Judicial Service Commission v Speaker of the National Assembly & 4 others; Commission on Administrative Justice (Amicus Curiae); Law Society of Kenya (Interested Party) (Petition 518 of 2013) [2014] KEHC 7493 (KLR) (Constitutional and Human Rights) (15 April 2014) (Judgment)

Judicial Service Commission v Speaker of the National Assembly & 8 others [2014] eKLR

Neutral citation: [2014] KEHC 7493 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 518 OF 2013

RM MWONGO, HA OMONDI, CW MEOLI, M NGUGI & HK CHEMITEI, JJ

APRIL 15, 2014

IN THE MATTER OF ENFORCEMENT AND INTERPRETATION OF THE CONSTITUTION

AND

IN THE MATTER OF THE INDEPENDENCE OF CONSTITUTIONAL COMMISSIONS AND INDEPENDENT OFFICES

BETWEEN

THE JUDICIAL SERVICE COMMISSION ..... PETITIONER

AND

SPEAKER OF THE NATIONAL ASSEMBLY ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

JUSTICE (RTD) AARON GITONGA RINGERA ..... 3RD RESPONDENT

JENNIFER SHAMALLAH ..... 4TH RESPONDENT

AMBROSE OTIENO WEDA ..... 5TH RESPONDENT

AND

COMMISSION ON ADMINISTRATIVE JUSTICE ..... AMICUS CURIAE

AND

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

Parliament's Standing Orders cannot override the Constitutional insulation provided for Constitutional Commissions in the exercise of their mandate.

Reported by Nelson Tunoi & Riziki Emukule

Constitutional law*-doctrine of separation of powers-arms of government-relationship between the different arms of government-nature and scope of Parliamentary oversight over State organs-whether the National Assembly enjoyed unlimited oversight over independent commissions and offices-nature and scope of the jurisdiction of the High Court in relation to the acts of other arms of Government-Constitution of Kenya, 2010, article 171, 251(3)(4), 253*

Civil Practice and procedure*-Parties-Joinder of parties- non joinder and misjoinder of parties-whether JSC was the correct petitioner-where the petition related to the removal of some of its members and not the entire Commission-whether the Speaker of the National Assembly could be enjoined in a suit-where the orders being sought in a petition were directed at the National Assembly-Constitution of Kenya, 2010 article 156; Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 ("Mutunga Rules") Rule 5 (b)(c)*

Brief facts

The conflict between the Petitioner, the Judicial Service Commission (hereafter JSC) and the 1st Respondent (Speaker of the National Assembly) was triggered by the action taken by the former against the then Chief Registrar of the Judiciary (hereafter CRJ) on 17th August, 2013. The Petitioner subsequently resolved on 19th August 2013 to send the said CRJ on compulsory leave for 15 days pending investigation and inquiry into allegations made against her in respect of her discharge of duties.

The joint committees of the JSC responsible for Finance and Administration and Human Resource Management were thereafter mandated to inquire into the allegations, *inter alia*, on procurement, employment, administration, finance and corporate governance and to frame specific issues to enable a response from the CRJ, against whom the allegations had been brought. Later, a petition by one Riungu Nicholas Mugambi (hereafter the '*Mugambi* Petition') was brought seeking the removal of the six Commissioners who were members of the Finance and Administration Committee of the JSC.

The JSC went to Court and obtained interim conservatory orders to stop deliberations of the Committee on Justice and Legal Affairs of the National Assembly (hereafter the 'Committee') on the petition. This order was not complied with. A further order was then issued by the Court barring deliberations of the full House in respect of the report of the Committee on the petition. This order was also disobeyed. Finally, the Court issued a stay of the Special Gazette Notice No. 15094 pending the *inter-partes* hearing of the application.

The effect of the order was to bar the chairperson and the members of the tribunal appointed on 29th November 2013 from commencing the investigations into the conduct of the six Commissioners and further stayed their suspension.

Issues

1. Whether a party wrongfully enjoined as a respondent to a petition could be held accountable for the actions of others.
2. Whether a person not a party to a petition could be bound by the orders made in a petition which was not served on him.
3. Whether the Judicial Service Commission was the proper petitioner in the instance where the petition related to the removal of some of its members and not the entire Commission.
4. Whether the Speaker of the National Assembly could be sued in his personal capacity in an instance where the orders being sought in a petition were directed at the National Assembly.
5. What was the nature and scope of Parliamentary oversight of State organs?

6. Whether the National Assembly enjoyed unlimited oversight over independent commissions and offices.
7. What was the nature and scope of the jurisdiction of the High Court in relation to the acts of other arms of Government?

Held

1. With regard to the issue of joinder, the provisions of Rule 5 (b) and (c) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereafter the "Mutunga Rules") which state as follows applied:

"(b) A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.

(c) Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit."

2. The suspension of the six (6) Commissioners as envisaged by the Mugambi petition would only have served to cripple the activities of the Petitioner given that it comprised of eleven members and moreover, a petition could not be defeated by the joinder or misjoinder of parties. The Petitioner was the proper petitioner in the matter.

3. The Speaker of the National Assembly was in law and effect the presiding and Principal Officer of the National Assembly on whose shoulders lay the responsibility for the proper constitutional conduct of proceedings and decisions in the National Assembly. The National Assembly was not a juristic person and its actions were taken and communicated through the Speaker, not through the entire House and as such the Speaker could be joined as a party or respondent in matters pertaining to the National Assembly. (See: Speaker of the Senate & Another v Hon. Attorney-General & 4 Others [2013] eKLR, Advisory Opinion No. 2 of 2013). Under the current constitutional dispensation, a party with a legitimate claim could not be barred from recourse simply because of the technical doctrine of legal personality.

4. The President's actions were based on actions undertaken by the National Assembly resulting in a petition to him under article 251(3) of the Constitution of Kenya, 2010. This was invalid since it was as a result of a process in Parliament that took place in violation of a Court order, hence making the President's acts to be based on an invalid act yet an act done in willful disobedience of a Court order was both a contempt of Court and an illegal and invalid act which could not effect any change in the rights and liabilities of others. Thus it was not necessary to join the President as a party to the proceedings.

5. The Constitution did not define the national government, but it was inherent in its provisions that the national government was the national Executive, the Legislature and the Judiciary as opposed to the County or devolved government. Any disputes in Court that involved either of these organs of State to which the people of Kenya have delegated their sovereign power were proceedings in which the Attorney General had a constitutional duty to appear. The new Constitution had brought a change in the governance structures, and consequently brought the organs of government, which were mandated to work together in the spirit of mutual respect and co-operation, into an unseemly conflict. The Attorney General had to find the middle ground that would enable him to play his constitutional role as the principal legal advisor of the government, as the legal representative of the national government in proceedings before the Court, and to promote, protect and uphold the rule of law and defend the public interest. In doing so, he had to emphasize the core principle of the Constitution which was that the Constitution was supreme and that all organs of state were bound by the provisions of the Constitution.

6. The doctrine of Parliamentary supremacy, which once gave Parliament the unbridled right to regulate and conduct any of its business as it pleased, was no longer central in the Constitution of Kenya. The Constitution

dispersed powers among various constitutional organs and where it was alleged that any of these organs had failed to act in accordance with the Constitution, then the Courts were empowered by article 165 (3)(d)(ii) to determine whether anything said to be done under the authority of the Constitution or of any law was inconsistent or in contravention of the Constitution. As such courts could only interfere with the work of Parliament in situations where Parliament acted in a manner that defied logic and violated the Constitution. Where a dispute arose which alleged violation of the Constitution, then judicial intervention would not be a violation of the doctrine of separation of powers as the Court would merely be performing its solemn duty under the Constitution. The Court had jurisdiction to deal with proceedings before the House or its Committees where allegations of violation of the Constitution were made.

7. The Committee in declining to afford the Petitioner time within which to make a response to the Mugambi Petition as well as to afford a hearing to the Petitioner's counsel to make representation before it while acting in its quasi-judicial capacity, not only breached the Standing Orders but also express provisions of the Constitution.

8. With regard to whether the Court was justified and in accordance with its jurisdiction within the context of the doctrine of separation of powers, it is the Constitution which was supreme and none of the arms of government could claim supremacy since it vested the High Court with the onerous responsibility of being its watchdog. The need for power to be dispersed to various arms of government in order to avoid abuse of the rights of citizens was reflected in the Constitution. Article 1(1) vested sovereignty in the people who then delegated their sovereign power to the three organs of government to be exercised in accordance with the Constitution.

9. The place of court orders in any civilized society was well settled in that they had to be obeyed. The only option available to a party aggrieved by a Court order was to appeal or apply for variation or discharge of that order. That was the only way to maintain the rule of law and the people's confidence in the judicial system. Kenya's legislative bodies had the obligation under article 94(4) to discharge their mandate in accordance with the terms of the Constitution and could not plead any internal rule or statutory provision as a reprieve. Therefore it was not a violation of the doctrine of separation powers for the Court to issue orders restraining acts of the Legislature that were alleged to be in violation of the Constitution.

10. Any decision made or action taken in defiance of a lawful Court order was null and void. Therefore the appointment of the tribunal by the President pursuant to the recommendation of the National Assembly in consequence of the proceedings before the Committee and the resolution of the National Assembly was null and void.

11. Parliamentary oversight was intended to be people-centered meaning the people had to be the beneficiaries or intended beneficiaries of Parliamentary oversight. Thus, Parliamentary oversight was not an end in and of itself or a mandate to be exercised in a whimsical or capricious manner. However, Parliament's oversight mandate was not a *carte blanche*. It had to be exercised in obedience and full perspective of all provisions of the Constitution and the law. The power to oversee organs of state including independent commissions like the Judicial Service Commission (JSC) did not extend to a violation of the independence of the commission acting within their mandate. Parliament could only summon the JSC over a legitimate cause.

12. The Judicial Service Commission was a creature of the Constitution, an independent commission subject only to the Constitution and the law and, as provided under article 249(2), was not subject to direction or control by any person or authority. Like other constitutional commissions and independent offices, the JSC was of necessity obliged to operate within the confines of the Constitution and the law. While enjoying financial and administrative independence, the JSC was accountable to Parliament. The JSC was also a partner to Parliament in supporting constitutional democracy.

13. Parliament, in carrying out its oversight role, had to respect the independence of the JSC and other independent offices. This was particularly important because of the pivotal role assigned by the Constitution to the JSC to facilitate and promote the independence and accountability of the Judiciary under article 172

of the Constitution of Kenya, 2010. The JSC played a complementary role to Parliament in overseeing the entire Judiciary. Also, the JSC and indeed the Judiciary had to be seen to be free from the undue influence of other organs.

14. Parliament's Standing Orders could not override the Constitutional insulation provided to independent commissions in the lawful exercise of their mandate. The question relating to the sending of the CRJ on compulsory leave and issues and circumstances thereof were matters of which the JSC was properly seized under article 172(1)(c). Consequently, the attempt by the Committee to interfere with the matter even before the JSC could complete its own inquiries cannot be defended under the banner of Parliamentary oversight. In the circumstances, the summons to the JSC by the Committee must be seen to reflect an intention to direct and control the JSC's exercise of its mandate under article 172(1)(c). Parliamentary exercise of the oversight mandate and authority to summon under articles 95 and 125 of the Constitution of Kenya, 2010 must be balanced against the independence of the commission as long as it was acting lawfully.

Petition Allowed.

Orders

i. *Petitioner as a Constitutional Commission not subject to the control or direction of the National Assembly or any of its Departmental Committees established under the Standing Orders in the lawful discharge of its Constitutional mandate under article 172 of the Constitution.*

ii. *The National Assembly through the Departmental Committee on Justice and Legal Affairs was not entitled to supervise and sit on appeal on the decisions of the Judicial Service Commission when the Commission was lawfully discharging its mandate under the Constitution.*

iii. *Order of Certiorari granted to remove to the High Court quashing the proceedings before the Committee on Justice and Legal Affairs seeking the removal of members of the Judicial Service Commission.*

iv. *The resolution of the National Assembly to transmit the Petition to the President in defiance of a Court order is null and void and hence quashed.*

v. *The appointment of the 3rd to 6th Respondents by the President of the Republic of Kenya as members of the Tribunal contemplated under article 251(4) of the Constitution of Kenya, 2010 under Special Gazette Notice No. 15094 was null and void and hence quashed.*

vi. *Justice (Rtd) Aaron Gitonga Ringera, Jennifer Shamalla, Ambrose Otieno Weda and Mutua Kilaka prohibited from taking oath, assuming office, carrying on or in any way discharging their mandate as members of the Tribunal appointed under Special Gazette Notice No. 15094.*

vii. *No order as to costs.*

Citations

Statutes

None referred to

Advocates

Mr. P.K. Muite, Mr. Issa and Ms. Mutua for the Petitioner
Mr. S.M Mwenesi for the Interested Party
Mr. Njoroge Regeru for the Attorney General
Mr. Y. Angima for the Amicus

JUDGMENT

Introduction

1. This petition brings into sharp focus the tensions that have arisen under the new Constitution with regard to the doctrine of separation of powers and the relationship between the arms of government and state organs in the execution of their respective mandates under the Constitution. In particular,

it calls for an inquiry into the important oversight role played by Parliament and its implications with regard to independent commissions established under the Constitution. It also raises the question of the extent to which the Court can intervene in the exercise of this oversight role by the Legislature where it is alleged that such exercise of the oversight role has been conducted in violation of the Constitution.

Background

2. The events that precipitated the filing of this petition started with the decision of the Petitioner to take certain disciplinary action against the then Chief Registrar of the Judiciary (hereafter CRJ), Mrs. Gladys Boss Shollei. During its deliberations at a meeting held on 17th August, 2013, the Judicial Service Commission (hereinafter referred to as the 'Petitioner' or 'JSC') passed a resolution to send the CRJ on compulsory leave to facilitate investigations and inquiry into allegations leveled against her in the discharge of her duties. Following a full meeting of the JSC on 19th August, 2013, the decision to send the CRJ on compulsory leave was confirmed.

3. Hot on the heels of this decision by the JSC, the Committee on Justice and Legal Affairs of the National Assembly (hereafter the 'Committee') by a letter dated 20th August, 2013, summoned the Petitioner for a meeting on 22nd August, 2013, to:

> "'...deliberate on the process, issues and circumstances surrounding her [CRJ] suspension and the general state of the Judiciary."

4. The Petitioner declined vide its letter to the Committee dated 26th August, 2013 informing the Clerk of the National Assembly that in making the decision to send the CRJ on 15 days' compulsory leave to facilitate investigations into the allegations of impropriety, the Petitioner was executing its mandate under the Constitution.

5. The Committee did not respond to this letter, but by a further letter dated 5th September 2013, the Committee demanded the annual reports of the JSC in respect of the financial year 2011/212 and 2012/2013 pursuant to Article 254(1) and (2).

6. On 17th September 2013, the Petitioner forwarded a copy of the Judiciary's Annual Report and Financial Statements for the 2011/2012 fiscal year and explained that allocations for the Commission were drawn from the Judiciary vote R 26 operated by the CRJ. They also attached the JSC's Annual Report regarding its activities in the said year. It also explained that the reports for the following year were not ready.

7. Again, the Committee did not react to the JSC response. Instead, by a letter dated 17th October, 2013, the Clerk of the National Assembly wrote to six of the JSC Commissioners forwarding a petition by one Riungu Nicholas Mugambi (hereafter the 'Mugambi Petition') seeking the removal of the six Commissioners who were members of the Finance and Administration Committee of the JSC. The Petitioner responded through its Counsel, Senior Counsel Mr. Paul Muite, who wrote to the Clerk of the National Assembly requesting for two weeks within which the Petitioner would respond to the Mugambi Petition as requested by the Committee. On 25th October, 2013, the Petitioner's Counsel, in the company of the Deputy Registrar of the Judiciary appeared before the Committee. The Committee, however, declined to hear the Petitioner's Counsel and resolved to proceed and prepare its report for presentation before the National Assembly for adoption on 31st October, 2013.

8. On 30th October, 2013, the Petitioner filed an application before the High Court for conservatory relief against the National Assembly staying any or further proceedings and restraining the Committee from hearing, deliberating, or in any way determining the Mugambi Petition.

