless and unfounded.**
>
> **3. The discretion to transfer Judges is vested in the Chief Justice of the Republic of Kenya pursuant to the Constitution, the Judicial Service Act and the High Court (Organization and Administration) Act. The Petitioner has not demonstrated the unlawful exercise of discretion in the decision made on 15th April 2016.**
>
> **4. There is no requirement for consultation by the Chief Justice of the Republic of Kenya in the transfer of Judges as alleged in the Petition.**
>
> **5. The Petitioner has not established any violation, infringement or threatened violation or infringement of any of his rights or fundamental freedoms.**
>
> **6. The Petitioner has not established any violation, infringement or threatened violation or infringement of the Constitution of Kenya by the Chief Justice of the Republic of Kenya.**
>
> **7. The Petitioner has not established violation of any statutory law by the Chief Justice of Kenya in the decision of 15th April 2016.**
>
> **8. The Petition is vexatious and amounts to an abuse of process.**

64. In its submissions, the LSK averred that the decision to transfer the judges was made in accordance to the law and urged this Court in determining this Petition to be guided by the law applicable in the transfer of Judges and the evidence adduced by the Petitioner, Respondents and the 3rd Interested Party.

65. According to the LSK, the powers of the Chief Justice are donated by the Constitution and by statute including the ***Judicial Service Act*** and the ***High Court (Organization and Administration) Act***. Under Section 5(c) of the ***Judicial Service Act***, the Chief Justice exercises general direction and control over the judiciary while section 13 of the ***High Court (Organization and Administration) Act*** provides for the power of the transfer of Judges. It provides that the power of transfer or deployment of judges vests with the Chief Justice and may be done whenever it is necessary for promoting the effective, prompt and efficient discharge of judicial service. The objective of Part II of the Judiciary Transfer Policy & Guidelines for Judicial Officers, according to the LSK is to give discretion to the Chief Justice to transfer Judges while under Part III, a judge who has served for three years in a station shall be eligible for a transfer. Part III does not provide that a judge who has served for less than three years shall not be eligible for a transfer. Under Part III, the ordinary transfer shall as far as possible be effected by 30th September every year. Part III does not provide that the ordinary transfer shall be effected after 30th September of every year. Under Part VII, the Chief Justice has the discretion to transfer and deploy judges notwithstanding any provision in the policy. It was submitted that this discretion must also be exercised lawfully.

66. The LSK took the position that the burden of proof lies on the Petitioner to prove all the allegations made in the Petition and in the various affidavits by the Petitioner. Whereas this court established that the

Petitioner had *locus standi* to institute this Petition, the court also established that the Petitioner had not demonstrated the rights or fundamental freedoms which had been violated. To this extent therefore, it was submitted that there was no breach of any constitutional right or fundamental freedom in the decision of 15th April 2016.

67. Whereas the Petitioner was obliged prove that the decision to transfer the judges was unlawful, both under the Constitution and in statute and that the exercise of discretion by the Chief Justice was unlawful, the LSK contended that the allegations contained in the Petitioner's various affidavits with regard to the particular judges and advocates mentioned therein remained mere allegations which were not supported by any evidence.

68. It was submitted on behalf of the LSK, by its learned counsel, **Mr Mureithi**, that the Petitioner did not establish that the decision by the Chief Justice to transfer and deploy the judges was made through bad faith, as a punishment or there were other ulterior motives by the Chief Justice in undertaking the transfers and the deployment. This is so taking into consideration the Replying Affidavit by the 3rd Interested Party which clearly indicated the considerations for the transfer and deployment. Notably, save for the allegations by the Petitioner, the facts set out by the Respondents and the 3rd Interested Party as the reasons for the transfer and deployment, remain uncontested. These include the creation of other High Court stations in striving to attain a High Court in every county in the process of devolution which is a strong pillar of the Constitution of Kenya, 2010. To the LSK, the decision of 15th April 2016 was meant to safeguard and promote devolution and it drew the Court's attention to the statement by the Chief Justice made on 9th July 2015 produced in the Supplementary Affidavit of the **Honorable Mr. Justice Richard Mwongo**.

69. It was asserted that the allegation that a judge ought to report to the new station in which he has been transferred to after a period of 3 months is not true and the LSK referred the court to section 13 of the ***High Court (Organization & Administration) Act***. Similarly, it was the LSK's position that the assertion by the Petitioner that a judge must remain at a station for at least 3 years is not true and referred the Court to Part II of the **Judiciary Transfer Policy & Guidelines for Judicial Officers** which provides that the 3 years is a normal approximate tenure. This is also taking into account that Special Transfers are also provided for under Part IV.

70. To the LSK, the Petitioner has not proved that the Chief Justice did not take into account any of the values provided under Article 10 of the Constitution of Kenya. In its view, the Replying Affidavits prove that in fact, the values were adhered to in the transfer and deployment of the judges and that the decision was lawful and was made in accordance with the Judiciary Transfer Policy & Guidelines for Judicial Officers. To the Society, the Petitioner has not proved that the decision by the Chief Justice is tainted with illegality or that the Chief Justice breached any provision of the Constitution.

71. The LSK was therefore of the view that taking into totality of the evidence by the Petitioner, his submissions and the law, this is a Petition which ought to be dismissed as it is not based on any evidence, and the Petitioner has not proved the breach of any law or the Constitution.

**3rd Interested Party's Case**

72. On his part, the 3rd interested party herein, the Principal Judge, **Honorable Mr. Justice Richard Mwongo,** averred that in terms of Article 161(2)(a) of the Constitution and section 5(1) and 5(2)(c) of the ***Judicial Service Act***, the Chief Justice is the Head of the Judiciary, and exclusively exercises general direction and control over the Judiciary. Under section 6(2) of the ***Judicial Service Act*** the Principal Judge in consultation with the Chief Registrar is responsible to the Chief Justice for the administration of the High Court, which means the practical management, performance of the duties and functions of, and direction and operation of the High Court on a day to day basis.

73. The Principal Judge disclosed that pursuant to Article 165(1) (a) and (b) of the Constitution the ***High Court (Organisation and Administration) Act, 2015*** came into effect on 2nd January, 2016,and that its

object was to better provide for the organisation and administration of the High Court and for connected purposes. Under section 2 thereof the "administrative function" in relation to the Chief Justice, Principal Judge, Presiding Judge or a judge means "the discharge of non-judicial functions assigned under this or any other law, which are necessary to facilitate the exercise of judicial authority by the Court". Under section 6 of the said Act, the Principal Judge is responsible to the Chief Justice for *inter alia*, the overall administration and management of the Court as well as ensuring the orderly and prompt conduct of the business of the Court. It was averred that by custom and practice, and in pursuance of good governance principles pursuant to the Constitution, 2010, and the policies of the Judiciary, the Chief Justice generally consults with the Principal Judge and the Chief Registrar in making decisions concerning or that affect the High Court.

