



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.208 OF 2012

**CENTRE FOR RIGHTS EDUCATION & AWARENESS(CREW) .....1<sup>ST</sup> PETITIONER**

**CAUCUS FOR WOMEN’S LEADERSHIP (CAUCUS) .....2<sup>ND</sup> PETITIONER**

**WOMEN IN LAW AND DEVELOPMENT IN AFRICA (K) ..... 3<sup>RD</sup> PETITIONER**

**DEVELOPMENT THROUGH MEDIA (DTM) ..... 4<sup>TH</sup> PETITIONER**

**COALITION OF VIOLENCE AGAISNT WOMEN(COVAW) ..... 5<sup>TH</sup> PETITIONER**

**YOUNG WOMEN LEADERSHIP INSTITUTE (YWLI) .....6<sup>TH</sup> PETITIONER**

**INTERNATIONAL CENTRE FOR POLICY & CONFLICT .....7<sup>TH</sup> PETITIONER**

**VERSUS**

**THE ATTORNEY GENERAL .....RESPONDENT**

**CONSOLIDATED WITH**

**MISC. APPL. JUDICIAL REVIEW NO 207 OF 2012**

**PATRICK NJUGUNA .....1<sup>ST</sup> PETITIONER**

**CHARLES OMANGA .....2<sup>ND</sup> PETITIONER**

**VERSUS**

**ATTORNEY GENERAL .....1<sup>ST</sup> RESPONDENT**

**MINISTER FOR INTERNAL SECURITY**

**AND PROVINCIAL ADMINISTRATION .....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

## Introduction

1. This judgment pertains to **High Court Petition No. 208 of 2012 Centre for Education Rights Awareness & Others-v- The Attorney General** and **Misc. Appl. Judicial Review No 207 of 2012, Patrick Njuguna & Another –v- The Attorney General** which were consolidated by orders of the Court made on the 28<sup>th</sup> of May 2012.
2. Both the Petition and the Judicial Review Application question the constitutionality of the appointment or deployment by the President of 47 County Commissioners by way of Gazette Notices issued on the 11<sup>th</sup> and the 23<sup>rd</sup> of May 2012.
3. In the Petition dated the 17<sup>th</sup> May 2012, the petitioners seek various declarations and orders the gist of which is to declare the act of the President in making the appointments as unconstitutional, null and void. The petition is supported by the affidavit of **Wangechi Leah Wachira**, Executive Director of the Centre for Rights Education and Awareness dated the 17<sup>th</sup> May, 2012. The applicants in Judicial Review Misc. Application No. 207 of 2012 seek orders of certiorari, mandamus and prohibition in respect of the appointments. The application is supported by the affidavit of the ex parte applicant, Patrick Njuguna, sworn on 16<sup>th</sup> May, 2012.
4. On the 28<sup>th</sup> of May 2012, Justice Warsame consolidated the Petition and the Judicial Review Application. In this judgment, I shall refer to both the petitioners in Petition No. 208 of 2012 and the applicants in Judicial Review Application No. 207 of 2012 as **‘the petitioners’** for the sake of convenience.
5. The respondents oppose the applications and filed a replying affidavit sworn on the 5<sup>th</sup> of June 2012 by **Mr. Mutea Iringo**, the Permanent Secretary, Ministry of Internal Security and Provincial Administration. The matter was argued before me on the 5<sup>th</sup> and 6<sup>th</sup> of June 2012.

## The Facts

6. The facts giving rise to the matter before the court are not in dispute. By **Gazette Notice No. 6604** dated 11<sup>th</sup> May 2012, the President appointed 47 persons to be County Commissioners. The Gazette Notice, titled **‘Appointment of County Commissioners’** read in part as follows:

***‘Pursuant to Section 17 of the Sixth Schedule to the Constitution of Kenya, I, Mwai Kibaki, President and Commander-in-chief of the Defence Forces of the Republic of Kenya, appoint the persons whose names appear in the first column to be County Commissioners to the respective counties outlined in the second column.***

***Further, the Fourth Schedule of the Constitution already outlines the distinct functions of the National Government and those of the County Governments.***

***The County Commissioners shall undertake the co-ordination of National Government Functions in the 47 counties’.***

7. On the 17<sup>th</sup> of May, 2012, the Petitioners filed their petition and application challenging the appointments.