9. An interim conservatory order was issued by the Court directed at the National Assembly and or the Committee staying any further proceedings under Article 251 (3) of the Constitution and restraining the Committee from hearing, deliberating, or in any way determining the Mugambi Petition. The said order was served on the 1st Respondent, the Speaker of the National Assembly (hereafter The Speaker) and the 2nd Respondent, the Attorney General (hereafter the AG) on the 30thand 31st of October, 2013, respectively.

10. Despite service, the Speaker and the AG did not file any response to the petition or the application for conservatory relief, and the application proceeded unopposed on 5th November, 2013 before Odunga J. On 6th November, 2013, Odunga J, made an order staying the suspension or removal from office of the six commissioners who were the subject of the Mugambi Petition, pending the hearing and determination of the Petition which was scheduled for hearing on 22nd January, 2014. The Court Order was served on the Speaker and the AG on 6th November, 2013.

11. Despite service of the Court order, the Speaker transmitted the Mugambi Petition to the President in accordance with the resolution of the National Assembly, leading to the appointment of a Tribunal under Article 251 (3). On 29th November, 2013, the 3rd - 6th Respondents were gazetted vide Special Gazette Notice No. 15094 as members of the Tribunal appointed by the President under Article 251 (4)to investigate the conduct of the six commissioners with a view to their removal.

12. Upon application by the Petitioner, Odunga J, in his ruling of 3rd December 2013, extended the Orders barring the suspension of the six Commissioners and restrained the Tribunal comprising the 3rd -6th respondents from sitting to deliberate on the Mugambi Petition.

The Parties

13. This petition pits the JSC, a constitutional commission established under Article 171 and constituted as a body corporate with perpetual succession and a common seal under Article 253,against the Speaker and the AG. The AG is joined pursuant to Article 156 which establishes the office and provides that the AG is the principal legal advisor of the government.

14. The 3rd- 6threspondents were appointed by the President as members of a tribunal under Article 251(4)vide Special Gazette Notice No. 15094 of 29th November, 2013.They did not file any pleadings or appear in these proceedings.

15. The Commission on Administration of Justice was admitted as a friend of the Court and shall hereafter be referred to as the 'Amicus'. It is established under Article 59(4) of the Constitution and the Administration of Justice Act, 2011. It states that its mandate obliges it to protect the sovereignty of the people of Kenya, defend and ensure observance of the Constitution.

16. Last is the Law Society of Kenya (hereinafter the 'LSK') which was admitted as an Interested Party. LSK is established under the Law Society of Kenya Act with a mandate under section 4 thereof to assist the Government and the Courts in all matters affecting legislation and the practice of law in the country.

Preliminary Matters

17. Prior to the hearing of this petition, three applications were made for joinder of the applicants in different capacities, either as interested parties or friends of the Court. Mr. Onesmus Mboko and the LSK applied to be enjoined as Interested Parties while Katiba Institute (hereafter Katiba)sought admission as Amicus Curiae. All the applications were opposed by the AG, while the petitioner opposed the application by Mr. Mboko. After hearing the submissions of the parties, we allowed

the application by LSK but dismissed the application by Mr. Mboko and Katiba. Given the need to proceed with the hearing of the petition and the time constraints at play, we reserved our reasons which we now present hereunder.

18. Katiba had sought to be enjoined as a friend of the Court as it is an institution with expertise in constitutional law, administrative and public international law; that it is a non-partisan, charitable organization dedicated to the full and effective implementation of the Constitution; and that its Counsel and Directors have ample experience in making submissions before Kenyan Courts and international human rights fora regarding interpretation and application of national, foreign and international law.

19. In opposing the joinder of Katiba, the AG contended that Katiba was clearly partisan on the issues in dispute. Mr. Regeru for the AG referred to three articles published in The Star Newspaper to illustrate the alleged partisan position of Katiba. One was written by Learned Counsel for, and a Director of, Katiba, Mr. Waikwa Wanyoike. It was titled "The President Erred in Forming JSC Tribunal" and is dated 6th December, 2013; another by Prof. Yash Pal Ghai, also a Director of Katiba, titled "In Defence of The CJ and Judiciary Politics Right of Reply" dated 12th December, 2013; and a third article also by Prof. Ghai titled "Katiba Corner: Separation of Powers A Principle, Not A Formula" dated 14th December, 2013. The AG argued that Katiba held strong views regarding the issues raised in this petition, which views support some of the parties.

20. In considering whether or not to allow the participation of any party either as an interested party or as a friend of the Court, the Court is guided by the provisions of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereafter the "Mutunga Rules").Rule 2thereof defines "friend of court" as an independent and impartial expert on an issue which is the subject matter of proceedings but is not a party to the case and serves to benefit the Court with their expertise.

21. In the case of Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others[2014] eKLR, the Supreme Court observed that an Amicus ought not to be partisan and that it was a 'neutral' party admitted into the proceedings so as to aid the Court in reaching an 'informed' decision, either way. It had also reached a similar position in the case of Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others (2013) eKLR in which it held that where, in adversarial proceedings, parties allege that an applicant for joinder as an Amicus Curiae is biased or hostile to one or more of the parties, or where the applicant through previous conduct appears to be partisan on an issue before the Court, then such objection must be considered seriously.

22. Consequently, in considering whether to allow participation by a party as a friend of the Court, we must consider whether the party can be deemed 'neutral' or 'non-partisan'.

23. In the present case, while the expertise of Katiba and its Directors is not disputed, the same could not be said for their non-partisanship. A reading of the three newspaper articles clearly shows that the two Directors of Katiba have taken a position on the issues arising in this matter and expressed strongly their views thereon. Their expertise notwithstanding, given the precedent from the Supreme Court on the issue of who qualifies as a friend of the Court, we could not properly allow their participation in the matter.

24. We reached a similar conclusion with regard to the participation of Mr. Mboko, who, as a former Member of Parliament, alleged that as a politician and an opinion leader, he has a duty to promote the Constitution in accordance with Article 3, 4 and 10.He contended that he would be able to make valuable contribution to the issues at hand, drawing from his experience in Parliamentary matters and

the workings of Parliamentary Committees. It was also his contention that the AG would not be in a position to properly represent the public interest as he had a conflict of interest in light of his role as a member of the JSC and as the principal advisor to the government under Article 156.

25. The AG's response was that his office was capable of dealing with the responsibilities imposed on it by the Constitution under Article 156; and that in any event, such conflict as was alleged could not be resolved by the joinder of Mr. Mboko as an interested party.

26. Rule 2 of the Mutunga Rules defines an interested party as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court, but is not a party to the proceedings or may not be directly involved in the litigation. In our view, the application by Mr. Mboko did not meet the criteria set in the Mutunga Rules. No identifiable stake or legal interest in the proceedings was demonstrated; nor was it shown how the outcome of these proceedings would impact on him. Further, with regard to his knowledge of Parliamentary matters and proceedings of Parliamentary committees, there was already a substantive party, the Speaker of the National Assembly, who could deal with the issues in dispute, and was the proper party to do so.

27. As noted above, we allowed the LSK to participate in the proceedings as an Interested Party. In Trusted Society of Human Rights Alliance (supra), the Supreme Court observed as follows with regard to an Interested Party:

> "Suffice it to say that while an interested party has a 'stake/interest' directly in the case, an Amicus' interest is its 'fidelity' to the law...Consequently, an interested party is one who has [a] stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause."

28. In opposing the joinder of LSK, the AG argued, among other things, that LSK had not shown an identifiable stake in the matter or in its outcome, or what prejudice it would suffer if it was not enjoined as a party. In response, LSK submitted, correctly in our view, that the provisions of section 4 of the Law Society of Kenya Act, Cap 16,list its objects as, inter alia, the obligation to assist the Court and to protect the public interest; that it has two members in JSC, elected by its membership in accordance with Article 171(2).We therefore took the view that it was entitled to participate in the proceedings as an interested party.

29. Having disposed of the application in relation to joinder of the parties, we proceeded with the hearing of the petition on the 1st and 2nd of April 2014. We now proceed to deal with the petition and the respective cases of the parties.

The Pleadings

30. The petitioner filed an Amended Petition dated 3rd December, 2013 supported by an affidavit sworn by Ms. Winfrida B. Mokaya, the JSC Registrar, on 10th March, 2014. The Petitioner also filed written submissions dated 28th March 2014.

31. The Speaker did not file a reply or appear in the proceedings at all, though the Court record indicates that he was duly served with all pleadings and processes. The Speaker's failure to participate was regrettable because the Court would no doubt have benefitted from hearing the National Assembly's perspective on the important national issues raised in this petition.

32. The AG did not file an affidavit in response to the Amended Petition but relied on his written submissions dated 28th March, 2014.LSK filed an affidavit sworn by its Secretary, Mr. Apollo Mboya on 21st March 2014, as well as written submissions dated 31st March 2014.

The Petition

33. It is useful, for a better understanding of the issues that we are confronted with, to set out in full the orders sought in this matter. In its amended Petition, the JSC seeks the following orders:

    1. " A declaration that the Petitioner as a Constitutional commission is not subject to the control or direction of the National Assembly or any or any of its Departmental Committees established under the Standing Orders in the lawful discharge of its Constitutional mandate under Article 172 of the Constitution.

    2. A declaration that members of the Judicial Service Commission are not personally liable for the corporate decisions if the Commission.

    3. A declaration that the attempt by the National Assembly through the Committee on Justice and Legal Affairs to supervise and sit on appeal on the decisions of the Judicial Service Commission is a violation of the Constitution.

    4. A declaration that the purported Petition filed by Riungu Nicholas Mugambi seeks to punish members of the Judicial Service Commission for discharging their mandate and is therefore an unconstitutional encroachment on the independence of the Judicial Service Commission and the Judiciary.

    5. A declaration that the Petition presented by Riungu Nicholas Mugambi was filed to achieve a collateral purpose of disbanding and crippling the operations of the Judicial Service Commission and is therefore unconstitutional.

    6. An order of Certiorari to remove to the High Court and quash the Petition presented by Riungu Nicholas Mugambi seeking the removal of members of the judicial Service Commission.

    7. An order of Certiorari to remove to the High Court and quash the proceedings before the Committee on Justice and Legal Affairs seeking the removal of members of the Judicial Service Commission.

    8. An order of Certiorari to remove to the High Court and quash the resolution of the National Assembly to forward the Petition to the President that is null and void in law having been made in defiance of a court order.

    9. A declaration that the appointment of the 3rd to 6th Respondents by the President of the Republic of Kenya as members of the Tribunal contemplated under Article 251(4) of the Constitution is null and void.

    10. An Order of Certiorari to remove to the High Court and quash the appointment of the 3rd to 6th Respondents as members of the Tribunal contemplated under Article 251(4) of the Constitution under Special Gazette Notice No. 15094.

    11. An order do issue prohibiting Justice (Rtd) Aaron Gitonga Ringera, Jennifer Shamalla, Ambrose Otieno Weda and Mutua Kilaka from taking oath, assuming office, carrying on or

in any way discharging their mandate as members of the Tribunal appointed under Special Gazette Notice No. 15094.

12. Respondents to pay the Petitioner costs of the Petition in any event."

The Submissions

34. The parties made lengthy and comprehensive submissions which revolved around five main issues: the independence of constitutional commissions and their insulation by the Constitution from untoward interference by other organs of state; the doctrine of separation of powers and its implications with regard to the jurisdiction of the Court under the Constitution to check the acts of the Legislature and the Executive; the meaning and extent of the oversight role of Parliament vis-a-vis other state organs; the constitutional threshold for the removal of constitutional commissioners; and the question whether there had been a misjoinder of parties.

35. We shall briefly set out hereunder the salient arguments raised by the parties in respect of each issue. In doing so, it is perhaps appropriate to start by setting out the submissions on the last issue which goes to the competence of the petition.

Non-joinder and Misjoinder of Parties

36. The AG raised the joinder issue by posing three questions: who should be the proper parties to this petition; whether a party wrongfully enjoined as a respondent to the petition can be held accountable for the actions of others; and whether a person who is not a party to the petition can be bound by the orders made in the petition which were not served on him.

Whether JSC is the proper Petitioner

37. The AG argues that the JSC is not the proper party to this petition; that it should not have filed this petition in its own name as the issues that gave rise to it relate to the removal of six individual members of the Commission and not the Commission itself. It was the AG's contention that the JSC was the wrong party and was litigating the personal issues of individual commissioners at tax payers' expense.

38. The Amicus agrees with the AG on this issue. Its contention is that this dispute was precipitated by the Mugambi Petition seeking the removal of six Commissioners; the petition made adverse allegations against these six Commissioners, and the orders of the Court were obtained for their protection. Its view was therefore, that these six Commissioners would have been the proper persons to challenge the decision of the National Assembly. The mere fact that they were discharging their functions as members of the JSC, which could have been a defence at the Tribunal appointed by the President, was not a sufficient reason for the JSC to file this petition in its name.

39. The petitioner takes the contrary view, contending that JSC is the right petitioner. As a constitutional commission, it is entitled, where its functions are threatened, to approach the Court under Article 22 and seek relief under Article 23. It further argued that the Mugambi Petition was seeking to remove members of the Commission, not in their individual capacity but as members of the Finance and Administration Committee of the JSC, (one of the two Committees established under section 14 of the Judicial Service Act(JSA)), for alleged violation of the Constitution. It contended further that under section 22(5) of the JSA, the quorum at sittings of the JSC is six of its eleven members, and if the six Commissioners were suspended, the JSC would not be able to function. In its view, this would mean that the disciplinary process against the CRJ would not proceed, which it alleges was the intention behind the petition.

Joinder of the Speaker

40. The second issue under this head relates to the joinder of the Speaker. The AG argued that the Speaker should not have been sued in his personal capacity while the orders sought are directed at the National Assembly, which is established under Article 93. The AG's contention is that the Speaker, being an ex officio member of the National Assembly as provided under Article 97(1) (d), is not the proper party; that he merely presides over the business of the National Assembly in accordance with Article 107 and that the business of the National Assembly, whether of the whole House or when the House is acting through Committees, is not the Speaker's business but the business of the House. Counsel's submission therefore was that it was the National Assembly that should have been a party to the suit, placing reliance on the decision of Majanja J, in High Court Petition No. 454 of 2012, Commission for the Implementation of the Constitution v Parliament of Kenya and 5 Others. His contention was that these entire proceedings and the resultant orders may have been misdirected. targeted at the wrong party.

41. Mr. Issa, Counsel for the Petitioner, argued that the Speaker is properly a respondent in the matter as the the National Assembly is not a juristic person. He relied on the case of Speaker of the Senate & Another v Attorney General & 4 Others [2013] KLR-SCK (Advisory Opinion No 2 of 2013), involving the Speaker of the National Assembly and the Speaker of the Senate and submitted that no objection was raised before the Supreme Court even though the National Assembly was not a party. Heal so called in aid the decision of the High Court of Tanzania in the case of Hon. Augustine Lyatonga Mrema v Speaker of the National Assembly & Another Misc. Civil Application No. 36 of 1998 (Unreported) with regard to the pre-eminent role of the Speaker and why he should be a party to these proceedings.

42. LSK's position was that though the Speaker chose not to appear in these proceedings, under section 7 (1)(b) of the Office of the Attorney General Act, the AG has a right of audience where matters before the Court involve the Legislature, Executive and Judiciary; and that consequently, by virtue of the AG's presence, given his constitutional and statutory mandate, the government is represented.

Non-joinder of the President

43. The final argument raised by the AG with regard to joinder of parties relates to the place of the President in the scheme of things in this matter. The AG contended that the President is not a party to these proceedings, yet certain allegations have been made against him, and orders made by the Court which have affected his decision materially and directly. He argued, further, that if the President was a party to the petition any orders intended to bind him should have been served on him or concrete proof provided that he was aware of the orders in question.

44. Counsel submitted that it is trite law that only parties to proceedings can be affected by those proceedings. He relied on the decision of Odunga J, in Gideon Mwangangi Wambua v Independent Electoral and Boundaries Commission and 2 Others [2013] eKLR in which the Learned Judge cited the Court of Appeal decision in Ernest Orwa Mwai v Abdul Rashid & Another, Civil Appeal No. 39 of 1995. He further submitted that injunctive orders must be served upon the party whose actions are sought to be restrained, placing reliance on Rodgers Muema Nzioka & 2 Others v Tiomin Kenya Limited [2001] eKLR. It was his contention that the only exception was in situations where actual knowledge of the existence of an order is established. (See also Basil Criticos v the Attorney General and 4 Others (2012) eKLR.)