74. The Principal Judge cited section 13 of the ***High Court Organisation and Administration Act, 2015*** which provides that the Chief Justice may, whenever it is necessary for purposes of promoting effective, prompt and efficient discharge of judicial service transfer a judge from one station to another or deploy a judge from one division to another and averred that he was aware of and was consulted by the Hon. Chief Justice in respect of the transfer of judges made through his communication of 15th April, 2016 by which the Chief Justice sought to transfer only thirteen (13) judges of the Court and not the 105 judges as exaggerated in the Petition and affidavit of the Petitioner. He clarified that the transferred Judges were:

**i. Hon Mr. Justice Weldon Korir**

**ii. Hon Lady Justice Helen Omondi**

**iii. Hon Mr. Justice Charles Mutungi Kariuki**

**iv. Hon Lady Justice Mumbi Ngugi**

**v. Hon Mr. Justice Prof. Joel Ngugi**

**vi. Hon Mr. Justice David Majanja**

**vii. Hon Mr. Justice Hillary Chemitei**

**viii. Hon Mr. Justice Eric Ogola**

**ix. Hon Lady Justice Margaret N Mwangi**

**x. Hon Lady Justice Grace Nzioka**

**xi. Hon Lady Justice Roselyne Aburili**

**xii. Hon. Mr. Justice Edward Muriithi**

**xiii. Hon Lady Justice Beatrice Jaden**

75. It was averred that in effecting the said transfers, the Chief Justice in consultation with the Principal Judge took into account the Judiciary Transfer Policy & and Guidelines for Judicial Officers, 2015, which was a product of an exhaustive internal consultation process within the Judiciary, approved by the Judicial Service Commission in 2015, and published by the Chief Registrar of the Judiciary. It was asserted that in particular, the Principles governing the Posting & Transfer Policy at page 5 of the Transfer Policy that provide, *inter alia*, that judicial officers upon appointment accept to serve the people of Kenya wherever in the Republic they are called upon to do so, were taken into account.

76. According to the Principal Judge, under the Policy, General Provisions page 7 (paragraphs (a)-(d)), the normal approximate tenure of posting of a judicial officer is three (3) years; that the Chief Justice may maintain a judicial officer in one station for no more than five (5) years; and that in computing the period

served in a station, study leave or time spent on special assignments outside the Judiciary shall not count.

77. It was explained that of the thirteen (13) transferred judges, five (5) have served in the same Station or Division for over four (4) years, and thus were over-due for transfer as shown in the following list:

**a. Hon Mr. Justice Weldon Korir** - had served in the Judicial Review Division, Milimani Law Courts, since October, 2011, the first posting after appointment as a Judge;

**b. Hon Lady Justice Mumbi Ngugi** – had served in the Constitutional & Human Rights Division since October, 2011, Milimani Law Courts, the first posting after appointment as a Judge;

**c. Hon Mr. Justice Hillary Chemitei** - had served in Kisumu Station since October, 2011, the first posting after appointment as a Judge;

**d. The Hon Mr. Justice Eric Ogola** – had served in the Commercial Division, Milimani Law Courts, since October, 2011, the first posting after appointment as a Judge;

**e. Hon Prof. Justice Joel Ngugi** - had served as the Acting Director and Director of the Judiciary Training Institute since 1st March, 2012.

78. He averred that of the thirteen (13) transferred Judges, two (2) , namely, **Hon Lady Justice Helen Omondi** and **Hon Lady Justice Grace Nzioka** had not been sitting for over one (1) year due to study leave or vetting by the Judges and Magistrates Vetting Board, respectively. **Hon Lady Justice Hedwig Ong'udi** was transferred by the Hon Chief Justice on 10th February, 2016, with a reporting date of 1st April, 2016**,** as shown in the letters by the Hon Chief Justice.

79. The Principal Judge therefore clarified that when a List of Postings is released to the public by the Hon Chief Justice, it does not necessarily imply that every Judge listed therein has been transferred; rather, it constitutes a notification to the public as to the Court Station or Division which each Judge, whether then transferred or not, is posted and will be carrying out their judicial functions from.

80. It was averred that although the Chief Justice in consultation with the Principal Judge relied on the Policy Guideline in respect of the policy on transfers of judicial officers as referred to by the Petitioner, the same is an internal policy document that cannot supersede an Act of Parliament. Accordingly, with regard to the timeframe within which a judge must hand-over or report to a new Station or Division, under the ***High Court (Organisation and Administration) Act***, section 13(2) requires that "for the purpose of effective hand-over, a judge shall report to the new duty station within three months from the date of on which he or she was notified of the transfer". However, the ***High Court (Organisation and Administration) Act, 2015*** does not specify when transfers should be done, thus, they can be effected as and when the Hon. Chief Justice in his discretion determines there is need taking into account the efficient discharge of judicial service.

81. It was averred that the Hon. Chief Justice is not legally obligated to consult the 2nd Respondent and the 1st and 2nd Interested Parties or at all as the transfer of judges is a purely internal administrative matter, and any such public consultations would result in both the gross interference with the responsibilities of the Chief Justice and functions of the Judiciary, and unnecessary and undue publicity of the privacy of Judges in respect of their personal needs and other issues necessitating transfer.

82. It was revealed by the Principal Judge that he was aware that the Chief Justice had during his tenure in office made other transfers and postings of judges throughout all the High Court Stations in the country and that judges had been posted to new stations in 1st September 2014 and also in July 2015.

83. While declining to respond to the other matters relating to the publications in the Nairobi Law Monthly and other annextures to the petitioner's affidavit, the Principal Judge noted that they were not evidence of probative value to support the statements that the petitioner makes in regard to the transfers; it

is also not possible to trace any contravention of the Pillars in the Judiciary Transformation Framework as alleged by the petitioner; further, there is no evidence presented that any of the judicial officers is dissatisfied with the postings.

84. The 3rd interested party therefore believed that the Petitioner's Petition was wholly devoid of substance and was brought maliciously and in bad faith purely to ventilate issues between quarrelling counsel.

85. On behalf of the Principal Judge, it was submitted by **Mr Njoroge**, his learned counsel that the office of the Chief Justice is established under the Constitution of Kenya, 2010 under Article 161 (2) which states;

***There is established the office of- (a) Chief Justice who shall be the Head of the Judiciary.***

86. The 3rd interested party submitted that the Constitution of Kenya 2010 establishes the Office of the Chief Justice and the functions and powers of that office are carried out by its substantive holder, the Chief Justice who draws his powers from the Constitution which is the Supreme Law of the land and exercises his mandate as provided by the Constitution. The 3rd interested party relied on section 5(1) of the ***Judicial Service Act*** Cap 185 B under the heading *Functions of the Chief Justice and the Deputy Chief Justice* that provides that;

> ***The Chief Justice shall be the head of the judiciary and the President of the Supreme Court and shall be a link between the judiciary and other arms of government.***

87. Section 5(2)(c) of the same Act states that the Chief Justice is the Head of the Judiciary and the President of the Supreme Court and exercises the general direction and control over the judiciary which involves the transfer and deployment of Judges to various stations throughout the country among other functions which have been provided by law hence the transfer of Judges to various stations within the country was well within the powers of the Chief Justice. Based on the definition of "administrative function" under section 2 of the ***High Court (Organization and Administration) Act*** No 27 of 2015 it was submitted that administrative function in relation to the Chief Justice means the discharge of non-judicial functions assigned under this or other law which is necessary to facilitate the exercise of the judicial authority by the court. The Chief Justice in transferring Judges from one station to another is well within this definition as he is exercising his administrative functions and the transfer of judges is a non-judicial function. This law provides the Chief Justice with the go ahead to exercise his authority as the Head of the Judiciary. In transferring the said Judges he had not acted beyond his powers nor had he conferred upon himself powers which he did not have so as to effect the said transfers but was well within his mandate to do so.