8. On the 23<sup>rd</sup> of May 2012, by **Gazette Notice No 6937** of 23<sup>rd</sup> May 2012 titled **‘Deployment of County Commissioners’**, the President revoked Gazette Notice No. 6604. The relevant parts of the Gazette are as follows:

***‘PURSUANT to section 3(2) of the Sixth Schedule of the Constitution of Kenya, and Sections 23 and 24 of the former Constitution. I, Mwai Kibaki, President and Commander-in-chief of the Defence***

***Forces of the Republic of Kenya, assign the officers whose names appear in the first Column to be County Commissioners to the respective counties outlined in the second column.***

***The County Commissioners shall co-ordinate the execution of the functions of the government in preparation for the setting up of the county governments, and in particular facilitate the transitional authority in the execution of its mandate’.***

9. Gazette Notice No. 6937 changed the words used in Gazette Notice No. 6604 from ‘**Appointment**’ to ‘**Deployment**’ and ‘**appoint**’ to ‘**assign.**’ It also changed the provisions of the Constitution and the law relied on, and the functions that those ‘deployed’ would perform. However, the names of those appointed and the counties they were to serve remained the same. Of the 47 persons ‘**appointed**’ or ‘**assigned**’ as County Commissioners in the two Gazette Notices, 37 were of the male gender while 10 were of the female gender.

10. The petitioners impugn the acts of the President in making the ‘**appointment**’ or ‘**deployment**’ as being unconstitutional and in violation of Articles 10, 27, and 132 of the Constitution. On their part, the respondents defend the acts of the President and deny any violation of the provisions of the Constitution as alleged by the petitioners.

### **Submissions by the Petitioners**

11. Mr. Ongoya and Mr. Oluoch made submissions on behalf of the petitioners. The basic submission was that the appointment of the County Commissioners by the President did not meet five essential principles of the Constitution as follows:

- i) The national values and principles set out in Article 10 of the Constitution, in particular the principles of non-discrimination and protection of the marginalised;
- ii) The principles of gender equality set out in Article 27;
- iii) The principle of consultation deriving from the National Accord and Reconciliation Act as enshrined in Section 3(2) of the Sixth Schedule to the Constitution;
- iv) The principle in Article 132 on the exercise of Presidential Powers;
- v) Section 17 of the Sixth Schedule on the manner of restructuring the Provincial Administration to accord with the devolved system of government.

### **Violation of Constitutional Provisions on Non-discrimination, Gender Equality and National Values and Principles**

12. Mr. Ongoya for the petitioners submitted that the positions of the County Commissioners were not advertised; that there was no consultation with the Prime Minister or any other person but the appointments were made unilaterally by the President. This was the first time that the office of County Commissioners was being created; that in appointing people to the position or seconding them, the appointments were being done on a clean slate. The state therefore had an ideal opportunity to meet all the four corners of the constitutional criteria in the establishment of the office and in the appointment, secondment or deployment to the office.

13. In Article 27(6) and (7), the Constitution had made a promise to the different genders in Kenya. Article 27(8) required that the state takes legislative and other measures to ensure that it follows the principle that no more than two thirds of any elective and appointive positions are of the same gender. ‘**Other measures**’ can only mean measures outside legislation such as the current appointments.