45. To the contention that the Attorney General was served with the orders issued by the Court on 30th October and 6th November 2013, and that therefore the President could not validly appoint a Tribunal under Article 251(4), the AG made a three pronged response.

46. First, he conceded that he is the principal legal adviser to the government, and that if the national government were a party, then his office would be deemed to be representing the government in accordance with Article 156 (4). He maintained, though, that the government is not a party to these proceedings, and that it would therefore be an unreasonable extension of the AG's role under Article 156(4) for him to be depicted, in Mr. Regeru's words, as "Advocate on record for the President", and therefore that service of Court orders on the AG translates to service thereof on the President. It was the AG's position that the Petitioner seeks to amend and enlarge his clear constitutional mandate under Article 156(4).

47. To the submission by LSK that the AG represents the President and indeed, even the Speaker by virtue of Section 7(1) of the Office of the Attorney General Act, 2012, it was the AG's contention that he has already assumed the public interest mandate referred to in Section 7(1) (a) which is reflected in the superior provision in Article 156(6). He was not therefore representing the President and the Speaker as the national government referred to in Article 156(4) was not a party

48. With regard to section 7(1) (b) of the Office of the Attorney General Act, it is the AG's case that it cannot be used to justify his participation on behalf of the Legislature as a central issue in this petition is the doctrine of separation of powers and the conflict that has arisen between the Legislature and the Judiciary. In his view, it would be remiss of the AG to take sides with either of the two arms of government to which he is the principal legal adviser; that section 7(1) (b) gives the AG a right of audience in matters involving the Legislature or the Judiciary, and as the present proceedings involve both, he cannot reasonably be expected to represent, simultaneously, the conflicting positions of these two organs of state; and that his office has endeavoured to place before the Court objective material as will assist the Court to arrive at an informed and just decision.

49. The petitioner's response is that it was not necessary to join the President as a party or to serve the orders on him personally. Since the Speaker and the AG were served but disregarded the orders of the Court, the acts of the President could not be sanitised as the process under Article 251 can only be proper if done in accordance with the Constitution. It was Counsel's further submission, in reliance on the decision of the Court in Republic v Chief Justice of Kenya & 6 Others ex parte Moijo Mataiya Ole Keiwua (2010) eKLR, that it was not necessary to make the President a party to the proceedings.

The Independence of Constitutional Commissions

50. It was argued for the petitioner that as one of the independent constitutional commissions and offices under Article 248, it was subject only to the Constitution in accordance with the provisions of Article 249(2) and was not subject to the direction or control of any party. The petitioner relied on the decision of the Supreme Court in The Matter of the Interim Independent Electoral Commission [2011] eKLR where the court observed that Article 249(2) secures the independence of commissions.

51. It is the petitioner's contention that as an independent commission, it is not subject to the 'oversight' mandate, direction or control of the National Assembly and its Committees when discharging its mandate lawfully. Therefore, by attempting to intervene in the disciplinary process of the former CRJ, the National Assembly acted in violation of the Constitution and the doctrine of separation of powers.

52. LSK agreed with the Petitioner that under Section 3 of the JSA as read with Article 249 (2), the JSC and its members are independent and only subject to the Constitution and the law. Further that the

petitioner is mandated to perform its functions without interference, direction or control from third parties. That being the case, LSK and the public in general, have the legitimate expectation that the independence of the JSC should be protected in order to enable it discharge its functions and exercise its mandate under Article 172 .

53. On this issue, Mr. Angima for the Amicus supported the petitioner's case. He argued that Article 249(2) was intended by the framers of the Constitution, for good reason, to confer independence on the JSC given the nature of its work. For the JSC to succeed in facilitating the independence and accountability of the Judiciary, it must be insulated from both Executive and Legislative influence. The Amicus also relied on the Supreme Court decision in Advisory Opinion No. 2 of 2011, (supra) arguing that the JSC cannot exercise its mandate with respect to the Judiciary if it was vulnerable to improper influence from other arms of government.

54. While acknowledging that the JSC and other commissions and independent offices enjoy constitutional protection of their independence, Mr. Regeru submitted on behalf of the AG that they were also subject to the Constitution and the law; that their powers were not unlimited or unfettered and must be exercised within the strict confines of the law. Counsel argued that the same Constitution subjected JSC to the oversight authority of Parliament, and the JSC cannot apply the Constitution selectively or interpret its provisions piece-meal. The AG relied on the case of Nderitu Gachagua v Thuo Mathenge and Others Nyeri Civil Appeal 14 of 2014 in which the Court held that the Constitution must be interpreted in a wholesome and purposive manner. Accordingly, whilst the JSC asserts its independence under Article 249(2), it must also acknowledge that it is subject to Parliament's oversight authority under Articles 95and 125.

The Doctrine of Separation of Powers

55. JSC contended that by purporting to interfere with its functions, the Committee was infringing on the independence of the Judiciary. This was because of the integral role that the JSC plays in ensuring the independence and accountability of the Judiciary. Further that bearing in mind the doctrine of separation of powers, the JSC should not be subjected to interference from any other organ of government. The petitioner relied on the case of Commission for the Implementation of The Constitution v National Assembly of Kenya, Senate& 2 Others [2013] eKLR, where the court held that the doctrine of separation of powers enables the three traditional arms of government as well as independent commissions to function freely without any direction or control by any other person.

56. With regard to Court orders, it is the Petitioner's case that the National Assembly is not immune to court orders. Counsel submitted that the misconception by members of the National Assembly that they are not subject to court proceedings springs from a misreading and misinterpretation of the National Assembly (Privileges and Immunities) Act. Mr. Issa relied on the Supreme Court of Zimbabwe case of Smith v Mutasa &Another LRC [1990] 87 that dealt with the question of Parliamentary privileges. In that case, the Court in Zimbabwe acknowledged that unlike the Parliament of the United Kingdom, the Parliament in Zimbabwe could not enjoy privilege, immunities and powers which were inconsistent with the fundamental rights guaranteed in the constitution. Thus, whereas Parliamentary privilege is recognized, it does not extend to violation of the Constitution, and further, that Parliament cannot flout a Court order and then plead immunity.

57. LSK agreed with the petitioner that the Committee and the National Assembly in discussing and passing a resolution to forward the Mugambi Petition to the President, acted in contravention of a Court Order. Reliance was placed on the decision of the Court of Appeal in Central Bank of Kenya and another v Ratilal Automobiles Ltd and others (Civil Application No. Nai 247 of 2006) where it was held that Court orders must be obeyed and it is not open to any person or persons to choose

whether or not to comply with or ignore such orders. By discussing and passing the resolution, the Committee and the National Assembly acted in violation of the Constitution, and the decision to send the petition to the President was therefore a nullity.

58. With regard to the reception of the petition by the President and the subsequent appointment of a tribunal, Mr. Mwenesi relied on the decision in Commercial Bank of Africa Ltd v Isaac Kamau Ndirangu (Civil Appeal No. 157 of 1995 {1990 – 1994} EA, 69), for the proposition that where any action is taken in contravention of a Court order, it was a nullity in law, and void.

59. The AG took a position diametrically opposed to that of the Petitioner and the LSK on the orders issued by the High Court pursuant to its jurisdiction under Article 165restraining the proceedings of the Committee and the National Assembly. It was the AG's contention that this Article does not give jurisdiction to the High Court to deal with matters which are, by dint of the Constitution and other written laws, the preserve of the other organs of state.

60. Counsel contended that Articles 117 and 124 insulated Parliament's Committee from supervision by the High Court under Article 165(6) when exercising its mandate of removal of a state officer; that unlike other tribunals and bodies, Committees of Parliament are grounded in the Constitution. Consequently, the suggestion that such committees could be susceptible to supervision by another organ of state offends the principle of separation of powers. The AG relied on the case of Republic v Registrar of Societies & 5 Others ex parte Kenyatta & 6 others Misc. Civil Appl. No. 747 of 2006where the Court observed that the doctrine of separation of powers connotes that Parliament is supreme.

61. It was the AG's further contention that Courts should not be seen to prevent the National Assembly from undertaking its constitutional obligations as it goes against the important tenet of Parliament's oversight role. Counsel referred the Court to the case of Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others [2013] (supra) submitting that in that case the Court interrogated the issue of judicial encroachment on matters wholly reserved for Parliament and held that the Court must restrain itself in order not to trespass onto that part of the legislative field which has been reserved by the Constitution, and for good reasons, to the Legislature.

62. The AG further relied on Peter O. Ngoge v Francis Ole Kaparo & Others (2007) eKLR for the proposition that it is not the function of the Court to interfere with the internal arrangements of Parliament unless it can be shown that they violate the Constitution; and to the holding in Kenya Youth Parliament & 2 Others v Attorney General & Another, Nairobi Petition No. 101 of 2011 where the Court held that it would hesitate to enter into the arena of merit review of a constitutionally mandated function by another organ of State that has proceeded with due regard to procedure. In the instant case, Mr. Regeru submitted, there is nothing to show that Parliament violated the Constitution in dealing with the Mugambi Petition.

63. The AG further contended that Courts should be slow to interfere with Parliamentary processes; that the privilege of Parliament is absolute, placing reliance on Section 12 and 29 of the National Assembly (Powers and Privileges) Act which ousts the jurisdiction of the Court in respect to proceedings or decisions of the National Assembly. The AG relied on the case of Kiraitu Murungi & 6 others v Hon. Musalia Mudavadi & Another, Nairobi HCCC No. 1542 of 1997 where Ole Keiuwa J. recognized Parliamentary immunity.

The Meaning and Scope of the Oversight Role of Parliament

64. It is the Petitioner's case that the National Assembly does not enjoy unlimited oversight over independent Commissions and offices, and if the Constitution so intended, it would have spelt out the same under Article 95(5). It argued that the National Assembly was from the outset trying to supervise

the petitioner's disciplinary process against the former CRJ; that the Committee purported to summon the JSC for a meeting to 'deliberate on the process, issues and circumstances 'surrounding the investigations relating to the CRJ; that the JSC declined to participate in the patently unconstitutional deliberations. JSC insists that the oversight role by the National Assembly cannot be conflated with the unlawful attempts to assist the former CRJ in the disciplinary proceedings; that the proceedings before the National Assembly were a charade and a mockery of the new Constitutional order; was in contravention of the Constitution and therefore null and void.

65. The Amicus argued that a distinction could be drawn between the first summons of the Committee to the JSC and the second letter which demanded production of certain financial information. With regard to the first, its case was that in so far as the first summons of the Committee were meant to discuss the disciplinary process of the former CRJ, they were not legitimate as they related to the performance of a constitutional function by the JSC under Article 172 which is insulated by Article 249(2). The Amicus argued, however, that the summons to inquire into the general state of the Judiciary, was a legitimate matter which the JSC should have acceded to.

66. The submissions on behalf of the AG in this regard were that the true test of democracy is the extent to which Parliament can ensure that government remains answerable to the people, achieved by maintaining constant monitoring of government's actions pursuant to Article 95; that the JSC, a state organ, notwithstanding its independence under Article 249(2)is not exempt from oversight by Parliament.

67. The AG submitted further that it is critically important to appreciate how the independence of the JSC should be balanced against the oversight authority of Parliament. He relied on Advisory Opinion No. 2 of 2011(supra) where the Supreme Court made a finding that the independence clause did not accord commissions and independent offices a carte blanche to act or conduct themselves on a whim but to operate within the terms of the Constitution and the law. Counsel submitted that Parliament in exercising its constitutional mandate can summon anyone for the purpose of providing evidence or giving information, and therefore the issues raised in the Mugambi Petition fell squarely within the Committee's statutory mandate pursuant to Standing Order 216 and Articles 124(1) and 125(1).

68. It was also the AG's submission that the proceedings before the Committee were of a special nature governed by specific provisions in the Constitution and the relevant standing orders and did not amount to a hearing within the meaning of Article 50.

69. He submitted further that it is the Committee's mandate to determine the documents or evidence to be furnished before it in order to safeguard its role under Articles 95 and 125 of the Constitution. He relied on the case of British Railways Board and another v Pickin (1974) 1 All ER 609 where the Court stated that it was for Parliament to decide what documentary material or testimony it requires. In the AG's view, when the JSC was summoned by the Committee, it was bound to comply with the Committee's summons; that it was not open for the JSC to decline to appear or decide the evidence it would avail before the Committee as such an approach would undermine and defeat the object of the Parliament's oversight role.

The Threshold for Removal of a Constitutional Commissioner

70. The petitioner contended that the Constitution sets the threshold for the removal of a member of the JSC under Article 251. Counsel also adverted to the decision of the Supreme Court of Canada in R v Boulanger, [2006] 2 S.C.R. 49, 2006 SCC 32, where the Court set out the threshold for the removal of a public officer. Thus, Counsel argued that none of the unsubstantiated allegations in the Mugambi Petition meets the threshold of serious violations of the Constitution and statute or of

gross misconduct. At best, the allegations as set out in the Mugambi Petition are speculative. Further, Counsel stated that the Mugambi Petition was not supported by any affidavit.

71. As regards the power of the National Assembly to call for evidence, it was the Petitioner's case that Article 125(1) has been misinterpreted by the National Assembly to mean that they have powers to summon any person. It was Mr. Issa's submission that the power conferred under Article 125 is not unique to Parliament but is also vested in County Assemblies. Further, that the powers conferred under Article 125 must be interpreted in the context of the National Assembly's mandate in the Constitution. To assert this position, the petitioner relied on the case of International Legal Consultancy Group v The Senate& Another, Petition No. 74 of 2014.According to the Petitioner, the power to call for evidence as provided under Article 125 does not extend to situations in violation of the independence of constitutional commissions acting within their mandate.

72. On the Mugambi Petition, LSK's position was that whereas under Article 251 (1) (a), a member of a constitutional commission or holder of an independent office may be removed from office, that can only be done for serious violation of the constitution or any other law, including a contravention of Chapter Six of the Constitution, and that such violation must be proved by sound and legally obtained or admissible evidence.

73. LSK argued, further, that the evidence, information and documents filed in support of the Mugambi Petition were subject to confidentiality under section 43(1) of the JSA, and that the circumstances under which they were obtained are unclear; that they violate the petitioner's right to fair administrative action under Article 47 and are inadmissible, under Article 50(4). LSK submitted that the information did not meet the requirements of Article 251(1) to warrant sending the Petition to the President under Article 251(3).

74. The Petitioner contended that since the Speaker transmitted the petition to the President in total disregard of Court orders, the act of the President in appointing a tribunal by Special Gazette Notice No. 15094 of 29th November, 2013,was null and void.

Issues For Determination

75. The parties to this matter have proposed certain issues for determination and have filed two lists in that regard; one agreed upon by the petitioner and the Interested Party and a separate list by the AG. We have considered the pleadings, the affidavits on record as well as the parties' respective submissions against the two lists of issues and have framed the following four issues, which we believe capture the real dispute properly before us:

    i. Whether there has been proper joinder or misjoinder of parties;

    ii. Jurisdiction of the Court in relation to the acts of other arms of government;

    iii. The meaning and scope of Parliamentary oversight of state organs;

    iv. What orders to grant in the matter, and the question of costs.

76. We now turn to consider and make our determination thereon.

Analysis and Determination

Joinder of Parties

77. In addressing our minds to the question of joinder, we bear in mind the provisions of Rule 5 (b) and (c) of the Mutunga Rules which state as follows:

"(b) A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.

(c) Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit."

Whether the JSC is the proper petitioner

78. The starting point in considering this issue is, we believe, the constitutional status of the petitioner. Article 253 provides that:

> "Each commission and each independent office—
>
> (a) is a body corporate with perpetual succession and a seal; and
>
> (b) is capable of suing and being sued in its corporate name."

79. Under Article 250(9), the Constitution insulates Commissioners and holders of independent offices from personal liability for actions and decisions taken in good faith in the course of their functions. It provides as follows:

> "(9) A member of a commission, or the holder of an independent office, is not liable for anything done in good faith in the performance of a function of office."

80. In the present case, the six Commissioners named in the Mugambi Petition were targeted, as is apparent from the wording of the petition, not because of actions taken in their individual capacity, but because of acts that they had done as members of a lawful committee of the Petitioner, the Finance and Administration Committee, and which actions had been adopted by the entire Commission.

81. In essence, the Mugambi Petition at Ground 1 states that the complaint concerned the six Commissioners in:

> "...abrogating to themselves oversight powers over fiscal management of the Judiciary under the guise of being members of the Finance and Administration Subcommittee of the Judicial Service Commission ...."