88. In the Principal Judge's view section 13 of the said Act that deals with *Transfer and Deployment of Judges* is very clear that the only person who can transfer and deploy Judges to various stations and divisions is the Chief Justice and this is done so as to promote the effective, prompt and efficient discharge of judicial service. This section of the Law as stated above is clear that it confers powers upon the Chief Justice to effect any transfers or deployment of Judges within the Judiciary. Reference was however made to Part II of the Transfer Policy which prescribes the *General Provisions* and provides that the policy applies equally to all judicial officers and that all transfers of judicial officers subject to the discretion of the Chief Justice must be done in accordance with the policy save for exceptions outlined therein. It was however submitted that the Chief Justice in transferring the Judges to the various stations through the country was within his powers and was exercising them as provided by the Constitution and the other Statutes we have quoted above. He did not act in excess of his powers nor did he confer upon himself powers which he did not have so as to effect the transfers.

89. On the issue of unconstitutionality of the transfer of the Judges, reliance was placed on the ***Cambridge Dictionary*** which defines "unconstitutional" as "not allowed by the Constitution of a country or organization"; The ***Black's Law Dictionary*** which defines the same word as "that which is contrary to the Constitution." On the other hand the term "unlawful" is defined by the ***Oxford Dictionary*** as "not

conforming to, permitted by, or recognized by law or rules"; by the ***Black's Law Dictionary*** as "that which is contrary to the law."

90. According to the interested party, the Office of the Chief Justice is established under the Constitution of Kenya 2010 under Article 161 (2). The Chief Justice as stated in the Constitution is the Head of the Judiciary. The functions and powers of the Chief Justice are provided for in statute of which these statutes are in conformity with the Constitution as the Supreme Law of the land. The Office itself cannot carry out these functions nor exercise these powers and that's why they are carried out by the Chief Justice on behalf of the Office that is established under the Constitution. It was submitted that the Chief Justice did not act contrary to the provisions of the Constitution nor did he do that which is not allowed by the Constitution since the transfer of the Judges that happened on 15th April 2016 was well within the confines of the Constitution. Further, the transfer of the said judges was not unconstitutional as the transfer was directed by the Chief Justice as the Head of the Judiciary in exercising his administrative functions which functions are conferred upon him by statutes enacted by the Parliament.

91. Based on the provisions of section 13 of the ***High Court (Organization and Administrative) Act No 27 of 2015*** and the ***Judicial Service Act*** Cap 185B it was submitted that the Chief Justice in exercising his administrative functions acted within the provisions of the law as provided and did not act contrary to any law that relates to the Judiciary as he did not assume powers he did not have in transferring the judges.

92. As to whether the decision of the Chief Justice contravened the petitioner's right to fair administrative action, it was submitted that though it is not in dispute that pursuant to Article 47 of the Constitution, everyone has a right to fair administrative action, which is expeditious, efficient, lawful, reasonable and procedurally fair, the Chief justice in transferring the judges to their new station was expeditious as he made the decision within a short period, having followed the law, because he took into consideration the fact that matters were still pending in court and which need to be heard and determined quickly. If he did not have this in mind he would not have hurried the transfer of these judges. The decision he made was efficient, lawful, reasonable and procedurally fair because he followed the laid down law and procedure in transferring the Judges. Further, the petitioner herein has not shown how his rights or fundamental freedom has been or is likely to be affected by the decision of the Chief Justice to transfer the said Judges. He has not shown nor has he tabled any evidence to show how he is affected or likely to be affected by the said decision. It is trite law that when a person alleges that a Constitutional Right is being infringed or will be infringed must prove it. In this respect the 3rd interested party relied on ***Anarita Karimi Njeru's Case*** (supra) and **Trusted Society of Human Rights Alliance vs AG & 2 others [2012] eKLR**

93. The Principal Judge also relied on the academic text by **S.A De Smith** on ***Judicial Review of Administrative Action*,** **third Edition** (1973) Stevens and Sons Limited, at page 60 where it is stated that the term administrative refers to broad areas of governmental activity in which the repositories of power may exercise every class of statutory function, and that an administrative act cannot be exactly defined but includes the adoption of a policy, the making and issue of a specific direction and the application of a general rule to a particular case in accordance with the requirements of policy, expediency or administrative practice. It was submitted that going by the above text it is very clear that the Chief Justice in transferring the judges to their new stations was in exercise of his powers as mandated by the Constitution and statutes. He adopted the Judiciary Transfer Policy and Guidelines for Judicial Officers; he made a specific direction which was the transfer of the thirteen judges of the High court in exercise of his administrative function. The Chief Justice acted in accordance with the laid down policy on transfer of judges and the essence was for expediency in determination of matters for the interest of justice.

94. It was therefore submitted that the Chief Justice did not in any way contravene the petitioner's right to fair administrative action, but exercised his powers as the Head of the Judiciary and as provided by the law. The petitioner did not show how the Chief Justice violated his right to fair administrative action as enshrined in the Constitution. He did not show how he would suffer because of the transfer of the judges to their new stations.

95. It was submitted that the Chief Justice transferred a number of thirteen Judges and not one hundred and five as alleged by the petitioner in his petition and supporting affidavit. Further, the petitioner has not

presented any substantial evidence to support his petition. The numerous copies of the Nairobi Law Monthly, according to the Principal Judge, do not support in any way the petitioner's case. In this respect reliance was placed on **Joseph Mbalu Mutava vs. The AG and another [2014]** for the holding that newspaper evidence is of little probative value and as such cannot be solely relied on to resolve the issue raised by the petitioner. It was therefore submitted that the copies of the Nairobi Law Monthly cannot be relied upon only as well as the other documents the petitioner has adduced in court, they have no probative value nor are they persuasive.

96. It was submitted that the Chief Justice acted within his powers, his actions were neither unconstitutional nor unlawful, that he did not violate the right of the petitioner on fair administrative action and that he only transferred thirteen judges. The petitioner has not proved or shown how the Chief Justice has acted contrary to the law. To the contrary, the transfer of the said judges was for the interest of justice throughout the country and not just one part of the country.