14. The petitioners asked the court to consider the provisions of Article 27(6) which require that the court, in the context of gender, always asks itself which gender has been disadvantaged in the past so that where

an opportunity arises to give a gender more than the mere average, that gender must be given priority to bridge the gap created by historical disadvantage. The petitioners referred the court to the case of **Milka Adhiambo Otieno & Another -v- The Attorney General & Another, High Court at Kisumu Petition No. 33 of 2011** in which the court held that public bodies should apply the principle contained in Article 27 (8). The duty was on the state to show that it could not get the 1/3 of County Commissioners out of the population of women comprising 51% of the total population. While the state talked about having made a 'sufficient effort' to reach qualified officers, the petitioners took the view that this only underscored the insufficiency of unilateral appointments.

15. With regard to the state's argument that the appointments were made '**in the spirit of progressive realization**' of the principle contained in Article 27(8), the petitioners referred to the provisions of Article 21 and 54 where the term is used with regard to social economic rights and with regard to the political representation of persons with disabilities and argued that had the intention been to subject the principle in Article 27(8) to the progressive realization argument, the Constitution could have provided so expressly. The principle was intended to be applied with regard to rights which require application of resources, and anyone relying on it should show the steps taken towards progressive realization.

16. With regard to the principles set out in Article 10 of the Constitution, the petitioners submitted that the principle of democracy and participation of the people had been violated in the non-competitive nature of the appointments. The principle of transparency and accountability had also been violated, as well as the principles of good governance and integrity which required that those appointed should be appointed in a transparent manner so that their integrity can be put under scrutiny.

### **The Principle of Consultation and Presidential Powers**

17. The petitioners contend that the appointment of the County Commissioners by the President was unconstitutional as there was no consultation with the Prime Minister as required under the National Accord and Reconciliation Act; that there were no powers vested in the President to make such appointments; and that the restructuring of the Provincial Administration contemplated under Section 17 of the Sixth Schedule did not give power to the President to appoint County Commissioners.

18. Mr. Oluoch submitted that if the President had power under the Constitution to appoint County Commissioners, such powers would be found under Article 132 which sets out Presidential Powers and makes the exercise of such powers subject to approval by Parliament. Further, initial appointment of the County Commissioners had been said to have been done under Section 17 of the 6<sup>th</sup> Schedule which provides for the restructuring of the Provincial Administration. However, in the petitioners' view, such restructuring could only take place so as to accord with the devolved government structure and within an established legal framework. Since the necessary legislation was not in place, the exercise of such powers by the President was in a vacuum and therefore a nullity as being in excess or want of such presidential powers.

19. Mr. Oluoch referred to **Gazette Notice No. 6937** issued on 23<sup>rd</sup> May 2012 titled '**Deployment of County Commissioners**' said to have been made under Sections 23 and 24 of the former Constitution. He submitted that the position of County Commissioners did not exist under the former Constitution, and to deploy or re-deploy such officers, the office would have to be established or created: one could not deploy or re-deploy from offices that were not in existence.

20. The petitioners also contended that under the National Accord and Reconciliation Act, the President is required to consult with the Prime Minister when making appointments. The requirement is saved by Section 3(2) of the Sixth Schedule. The President had not consulted with the Prime Minister in making the appointments.

21. The petitioners consider the appointment of the County Commissioners to have been done in an apparent rush to fill a gap deemed to exist under Section 17 of the Sixth Schedule. The false impression has been created that there is a gap that needs to be filled by the national government, and to deny the President the opportunity to redeploy would create a void. The petitioners conceded that the national

government has power to restructure the Provincial Administration under Section 17 of the Sixth Schedule but submitted that there is no vacuum or a void that needs to be filled. Even if there was such a void, it does not entitle the President to act in violation of the Constitution. They argued that the act of the President in making the appointments was an act done in bad faith, a ground on which orders of judicial review can issue.