In such circumstances, it is our view that the Petitioner rightly instituted this petition in its own name, since what was at issue was, essentially, its corporate decision. The Mugambi Petition appears to conflate the corporate liability of JSC and individual responsibility of the Commissioners.

82. Further, the effect of the suspension of the six Commissioners would be to cripple the operations of the Petitioner as it would be unable to reach the quorum of six members required for it to transact business under section22(5) of the JSA.

83. As observed above, however, in reference to the provisions of the Mutunga Rules, a petition shall not be defeated by reason of the joinder or misjoinder of parties. We therefore find and hold that the JSC is the proper petitioner in this matter. In any event, even if there had been a misjoinder, which we find is not the case, the Court would not, by virtue of Rule 5(b), be precluded from dealing with the issues in dispute.

Whether the Speaker should have been joined as a respondent

84. In determining this issue, we consider the place of the Speaker in relation to the operations of the National Assembly. The position and functions of the Speaker are provided for in general terms in the Constitution. Article 97 provides for the composition of the National Assembly, and at Article 97(1)(d), indicates that the National Assembly includes the Speaker, who is an ex officio member. Article 107 provides that it is the Speaker of the respective Houses of Parliament who shall preside at sittings of the Houses, with the Speaker of the National Assembly presiding at joint sittings of both Houses.

85. The specific roles are better spelt out or emerge from the National Assembly (Powers and Privileges) Act, the Standing Orders and Parliamentary practice. To illustrate, under the National Assembly (Powers and Privileges) Act, it is the Speaker who is given power to safeguard the privileges of the National Assembly by the issue of such orders as are necessary for the better carrying out of the provisions of the Act, and issue a Code of Conduct for Members under section 9. Under the Standing Orders, it is the Speaker who determines the business of the House, restrains disorderly conduct and restricts debate (Standing Orders 98, 102, 103 – 107, 112); and whether motions tabled by Members of Parliament are admissible. If they are in violation of the Constitution or an Act of Parliament, he may propose changes or rule that they are inadmissible. Indeed, nothing is done within the National Assembly that does not have the approval of the Speaker.

86. The Speaker is the Presiding Officer of the House, with very wide discretion under Standing Order 1. He is the representative of the House in relation to other organs and authorities such as the Presidency and the Senate (Standing Order 41 and 42). He rules on points of order in the House and his rulings are binding precedents in the National Assembly.

87. The Speaker makes orders in relation to procedures and debate in the House; and has the responsibility to transmit decisions of the House. Further, under section 6 of the National Assembly (Powers and Privileges) Act which prohibits service of process within the precincts of Parliament, such processes where they relate to the attachment of a Member's salary can be served or executed through the Speaker. He is, in law and effect therefore, the Presiding and Principal Officer of the National Assembly on whose shoulders lie the responsibility for the proper constitutional conduct of proceedings and decisions in the National Assembly. If we may borrow from the words of the High Court in Tanzania in the case of Hon. Augustine Lyatonga Mrema v Speaker of the National Assembly & Another (supra)with regard to the place of the Speaker in a constitutional democracy, as extrapolated from his multifarious roles in Parliament:

> "So far for the authority above, and what is sought to be protected, is what goes on in the National Assembly, while on active duty. But allow me to pose, a mischievous question, for the National Assembly to deserve immunity, what goes [on] in there? I am sure, the MPs know better, but we reasonably know, that, the National Assembly, is the power-house for the legislation of law, see Article 64 of the Constitution_. And a moulder of policy of State, under the guiding Parliamentary Standing Orders, 1988, promulgated under Article 89(1) and (2) of the Constitution, under the Chairmanship of the Hon. Speaker, who in this case, is the impleaded party. And the Speaker thereof is impleaded, or impleadable, because by virtue of Article 84 of the Constitution, and Section 12(2) of the Act, I view him, to have such duties, as follows:
>
> 1. he is first, the spokesman and representative, of the National Assembly,
>
> 2. he is the custodian of the Powers and Privileges of the Assembly,

3. chief functionary and Constitutional head,

4. he is required under Section 12(2) of the Act, to discharge duties of a Judicial, or interpretative character, having finality attached to the same, and -

5. the Speaker is the Chairman of the Assembly, and in that capacity, he maintains order in its debates, decides such questions, as may arise, on points of order, puts the questions, and declares, the determination of the Assembly. The speeches, participation, debates, immunised, being the base of the essence of Parliamentary system of Government, that MPs express themselves without fear of legal consequences, - but the orders and rules of parliament being under control of the Speaker of the Assembly.

Objectively observed, this is no mean portfolio, though the said Speaker should not shelter thereunder, where human rights are involved." (Emphasis added)

88. As submitted by the Petitioner, the National Assembly is not a juristic person. Its actions are taken and communicated through the Speaker, not through the entire House. It follows, therefore, that there is nothing remiss in civil processes under the law which question acts of the National Assembly being instituted against the Speaker, or in orders emerging therefrom being served upon the Speaker.

89. Indeed, the practice in this jurisdiction has shown that the Speaker can be joined as a party or respondent in matters pertaining to the National Assembly. The latest illustration of this is the Advisory Opinion No. 2 of 2013 in Speaker of the Senate & Another v Hon. Attorney-General & Another & 4 Others [2013] eKLR which pitted the Speaker of the National Assembly and the Speaker of the Senate in a dispute regarding the role of the Senate in Parliamentary Bills that would impact on devolved government. In that matter, there was no argument that the Speakers of both Houses were not properly before the Supreme Court.

90. The AG has sought to make what in our view is a somewhat specious argument that the distinction in that case from the present matter is that it was an advisory opinion, not adversarial proceedings. In our view, the nature of proceedings does not make a difference. If the Speaker is a proper party before the Supreme Court, there is nothing in law to bar the Speaker from being a party in proceedings directed at acts of the National Assembly.

91. The AG also relied on the decision of Majanja J in Commission for the Implementation of the Constitution v Parliament and the Attorney General (supra),specifically paragraph 40 thereof, where the Court stated as follows:

"[40.] I have been cautioned that the doctrine of separation of powers forbids this court from straying into what is seen as the sphere of Parliament. I have also been warned that 'Parliament of Kenya' as a state organ cannot be sued by its own name. I think the latter issue is effectively answered by the question of jurisdiction I have discussed above. In any case, and on this I agree with Mr. Regeru, counsel representing CIC, that a reading of Article 261(5) and (6) contemplates Parliament as the Party to any Petition that may be filed therein. The provision reads that, 'If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter'."

92. This Court observes that the argument made before the Court (Majanja J) as it appears at paragraph 29 of the judgment is that the Court would need to interrogate the issue whether Parliament could be sued as an entity; as 'Parliament of Kenya'. The submission by the Amicus in that matter, Transparency International, was that nonetheless, even if Parliament could not be sued in its own name, the Petitioner

should not be non-suited as the AG was party to the suit. In dealing with this argument, the Court therefore went on to state as follows at paragraph 41 of the judgment:

> "[41.] I therefore reject the respondent's contention that Parliament, as a State organ, cannot be sued by its own name at least for purposes of this suit. I think the common law notions of whether regarding capacity to be sued must yield to the Constitution which recognizes Parliament as a State organ and imposes on its (sic) specific responsibilities. The doctrines of legal personality must be read against the beam of the rich provisions of our Constitution."

93. Our understanding of the decision of Majanja J, in which Parliament had been sued in its name, is that under the current constitutional dispensation, a party with a legitimate claim cannot be barred from recourse simply because of the technical doctrine of legal personality. In the present case, we have taken the view that the Speaker is properly made a party to the suit, but nonetheless, irrespective of whether it was the Speaker or the National Assembly that had been enjoined in the proceedings, the constitutional dictates demand that the Court exercise its jurisdiction when moved appropriately.

Whether the President can be bound by Orders not served on him in a matter to which he is not a party

94. The President's actions were predicated on actions taken by the National Assembly resulting in a petition to the President under Article 251(3). The validity and bona fides of this petition is in contention. If, as the Petitioner contends, it was invalid for having been the result of a process in Parliament that took place in violation of a Court order, then the President's acts would have been based on an invalid act; and as the Court observed in the case of Clarke and Others v Chadburn and Others [1985] 1 ALL ER 211, an act done in wilful disobedience of a Court order is both a contempt of Court and an illegal and invalid act which cannot effect any change in the rights and liabilities of others. (See also the decision in Commercial Bank of Africa Ltd v Isaac Kamau Ndirangu (Civil Appeal No. 157 of 1995 {1990 – 1994} EA, 69).

95. We are further bolstered in our finding on this issue by the decision of the High Court in Hon. Mr. Justice Joseph Mbalu Mutava v The Attorney General and The Judicial Service Commission High Court Petition No. 337 of 2013where the Court had no hesitation in making orders invalidating the appointment of a tribunal by the President, even though he was not a party to the matter before it.

96. We therefore find and hold that it was not necessary to join the President as a party to the present proceedings.

The Role of the Attorney General

97. In closing on the issue of joinder and non-joinder of parties, we feel that it would be remiss if we did not comment on the role of the AG envisaged under the Constitution and the Office of the Attorney General Act.

98. Mr. Regeru submitted at length on the issue of whether or not the AG could be taken as representing the President and the Speaker given the provisions of Article 156 and section 7 of the Office of the Attorney General Act. His argument is that as the national government is not a party to these proceedings, and as the same involve a dispute between two arms of government, the AG cannot be seen to be taking sides with either arm of government.

99. We appreciate the somewhat awkward and untenable predicament that the AG is placed in by this petition, and indeed by the many other disputes that have arisen as a consequence of the

implementation of the new Constitution and the interplay between the new governance structures that it introduces.

100. However, the Constitution and the Act impose on the AG a duty that he cannot run away from, and which he must confront with fortitude, mettle and vigour, and without fear or favour.

101. In the present case, while proclaiming that he is not representing either the Speaker or the President, the AG has made very lengthy and eloquent submissions doing exactly that. The danger is that in so doing, he may fail to be guided by the public interest which he is under a constitutional duty to safeguard. He may also fail in his duty to promote constitutionalism and the rule of law.

102. Section 7 of the Office of the Attorney General Act provides as follows:

> "7
>
> (1) Despite the provisions of any written law to the contrary or in the absence of any other written law, the Attorney General shall have the right of audience in proceedings of any suit or inquiry of an administrative body which the Attorney General considers:-
>
> (a) to be of public interest or involves public property; or
>
> (b) to involve the legislature, the judiciary or an independent department or agency of the Government."

103. The provisions of Article 156 relevant for the purposes of this analysis are sub-articles 4 -6 which are in the following terms:

> "(4) The Attorney-General—
>
> (a) is the principal legal adviser to the Government;
>
> (b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and
>
> (c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.
>
> (5) The Attorney-General shall have authority, with the leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party.
>
> (6) The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest."

104. The Constitution does not define the national government, but it is implicit in its provisions that the national government is the national Executive, the Legislature and the Judiciary as opposed to the County or devolved government. That being the case, any dispute in Court that involves either of these organs of state to which the people of Kenya have delegated their sovereign power are proceedings in which the AG has a constitutional duty to appear.

105. We appreciate also that these are troubled and troubling times in the history of our country. We have a new Constitution that has brought an earth shaking change in our governance structures, and has consequently brought the organs of government, which are mandated to work together in the spirit of mutual respect and co-operation, into an unseemly conflict that does not augur well for the people of Kenya. The AG must find the middle ground that enables him to play his constitutional role as the principal legal advisor of the government, as the legal representative of the national government in proceedings before the Court, and to "promote, protect and uphold the rule of law and defend

the public interest." In doing so, he must emphasise the core principle of our Constitution: that it is the Constitution that is supreme; and that all organs of state are bound by the provisions of the Constitution.

The Court's Jurisdiction With Regard To Acts Of Other Arms Of Government

106. The AG asserted that this Court should not entertain this petition as matters before Parliament and the Committee were privileged. He relied on Article 117 (1) which provides that there shall be freedom of speech and debate in Parliament, which provision is echoed in section 4 and 12 of the National Assembly (Powers and Privileges) Act. He also cited several judicial decisions for the proposition that Parliament's immunities and privileges insulate it from the Court's scrutiny. In this section, we examine the jurisdiction that the Constitution vests in the Court vis-a-vis other organs of government.

The Immunities and Privileges of Parliament

107. In addressing the issues relating to the powers, privileges and immunities alluded to by the AG, it is prudent to consider the meaning and history of Parliamentary privilege, and how Courts in jurisdictions similar to ours have dealt with the issue.

108. Black's Law Dictionary 6th Edition defines immunity as "exemption from duties which the law generally requires other citizens to perform".

109. According to Erskine May on Parliamentary Practice, 23rd edition page 75:

> "Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law. Certain rights and immunities such as freedom from arrest or freedom of speech belong primarily to individual Members of each House and exist because the House cannot perform its functions without unimpeded use of the services of its Members. Other such rights and immunities such as the power to punish for contempt and the power to regulate its own constitution belong primarily to each House as a collective body, for the protection of its Members and the vindication of its own authority and dignity. Fundamentally, however, it is only as a means to the effective discharge of the collective functions of the House that the individual privileges are enjoyed by Members."

110. In the same text, at page 176, Erskine May observes as follows with regard to the history of the relationship between the Courts and Parliament:

> "The earliest conflicts between Parliament and the courts were about the relationship between the lex parliamenti and the common law of England. Both Houses argued that under the former, they alone were the judges of the extent and application of their own privileges, not examinable by any court or subject to any appeal. The courts initially professed judicial ignorance of the lex parliamenti, but after a time came to regard it not as a particular law but as part of the law of England, and therefore wholly within their judicial notice."

111. The key features of the English model are seen in many parliaments, predominantly those which were once British colonies or possessions which later made changes in parliamentary principles either by legislation or constitutional provisions.

112. In the 19th and 20th centuries, three major cases (Budget v Abolt (1811) 14 East 1) Stockdale vs. Hansard (1839) 9 A2 &E, Bradlaugh v. Gosset (1884) 12 QBD 271 were determined by the English courts. In Stockdale v Hansard, the Court accepted the exclusive jurisdiction of Parliament over its internal proceedings, stating, however, that it was for courts to determine whether or not a claim of privilege fell within that category. In Bradlaugh v Gosset, the Court upheld the exclusive jurisdiction of the House of Commons in matters found to relate to the management of internal proceedings of the House.

113. In Zimbabwe, in the case of Biti and Another v Minister of Justice, Legal and Parliamentary Affairs and Another [2002] ZWSC 10, where the Supreme Court was called upon to resolve a conflict between fundamental rights and privileges of Parliament, the Court held that where a claim to parliamentary privilege violated constitutional provisions, the Court's jurisdiction would not be defeated by the claim to privilege.

114. In the Indian decision of Kihoto Holohan v Zachillu and Others 1992 SCR (1) 886, the Supreme Court of India was called upon to consider an ouster clause which sought to impart statutory finality in the Speaker of Parliament. The Court held that the concept of statutory finality did not detract from or abrogate the Court's jurisdiction in so far as the complaints made were based on violation of constitutional mandates or non-compliance with rules of natural justice.

115. In this jurisdiction, Parliamentary privileges and immunities were first addressed in the National Assembly (Powers and Privileges) Act of 1952. Although the legislation has been amended from time to time until 1981, a perusal of the revised 2012 edition shows no amendment has been made in accordance with section 7 of the Sixth Schedule of the Constitution, to bring it into conformity with the Constitution.

116. Section 12 of the Act provides that proceedings before the National Assembly or the Committee of Privileges shall not be questioned in any Court. At section 14, the Act sets out the power of the National Assembly or any Standing Committee to order attendance of witnesses to give evidence or produce documents. Also worth mentioning is Section 4, which confers immunity from legal proceedings to members of the National Assembly for words spoken before or written in a report to the Assembly or a committee of the Assembly.

117. It is against this legislative backdrop that the AG submits that the effect of the orders issued by the Court were an undue encroachment in areas reserved by the Constitution to the Legislature, and that the subsequent order of 6th November 2013 extended to the Executive in execution of its constitutional mandate under Article 251 (4) .

118. Counsel argued that the JSC ought to have awaited the appointment of the tribunal, then challenge the process because:

> "Intervention would only be appropriate if an applicant can show that there would be no effective remedy available to him or her, once the legislative process is complete as the unlawful conduct will have achieved the object in the course of the process. The applicant must show that the resultant harm will be material and irreversible."