97. In the view of the Principal Judge, this petition was overtaken by events given that the transferred judges were already in their new stations and had commenced work.

**Determinations**

98. I have considered the petition, the facts in support thereof, the affidavits and grounds in opposition thereto, the submissions made in support of the parties' respective cases as well as the authorities relied upon.

99. The first issue I intend to deal with is the immunity of the Respondents herein. I agree that the general position with respect to judicial immunity is the one restated in **Maina Gitonga vs. Catherine Nyawira Maina & Another [2015] eKLR** where High Court stated as follows:

> **"it is undoubted that under the established doctrine of judicial immunity, a judicial officer is absolutely immune from a criminal or civil suit arising from acts taken within or even in excess of his jurisdiction…Judicial immunity is necessary for various policies. The public interest is substantially weakened if a judge or a magistrate allows fear of a criminal or civil suit to affect his decisions. In addition, if judicial matters are drawn into question by frivolous and vexatious actions, 'there never will be an end of causes: but controversies will be infinite…I agree with Bosire J that judicial officers should not be put in a position which forces them to look over their backs every time they make a decision. Whenever a judicial officer has to make a decision, he should make such a decision in good faith and without fear that he will be taken to court for making the decision. Whenever a party wants to challenge the decision of a judicial officer by way of a judicial review, he should not make the judicial officer who made the decision a respondent. …"**

100. It is however my view that a judicial officer is not immuned in respect of all actions and inactions done or omitted by himself or herself unless such omission or commission occurs in the course of performance of his or her judicial functions. Article 160(5) of the Constitution of Kenya which provides that:

> ***A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.***

101. However Article 160(1) of the Constitution provides as follows:

> ***In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.***

102. It therefore follows that members of the judiciary, in carrying out their judicial functions must adhere to the dictates of the Constitution and the law. As long as they do that their actions cannot be the

subject of civil and criminal litigation. In carrying out their mandate, members of the judiciary just like the legislature and the executive must remember that theirs is a delegated function. This, in my view is the spirit of Article 1(1)(2) and (3) of the Constitution which in my view reflects the *Social Contract* jurisprudential theory. Those provisions provide that:

> ***(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.***
>
> ***(2)The people may exercise their sovereign power either directly or through their democratically elected representatives.***
>
> ***(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—***
>
> ***(a) Parliament and the legislative assemblies in the county governments;***
>
> ***(b) the national executive and the executive structures in the county governments; and***
>
> ***(c) the Judiciary and independent tribunals.***

103. It is therefore important to take special note of the fact that Article 160(5) of the Constitution expressly talks to "*judicial function*" as opposed to "*administrative function*". As rightly appreciated on behalf of the Principal Judge, pursuant to section 2 of the ***The High Court (Organization and Administration) Act***, No. 27 of 2015 the "administrative function" in relation to the Chief Justice, Principal Judge, Presiding Judge or a judge means "the discharge of *non-judicial* functions assigned under this or any other law, which are necessary to facilitate the exercise of judicial authority by the Court". The Principal Judge opined, rightly in my view, that in transferring Judges from one station or division to another, the Chief Justice is exercising his administrative functions as the transfer of judges is a non-judicial function. It follows that transfer of judges is not one of the functions contemplated under Article 160(5) of the Constitution and is accordingly not immuned from judicial scrutiny.

104. That function, in my view constitute administrative or policy function. In this respect I associate myself with the position of **S.A De Smith** on ***Judicial Review of Administrative Action*, third Edition** (1973) Stevens and Sons Limited, at page 60 that the term administrative refers to broad areas of governmental activity in which the repositories of power may exercise every class of statutory function, and that an administrative act cannot be exactly defined but includes the adoption of a policy, the making and issue of a specific direction and the application of a general rule to a particular case in accordance with the requirements of policy, expediency or administrative practice.

105. Article 165(6) of the Constitution provides that:

> ***The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***

106. In this case, it is clear that the Chief Justice in exercising his power of transfer of judges was exercising his administrative functions and being a State Officer the Chief Justice was enjoined to adhere to the provisions of Article 2 of the Constitution which provides that:

> ***(1) This Constitution is the Supreme law of the Republic and binds all persons and all state organs at both levels of government.***
>
> ***(2) No person may claim or exercise state authority except as authorised under this Constitution.***

107. In my view, when any of the state organs steps outside its administrative mandate, this Court will not hesitate to intervene and this was appreciated by the Supreme Court in **Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011** in the following words:

**"The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation."**

108. As this Court held in **The Council of Governors and Others vs. The Senate Petition No. 413 of 2014**:

**"this Court [is] vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the Petition before us alleges a violation of the Constitution by the Respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. In fact the invitation to do so is most welcome as that is one of the core mandates of this Court".**

109. In arriving at the said decision the Court cited with approval the decision **Kasanga Mulwa, J** in **R vs. Kenya Roads Board ex parte John Harun Mwau HC Misc Civil Application No. 1372 of 2000** wherein the learned Judge stated that:

**"Once a Constitution is written, it is supreme. I am concerned beyond peradventure that when the makers of our Constitution decided to put it in writing and by its provision thereof created the three arms of Government namely the Executive, the Legislature and the Judiciary, they intended that the Constitution shall be supreme and all those organs created under the Constitution are subordinate and subject to the Constitution."**

110. This was the position adopted by the Supreme Court in **Zacharia Okoth Obado vs. Edward Akong'o Oyugi & 2 others [2014] eKLR** where it was held that:

**"Article 3(1) of the Constitution imposes an obligation on every one, without exception, to respect, uphold and defend the Constitution. This obligation is further emphasized with regard to the exercise of judicial authority, by Article 159(2) (e) which requires that in the exercise of judicial authority the Courts must pay heed to the purpose and principles of the Constitution being protected and promoted. However, all statutes flow from the Constitution, and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void. Thus, it cannot be said that this Court cannot stop a constitutionally-guided process. What this Court would not do is to extend time beyond that decreed by the Constitution. However, a process provided for by the Constitution and regulated by statute can be stayed, as long as it is finally done within the time-frame constitutionally authorized. For that reason, this Court would, by no means be interfering with a constitutionally-mandated process, if the order for stay is granted. This is because an order for stay will be sufficient to bring to a halt the preparation of the by-election by the IEBC as well as stop the swearing in of the Speaker."**

**111. Nyamu, J** was even more blunt in his opinion in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** where he expressed himself as follows:

"**To exempt a public authority from the jurisdiction of the Courts of law is, to that extent, to grant doctorial power…This is the justification for the strong, it might even be rebellious, stand which the courts have made against allowing Acts of Parliament to create pockets of**

**uncontrollable power in violation of the rule of law…The law's delay together with its uncertainty and expense, tempts governments to take short cuts by elimination of the Courts. But if the courts are prevented from enforcing the law, the remedy becomes worse than the disease."**

**112. Professor Sir William Wade** in his authoritative work, ***Administrative Law***, 8th Edition at page 708 properly captured the failure of Parliamentary draughtsman as hereunder:

**"The Judges, with their eye on the long term and the rule of law, have made it their business to preserve a deeper constitutional logic, based on their repugnance to allowing any subordinate authority to obtain uncontrollable power."**

113. As was appreciated by **Langa, CJ** in **Hugh Glenister vs. President of the Republic of South Africa & Others Case CCT 41/08; [2008] ZACC 19** at para 33:

**"In our constitutional democracy, the courts are the ultimate guardians of the constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds."**

114. I associate myself with the positions adopted in these decisions and dare add that when any of the State Organs or State Officer steps outside its mandate, this Court will not hesitate to intervene. It is therefore my view that save for the actions falling within Article 160(5) of the Constitution, this Court is vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, as this petition alleges a violation of the provisions of the Constitution by the Respondents, it is my finding that the immunity donated by the Constitution to the members of the judiciary when exercising their judicial function does not extend to purely administrative functions such as the transfer of judges.