22. The petitioners submitted that the National Government has 5 years under the provisions of Section 17 of the Sixth Schedule to restructure the Provincial Administration, and there was therefore no need to rush now in making the appointments. Section 17 seems to contemplate the enactment of legislation to guide the national government in the process of restructuring, and it also seems to contemplate consultation between the national and the county governments. The President could therefore not make appointments in the absence of the necessary legislative framework, without consultation and in breach of the national values and principles. In addition, the positions that the President had purported to fill through deployment would need to exist and then be filled in accordance with Article 10.

### **Submissions by the Respondents**

23. Ms. Munyi for the respondents relied on the affidavit of Mutea Iringo, Acting Permanent Secretary in the Ministry of Internal Security and Provincial Administration sworn on the 5<sup>th</sup> of June 2012. She took the position on behalf of the respondents that the petitioners have totally misapprehended the facts, law and the constitutional provisions on the matter.

24. Ms. Munyi referred to the Notice of Motion dated 30<sup>th</sup> May 2012 in which the applicants seek orders directed against the Gazette Notice dated 11<sup>th</sup> May 2012. She submitted that there was no Notice of Motion properly before the court as by the time the Notice of Motion was filed on 30<sup>th</sup> May 2012, the Gazette Notice of 11<sup>th</sup> May 2012 had been revoked by the Gazette Notice of 23<sup>rd</sup> May 2012. The substance of the Notice of Motion therefore lapsed with the revocation of Gazette Notice No. 6604. Ms. Munyi submitted with regard to the Petition that it refers to the Gazette Notice dated 11<sup>th</sup> May 2012; that the petitioners were concerned with the decision made on 11<sup>th</sup> May 2012 and since the Gazette Notice had been revoked, the matter had been overtaken by events.

25. On the substantive issues raised by the petitioners, the respondents submitted that they had adhered to the principles in Articles 10, 27 and 132 in making the appointments. Ms. Munyi contended that although Gazette Notice No 6604 of 11<sup>th</sup> May 2012 talks of ‘appointment of County Commissioners,’ the position was clarified as ‘Deployment of County Commissioners’ and the Gazette Notice of 11<sup>th</sup> May 2012 revoked on 23<sup>rd</sup> May 2012; that the process that the petitioners are questioning is deployment, not appointment. Ms. Munyi referred the court to the definition of the term **“deployment”** in the **Longman’s Dictionary of Contemporary English** as being **‘to spread out or arrange for effective action.’**

26. The respondents contend that the deployment was of senior officers within the Provincial Administration and that it met the requirements of the Constitution and national values and principles under Article 10; that a criteria was used to identify suitable officers for deployment which included performance, seniority, regional balance and gender; that the officers serving in the administration must undergo training as paramilitary officers and take leadership courses unique to their career, and that in view of this requirement, officers not serving in the scheme of service for administrators are not qualified for appointment as County Commissioners.

27. Ms. Munyi submitted that there was therefore no violation of the provisions of Article 27(8). The state has only 26 women out of 286 District Commissioners, and based on the selection criteria the respondents did not have sufficient numbers of the female gender to meet the constitutional requirement under Article 27(8).

28. The respondents made certain concessions in the course of the hearing: that there were no County Commissioners in existence before the 11<sup>th</sup> or the 23<sup>rd</sup> of May 2012; that there are 26 District

Commissioners who are of the female gender; that these District Commissioners would have the requisite qualifications for appointment as County Commissioners, including paramilitary and leadership training.

29. The respondents nevertheless argued that despite the deliberate effort to achieve gender equity, only 10 women qualified and were deployed; that the realization of the principle set out in Article 27(8) is within the framework of progressive realization; that the Public Service Commission is the body charged with the responsibility of appointments to public office, and that collective measures are being taken to address the gender disparity.

30. With regard to the principle of participation of the people, the respondents submitted that there is no evidence availed by the petitioners to show that a qualified officer was not considered; that in any event, the principle of democracy and participation of the people is not applicable in deployment of officers in the Provincial Administration as such deployment cannot be subjected to participation. Sufficient consultation was undertaken internally within the existing legal framework, and a clear reading of the Gazette Notice shows that it was only a re-assignment of duties within an existing structure.