119. The AG acknowledged that there may be exceptional circumstances in which Courts may interfere with Parliament's exercise of its powers where the latter acts in breach of the Constitution. This would include, for instance, where Parliament enacts a law that is contrary to the Constitution. On the whole, however, as it emerged from the authorities that he relied on, the AG leaned strongly on the side of

Parliamentary supremacy, urging the Court to exercise restraint when matters before it involved the Legislature.

120. We fully acknowledge the need for the Court to exercise restraint in dealing with matters vested in the other arms of government by the Constitution. However, we must emphasise that the doctrine of Parliamentary supremacy, which once gave Parliament the unbridled right to regulate and conduct any of its business as it pleased, is no longer central in the Constitution of Kenya.

121. The Constitution disperses powers among various constitutional organs. Where it is alleged that any of these organs has failed to act in accordance with the Constitution, then the Courts are empowered by Article 165 (3)(d)(ii)to determine whether anything said to be done under the authority of the Constitution or of any law is inconsistent or in contravention of the Constitution.

122. In the case of Okiya Omtatah & 3 Others v Attorney General & 3 Others [2014] eKLR, the Court acknowledged, as we indeed do, that the people of Kenya gave the responsibility of making laws to Parliament, and such legislative power must be fully respected. This means Courts can only interfere with the work of Parliament in situations where Parliament acts in a manner that defies logic and violates the Constitution.

123. We note that, in carrying out its affairs, debates are a critical aspect of Parliament's business. It is in such instances that the concept of immunity of Parliamentary debate applies. This is what was held in the Canadian case of Canada (House of Commons) v Vaid [2005] 1 S.C.R where the Court stated at paragraph 42 that:

> "Parliamentary privilege consists of rights and immunities which the two Houses of Parliament and their members and officers possess, to enable them carry out their Parliamentary functions effectively. Without this protection then the members would be handicapped in performing the parliamentary duties..."

124. We acknowledge that there is Parliamentary privilege which covers debate and deliberation within the precincts of Parliament, and we believe that this Court is not being called upon to restrain Parliamentary debate in the course of its lawful business. That does not, however, limit the Court's jurisdiction to deal with matters where allegations are made regarding violation of the Constitution.

125. Counsel for the AG referred us to, among others, the case of Kiraitu Murungi & 6 Others v Musalia Mudavadi & Another Civil Case No. 1542 of 1997 (Unreported) where Bosire, J (as he then was) stated that Parliament had created and provided itself with powers and privileges giving it absolute immunity by virtue of section 4 of the National Assembly (Powers and Privileges) Act. However, as we have observed above, the situation prevailing in that case can be easily distinguished from the present scenario. In that case, the Judge indeed observed that no provision of the Constitution had been presented to show that the Court had jurisdiction to deal with the matters brought before it. That is not the situation in the instant case, as Article 165 (3) (d) of the Constitution expressly gives this Court such power. In a constitutional democracy like we have, Parliament is not beyond the reach of the Court.

126. Our view is that the provisions in the National Assembly (Powers and Privileges) Act along with Article 117 (2), must be read alongside Article 165 (3) (d) (ii)and 165 (6) which give the High Court jurisdiction first, to determine whether anything said to be done under the authority of the Constitution or any law is inconsistent with or in contravention of the Constitution; and secondly, gives the High Court jurisdiction over subordinate courts and any

person, body or authority exercising judicial or quasi-judicial functions but not over a superior court. These provisions state as follows:

> (3) Subject to clause (5), the High Court shall have —
>
> (a) unlimited original jurisdiction in criminal and civil matters;
>
> ...
>
> (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
>
> (i) he question whether any law is inconsistent with or in contravention of this Constitution;
>
> ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution ;...
>
> (6) 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.//**

127. A reading of the National Assembly (Powers and Privileges) Act and Article 117 (2) as we propose would give life to the spirit of interpreting the Constitution in a wholesome manner that promotes its objectives and values, and recognises the supremacy of the Constitution.

128. We are bolstered in this finding by the decision of the Supreme Court in the matter of Speaker of the Senate and Another v The Hon. Attorney General and 3 others, Advisory Opinion Reference No. 2 of 2013. In that case, the respondents had argued that pursuant to the doctrine of separation of powers, the Judiciary had no legitimate business to intervene in matters falling within the legislative competence of Parliament. Further, that Parliament's business was strictly conducted within its own standing orders which are recognised by the Constitution.

129. The Court recognised the legislative authority vested in Parliament by the Constitution, and said it would be reluctant to question Parliamentary procedures or workings, as long as they did not breach the Constitution. However, where a dispute arises which alleges violation of the Constitution, then judicial intervention would not be a violation of the doctrine of separation of powers as the Court would merely be performing its solemn duty under the Constitution.

130. We wish to echo what Justice Chaskalson, the President of the South African Constitutional Court stated in the case of The State v T. Makwanyane and Another 1995 (3) S.A. 391 (C.C.) that:

> "Public opinion may have some relevance... but in itself it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of right could then be left to Parliament, which has a mandate from the public, and is answerable to the public, for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order..."
>
> (Emphasis added)

131. This statement is in consonance with Kenya's current constitutional dispensation. Indeed, Courts will not allow any challenge to be made to what is said or done within the walls of Parliament in

performance of its legislative functions and protection of its established privilege, if this is done within the confines of the Constitution.

132. We therefore hold that there was no breach of either the constitutional or statutory provisions under the National Assembly (Powers & Privileges Act) by the Court when it issued the orders impugned by the AG as being a violation of the privileges and immunities of Parliament. The Committee and the National Assembly, while carrying out their constitutional mandate, must do so with strict fidelity to the Constitution.

133. In reaching this conclusion we have drawn, as illustrated above, from decisions made in various jurisdictions dealing with issues similar to the ones currently before us which are new to our jurisprudence but are well established in other jurisdictions. However, we are cautious and bear in mind the supremacy of our Constitution and the circumstances prevailing in those jurisdictions. What we find is that history is replete with examples from other Commonwealth countries which have similar constitutional and statutory provisions regarding parliamentary privileges and immunities, yet have declined to apply narrow strictures to provisions ousting the Court's intervention. The position we have taken is therefore not peculiar to Kenya.

The Nature of the Proceedings before the Departmental Committee of the National Assembly

134. Having found that the Court has jurisdiction to deal with proceedings before the House or its Committees where allegations of violation of the Constitution are made, we now turn to consider the nature of the proceedings before the Committee. It was submitted on behalf of the Petitioner that the proceedings, which were quasi-judicial in nature and subject to the Court's jurisdiction under Article 165(6), violated its rights under Article 47 and 50 of the Constitution. In response, Counsel for the AG submitted that the proceedings were not a trial but proceedings of a special nature and therefore Article 50 did not apply. He argued that the Standing Orders bound the Committee to abide by strict timelines, relying on Standing Order 230 that requires the Committee to investigate a petition and report to the House within 14 days.

135. The proceedings before the Committee, which were purported to be pursuant to the provisions of Article 251 (2) and (3), were aimed at investigating the allegations made in the Mugambi Petition against the six Commissioners. Of necessity, they were to involve hearings and, according to the summons from Parliament, the Commissioners could elect to appear in person or by legal representative.

136. Black's Law Dictionary 9th Edition defines a quasi-judicial process as a term applied to the action of bodies which are required to investigate, or ascertain the existence of facts, hold hearings, weigh evidence and draw conclusions from them as a basis for their official action, and to exercise discretion of a judicial nature. At page 34 of their text Administrative Law,10th Edition, H.W.RWade and C.F. Forsyth define a quasi-judicial function as:

> "... an administrative function which the law requires to be exercised in some aspects as if it were judicial. The procedure is subject to the principles of natural justice."

137. Upon receipt of the summons from the National Assembly, the JSC sent its Counsel to attend the hearing. At the conclusion of the proceedings of the Committee, a resolution was reached in respect of the Mugambi Petition, and a report presented to the full House for debate and adoption. Thereafter, a resolution was made to transmit the petition to the President.

138. In the circumstances therefore, and with great respect, we disagree with the submissions by the AG as regards the nature of the Committee proceedings. We hold the view that from the provisions of Articles

95(5), 251 and 125, the scrutiny and oversight function, primarily discharged through Parliamentary committees, is intrinsically a quasi-judicial function. We are therefore satisfied that the proceedings of the Committee, being quasi-judicial proceedings in nature, are subject to the supervisory jurisdiction of the Court in terms of Article 165(6).

139. What does the law require of a body exercising quasi-judicial functions? In the case of Local Government Board v Arlidge (1915) AC 120 (138) HL the Court stated:

> "...those whose duty it is to decide must act judiciously. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice."

140. In addition to the requirement to act judiciously, a body exercising a quasi-judicial function must accord parties a fair hearing. In Halsbury's Laws of England, 5th Edition 2010 vol. 61 at paragraph 639, it is stated that:

> "The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him, and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court...."

141. In this jurisdiction, the requirement of fairness is echoed in the case of Onyango Oloo v The Attorney General [1986 – 1989] EA 499 where the Court stated that:

> "...ordinary people would expect those making decisions which will affect others to act fairly..."

142. Indeed, Standing Order 67 of the Parliamentary Standing Orders states that:

> "Whenever the Constitution, any written law or these Standing Orders –
>
> a). requires the National Assembly to consider a petition or a proposal for the removal of a person from office, the person shall be entitled to appear before the relevant Committee of the Assembly considering the matter and shall be entitled to legal representation;"
>
> (Emphasis added)

143. The right to a hearing and fair administrative action is no longer just a rule of natural justice, but is now a constitutional principle which applies in equal measure to all proceedings, investigations and hearings whether judicial, quasi-judicial or administrative. Article 47 guarantees to everyone administrative action that is "expeditious, efficient, lawful, reasonable and procedurally fair". The right to a fair hearing is guaranteed under Article 50.

144. It is not disputed that the six Commissioners were given notice and copies of the Mugambi Petition, but the complaint by the JSC is that adequate time was not given to respond to the petition. It alleges therefore that its rights to fair administrative action and fair hearing were violated.

145. We appreciate that a hearing may take various forms, and indeed the Petitioner's members were given the option to either appear before the Committee in person or send a written response. They elected to

send their Counsel in accordance with Standing Order 67 cited above, which entitles a party to appear before the Committee and to legal representation.

146. We agree with the views of the Court in Joseph Mutava v. Attorney General & JSC, Petition No. 337 of 2013 that a Committee involved in a decision making process that would affect the rights of a party is quasi-judicial and administrative in nature and is therefore subject to Article 47. In the present case therefore, we hold that the proceedings of the Committee were quasi-judicial and administrative in nature as they involved a decision making process that would affect the rights of the six Commissioners and are therefore subject to Article 47.

147. In exercising its mandate under Article 251, the Committee performs a quasi-judicial function, and has powers to summon any person to tender evidence or provide information, and enforce attendance of witnesses and compel production of documents. In doing so, in accordance with Article 125, it has, as a Committee of Parliament, the same powers as those of the High Court. It follows therefore that in the same manner that Courts have inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court, the Committee in exercising its mandate, acquires the power to enlarge time within which to adjudicate over a matter before it. The reliance on Standing Order 230 which the AG contended imposed strict time lines could not override the requirements of substantive justice under the Constitution.

148. It is uncontroverted that the Committee declined to afford the Petitioner time within which to make a response to the Mugambi Petition and secondly, the Committee declined to afford a hearing to the Petitioner's Counsel to make representation before it. From the foregoing provisions of the Constitution and the National Assembly Standing Orders, together with the authorities referred to hereinabove, it is our finding that the Committee, acting in its quasi-judicial capacity, not only breached the Standing Orders but also express provisions of the Constitution.

149. We now turn to consider whether the issuance of orders by the Court was justified and in accordance with its jurisdiction within the context of the doctrine of separation of powers.

Court Orders and the Doctrine of Separation of Powers

150. The jurisdiction bestowed on Courts by the Constitution has assumed new significance in its impact on the balance of power between the three arms of government. This is particularly so with regard to the issuance of conservatory orders directed at the other arms of government. We have emerged from a constitutional dispensation in which the acts of the Executive and Legislature were hardly ever questioned or restrained.

151. We have entered a new constitutional era in which it is the Constitution which is supreme; in which none of the arms of government can claim supremacy; and which vests the High Court with the onerous responsibility of being the watchdog for the new Constitution. It is in this light that we must view the question of separation of powers and the rule of law against the orders issued by the Court in this matter.

152. In considering this issue, we begin by echoing the words of the High Court in Trusted Society of Human Rights v The Attorney General and Others High Court Petition No. 229 of 2012, at paragraph 63:

> "In answering [these constitutional questions], it is imperative that we begin by re-stating that the doctrine of separation of powers is alive and well in Kenya. Among other pragmatic manifestations of the doctrine, it means that when a matter is textually committed to one of the coordinate arms of government, the Courts must defer to the decisions made by those

other coordinate branches of government. *Like many modern democratic Constitutions, the New Kenyan Constitution consciously distributes power among the three co-equal branches of government to ensure that power is not concentrated in a single branch. This design is fundamental to our system of government. It ensures that none of the three branches of government usurps the authority and functions of the others. "*

153. The concept of separation of powers was succinctly articulated in the 18th century by the French Philosopher, Montesquieu in his treatise, the Spirit of Laws published in 1748. Arguing that no person or organ should exercise or wield absolute power as this would invariably lead to tyranny, he postulated:

> "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.... There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals. " 1 Charles Secondat, Baron de Montesquieu, The Spirit of the Laws 151-52 (Thomas Nugent trans., Hafner Publishing Co. 1949) (1748).

154. The need for power to be dispersed to various arms of government in order to avoid abuse of the rights of citizens is reflected in our Constitution. Article 1(1) vests sovereignty in the people who delegate their sovereign power to the three organs of government to be exercised in accordance with the Constitution.

155. Article 1 provides 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

(c) the Judiciary and independent tribunals.

.....

156. At Article 2, the Constitution states that:

2.

(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.

157. It is then provided at Article 3(1) that "Every person has an obligation to respect, uphold and defend this Constitution."

158. We thus recognise fully the doctrine of separation of powers and the need for Courts to be always conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. As observed by the Supreme Court of Zimbabwe in Smith v Mutasa (1990) LRC 87, the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.

159. It is important at this juncture to restate the provisions of Article 165 (3)(d)(ii) with regard to the jurisdiction of the Court. The Constitution expressly mandates the Court with jurisdiction to determine the question "...whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution..."

160. In dealing with this petition in its initial stages, the High Court (Odunga J) was confronted with the challenge of determining whether he had jurisdiction under our Constitution to issue orders directed at a Parliamentary committee and thereafter at the National Assembly itself. It can be safely assumed from the orders made that he was satisfied that he was vested with the necessary constitutional authority.

161. The issuance of orders with respect to a decision or act of Parliament is not a novelty. It is a recognition that there has been a sea change in governance, from the situation in which Parliament was deemed, and deemed itself, supreme, to a constitutional dispensation where the Constitution is the overlord and all organs of state are its handmaidens.

162. In making orders directed at Parliament, the Court in South Africa in De Lille & Another v The Speaker of the National Assembly (1998)(3) SA 430(c) stated as follows:

> "The National Assembly is subject to the Supremacy of the Constitution. It is an organ of state and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution. It is subject in all respects to the provisions of our Constitution. It has only those powers vested in it by the Constitution expressly or by necessary implication or by other statutes which are not in conflict with the Constitution. It follows therefore that Parliament may not confer on itself or on any of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication."

163. On appeal by the Speaker in the above case, (Speaker of National Assembly v De Lille MP & Another 297/98 (1999)(ZASCA 50) the Court rendered itself as follows:

> "This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is Supreme- not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No parliament, no official and no institution is immune from Judicial scrutiny in such circumstances." (Emphasis added)

164. Similarly, in Doctors for Life International v Speaker of the National Assembly and Others CCT 12/05)[2006]ZACC 11 at para 38, the Court held that:

> "....Under our Constitutional democracy, The Constitution is the Supreme Law. It is binding on all branches of government and no less parliament when it exercises its legislative authority, Parliament must act in accordance with and within the limits of the constitution, "and the Supremacy of the Constitution requires that "the obligations imposed by it must be fulfilled" Courts are required by the Constitution "to ensure that all branches of Government Act within the Law "and fulfil their constitutional obligations."