115. My finding is fortified under the principle that the Constitution is the Supreme Law of this country all State Organs and Officers must function and operate within the limits prescribed by the Constitution. In cases where they step beyond what the law and the Constitution permit them to do, they cannot seek refuge and ensconce themselves in judicial immunity when they are not performing their judicial functions in order to escape judicial scrutiny. Therefore save for the limited cases covered by judicial immunity, I adopt the position in **Githu Muigai & Another vs. Law Society of Kenya & Another [2015] eKLR** where it was held that:

**"In our view, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In *Republic vs. Kenya Revenue Authority Ex Part Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530*, it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others, and based on *East African Railways Corp. vs Anthony Sefu Dar-es-Salaam HCCA No.19 of 1971 [1973] EA*, Courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. Consequently, where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. Further, courts will not be rubber stamps of the decisions of administrative bodies. However, if Parliament gives great powers to statutory bodies, the courts must allow them to exercise it. The Courts must nevertheless be**

**vigilant to see that the said bodies exercise those powers in accordance with the law."**

116. In my view judicial immunity must be read in the context of our Constitutional framework and where the adoption of the doctrine would clearly militate against the constitutional principles that doctrine or principle must bow to the dictates of the spirit and the letter of the Constitution and the enabling legislation and it is not only the role of the Courts to superintend the exercise of such powers but their constitutional obligation to do so. In effect the immunity accorded to the judiciary by Article 160(5) of the Constitution only remains valid and insurmountable as long as its members are exercising their functions in good faith in the lawful performance of such judicial functions.

117. Once they leave their judicial stratosphere and enter the airspace of administrative action, their actions invite the wrath of judicial scrutiny and the Courts are then justified in scrutinizing their operations.

118. I must however hasten to add that where it comes to policy issues, this is not a jurisdiction that the Courts would lightly invoke. In this respect I would paraphrase the position adopted by the Supreme Court of India in **Maharashtra State Board of Secondary and Higher Secondary Education & Anor vs. Kurmasheth and others [1985] CLR 1083** at pg 1105 and hold that the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to matters pertaining to the transfer of judicial officers in preference to those of the Chief Justice who under section 5(c) of the ***Judicial Service Act***, is empowered to exercise general direction and control over the judiciary while section 13 of the ***High Court (Organization and Administration) Act*** vests in him the power of transfer or deployment of judges which power may be exercised whenever it is necessary for promoting the effective, prompt and efficient discharge of judicial service.

119. That the Chief Justice has the power to transfer Judges from one station to another or from one Division to another is not in doubt. This is clear from section 13 (1) of the ***High Court (Organization and Administration) Act No. 27 of 2015*** as read with Part II of the ***Judiciary Transfer Policy and Guidelines for Judicial Officers.*** Section 13 of the ***High Court (Organization and Administration Act*** No. 27 of 2015 provides that:

> ***(1)The Chief Justice may, whenever it is necessary for purposes of promoting effective, prompt and efficient discharge of judicial service—***
>
> ***(a) transfer a judge from one station to another; or***
>
> ***(b) deploy a judge from one division to another.***
>
> ***(2) For the purpose of effective hand-over, a judge shall report at the new duty station within three months from the date on which he or she was notified of the transfer.***
>
> ***(3) The Chief Justice shall take into account the expertise and legal specialization in the deployment of judges under subsection (1) (b).***
>
> ***(4) The Chief Justice may assign special duties to any judge for the purposes of exercising judicial authority.***

120. On the other hand, Part II of the ***Judiciary Transfer Policy and Guidelines for Judicial Officers*** states *inter alia* that:

> ***Transfer decisions shall be made by the Chief Justice as the head of the Judiciary provided that s/he may delegate the implementation of this policy to the Registrar responsible for Magistrates Courts and the Principal Judge of the High Court.***

121. The clause on Eligibility for Ordinary Transfer and Timing of Transfers in the Transfer Policy on the other hand provides that:-

***A Judicial Officer, who has served for three years in a station, shall be eligible for a Transfer…***

> ***a. As far as possible, the Ordinary Transfer of Judicial Officers shall be effected by the 30th of September every year, and the Judicial Officers transferred in the annual chain shall be required to report to their new station in January of the following year.***
>
> ***b. In cases of Special Transfers other than those in the annual chain as defined under section 7 of this Policy, the reporting date shall be indicated in the Transfer letter to be issued by the Chief Justice.***

122. Therefore there are two types of transfers envisaged in the Transfer Policy: ordinary and special transfers. Ordinary Transfer are to be effected by the 30th of September every year, and the Judicial Officers transferred thereunder are required to report to their new station in January of the following year. With respect to special transfers, the effective date is to be indicated in the transfer letter. Special transfers, according to the policy are those based on medical grounds, academic grounds, transfer on election or appointment to special functions, swapping of posts and transfer for security reasons. I am however not prepared to hold that these are the only instances in which special transfers may be effected. To do so would amount to unjustifiably curtailing the discretion of the Chief Justice in undertaking his Constitutional and Statutory mandate.

123. The Respondents and the 3rd Party have pursuant to the foregoing adopted the position that the ***Judiciary Transfer Policy and Guidelines for Judicial Officers*** as formulated under the provisions of the ***High Court (Organization and Administrative) Act No. 27 of 2015,*** is an internal policy document hence cannot override, supersede and triumph over an express provision of an Act of Parliament. It was further contended that Part VII of the **Judiciary Transfer Policy & Guidelines for Judicial Officers** gives discretion to the Chief Justice to transfer judges notwithstanding the specific provisions in the policy so as to foster efficient, effective and fair administration of justice and the interests of the Judiciary.