31. On the petitioners' contention that the appointment was subject to Parliamentary approval, the respondents submitted that such approval was not necessary as the County Commissioners are not included in Article 132(f). The act of the 2<sup>nd</sup> respondent was a deployment or assignment of duties, not employment.

32. With regard to Section 17 of the Sixth Schedule, the respondents conceded that the restructuring is to be done within 5 years and submitted that the process was on-going and a draft National Administration Bill was in the process of enactment and would be addressed in a consultative and inclusive exercise; that the deployed officers would operate within the existing legal framework and structure of the Provincial Administration and once a new structure is in place, then new appointments can take place.

## **Determination**

33. This petition raises critical issues on the exercise of power under the Constitution by the President of the Republic of Kenya. It raises questions with regard to the obligations and commitments of the President to be faithful to the letter and spirit of the Constitution, and seeks once again to re-establish the constitutional benchmark for the exercise of executive power and the right of citizens to question and challenge any deviation or perceived deviation from the letter and spirit of the Constitution. It comes at a critical time when the implementation of the Constitution is at a nascent stage, and the manner in which fidelity to the Constitution is upheld and protected is critical to the long-term establishment and survival of constitutionalism and the rule of law in Kenya.

34. In making a determination of the issues raised in this matter, I will start from the Constitutional provisions relating to the exercise of powers by the President of the Republic of Kenya. Article 129 sets out the principles of Executive Authority as follows:

**(1) Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution.**

**(2) Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their wellbeing and benefit.**

35. Article 131 spells out the authority of the President in the following terms:

**(1) The President—**

**(a) is the Head of State and Government;**

**(b) exercises the executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries;**

*(c) is the Commander-in-Chief of the Kenya Defence Forces;*

*(d) is the chairperson of the National Security Council; and*

*(e) is a symbol of national unity.*

**(2) The President shall—**

*(a) respect, uphold and safeguard this Constitution;*

*(b) safeguard the sovereignty of the Republic;*

*(c) promote and enhance the unity of the nation;*

*(d) promote respect for the diversity of the people and communities of Kenya; and*

*(e) ensure the protection of human rights and fundamental freedoms and the rule of law.* (Emphasis mine)

36. Article 132 sets out the functions of the President while Article 132(2) sets out his powers with regard to appointments as follows:

**(2) The President shall nominate and, with the approval of the National Assembly, appoint, and may dismiss—**

**(a) the Cabinet Secretaries, in accordance with Article 152;**

**(b) the Attorney-General, in accordance with Article 156;**

**(c) the Secretary to the Cabinet in accordance with Article 154;**

**(d) Principal Secretaries in accordance with Article 155;**

**(e) high commissioners, ambassadors and diplomatic and consular representatives; and**

**(f) in accordance with this Constitution, any other State or public officer whom this Constitution requires or empowers the President to appoint or dismiss.**

37. It is also worth setting out the provisions of Article 2, 3, 10 and 20 of the Constitution.

**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.**

38. Article 3 (1) provides that ‘**Every person has an obligation to respect, uphold and defend this Constitution**’ while Article 10 contains the national values and principles of governance and provides as follows:

**10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them:-**

**(a) applies or interprets this Constitution;**

**(b) enacts, applies or interprets any law; or**

*(c) makes or implements public policy decisions.*

*(2) The national values and principles of governance include–*

*(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;*

*(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;*

*(c) good governance, integrity, transparency and accountability; and*

*(d) sustainable development.*

39. Finally, Article 20(1) provides that ***‘The Bill of Rights applies to all law and binds all State organs and all persons.’***

40. I will now apply the above constitutional provisions to the facts before me, starting from the position that the factual situation giving rise to this petition is not in dispute, and from the concessions on the facts that the respondents made in the course of the hearing.