165. We agree fully with the sentiments of the Court set out above. We need not emphasise how closely our constitutional provisions reflect those contained in the Constitution of South Africa, and how heavily we borrowed therefrom.

166. In this jurisdiction, Ringera J (as he then was) had pronounced himself long before the promulgation of the current Constitution on the supremacy of the Constitution. In the case of Njoya & 6 Others v Attorney General and 3 Others (2004) 1 EA 194, where he said that:

> "I would rank constitutionalism as the most important. The concept of constitutionalism betokens limited government under the Rule of Law.
>
> Every organ of Government has limited powers, none is inferior or superior to the other, none is supreme, the Constitution is supreme and they all bow to it."

167. It emerges from the facts of the case before us that when the six Commissioners were served with the Mugambi Petition, JSC went to Court and obtained interim conservatory orders to stop deliberations of the Committee on the petition. This order was not complied with. A further order was then issued by the Court barring deliberations of the full House in respect of the report of the Committee on the petition. This order was also disobeyed. Finally, the Court issued a stay of the Special Gazette Notice No. 15094 pending the inter-partes hearing of the application. The effect of the order was to bar the chairperson and the members of the tribunal appointed on 29th November 2013 from commencing the investigations into the conduct of the six Commissioners and further stayed their suspension. The orders were served on the National Assembly and the AG.

168. One of the essential attributes of the rule of law is that the authority of the Court should be respected and obeyed by all in society. Those against whom Court orders are directed, and those affected, should obey them. The locus classicus in this regard is the case of Hadkinson v Hadkinson (1952) 2 ALL ER 567 in which the Court held that:

> "It is [the] plain and unqualified obligation of every obligation of every person against or in respect of, who an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."

169. In the case of Democratic Alliance v President of The Republic of South Africa & Others (263/11) [2011] ZASCA 241, the Supreme Court of Appeal of South Africa quoted with approval what the former Chief Justice Mahomed, of South Africa in an address on the Independence of the Judiciary

in Cape Town on 21st July, 1998 stated that the mandate of the legislature is to make only those laws permitted by the Constitution, and

> "...to defer to the judgment of the court, in any conflict generated by an enactment challenged on constitutional grounds .... A democratic legislature does not have the option to ignore, defy or subvert the court. It has only two constitutionally permissible alternatives, it must either accept its judgment or seek an appropriate constitutional amendment, if this can be done without subverting the basic foundations of the Constitution itself."(Emphasis added)

170. The Court was of the view that these statements apply with equal force where decisions of the Executive are concerned.

171. In this jurisdiction, the Court (Ibrahim, J (as he then was)), in the case of Econet Wireless Kenya Ltd v Minister for Information and Communication of Kenya and Another [2005] 1 KLR 822, quoted an extract from the Court of Appeal ruling in Refrigeration and Kitchen Utensils Ltd. v. Gulabchand Popatlal Shah and Another, Civil Application No. 39 of 1990 as follows:

> "... It is essential for the maintenance of the rule of law and good order, that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders, and will not shy away from its responsibility to deal firmly with proved contemnors ...."

172. From the foregoing, the place of court orders in any civilized society is well settled – they must be obeyed. The only option available to a party aggrieved by a Court order is to, appeal or apply for variation or discharge of that order. This is the only way to maintain the rule of law and the people's confidence in the judicial system. Kenya's legislative bodies have the obligation under Article 94 (4) to discharge their mandate in accordance with the terms of the Constitution and cannot plead any internal rule or statutory provision as a reprieve.

173. We conclude therefore that it is not a violation of the doctrine of separation powers for the Court to issue orders restraining acts of the Legislature that were alleged to be in violation of the Constitution.

Validity of the Appointment of the Tribunal

174. We have found that all state organs are under a constitutional obligation to obey Court orders. The question that then arises is whether the act of the President in setting up a tribunal pursuant to the recommendation of the National Assembly, made in disobedience of a Court order, is valid. The answer to this question must be in the negative. From the foregoing discussion, it follows that any decision made or action taken in defiance of a lawful Court order is null and void. We therefore hold that the appointment of the tribunal in consequence of the proceedings before the Committee and the resolution of the National Assembly was null and void.

Parliamentary Oversight of State Organs.

175. The genesis of the dispute that led to the present petition is the purported exercise by the Committee of what it saw as its constitutional oversight role in relation to the petitioner. Before considering the nature and extent of the role of parliamentary oversight, it is useful to start with a definition of the term.

Definition of oversight

176. Black's Law Dictionary (6thEdn) defines the term "overseer"as a superintendent or supervisor, a public officer whose duties involve general superintendence on routine duties. The verb "oversee" is defined in the Concise Oxford English Dictionary (12th Edn) as"Supervise (a person or their work.)"

177. The dictionary defines "oversight" as the action of overseeing. With regard to Parliament, one of the earliest traditional definitions of oversight is contained in the statement by John Stuart Mill, the British Utilitarian Philosopher, to the effect that:

> "... the proper office of a representative assembly is to watch and control the government; to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which anyone considers questionable."

178. There is no definition of the word "oversight" in the Constitution. Article 95 (4) (c) and 5 (b) assign the oversight role with respect to the national budget and expenditure, and of state organs, respectively, to Parliament. In this regard Article 95 (1) sets the basis for this assignment. It states:

> "The National Assembly represents the people of the constituencies and special interests in the National Assembly."

179. The above Article resonates with the principle of the people's sovereignty under Article 1 and the fact that Parliament, while performing its oversight role under the Constitution, is exercising the power delegated to it by the people of Kenya. We therefore agree with the submission by the Amicus that oversight is a form of monitoring and further that:

> "Monitoring does not entail controlling, giving instructions or micro managing, but checking regularly the progress or development (of a subject). The true test of a democratic State is the extent to which Parliament can ensure that the government is accountable to the people."

180. We were also referred by the Amicus to Hironori Yamamoto's Study Report entitled "Parliamentary oversight: A Comparative Study of 88 Parliaments", which gives a good guide on what Parliamentary oversight ought to entail. In that study, Yamamoto observes that:

> "Parliamentary oversight encompasses the review, monitoring and supervision of government and public agencies including the implementation of policy and legislation."

181. It is also worthwhile, for a better understanding of the concept of oversight, to consider the situation in South Africa. Section 55 of the Constitution of South Africa, from which we borrowed liberally in drafting and enacting our own Constitution, has provisions which are in many respects similar to the provisions of our Constitution, contained in Article 95, with regard to Parliamentary oversight.

182. In a 1999 report prepared at the request of the Speaker of the National Assembly in South Africa by Hugh Corder, Saras Jagwanth and Fred Soltau of the Faculty of Law, University of Cape Town titled "REPORTON PARLIAMENTARY OVERSIGHT AND ACCOUNTABILITY"(available online at pmg.org.za) the authors make a distinction between the term 'oversight' and 'accountability by defining accountability as follows:

> "At a basic textual level accountability means 'to give an account' of actions or policies, or 'to account for' spending and so forth. On a wider understanding accountability can be said to require a person to explain and justify - against criteria of some kind - their decisions or

actions (....). It also requires that the person goes on to make amends for any fault or error and takes steps to prevent its recurrence in the future.'

183. It must be obvious why the oversight function must be considered side by side with the responsibility to account. It is a requirement of our Constitution, as it is under the Constitution of South Africa, that those charged with the affairs of state and governance are accountable to the citizen. Article 10(2)(c) provides that the values and principles of governance include "transparency and accountability".

184. With regard to oversight, the University of Cape Town Reportstates as follows:

> "Oversight refers to the crucial role of legislatures in monitoring and reviewing the actions of the executive organs of government. The term refers to a large number of activities carried out by legislatures in relation to the executive. In other words oversight traverses a far wider range of activity than does the concept of accountability."

185. In considering Parliamentary oversight, it is useful to also consider the purpose and scope of such oversight, as this further helps in understanding the meaning and implications of the concept. We now turn to address the purpose and scope of oversight

The Purpose and Scope of Oversight

186. The University of Cape Town Report lays emphasis on the purpose of oversight as a constitutional imperative. The authors stated:

> "Oversight is the function of the legislature which flows from the separation of powers and the concept of responsible government, like law-making, which entails certain powers. Foremost among these is the power to hold the executive accountable. Monitoring the implementation of laws goes to the heart of the oversight tool....the legislature is in this way able to keep control over the law it passes and to promote constitutional values of accountability and good governance. Thus oversight must be seen as one of the central tenets of democracy...accountability is also designed to encourage open government. It serves the function of enhancing public confidence in government ".

187. In his study, Yamamoto (supra) identified several key functions of oversight as including detection and prevention of abuse, arbitrary, illegal, or unconstitutional conduct. This function underscores the protection of rights and liberties. By holding the government accountable for expenditure, Parliament is able to detect and prevent wastage, thereby enhancing efficiency and economy. Through Parliamentary oversight, the government is kept on its toes, so to speak, to deliver on its own policies or goals set through legislation. Oversight contributes to improving transparency of government operations and enhances people's trust in the government.

188. It is thus manifest from these functions that Parliamentary oversight is intended to be people-centred: the people must be the beneficiaries or intended beneficiaries of Parliamentary oversight. Thus, Parliamentary oversight is not an end in and of itself, or a mandate to be exercised in a whimsical or capricious manner.

189. In a paper entitled "Parliamentary Oversight for Government Accountability" edited by Riccardo Pelizzo, Rick Stapenhurst and David Olson (available online at wbi.worldbank.org) it is stated:

> " Regardless of whether oversight is viewed as a sort of ex post review of government policies and programmes, or whether it is viewed instead as a supervision of government activities that can be performed both ex post and ex ante, scholars have generally agreed on the

> fact that effective oversight is good for the proper functioning of a democratic political system. Effective oversight is beneficial for a political system, for, at least, two basic reasons: First, because the oversight activity can actually contribute to improving the quality of policies/programs initiated by the government; second, because as the government policies are ratified by the legislative branch, such policies acquire greater legitimacy."

190. Closer to home, the legislature in South Africa, in an endeavor to develop an effective model for oversight, grappled with the meaning, scope and purpose of oversight:

> "In the South African context, oversight and accountability are constitutionally mandated functions of legislatures to scrutinize and oversee executive action and any organ of State. Oversight entails the informal and formal, watchful, strategic and structured scrutiny exercised by legislatures, including Parliament, in respect of the implementation of laws, the application of the budget, and the strict observance of statutes and the Constitution. In addition, and most importantly, it entails overseeing the effective management of government departments by individual members of relevant executive authority in pursuit of improved service delivery for the achievement of a better quality of life for all people."(Emphasis added)

191. The above quotation is taken from a report titled "Oversight Model of the South African Legislative Sector "commissioned by theSouth African Legislatures' Secretaries" Association (SALSA)(available online at sals.gov.za). The model was developed as a unified framework for the Legislative Sector in South Africa with a view to creating a common oversight practice, common standards, vision, principles and best oversight practices in South Africa.

192. As an integral process for the enhancement of the rule of law, Parliamentary oversight is bound within established legal contours hence must be exercised in accordance with the law. Article 95 (4) (b) and (5) (b) provides for oversight by Parliament over national revenue and expenditure, on one hand, and of state organs on the other. Ordinarily, this mandate is exercised by Parliament through ad hoc or standing committees of Parliament established in accordance with the provisions of Article 124.

193. Under section 7 (d) of the Public Financial Management Act (PFMA), Parliament has the mandate to monitor adherence by the three arms of government to the principles of public finance through the relevant committee, in this case the Budgetary and Appropriations Committee created under Standing Order 207. The duties of that Committee are, inter alia, to investigate, inquire into and report on all matters related to coordination, control and monitoring of the national budget.

194. Under Standing Order 216 (3) and the Second Schedule of the Standing Orders, matters related to constitutional affairs and the administration of law and justice, including the Judiciary, ethics and integrity, fall under the Committee.

195. Commissions such as the JSC, and independent offices are required under Article 254 (1) to submit a report to Parliament and the President after the end of each financial year; and these two state organs may also require such Commission or independent office to submit a report on a particular issue at any time.

196. Article 254(3) requires that every report thus required of a constitutional commission or independent office must be "published and publicized". This, in effect, means that just as the annual reporting process must result in a publication which is publicized, so also, when an ad hoc report is required of a commission by the President, the National Assembly or Senate, such report must be published and publicized.

197. "Publication" is defined in the Collins Complete and Unabridged Dictionary as including "the act or process of publishing a printed work... the act or instance of making information public" while "publish" is defined as "to produce and issue (printed or electronic matter) for distribution and sale; to have one's written work issued for publication; to announce formally or in public...." Finally, "publicise" is defined in the same dictionary as "to bring to public notice; advertise." (Emphasis added).

198. One may ask why the Constitution makes express provision for these requirements for publication and publicization. These two requirements create the obvious presumption and expectation that, in respect of the annual report and an ad hoc report that may be constitutionally called for, both require a measure of time and transparent engagement between the state organs involved. In addition, there is the required expectation of engagement with the general public. These do not seem to us to be idle constitutional provisions.

199. To our minds, the purpose of publication and publicization is twofold. Firstly, it is to ensure that the people of Kenya are not kept in the dark with regard to the nature of information these two arms of government seek or obtain from independent commissions. Secondly, it is to ensure that the process is open and formal rather than informal. The openness resulting from publication and publicization would also be in accord with the provisions of Article 10 which require public participation in matters of governance.

200. Consequently, it is evident that the Constitution does not envisage that any one organ of state, in exercising its oversight role over another, should make haphazard or un-coordinated incursions of inquiry into the mandate of another state organ or independent commission or office.

201. For the purpose of its oversight functions, Parliament through its committees is empowered, by dint of Article 125, to summon any person to appear before it to give evidence or provide information. It is therefore beyond disputing that the power of Parliament in the exercise of its oversight role of state organs is fairly wide. The caveat, however, is in Article 93 (2) which states that:

> "The National Assembly and the Senate shall perform their respective functions in accordance with this Constitution."

202. It is indeed true, as submitted by Counsel for the AG, that under Standing Order 216 (5) (a) and (e) and the Second Schedule of the Standing Orders, part of the functions of a Parliamentary Departmental Committee are to investigate, inquire into and report on all matters "relating to the management activities, administrations, operations and estimates of the assigned ministries and departments," and to "investigate and inquire into all matters relating to the assigned ministries and department as they deem necessary." However, such investigations and inquiries must be conducted in a manner that does not violate the Constitution, as for instance breaching fundamental rights, or by exceeding the scope prescribed within the enabling Articles of the Constitution.

203. A pertinent question that arises in the circumstances of this case is whether the procedure prescribing the removal of members of constitutional commissions or holders of independent offices under Article 251 falls within the oversight role of Parliament. The answer to this question is, in our view, simultaneously yes and no. We say this because, strictly speaking, the oversight role envisaged in Articles95 and 125, for instance, appears quite distinct from the purposes of Article 251. While oversight relates to a body corporate, generally, the removal process is with respect to an individual commissioner. However, given that Parliament is involved in all aspects of the life of a commission including the appointment of commissioners (see Article 250 (2) (b), funding of commissions (Article 249 (3), oversight proper (Article 254) and removal of commissioners (Article 251)), Parliament's oversight role (and here, we use the word oversight loosely with regard to Article 251) with respect to

independent commissions appears to be generally on a continuum, from inception or appointment to removal.

204. In that light, removal can be said to be the ultimate sanction in the oversight process which is otherwise routine. The ultimate threat of the sanction of removal is in and of itself a tool for regulating the conduct of commissioners and independent office holders while in office. It is intended as the ultimate check on the competence, capacity and integrity of such commissioners and office holders. It is the oversight tool of last resort. The process of removal touches personally upon, and is concerned with, the conduct or capacity of individual members of a commission.

205. The removal process under Article 251 is not, however, part of the routine oversight vested in Parliament by the Constitution. It is initiated, not by the House or committee of Parliament, unlike other oversight mechanisms, but by a petition by any person who desires the removal of a commissioner under Article 251(2).

206. One of the issues identified by the parties and upon which Counsel made submissions related to the threshold for removal of a constitutional commissioner. We were invited to consider and find that the Mugambi Petition did not meet the constitutional threshold for such removal; that the evidence relied on was illegally obtained; and that in any event it did not meet the constitutional threshold.