124. This argument, with due respect fails to appreciate the current constitutional framework. It may be deemed to trash the Transfer Policy unless treated with caution. Though the Chief Justice is clearly mandated to exercise his or her discretion in implementing the Transfer Policy, it is clear that power ought to be properly exercised and ought not to be misused or abused. According to **Prof Sir William Wade in his Book *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…"**

125. In my view, where the decision to effect the transfers is informed by other motives other than the legally recognised principles, the Court may well be entitled to interfere. I therefore associate myself with

the position adopted by **Vyas, Yash** in his article **"The Independence of the Judiciary: A *Third World Perspective*** published in ***Third Legal Studies:*** **Vol. 11, Article 6** where he states at page 138 that:

> **"A judge may sometimes be transferred from one jurisdiction to another. In many countries, prior consent of the judge whose transfer is proposed is not necessary. But any transfer by way of punishment is not permitted. Transfer with an oblique motive or for an oblique purpose, such as not toeing the line of the executive or for not rendering decisions unpalatable to the executive, amounts to a punishment. Such transfers are likely to be struck down by the courts, because they amount to interference with the independence of the judge concerned or of the judiciary."**

126. In my view, it is because of this that our transformative Constitution provides in Article 10 that all State organs, State officers, public officers and all persons whenever they make or apply policy decisions are bound by the national values and principles of governance which include participation of the people, inclusiveness, integrity, transparency and accountability. Our Constitution, in my view is a value-oriented Constitution as opposed to a structural one. The distinction between the two was made by **Ulrich Karpen** in ***The Constitution of the Federal Republic of Germany*** thus:

> **"…the value –oriented, concerned with intensely human and humane aspirations of personality, conscience and freedom; the structure-oriented, concerned with vastly more mundane and mechanical matters like territorial boundaries, local government, institutional arrangements."**

127. Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality. As appreciated by **Ojwang, JSC**, in **Joseph Kimani Gathungu vs. Attorney Genral & 5 Others Constitutional Reference No. 12 of 2010**:

> **"A scrutiny of several Constitutions Kenya has had since independence shows that, whereas the earlier ones were designed as little more than a regulatory formula for State affairs, the Constitution of2010 is dominated by s "social orientation", and as its main theme, "rights, welfare, empowerment", and the Constitution offers these values as the reference-point I governance functions."**

128. As was appreciated by the majority **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Sup. Ct. Advisory Opinion Appl. No. 2 of 2012** at para 54:

> **"Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions. A consideration of different constitutions are highly legalistic and minimalistic, as regards express safeguards and public commitment. But the Kenya Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a constitution takes such a fused form in its terms, we believe, a court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm."**

129. The Court is therefore required in the performance of its judicial function to espouse the value

system in the Constitution and to avoid the structural minimalistic approach. The German Federal Constitutional Court in **Luth Decision BVerfGE 7, 198 I. Senate (1 BvR 400/51)** noted as follows:

> **"But far from being a value free system the Constitution erects an objective system of values in its section on basic rights and thus expresses and reinforces the validity of the basic rights. This system of values, centering on the freedom of human being to develop the society must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration and judicial decisions. It naturally influences private law as well, no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit."**

130. The foregoing position was aptly summarised by the South African Constitutional Court in **Carmichele vs. Minister of Safety and Security (CCT 48/00) 2001 SA 938 (CC)** in t following terms:

> **"Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court: 'The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and the judiciary.' The same is true of our Constitution. The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed."**

131. Therefore the Constitution of Kenya, 2010, just like the post Nazi German Basic Law and the post-apartheid 1996 Constitution of South Africa, as 'a transformative instrument' is the key instrument to bring about a better and more just society". See **Michaela Hailbronner** in ***Traditions and Transformations: The Rise of German Constitutionalism***.

132. It is my view that our position is akin to the one described by the German Constitutional Court in **BVverfGE 5, 85** that:

> **"Free democratic order of the Basic Law…assumes that the existing state and social conditions can and must be improved. This presents a never-ending task that will present itself in ever new forms and with ever new aspects."'**

133. This is my understanding of Article 20(2)(3) and (4) of the 2010 Constitution which provides as follows:

> ***(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.***
>
> ***(3) In applying a provision of the Bill of Rights, a court shall—***
>
> > ***(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and***
> >
> > ***(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.***
>
> ***(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—***
>
> > ***(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and***

***(b) the spirit, purport and objects of the Bill of Rights.***

134. To paraphrase **Chege Kimotho & Others vs.Vesters & Another [1988] KLR 48; Vol. 1 KAR 1192; [1986-1989] EA 57, the Constitution** is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle. It must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. As appreciated **In the Matter of the Estate of Lerionka Ole Ntutu [2008] KLR 452:**

> **"Constitution of any country of the world should not represent a mere body or skeleton without a soul or spirit of its own. The Court would not like to discard the possibility of the court adopting broader view of using the living tree principle of the interpretation of the Constitution where they are "amongst others, ambiguity, unreasonableness, obvious imbalance or lack of proportionality or absurd situation."**

135. Similarly in **Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006,** it was held that:

> **"…the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits."**

**136. Nyamu, J** (as he then was) in **Richard Nduati Kariuki vs.Honourable Leonard Nduati Kariuki & Another [2006] 2 KLR 356** expressed himself as hereunder:

> **"The Constitution is a living document. It is a house with many rooms, windows and doors. It is conservative enough to protect the past but flexible enough to advocate new issues and the future."**

137. It follows that the norms and values identified in Article 10 of the Constitution are bare minimum or just examples. This must be so because Article 10(2) of the Constitution provides that:

> ***"The national values and principles of governance include…"***

138. By employing the use of the term "include" the framers of the Constitution were alive to the fact that there are other values and principles which may advance the spirit of the Constitution and hence all State organs, State officers, public officers and all persons may be enjoined to apply them. What this means is that the national values and principles of governance in Article 10 of the Constitution are not exclusive but merely inclusive. The Constitution set out to plant the seed of the national values and principles of national governance but left it open to all State organs, State officers, public officers and all persons when applying or interpreting the Constitution, enacting, applying or interpreting any law, or applying or implementing any public policy decision to water and nurture the seedling to ensure that the plant develops all its parts such as the stem, the leaves, the branches and the flowers etc. In other words the national values and principles of governance must grow as the society develops in order to reflect the true state of the society at any given point in time.