41. The President issued a Gazette Notice on 11<sup>th</sup> May 2012 in which he appointed 47 County Commissioners, 37 of them men and 10 of them women. The respondents argue that the matters before this court have been overtaken by events as the second Gazette Notice revoked the first, which referred to ‘appointments’, and made reference to ‘deployment.’ In my view, however, the second Gazette Notice does not cure the problem for the respondents. The Petition and the Judicial Review application were filed to challenge the Gazette Notices and the perceived violation of the Constitution. During the pendency of the two matters, the respondents issued Gazette Notice No. 6937 to revoke the earlier Gazette Notice. Article 258 of the Constitution allows any person to ***‘institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.’*** From the facts before me, there is nothing to indicate that the revocation cures the alleged violation of the Constitution, and I take the view that the revocation does not affect the issues raised by the petitioners as the threatened violations of the Constitution have not been addressed and they are still open for determination by the court.

### **Fidelity to National Values and Principles**

42. The first issue relates to the submission that the appointments or deployments were in violation of the national values and principles of governance set out in Article 10 of the Constitution.

### **Gender Equity**

43. Article 10(b) requires observance of the principle of ***‘human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized’*** while Article 27(8) more specifically requires that ***‘In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.’***

44. The President ***‘appointed’*** or ***‘deployed’*** 47 County Commissioners, 37 of them male and 10 female. The petitioners allege, and this has not been disputed by the respondents, that the appointments resulted in 21.3% of the appointees being female and 78.7% of the appointees being male. Clearly, the appointments do not meet the constitutional requirements at Article 27(8) and on the face of it, violate the non-discrimination provisions of Article 27.

45. The respondents give two explanations for this violation of the constitutional requirement. The first is that there were not enough women qualified to be appointed County Commissioners. However, the respondents destroy their own argument by conceding that there are at least 26 women who are District

Commissioners, and who have the necessary paramilitary and leadership training. The respondents picked 10 from this number. To meet the constitutional requirement, they would have needed only another five (5).

46. There is no explanation tendered before the court why and in what way the other 16 female District Commissioners did not meet the criteria enumerated by the respondents. Was it performance? Seniority? Regional representation? In my view, the primary obligation imposed by Article 27(8) on the state is to do its utmost to meet the constitutional requirement. An effort must be made, bearing in mind the historical disadvantage to which women have been subject, to ensure gender equity. From the facts before me, there does not appear to have been any effort made to meet the requirements of the Constitution.

47. The respondents further justify the failure to meet the requirements of Article 27(8) on the basis that the principle is subject to the progressive realisation test. I think this argument was well answered by the petitioners. The Constitution is very clear on what rights are subject to the test of progressive realisation. Article 21 provides that

***(1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.***

***(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.*** (Emphasis added)

48. Article 54(2) on the rights of persons with disability provides that '***The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.***'

49. The Constitution is thus very clear on what rights are subject to the progressive realisation test—the social and economic rights to health care, education, water, housing, and sanitation. Such rights require the allocation of resources, and as is the case with similar provisions in the **International Covenant on Economic, Social and Cultural Rights**, the state's obligation is made subject to the availability of resources. Had it been the intention to make the principle that not more than two thirds of elective and appointive positions should be of the same gender subject to progressive realisation, nothing would have been easier than for the Constitution to make this specific provision.

50. I am aware that there have been two decisions of the High Court that give conflicting interpretations of this principle. The first is the case of **Federation of Women Lawyers & Others –v- The Attorney General Nairobi High Court Petition No. 102 of 2011** (The FIDA case) where the court ruled that the principle was subject to progressive realisation. In the case of **Milka Adhiambo Otieno & Another -v- The Attorney General & Others Kisumu High Court Petition No. 44 of 2011**, the court departed from the decision of the Court in the FIDA case and held that the state had other measures apart from legislation to ensure that the requirements of Article 27(8) are complied with. I would respectfully differ with my brothers and sister judges in the FIDA case, and take a step further than the court in the **Milka Adhiambo Otieno** case. I take the view that the phrase '***progressive realisation***' is applied to those circumstances where an allocation of limited resources is required. The state can only achieve certain rights over a period of time as resources are limited. The phrase is used in reference to socio-economic rights, and this is made clear in Article 21 of our Constitution. In the South African case of **Soobramoney –v- Minister of Health (Kwa Zulu Natal) 1998 (1) SA 765 (CC)** the Constitutional Court of South Africa observed as follows:

***'What is apparent from these provision is that the obligations imposed on the state by ss 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.'***

51. In matters of appointment or election to office in order to achieve gender equality and equity, there is no qualification of the state's obligation as there is no outlay of resources required and which is shown to limit or inhibit the realisation of this right. This is particularly so in a scenario such as the one before the court where, on the respondents' own admission, there are at least another 16 female District Commissioners with the requisite qualifications to meet the criteria that the respondents had set for appointment as County Commissioners. There is really no justification or explanation for the President's failure to observe the requirements of Article 27(8). The 'appointments' or 'deployments,' whatever term is used, assuming that the President had power to make them, fail the test of constitutionality by disregarding the national values and principles set out at Article 10(b) and the principle contained in Article 27(8) of the Constitution.

### **Public Participation and Consultation**

52. The inclusion of the national values and principles at Article 10 of the Constitution is a reflection of the concerns of Kenyans with the opaque and unaccountable manner in which many acts by the state which had an impact on the public were done. Public appointments were made in a manner that totally lacked transparency, and the criteria and the basis for the appointments were known only to the appointing authority. This is what Kenya has been moving away from, and the inclusion of the requirement for transparency imposes an obligation on the state and state officers to do all things in such a manner that will allow for transparency and for public participation in the process.

53. We are now in the process of implementing the Constitution and undertaking the reforms that Kenyans have fought for in the last two decades. The precedents we set now will have a major impact on how we move forward, and whether or not the culture of constitutionalism is embedded in our country. With regard to public appointments, I take the view that it is critical to have public participation and consultation. This does not require that there is a round table at which the public is allowed to air their opinion on a proposed appointment, but that an opportunity is given to all who may be interested in the position to apply, and for anyone who may have a view on the suitability of a proposed appointee, particularly with regard to integrity and competence, to be heard should they wish to be heard.

54. In the present case, the country was presented with a fait accompli with the publication of the Gazette Notices. Whatever view one may have had on the suitability of those appointed- and this judgment should not be seen as a comment on their suitability-one would not have had an opportunity to present it. This is what the country wanted to get away from, and the President is under an obligation to ensure that he, too, helps to move the country forward and to respect the values and principles of the Constitution. He did not do this in the present case.

### **Appointment of the County Commissioners**

55. I now turn to consider whether, even if the President had complied with the provisions of the Constitution with regard to observance of the national values and principle, he had power under the Constitution to appoint County Commissioners.

56. Gazette Notice No. 6937 states that the deployment was carried out in accordance with Sections 23 and 24 of the former Constitution. These provisions of the former Constitution, which provided for Executive Power, were as follows:

***23. (1) The executive authority of the Government of Kenya shall vest in the President and, subject to this Constitution, may be exercised by him either directly or through officers subordinate to him.***

***(2) Nothing in this section shall prevent Parliament from conferring functions on persons or authorities other than the President.***

***24. Subject to this Constitution and any other law, the powers of constituting and abolishing offices for the Republic of Kenya, of making appointments to any such office and terminating any such appointment, shall vest in the President.***

57. These provisions of the former Constitution were not saved by the Transitional Provisions contained in Schedule 6 of the Constitution. Consequently, the President could not make any appointments under the former constitution.