207. We agree that this is an important issue, and were the facts and circumstances of this matter different, we would no doubt consider it and make appropriate findings. However, in this petition, we are not concerned with the validity or constitutionality of the Mugambi Petition. Whether or not it meets the constitutional threshold is a question that would have properly belonged to the proposed tribunal. Since we have held that the appointment of that tribunal was null and void, this question is moot and we shall say no more about it.

208. We now turn to consider whether the JSC is subject to the oversight of Parliament.

Whether the JSC is Subject to Oversight by Parliament

209. Article 249describes the objects of the commissions and independent offices set up under ChapterFifteen of the Constitution as the protection of the sovereignty of the people, securing the observance by all state organs of democratic values and promotion of constitutionalism. The South African Constitution describes the independent institutions as"strengthening constitutional democracy" (see section 181(1) which is in parimateria with our Article 249).

210. Discussing the unique and special role of the independent commissions in South Africa, the University of Cape Town Report(supra) states:

> "They are an integral part of the checks and balances of a constitutional democracy and accountable government. An important part of each of their functions is calling government to account and strengthening and promoting respect for the Constitution and the law by society at large. In relation to Parliament they have two roles. Firstly they should be seen as complementary to Parliament's oversight function: together with Parliament they act as watch-dog bodies over the government and organs of state. Secondly, they support and aid Parliament in its oversight function by providing it with information that is not derived from the executive."

211. Citing the challenges of inadequate resources and political independence faced by members of Parliament, the Report goes on to state:

> "As pointed out above, one of the constitutional functions of Parliament is to be an oversight body to provide a check on the arbitrary use of power by the executive. However, with the complex nature of modern government, members of parliament often do not have the time and resources to investigate in depth, or because of party discipline do not have the political independence that is required....Hence state institutions supporting constitutional democracy have been created to assist parliament in its traditional functions. This function is most obvious in relation to the office of the Auditor-General which performs the primary part of oversight of financial matters, but this is clear also in relation to the other institutions in chapter 9. The Public Protector for example has as its main function the investigation of improper conduct in state or government affairs and in the public administration which also forms a crucial part of Parliament's oversight role. Similarly, the Human Rights Commission not only ensures the protection and development of human rights but is also the main vehicle through which the implementation of socio-economic rights in government departments is monitored."

212. The authors of the Report concluded as follows:

> "Thus Parliament's oversight function can be enhanced by ensuring the effective functioning of state institutions supporting constitutional democracy. Much the same arguments may be advanced in respect of other bodies established in terms of the Constitution, including the Judicial Service Commission, the Financial and Fiscal Commission and the Public Service Commission."

213. In light of the foregoing discussion, the question whether the JSC is subject to Parliamentary oversight must be answered in the affirmative. The JSC is a creature of the Constitution, an independent commission subject only to the Constitution and the law and, as provided under Article 249 (2), is not subject to direction or control by any person or authority. Like other constitutional commissions and independent offices, the JSC must however operate within the confines of the Constitution and the law. While enjoying financial and administrative independence, the JSC is accountable to Parliament. The JSC is also a partner to Parliament in supporting constitutional democracy.

214. The key functions of the JSC, its raison d'etre so to speak, is spelt out in Article 172 (1) as follows:

> "The Judicial Service Commission shall promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice ...."

215. The rest of its mandate is spelt out in sub-articles (1) (a), (b), (c), (d) and (e). Of relevance to this case is sub-article172 1 (c) which empowers the JSC, inter alia, to appoint, receive complaints against, investigate and remove from office or discipline registrars, magistrates and other staff "in the manner provided by an Act of Parliament" – in this case the JSA. Like Parliament, the Auditor General, the National Land Commission and the National Commission on Human Rights, the JSC is empowered under Article 252 to conduct general investigations suo motu, or on a complaint lodged by a member of the public, and to summon witnesses.

216. For the facilitation of the constitutional mandate of the Judiciary under Article 159, the JSA makes provision for the administration of the Judiciary, the powers and functions of the JSC, financial

matters, procedures for appointment and removal of Judges, and the discipline of judicial officers and staff, among other matters. These objects are accurately captured in the preamble to the JSA as follows:

> "An Act of Parliament to make provision for judicial services and administration of the Judiciary; to make further provision with respect to the membership and structure of the Judicial Service Commission; the appointment and removal of judges and the discipline of other judicial officers and staff; to provide for the regulation of the Judiciary Fund and the establishment, powers and functions of the National Council on Administration of Justice, and for connected purposes".

217. These objects are restated, together with the functions set out in Article 172, within section 3 of the JSA. In particular, Parliament found it fit to provide at Section 3(h) that the Judiciary and the JSC shall:

> "...be the administrative manifestation of the Judiciary's autonomy and inherent power to protect and regulate its own processes in achieving these objects through application of principles set out in the Constitution and other laws." (Emphasis added)

18. Section 13 (1) of the Act is, inter alia, in the following terms:

> "In addition to the power of the Commission under Article 253 (sic) of the Constitution, the Commission shall have the power to –
>
> ...
>
> (d) do or perform all such other things or acts necessary for the proper performance of its functions under the Constitution and this Act which may be lawfully done or performed by a body corporate."

219. Sub section 2 states that in the discharge of their responsibilities, the members of the commission "shall be guided ... by the principles contained in the Constitution and in this Act."

220. It is clear from these provisions that the intention of Parliament in enacting the JSA was to give effect to the provisions of Article 172 thereby freeing Judiciary's administrative processes from interference by other organs. The provisions also clearly demonstrate the symbiotic relationship between the JSC and the Judiciary, even though both have distinct and separate legal identity. These provisions were intended to accord financial and administrative independence to the JSC and ultimately to the Judiciary itself. These terms were defined in the University of Cape Town Report (supra) as follows:

> "Financial independence implies the ability to have access to funds reasonably required to perform constitutional obligations.... Linked to financial independence is the ability of constitutional institutions to perform their functions without administrative control by the executive...(it) implies control over matters directly connected with the functions that such institutions must perform."

221. Therefore a clear reading of Articles 172 and 249 (2) vis-a-vis Articles 95, 125,251 and 254, together with the above provisions of the JSA suggest that oversight, in the context of the JSC cannot translate to control and direction. Nor is oversight micromanagement of the JSC.

222. Black's Law Dictionary (9th Edition) defines control as "...the direct or indirect power to govern the management and policies of a person or entity, whether through ownership of voting securities....or otherwise, the power or authority to manage, direct...." On the other hand, to direct means to guide (something or someone), to govern or instruct (someone) with authority. These are the ordinary meanings ascribed to the words "control" and "direction" by the Supreme Court in its Advisory

Opinion on Article 163 (6) and the Date of the First General Election (Advisory Opinion No 2 of 2011).

223. The distinction between oversight and direction/control is important and ought to guide Parliament in the exercise of its mandate under Articles 95 and 125.

224. It was submitted by Counsel for the AG that "the relevance or otherwise of the documents or evidence required by the committee is to be determined by the committee and the committee alone" in reference to Articles 95 and 125. This submission was based on the authority of the English decision in British Railways Board and Another v Pickin (1974) 1 ALL ER 609. On that basis Counsel went on to submit that:

> "the JSC was bound to comply with the committee's summons and to appear before it to produce the evidence that had been called for and to answer any queries... This is a strict constitutional requirement on the part of the JSC ... neither is it open to the JSC to decide what evidence it shall avail and which it shall not. Such approach would undermine and defeat the whole object of parliament's oversight role."

225. With respect, that submission is untenable on two accounts. Firstly, the English authority on which it is based emanates from a jurisdiction where Parliamentary supremacy is observed. That is not the position in this country under the Constitution. Indeed, though Kenya followed the Westminster model prior to 2010, the said model was modified to the extent that we had a constitutional democracy in which the constitution was supreme. In this regard, the words of Ringera J,(as he then was) in Njoya and 6 Others v AG and 3 Others (Supra)are apt:

> "I would rank constitutionalism as the most important....(it) betokens limited government under the rule of law. Every organ of government has limited powers, none is inferior or superior to the other, none is supreme, the Constitution is supreme and they all bow to it" (see also the Indian Supreme Court decision in Raja Ram Pal v The Honourable Speaker, Lok Sabha & Others. Writ Petition (Civil) 1 of 2006).

226. In the case of New National Party v Government of the RSA And others [1999] (5) BCLR 489, the Court was asked to determine the constitutionality of the conduct of the government in its dealings with the Electoral Commission. Part of the commission's complaint was that the government had usurped and interfered, through its Department, with the powers, duties, and functions of the electoral commission and violated its financial independence through inadequate funding. Emphasising the importance of administrative and financial independence of independent commissions, Lwanga DP, went on to state that:

> "Administrative independence implies control over matters directly connected with the functions the commission has to perform under the Constitution and the law".

227. In our considered view, the Constitution of Kenya contains inbuilt limits to the scope and purpose of Parliamentary oversight. A proper reading of Articles 254(2), 171(2), and 249 on one hand and Articles 95 and 125 on the other, does not support the proposition advanced by the AG. Parliament's oversight mandate is not a carte blanche. It must be exercised in obedience and full perspective of all provisions of the Constitution and the law. The power to oversee organs of state including independent commissions like the JSC does not extend to a violation of the independence of the commission acting within their mandate. Such is the construction that accords with Article 259 of the Constitution. We agree on this issue with the submissions made by the Petitioner and the Amicus. Parliament can only summon the JSC over a legitimate cause.

228. In the result, the answer to the issue under discussion must be a qualified one: that the JSC is subject to lawful and proper oversight by Parliament. This in our considered view, represents the wholesome and purposive reading of the Constitution urged upon us by Counsel for the AG on the authority of Nderitu Gachagua v Thuo Mathenge & Others, Nyeri C.A. No. 14 of 2014.

Whether Parliament properly exercised its Oversight Role over JSC.

229. In the preceding paragraphs, we have drawn a distinction between the meaning and purport of oversight in contradistinction with direction and control. We have also demonstrated that oversight is not an end in itself but is intended to serve a clear purpose in the advancement of Kenya's constitutional democracy and improvement of the quality of life of its citizens.

230. It is undisputed that the conflict between the JSC and the National Assembly was triggered by the action taken by the former against the erstwhile CRJ, Gladys Boss Shollei, on 17th August, 2013. The Petitioner subsequently resolved in a full meeting on 19th August 2013 to send the said CRJ on compulsory leave for 15 days pending investigation and inquiry into allegations made against her in respect of her discharge of duties. The joint committees of the JSC responsible for Finance and Administration and Human Resource Management were thereafter mandated to inquire into the allegations, inter alia, on procurement, employment, administration, finance and corporate governance and to frame specific issues to enable a response from the CRJ, against whom the allegations had been brought. We will review the subsequent events in the following portion of our judgment.

231. Following the decision of the Petitioner to send the CRJ on compulsory leave, the Departmental Committee on Justice and Legal Affairs of the National Assembly summoned the JSC through a letter dated 20th August, 2013 for a meeting whose agenda was stated to be to: "deliberate on the process, issues and circumstances surrounding her [CRJ] suspension and the general state of the Judiciary."

232. The authority cited by the said Committee was Standing Order 216 (5) (a) of the Standing Orders of the National Assembly which states that:

> "The functions of a Departmental Committee shall be to:
>
> Investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments."

233. The AG's submission with regard to the summons was as follows:

> "...the JSC was bound to comply with the Committee's summons and to appear before it and to produce the evidence that had been called for and to answer any queries put to the commission .... it was certainly not open to the commission to decline to appear ... or to decide what evidence it shall avail ... when the people's chosen representatives, through the committee summon the JSC, they are bound to drop all else and to answer the summons and to be fully responsive to all issues raised on behalf of the people."

234. On its part the Amicus, though agreeing that the JSC ought to have honoured the summons of the Committee, argues that the question of the suspension of the CRJ was not a legitimate matter for the Committee to handle, but that the question of the "general state of the Judiciary" was. The reason given for this distinction is that with regard to the first matter, "it related to the performance of a constitutional function by JSC under Article 172 and was therefore insulated by the independence

clause of Article 249 (2) of the Constitution."This latter submission is in agreement with the Petitioner's arguments.

235. As regards the topic of the general state of the Judiciary, we think that the whole question of the purport of Article 125, and the circumstances of the summons, must be considered. Firstly, we do not accept the AG's argument that the JSC, once summoned, regardless of the subject matter of the summons should have "dropped everything" and hurried to answer "all questions and provide all documents required of them". We take this view because this submission appears to be based on the notion of a supreme Parliament with unlimited oversight power. This notion runs counter to the provisions of Article 2 which declares the Constitution to be supreme.

236. The authority of British Railways Board & Another v Pickin(supra) is therefore not relevant in our constitutional design. Parliamentary oversight must be conducted within the strictures of the Constitution. As the Amicus has stated, the matter of the removal of the CRJ was out of bounds for the Committee, in as much it amounts to micromanagement of the JSC in its assigned functions. In dealing with the matters related to complaints or allegations against the CRJ, the JSC was exercising its mandate under Article 172(1)(c), a matter properly within its constitutional functions.

237. In carrying out its oversight role, Parliament must respect the independence of the JSC and other independent offices. This is particularly important because of the pivotal role assigned by the Constitution to the JSC to facilitate and promote the independence and accountability of the Judiciary under Article 172. As we have stated before, the JSC plays a complementary role to Parliament in overseeing the entire Judiciary. It is not a competitor, or intended to be a competitor against Parliament. It is ideally a partner in the constitutional scheme.

238. Secondly, the JSC and indeed the Judiciary must be seen to be free from the undue influence of other organs. TheChief Justice of the Republic is the Head of the Judiciary under Article 161 and also the chairman of the JSC. A sustained and patently unconstitutional assault on the JSC from whatever quarters could well symbolize an actual assault on the Judiciary as an arm of government. This symbolism and the utterances ascribed by the media to key members of the Committee are an important consideration in viewing the propriety of the summons by the Committee to the entire JSC. It bears reiterating the words of Parliament in section 3(h) of the JSA that the JSC and the judiciary are "...the administrative manifestation of the Judiciary's autonomy and inherent power..." (Emphasis added)

239. In Constitutional Petition No. 74/2014, International Legal Consultancy Group v. The Senate and Another, the Court grappled with a similar question respecting summons to several County Governors by the Senate. The Court stated that the Senate could not arrogate to itself powers not given to it under the Constitution and then went on to observe as follows with regard to the Senate:

> "While it does have power under Article 125 to summon anyone, that power cannot have been intended to be exercised arbitrarily and in isolation but must be read in conjunction with other provisions of the Constitution which allocate functions and powers to the various organs created by the Constitution ... The court as the final arbiter under the Constitution is obliged to adjudicate any dispute between various arms of the State and to determine the contours of separation having regard to the Constitutional functions of each organ."

240. It must be said for the JSC that in its letter declining the Committee's summons, rather than advancing its own opinion or interpretation of its independence, it relied on a binding pronouncement of the Supreme Court on the meaning of Article 249 (2), the independence clause of the Constitution with

regard to constitutional commissions and independent offices, in Constitutional Application No. 2 of 2011(supra).After quoting verbatim from the said decision, the JSC went on to state at paragraph 4 of the letter:

> 4. "By requiring the Commission to appear before it to deliberate on the "process, issues and circumstances surrounding the suspension (sic) of the Chief Registrar, the Departmental Committee on Justice and Constitutional Affairs (herein, "the Committee") would not only be calling into question the purpose of the constitutional provisions cited above, but would undermine the doctrine of separation of powers which runs through the Constitution (the Commission is the facilitator of the independence and accountability of the Judiciary)."

241. The JSC also notified the Committee that its actions against the CRJ were already the subject matter of court proceedings brought against the JSC in which orders were issued to restrain the JSC from instituting or continuing disciplinary proceedings against the CRJ.

242. The JSC letter in our view amounts, not to "defiance" as viewed by one member of the Parliamentary Committee (see Annexture WBM5 to Amended Petition) but a robust assertion of its independence and the law. In the New National Party case (supra), the Court endorsed the electoral commission's assertions of independence communicated in various correspondence addressed to the "interfering party".

243. Parliament's Standing Orders cannot override the Constitutional insulation provided to independent commissions in the lawful exercise of their mandate. The question relating to the sending of the CRJ on compulsory leave and issues and circumstances thereof were matters of which the JSC was properly seized under Article 172 (1) (c). Consequently, the attempt by the Committee to interfere with the matter even before the JSC could complete its own inquiries cannot be defended under the banner of Parliamentary oversight. In the circumstances, the summons to the JSC by the Committee must be seen to reflect an intention to direct and control the JSC's exercise of its mandate under Article 172 (1) (c). Parliamentary exercise of the oversight mandate and authority to summon under Article 95 and 125 of the Constitution must be balanced against the independence of the commission as long as it was acting lawfully.