139. Article 10(1)(c) of the Constitution binds all State organs, State officers, public officers and all persons to the national values and principles of governance thereunder whenever any of them makes or implements public policy decisions. The transfer of Judges clearly is a public policy decision and this was appreciated in the preamble to Transfer Policy in the following terms:

> ***While important and necessary, Transfer of Judicial Officers inevitably cause disruption in service delivery and in the private lives of the Judicial Officers and their families. If not properly managed, Transfer can be a source of stress and low morale for Judicial Officers, resentment between colleagues, and a build-up of case backlog. This policy is in line with***

***Pillars 1 and 2 of the Judiciary Transformation Framework 2012 – 2016 on the Expeditious delivery of Justice and Transformative Leadership, Organizational Culture and Professional and Motivated Staff respectively.***

140. Clearly therefore in implementing the Transfer Policy the Chief Justice while appreciating that the **Judiciary Transfer Policy and Guidelines for Judicial Officers** provides that judicial officers accept, upon appointment, to serve the people of Kenya wherever they may be called upon to serve within the Republic, ought to take into account the circumstances of the individual Judge in order to uphold the dignity of the person as mandated under Article 28 of the Constitution. It is therefore not out of place for the Chief Justice to for example consider the impact of the transfer on the family of the concerned judicial officer at that particular time. In **Republic –vs- Deputy Inspector General of National Police & 32 others (2013) eKLR** this Court expressed itself on the issue as follows:

> **"In the preamble to the Constitution, the people of Kenya committed themselves *inter alia* to nurturing and protecting the well-being of the individual, the family, communities and the nation. In Olum & Another vs. Attorney General (2) [1995-1998] 1 EA 258, it was held that although the national objectives and directive principles of State policy are not on their own justiciable, they and the preamble of the Constitution should be given effect wherever it is fairly possible to do so without violating the meaning of the words used. To emphasise the importance the Constitution attaches to the family Article 45(1) of the Constitution provides as follows:**
>
> ***The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.***
>
> **Article 3(1) of the Constitution enjoins every person to respect, uphold and defend the Constitution. Therefore in exercising its statutory powers the executive ought to ensure that its action is geared towards the recognition and protection of the family unit as far as is practicable. To take actions which are meant to place the family unit in jeopardy would be clearly contrary to the spirit of the Constitution. To fail to take into account the need to recognise and protect the family therefore amounts in my view to failure to take into account a relevant factor… To transfer a public officer without taking into account his family obligations not only affects the officer but his family as well such as the right to education as enshrined under Article 43 of the Constitution."**

141. The Chief Justice is also required to consider the impact of the same on the administration of justice. Such matters as part heard matters, in my view must have been the rationale for the provision of adequate notice in the Transfer Policy between the notification of the transfer and the effective date for the same.

142. It therefore follows that the Chief Justice in implementing Transfer Policy must adhere to the national values and principles of governance. Whereas, the Court does not relish the habit of interfering with policy decisions of those entrusted with the mandate of implementing the same, it is only after they comply with the relevant Constitutional and statutory provisions in implementing the policy that this Court would be barred from interfering with the decision. It is that context that I understand the following various decisions dealing with policy decisions.

143. In **Republic vs. The Council of Legal Education ex parte James Njuguna and 14 Others, Misc Civil Case No. 137 of 2004 [2007] eKLR it was held that:**

> **"It would not be improper or right for the court to veto powers conferred by Parliament on a public authority or body…and for the court to substitute its own view from that of the [body] to which discretion was given except where the discretion has been improperly exercised as enumerated in the ten situations above."**

144. In other words it is not the Court's view on the suitability of the decision that should determine whether or not the Court should interfere with the same. Where it is not shown that the decision was

unreasonable, I associate myself with the decision of the Court of Appeal in **Eunice Cecilia Mwikali Maema vs. Council of Legal Education and 2 Others Civil Appeal No. 121 of 2013** that:

> **"…it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the Regulations."**

145. I also wish to associate myself with the decision in **Susan Mungai vs. The Council of Legal Education & 2 Others Constitutional Petition No. 152 of 2011 in which Mumbi Ngugi, J expressed herself as follows while citing with approval the case of Republic –vs- The Council of Legal Education ex parte James Njuguna and 14 Others, Misc Civil Case No. 137 of 2004 (unreported):**

> **"The decision was made on merit and this Court has no reason to intervene. The Regulations and the policy behind the rules were properly made pursuant to the Act and it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the regulations...a Court of law would only be entitled to inquire into the merits of a decision in circumstances where the decision maker abused its discretion, exercised its decision for an improper purpose, acted in breach of its duty to act fairly, failed to exercise its statutory duty reasonably, acts in a manner which frustrates the purposes of the Act which gives it power to act, exercises its discretion arbitrarily or unreasonably, or where its decision is irrational or unreasonable as defined in the case of *Associated Provincial Picture Houses Ltd. –v- Wednesbury Corporation [1947] 1 KB 223*.."**

146. It is however my view that it is one thing to say that the Court ought not to interfere with policy decisions and another to investigate the manner in which such policy decisions are arrived at. While the Court may not set about investigating the merits of the policy decisions, there is nothing barring the Court from investigating the manner and the process through which such policy was arrived at.

147. As clearly expressed in Part II of the Transfer Policy prescribing general provisions, the policy applies equally to all judicial officers and that all transfers of judicial officers subject to the discretion of the Chief Justice must be done in accordance with the policy save for exceptions outlined therein. How then does the Chief Justice exercise his discretion on matters of transfer?

148. The Transfer Policy itself appreciates that there may be circumstances that may warrant action being taken without adhering to the strict dictates of the Transfer Policy. In my view this must be the thinking that dictated Part VII of the said Transfer Policy, which deals with discretion in the following terms:

> **a. *"notwithstanding anything contained in this policy, the efficient, effective and fair administration of justice and the interests of the judiciary shall be of paramount consideration in all transfer decisions.***
>
> ***b. In regards to matters which are not specifically provided or covered by this policy, the Chief Justice may issue such general or particular directions as s/he may consider necessary to effectuate this policy and the smooth administration of justice.***
>
> ***c. In case any doubt arises with regard to any aspect of this policy or its implementation, the same will be clarified by the chief justice and such clarification shall be treated as part of this policy.***

149. The foregoing provisions therefore give the Chief Justice wide powers to take action geared towards attaining the efficient, effective and fair administration of justice and the interests of the judiciary even if such actions do not necessarily conform to the Transfer Policy. Accordingly the Transfer Policy is not cast in stone and is subject to the exigencies of a particular period in time. In this respect the Transfer Policy recognises that *there are circumstances which may require a judicial officer to be transferred to a particular station, even though this may not be in line with the rotation required in the transfer policy*. It is however my view that in order to stem arbitrary decisions, the Chief Justice where he or she opts for a decision that is not in line with the Transfer Policy ought to explain to the public the reasons behind such

a decision.

150. In this case, according to the Chief Justice, the decision to transfer judges was in exercise of powers conferred to him under section 13 of the ***High Court (Organization and Administration) Act, 2015,*** and in compliance with the 'Transfer Policy and Guidelines for Judicial Officers and Judges of the High Courts and Court of Equal Status'. Clearly this statement did not allude to existence of exceptional circumstances warranting a transfer which was not in line with the Transfer Policy.

151. It is my view that in implementing the public policy decision by way of transfer of judges the Chief Justice owes to the public a statement informing the public of the circumstances that informed him or her in making that decision. This, if for nothing else, will avoid speculations and conjectures as was witnessed in this case where the public or part of it, form the notion that the transfers have been engineered by some "dark forces". It will also avoid perceptions that the transfers are being used as a means of rewarding or punishing some judges for the views they may hold. This will go a long way in helping the achievement of the object of part VII of the **Judiciary Transfer Policy & Guidelines for Judicial Officers** that provides that the discretion to the Chief Justice to transfer judges is to foster efficient, effective and fair administration of justice and the interests of the Judiciary.