58. The respondents also argue that what the President did was to **'deploy'** the County Commissioners. However, the respondents conceded during the hearing that positions of County Commissioners did not exist under the former Constitution, but they argue that the President was entitled to **'deploy'** the officers named in the Gazette. The contradiction is obvious. If a position does not exist, it is clearly not possible to **'deploy'** officers to or from such non-existent position. The office would have to be created first, then appointments made, before 'deployment' or 're-deployment' to that position can take place. Clearly, Gazette Notice No.6937 of 23<sup>rd</sup> May 2012 was an attempt to cure what was not curable.

59. Section 17 of the 6<sup>th</sup> Schedule makes provision for the re-structuring of the Provincial Administration. While it does not spell out exactly how this is to be done, logic dictates that there must be some form of legislative and institutional framework to provide for and guide the restructuring process. Further, the Constitution provides that the restructuring will be done within a period of five years from the coming into force of the Constitution. I agree with the petitioners that this must imply a legislative framework within which provision is made for the restructuring, and for consultation with county governments as such restructuring is intended to accord with the county administration. There is clearly a failure by the Executive and the Legislature in not moving with despatch to enact the legislation necessary to begin the process of restructuring the Provincial Administration.

60. In any event, a perusal of the powers vested in the President under Article 132(f) of the Constitution shows that there is clearly no intention that the restructuring of the Provincial Administration to accord with the devolved form of government contemplates a situation in which the President establishes and deploys officers to the county administration. As Ms. Munyi submitted, the power to create offices in the civil service is vested by Article 234 in the Public Service Commission. Any attempt by any party other than the Public Service Commission to create such offices would be a usurpation of the powers of the Commission.

### **Consultation in Accordance with the National Accord and Reconciliation Act**

61. The final issue to consider is whether the President was in violation of the Constitution by failing to consult with the Prime Minister in making the **'appointments'** or **'deployment'** of County Commissioners as required under the provisions of the National Accord and Reconciliation Act as saved under Section 3(2) of the Sixth Schedule to the Constitution.

62. Section 3(2) provides as follows:

***(2) Sections 30 to 40, 43 to 46 and 48 to 58 of the former Constitution, the provisions of the former Constitution concerning the executive, and the National Accord and Reconciliation Act, shall continue to operate until the first general elections held under this Constitution, but the provisions of this Constitution concerning the system of elections, eligibility for election and the electoral process shall apply to that election.***

63. Section 29 (2) of Schedule 6 provides as follows:

***'Unless this Schedule prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.'***

64. As I have already stated above, the President did not have power to appoint or deploy persons as County Commissioners. However, if he had had such powers under the Constitution, then he would have been required by the provisions of Section 29(2) set out above to consult the Prime Minister and to seek

the approval of the National Assembly for the appointments.

## **Conclusion**

65. There is no reason to believe that the actions of the respondents were motivated by a desire other than to start the process of coordinating national government functions at the county level prior to the coming of the county governments following the forthcoming elections. However, it is important that anything that is done in order to implement the new Constitution is done so as to faithfully accord with the provisions of the Constitution. It will do great damage to the hopes of Kenyans for a new dawn should the country continue on the well-trodden path of disregard for the provisions of the Constitution.

66. In light of the above matters, I find and hold as follows:

i. The President had no power to appoint or deploy County Commissioners as he purported to do under Gazette Notice No. 6604 of 11<sup>th</sup> May 2012 and Gazette Notice No. 6937 of 23<sup>rd</sup> May 2012.

ii. Even if the President had had power to make such appointments or deployments, the appointments or deployments violated Article 10 and 27 of the Constitution.

iii. The purported deployment of County Commissioners by **Gazette Notice No. 6937 of 23<sup>rd</sup> May 2012** was therefore unconstitutional, null and void.

67. In view of the public interest nature of this matter, I make no order as to costs.

68. I am grateful to the parties for their well researched arguments and submissions.

**Dated Delivered and Signed at Nairobi this 29<sup>th</sup> day of June 2012.**

**MUMBI NGUGI**  
**JUDGE**