244. There is no evidence cited by the Committee in its communication with the Petitioner that the JSC had acted in an unlawful manner. Neither the summons dated 20th August, 2013 nor the subsequent demand for annual reports dated 5th September, 2013 make any reference to unlawful or improper conduct by the JSC.

245. We agree with the submissions by the Amicus that the attempt by the Committee to engage in the matter of the suspension of the CRJ was not a legitimate exercise of its oversight role. We are bolstered in our view by the fact that, upon receipt of the JSC's response of 26th August, 2013 to their first letter in which JSC pleaded independence, the Committee did not make a rejoinder. However, a day after the JSC formally communicated its resolution not to honour the summons, a member of the Committee was quoted in the Standard of 27th August 2013 issuing threats of dire consequences including removal of Commissioners of the JSC for its alleged "defiance" of the summons. He suggested that the JSC members had realised they were guilty of violating the law and were avoiding "scrutiny". (see annexure WBM5 in the affidavit of Wilfrida Mokaya sworn in support of the Amended Petition).

246. Not having responded to the JSC letter of 26th August, 2013, the Committee's next step was a demand for annual reports from the Commission in respect of the financial year 2011/2012 and 2012/2013 pursuant to Article 254 (1) and (2)vide a letter dated 5th September, 2013. This letter not only made no reference to the previous communication or issues but it also encompassed items which on the face of

it could arguably fall under Part IV of the Public Financial Management Act (PFMA), and for which the Controller of Budget and Auditor General were responsible under Section 68 of the PFMA, as well as the Budget and Appropriations Committee established under Standing Order 207.

247. On 17th September, 2013 the JSC forwarded a copy of the Judiciary Annual Report and Financial Statements for the 2011/2012 fiscal year, explaining that allocations for the Commission were drawn from the Judiciary vote R26 operated by the CRJ as chief administrator and accounting officer of the Judiciary. Also attached was the Commissions Annual Report regarding the JSC activities in the said year. The JSC explained in the said letter that the reports for the following year were not ready.

248. With regard to the information sought under Article 254 (2) the JSC took the position that these items formed part of the "ongoing investigations by the Judicial Service Commission into various allegations of mismanagement in human resource, procurement process and finances against the Chief Registrar of the Judiciary."That is an indication that despite the previous notification by the JSC to the Committee that the CRJ's matter was sub-judice, the Committee continued to demand related information. The demand is also intriguing in another respect: any report supplied under Article 254(2) ought to be published and publicized. What purpose we ask, would be served by the premature publication of material related to an inchoate investigation other than sabotaging the investigation? However, no further communication issued from the Committee in response to the JSC letter of 17th September, 2013.

249. A month later, on 17th October, 2013, the Mugambi Petition was forwarded by the Clerk of the National Assembly, on behalf of the Committee, to the six Commissioners of the JSC. The said Commissioners were given an election to appear in person or submit written responses to the Committee on 25th October, 2013. Two events that occurred two days before and seven days respectively, after this letter deserve mention. The first is a letter addressed to the CRJ and copied to the Chief Justice. Its stated purpose was to clarify that the CRJ is the accounting officer of the Judiciary, by virtue of Article 161(2)(f) and to point out her designation as Accounting Officer by the Cabinet Secretary of The National Treasury Henry K. Rotich, the author of the letter. For good measure the letter adds that:

> "Please note, that Section 197(m) of PFMA provides that 'a public official commits an offence of financial misconduct if, without lawful authority, the officer intentionally or recklessly obstructs or hinders a person while that person is acting in the performance or exercise of the person's functions or powers under the PFMA' ".

250. Firstly, the Cabinet Secretary was in his letter purporting, contrary to the Constitutional provision he cited in his letter, that the CRJ was his appointee; but secondly, and more disconcerting he was issuing a veiled threat against those he perceived as obstructing the CRJ in her duties.

251. On 20th October, 2013, the Cabinet Secretary wrote directly to the Chief Justice informing him that a special audit of the Judiciary would be conducted "with immediate effect to ascertain whether there are material challenges in the performance of financial functions in the Judiciary Department...(and) to determine appropriate intervention". The Cabinet Secretary explained that the latter letter was prompted by media reports "highlighting financial management and accountability issues" concerning the Judiciary.

252. It is undisputed that while the formal communications between these bodies were being exchanged, the media, especially the print media, continued to carry reports associating the Chairman of the Committee with threats directed at the JSC. For example, on 21stAugust, 2013 the said chairman

allegedly stated that the Committee had "huge dossiers of serious and damaging allegations made against some of the Commissioners. It is in their interest that they appear."

253. On the very date that the Committee forwarded the Mugambi Petition to the six members of the JSC, the Chairman was again reported in The Standard newspaper of 19th October 2013 (annexure WBM9 in the affidavit of Wilfrida Mokaya) as stating:

> "We as the Committee that play the oversight role on matters of justice have the ultimate say on the future of JSC. We shall be failing in our duties if we allow this kind of wastage to go on without our intervention. JSC must be willing to be controlled or we disband them."

254. At paragraph 15 of the Petitioner's affidavit, it is stated that the said Chairman was the father of an Administrative Assistant employed by the CRJ in the Judiciary, and that her irregular recruitment and payment of her postgraduate studies fees formed part of the investigation against the CRJ. The allegations are supported by an extract by the CRJ to the JSC, (annexure "WBM-4") and none have been disputed. Secondly, allegations of close or family ties between the said Chairman and the CRJ have not been disputed. The Petitioner therefore deponed that the Chairman was driven by personal interests.

255. As urged by the Amicus, the events preceding the removal of the six commissioners of the JSC must be viewed as one transaction starting with the sending on compulsory leave of the CRJ by the JSC. We find it significant that following the last communication by the JSC to the Committee (in its letter of 17th September, 2013) no rejoinder was sent to the JSC. Instead a Petition dated 4th October 2013, on the face of it by an independent citizen, was forwarded by the National Assembly to the JSC, targeting the removal of six commissioners.

256. This Petition appears to take over matters from where the Committee left off. We say this cautiously and respecting Mr. Mugambi's right, under Article 251(2), to present a petition to Parliament seeking the removal of the six commissioners. We take this view because it is an inescapable observation, and on this score we rely on section 119 of the Evidence Act, that looking at the language and substance of the Mugambi Petition, it uncannily harks back to the "process and circumstances of the removal" of the CRJ which ignited this dispute. If the sentiments of the key members of the Committee on this matter were accurately carried in the print media, as set out above, and considering the unwillingness of the Committee to extend time for the Commissioners to appear or make presentations to the Committee with regard to the Petition, any reasonable person would begin to see a disturbing pattern.

257. The ensuing plenary discussion in Parliament suggests that the real intention of this entire exercise was the subjugation of the JSC to the National Assembly, rather than a genuine desire to exercise oversight for the benefit of the people represented by Parliament. The beneficiary would seem to be the erstwhile CRJ and the assertion by Parliament of its assumed positional supremacy. This does not accord with a simple purpose test drawn from the functional definition of oversight in the oversight model of the South African Legislative Sector, earlier cited in this judgment; that:

> "Oversight entails the informal and formal, watchful, strategic and structured scrutiny ... overseeing the effective management of government departments by individual members of relevant executive authority in pursuit of the improved service delivery for the achievement of a better quality of life for all people."

258. We have taken judicial notice of the report of the debate in Parliament as reported in the Official Hansard of 6-7th November, 2013. This is in accordance with the provisions of section 60 of the Evidence Act. A cursory reading of the same, retrieved from the official website of the National

Assembly, demonstrates the animus by a majority of the speakers towards the JSC and the desire for its control. Two examples will suffice. At page 33 of the Hansard, one Honourable Member is reported to have stated as follows:

> "The horns of the JSC can only be trimmed by this House through our oversight role."

259. At page 20 another Honourable Member of Parliament, who was also a member of the Committee, in seconding the motion to adopt its report, stated that:

> "From the outset I wish to state that the journey which this Committee has travelled with the JSC has been very turbulent. This is a commission (JSC) that would only wish to oversee itself. Before this petition, we had issues with this Commission. This is the time for this House to assert itself ... this Commission snubbed a Committee of Parliament. If members will not assert its authority, tomorrow another Commission will snub another Committee...we have always had commissions appear before us in the past whenever the Committee required them to appear...They have always appeared before this Committee but the JSC did not"

260. Despite objections by several Honourable members of Parliament casting doubt on the identity/existence of the petitioner Riungu Nicholas Mugambi, and observing that he had not appeared before the Committee, as well as noting the inadequacy of the allegations in the Petition, the Committee's Report was adopted.

261. The ultimate question then is whether the kind of oversight disclosed in this case is that anticipated in Article 125, 95 and 254, of an independent commission protected under Article 249. In our view, when the interaction between JSC and the Committee is reviewed in its entirety, the answer must be a resounding no. Whereas the oversight provisions anticipate a purposeful, lawful, objective and careful oversight, the actions undertaken by the Committee reveal a disregard for constitutionalism, sabre rattling, and partiality.

262. The circumstances of this case make it difficult not to believe that the actions of the Committee were driven by motives other than the execution of the legal oversight obligation for the benefit of the people. To use the words ascribed in the media to the Chairman of the Committee, the apparent intent was to subjugate and control the JSC. The Committee's "oversight" amounted in substance and procedure to piling undue influence on the petitioner in the investigations involving the erstwhile CRJ.

263. As the Court stated in the New National Party case, tensions are inevitable between the legislature and independent commissions and institutions. But it is incumbent upon the parties involved to endeavour to resolve the tensions. We take the view that a proactive intervention through meaningful discussions between the Chairman of the JSC and the Speaker of the National Assembly could have resolved the initial tensions, obviating the need for court proceedings which should ideally come as a last resort. Perhaps this calls for an early warning mechanism, and a protocol to facilitate timely and effective intervention in the future.

264. In order for such a system to work, parties must understand their place in the constitutional design and the value of constitutionalism. It is unfortunate that the JSC's assertion of its independence in this case was seen by the Committee and Parliament as an act of "defiance". In the New National Party case, the Court endorsed a robust exchange between two state organs in which the "offended party", the Electoral Commission, questioned what it claimed to be the usurpation/interference with its mandate by the "offending party". Although the dispute eventually ended up in court, the court appeared to lean in favour of the proposition that court action between state organs ought to be a last resort.

265. We find that in the circumstances of this case, the purported exercise of oversight of the JSC by the National Assembly was improper and constituted a violation of the Constitution.

Recommendations

266. Before giving our final orders in this matter we deem it appropriate to, respectfully, make certain recommendations which we hope will form a basis for future cordial and constructive engagement between state organs. In making these recommendations we go back to the University of Cape Town Report in which it was postulated that:

> "Effective and proper exercise of oversight thus requires Parliament and members of the executive to fully understand the constitutional justification and rationale behind accountable government and the purpose it serves."*[1]*

267. For independent Commissions or those in power, and therefore subject to, or responsible for, oversight, accountability and oversight will be more effective if they all recognise "the central organising principle of the Constitution": it is a two way street in the enhancement of democracy and the well-being of the people.These ideals were seemingly lost in the tensions generated by this dispute.

268. The Constitution has brought fundamental changes in the governance structure of our country, including through the introduction of no less than twelve new constitutional commissions and independent offices. Their number and the complexity of overseeing these new institutions, with their important yet diverse functions, means that there is a need for Parliament to be innovative in order to efficiently carry out its oversight role over these new entities, so as to realize real benefits for the people of Kenya. Further, and in order to facilitate better working relationships between organs of state that enhance performance of their respective constitutional mandates for the people of Kenya, we make the following recommendations:-

A. That Parliament considers the establishment of a committee within Parliament dedicated to the oversight of all the independent offices and commissions.

B. That Parliament considers developing an appropriate, structured, oversight model that takes into account and facilitates strategic and structured scrutiny of state organs by Parliament with the aim of advancing our constitutional democracy, enhancing service delivery and better quality of life for the people of Kenya.

C. That the Executive, Legislature and Judiciary develop a Protocol for Engagement between the heads of the three arms of government to facilitate amicable discussion and resolution of issues of governance and areas of potential conflict, in the spirit of co-operation and mutual respect that underlies our Constitution.

Summary Of Findings

269. We now summarise hereunder our findings in respect of the substantive issues which we dealt with.

270. On the first issue of joinder and or misjoinder, we have found that JSC was a proper Petitioner; that the Speaker of the National Assembly was properly enjoined; and that in the circumstances of this case, even if there had been a misjoinder, which was not the case, the President can be bound by Court orders arising from proceedings to which he was not a party;

271. On the second issue regarding the jurisdiction of the Court in relation to acts of other arms of government, we have found that judicial intervention by the High Court is not a violation of the

doctrine of separation of powers insofar as the Court is performing its solemn duty under Article 165(3)(d)(ii) of the Constitution in inquiring into alleged constitutional violations or contraventions.

272. On the third issue as to the meaning and scope of Parliamentary oversight of state organs, our findings are three pronged:

a. Firstly, that the constitutional provisions for Parliamentary oversight of constitutional commissions and independent offices anticipate a purposeful, lawful, objective and carefully structured oversight for accountable governance for the achievement of a better quality of life for the people of Kenya;

b. Secondly, that Parliament's constitutional powers of over sight do not amount to a right to subjugate, micromanage, control or direct the JSC;

c. Finally, that oversight connotes the constitutional imperative aimed at the enhancement of constitutional democracy and the rule of law through upholding and protecting the financial and administrative independence of constitutional commissions.

DISPOSITION

273. In light of the foregoing, the following orders commend themselves to us:

1. We issue a declaration that the Petitioner as a constitutional commission is not subject to the control or direction of the National Assembly or any of its Departmental Committees established under the Standing Orders in the lawful discharge of its Constitutional mandate under Article 172 of the Constitution;

2. We declare that the National Assembly through the Departmental Committee on Justice and Legal Affairs is not entitled to supervise and sit on appeal on the decisions of the Judicial Service Commission when the Commission is lawfully discharging its mandate under the Constitution;

3. We hereby issue an order of Certiorari to remove to the High Court and quash the proceedings before the Committee on Justice and Legal Affairs seeking the removal of members of the Judicial Service Commission;

4. We hereby declare that the resolution of the National Assembly to transmit the Petition to the President in defiance of a Court order is null and void and is hereby quashed;

5. We declare that the appointment of the 3rd to 6th Respondents by the President of the Republic of Kenya as members of the Tribunal contemplated under Article 251(4) of the Constitution under Special Gazette Notice No. 15094 is null and void, and is hereby quashed;

6. We issue an order prohibiting Justice (Rtd) Aaron Gitonga Ringera, Jennifer Shamalla, Ambrose Otieno Weda and Mutua Kilaka from taking oath, assuming office, carrying on or in any way discharging their mandate as members of the Tribunal appointed under Special Gazette Notice No. 15094.

7. We decline Prayers 2, 4, 5 and 6 of the Petition.

Costs

274. Under Rule 26 of the Mutunga Rules, the award of costs is at the discretion of the court. This has been the holding in several decisions of the courts including John Harun Mwau v The Attorney General

Petition No 65 of 2010 [2012]eKLR and Rose Wangui Mambo and Others v Limuru Country Club Petition No. 160 of 2013 [2014] eKLR.

275. Taking into account that this matter raises issues of great public interest and importance, we make no order as to costs.

276. Finally we wish to thank Counsel who participated in these proceedings for their thorough preparation and incisive submissions, as well as for the assistance which they gave to the Court in this matter.

Orders accordingly.

Signed and Dated at Nairobi this 15th day of April, 2014

RICHARD MWONGO

PRINCIPAL JUDGE

.....

HELLEN OMONDI

JUDGE

.....

CHRISTINE MEOLI

JUDGE

.....

MUMBI NGUGI

JUDGE

.....

HILARY CHEMITEI

JUDGE

In the presence of:

1. Mr. P.K. Muite, Mr. Issa and Ms. Mutua for the Petitioner

2. Mr. Njoroge Regeru for the Attorney General

3. Mr. S.M Mwenesi for the Interested Party

4. Mr. Y. Angima for the Amicus