152. It has however been explained in these proceedings and judicial notice may be taken of the fact that the Notice dated 15th April 2016 by the 1st Respondent had the effect of posting judges to the newly created stations such as **Kiambu, Nanyuki, Nyamira, Chuka, Lodwar, Kapenguria, Voi and Marsabit.** The Respondents contended that the creation of the new stations was for purposes of bringing justice closer to the people thus decongesting the Courts surrounding the new stations contrary to the Petitioner's assertion. Article 48 of the Constitution enjoins the State to ensure access to justice for all persons. One of the ways in which this can be achieved is by establishing Courts in the whole Republic and posting Judges and judicial officers thereto. In my view it would have been imprudent to establish Courts and then wait for the normal transfer cycle to post judges. The mere fact that some judges who may not have served the period provided under the ***High Court (Organisation and Administration) Act, 2015*** were affected by the said action does not necessarily in my view render such decision unlawful. Policy matters are discretionary and as long as the discretion is not being exercised un-judiciously, the Court ought not to interfere. The exercise of discretion in circumstances where the transfer is occasioned by the need to implement the Constitution, as was in this case, may necessitate reorganisation of the judiciary and may on occasions lead to movement of judges which movements may not necessarily be in line with the normal transfer policy. Suffice it to say that there is no evidence before me that any of the affected Judges were prejudiced by the said action. The law however permits the Chief Justice in making decisions relating to transfer of judges to take into account *the expertise and legal specialization in the deployment of judges* and that in my view may dictate the manner in which the transfers are effected.

153. In my view, the Court ought not to lightly interfere with decisions made by professional men and women possessing technical expertise and rich experience of actual day to day working of judicial institutions and the departments controlling them. It will be wholly wrong for the Court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the judicial system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. It is equally important that the court should also as far as possible, avoid any decision or interpretation of a statutory provision, rule or byelaw which would bring about the result of rendering the system unworkable in practice. I also agree with the position adopted in **Puhlofer & Anor. vs. Hillingdon London Borough Council [1986] 1 AC 484** that:

> **"It is not appropriate that judicial review should be made use of to monitor actions of local authorities under the Act, save in exceptional cases. Where the existence or non-existence of fact is left to the discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to who Parliament has entrusted the decision making power save where it is obvious that the public body consciously or unconsciously are acting perversely."**

154. The Petitioner has raised issues which in his view show that the transfers were effected by ulterior motives. In his own petition, he has referred to what in his view are public perceptions. To support these public perceptions he relied on media reports. In **Wamwere vs. The A.G (2004) 1 KLR and Randu Nzau Ruwa & 2 Others vs Internal Security Minister & Anor [2012],** it was held that:

> **"…media articles, taken alone, are of no probative value and do not demonstrate any effort on the part of the petitioners to demonstrate violation of the Constitution by the respondents".**

155. This position was approved in **Michael Maina Kamami & Another vs. Attorney General [2016] eKLR** in which the Court cited with approval the decision in **Kituo Cha Sheria and Another vs Central Bank of Kenya and 8 Others, Petition No 191 of 2011, Consolidated with Petition No 292 of 2011,** where the Court expressed itself as follows:

> **"[32] As correctly pointed out by the Attorney General and the 1st respondent, the petition has its basis in a newspaper article and documents which have not been executed. Clearly, therefore, the primary documents that the petitioners rely on are of doubtful probative value, as submitted by the respondents in reliance on the case of Wamwere vs The A.G and Randu Nzau Ruwa and 2 Others –vs- Internal Security Minister and Another (2012) eKLR. If I may borrow the words of the court in the Ruwa case, with tremendous respect to the petitioners, these media articles, taken alone, are of no probative value and do not demonstrate any effort on the part of the petitioners to demonstrate violation of the Constitution by the respondents.**
>
> **[33] The first is a newspaper article from the Daily Nation of October 19 2011. The second is an unsigned, undated agreement referred to as a** "**Share Sale and Purchase Agreement"**. **The third is the lease between Central Bank and Thomas De La Rue Kenya Limited entered into in 1992, while the fourth document is titled "De La Rue Currency and Security Print Limited Statement of Financial Position as at March 2009"**.
>
> **[34] The petitioners have alleged violation of public procurement laws. On the basis of the documents before me, it is difficult to see how such violation occurred. There is no evidence that the alleged contracts had been entered into, and if they had, whether the process was indeed in violation of the law that regulations procurement**."
>
> **(See also Michael Sistu Kamau and 12 Others vs Ethics and Anti-Corruption Commission and 4 Others [2016] eKLR)**

156. In **Michael Maina Kamami & another vs. Attorney General [2016] eKLR**, the Court proceeded that:

> **The foregoing makes it quite clear on the inadmissibility of newspaper articles and cuttings and I do not see any reason to depart from the holding therein. I say so well aware that Rule 10 (3) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*** provides as follows:
>
> > ***"Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom."***
>
> **Rules 9 and 10 do not depart from the requirements that only admissible documents should be the basis of any credible evidence.**

157. I do not therefore attach much weight to the said media reports. Such reports cannot be the basis upon which the Court can successfully assail a policy decision especially where a plausible reason is placed before the Court as in this case.

**Summary of Findings**

158. I have dealt in the preceding sections with the issues which were raised before me in this petition. What remains is to summarise my findings in this judgment and my disposition of the petition. Consequently I find that:

> **1. In his decision of 15th April, 2016, the 1st Respondent was undertaking a special transfer. Accordingly, he was obliged pursuant to Article 10 of the Constitution to explain to the public the circumstances that necessitated the same. I however reject the notion that the 1st Respondent was obliged to consult any member of the public before doing so.**
>
> **2. I find that in his statement effecting the said special transfers, by failing to disclose the reasons for the same, the 1st Respondent did not comply with the provisions of Article 10 of the Constitution.**
>
> **3. I find however that the Respondents and the 3rd party have satisfactorily explained the circumstances that necessitated the said transfers and I am satisfied that the 1st Respondent was entitled take the action he took in the circumstances notwithstanding the provisions of the Transfer Policy.**
>
> **4. I find that there is no satisfactory evidence or material before me to show the said transfers were based on ulterior motives or were influenced by third parties.**
>
> **5. Accordingly, I find that the transfer of judges effected on 15th April, 2016 was lawful.**

**Disposition and Remedies**

159. Having considered this petition, it is my view that this petition in the whole must fail.

160. In the result the petition is dismissed but with no order as to costs considering my finding on the issues of the need for reasons for the special transfers as well as the fact that this was a public interest litigation.

161. Orders accordingly.

**Dated at Nairobi this 15th day of December, 2016**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Mr Havi for the Petitioner***

***Mr Gichuru for Mr Mureithi for the 2nd interested party***

***CA Mwangi***