Katiba Institute & 2 others v Attorney General & another; Judicial Service Commission & 10 others (Interested Parties) (Constitutional Petition 268 of 2018 & Petition 251 of 2017 (Consolidated)) [2025] KEHC 1610 (KLR) (Constitutional and Human Rights) (19 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1610 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION 268 OF 2018 & PETITION 251 OF 2017 (CONSOLIDATED)

EC MWITA, J

FEBRUARY 19, 2025

BETWEEN

KATIBA INSTITUTE ..... 1ST PETITIONER

OKIYA OMTATA OKOITI ..... 2ND PETITIONER

KENYA COALITION FOR WILDLIFE CONSERVATION AND MANAGEMENT ..... 3RD PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

THE NATIONAL ASSEMBLY ..... 2ND RESPONDENT

AND

JUDICIAL SERVICE COMMISSION ..... INTERESTED PARTY

THE NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY ..... INTERESTED PARTY

NATIONAL LAND COMMISSION ..... INTERESTED PARTY

KENYA WILDLIFE SERVICE ..... INTERESTED PARTY

KENYA RAILWAY CORPORATION ..... INTERESTED PARTY

CHINA ROAD AND BRIDGE CORPORATION ..... INTERESTED PARTY

MINISTRY FOR TRANSPORT AND INFRASTRUCTURE .... INTERESTED PARTY

MINISTRY OF ENVIRONMENT AND MINERAL RESOURCES . INTERESTED PARTY

HABITAT PLANNERS TEAM ..... INTERESTED PARTY

AFRICA CENTRE FOR OPEN GOVERNANCE ..... INTERESTED PARTY

HOMESCOPE PROPERTIES LIMITED ..... INTERESTED PARTY

JUDGMENT

Introduction

1. On 16th November 2016, the National Assembly passed the Prevention of Torture Bill 2016 which was assented to on 13th April 2017 as the *Prevention of Torture Act*, 2017. The Act amended section 129(4) of the *Environmental Management and Co-ordination Act*, 1999 (EMCA). The amendment was challenged in court through Petition No. 251 of 2017 and a conservatory order was issued suspending the coming into operation of that amendment.

2. On 13th November 2017 the National Assembly again proposed amendments to sections 125 and 129 of EMCA through the Statute Law (Miscellaneous Amendment) (No. 3) Bill, 2017. The Bill was passed by the National Assembly and the Act was assented to by the President on 4th April 2018 with a commencement date of 21st May 2018.

3. Prior to the amendments, section 129(4) allowed automatic stay of the decision of National Environmental Management Authority (NEMA) once an appeal was lodged before the National Environment Tribunal (NET). Section 125 provided for the appointment of the chairperson and members of the NET.

4. Petition No. 268 of 2018 was again filed to challenge the constitutionality of the amendments to those sections through the Statute Law Miscellaneous (Amendment) Act, 2018. Petition Nos 251 of 2017 and 268 of 2018 were consolidated with Petition 268 of 2018 designated as the lead file.

5. Petition No. 268 of 2018 was filed against the Attorney General while the Judicial Service Commission was named as the interested party. Petition 251 was brought against the National Assembly and the Attorney General as the 1st and 2nd respondents, respectively. The National Environmental Management Authority, (NEMA), National Land Commission, (NLC) Kenya Wildlife Service, (KWS) Kenya Railway Corporation; China Road and Bridge Corporation; Ministry for Transport and Infrastructure; Ministry of Environment and Mineral Resources; Habitat Planners Team and Africa Centre for Open Governance were named as interested parties.

Petition No. 268 of 2018

6. Katiba Institute (the 1st petitioner) averred that the Statute Law (Miscellaneous Amendment) Act, 2018 introduced fundamental changes on the functioning of NET; functions of the county governments under the Fourth Schedule and on the duty of the State to protect the environment, thereby impliedly amending other legislations, including The *Judicial Service Act* No. 1 of 2011.

7. It was the 1st petitioner's case, that the amendments to section 125 of EMCA took away the mandate of the JSC to appoint the chairperson of NET. The amendments to section 129 (3) and (4) of EMCA, removed automatic maintenance of status quo upon filing of an appeal before NET; vacated the status

quo orders previously issued automatically; applied retrospectively and required parties to make fresh applications for orders to maintain the status quo of any matter or activity subject to the appeal.

8. The 1st petitioner stated that while passing the *Prevention of Torture Act*, the National Assembly also amended section 129 of EMCA through section 29 of that Act but the amendments were suspended through a conservatory order issued in Petition No. 251 of 2017.

   The 1st petitioner asserted that sections 125 and 129 of EMCA as amended are unconstitutional for violating various provisions of *the Constitution*. According to the 1st petitioner, the amendments to sections 125(1) (b) –(d); section 125(2); 125(4) (c) and 125(5) violated the right to a fair hearing before an independent and impartial tribunal. The sections now provide for appointment of members of NET otherwise than by the JSC. The amendments also gave the Cabinet Secretary powers to remove members of NET.

9. The 1st petitioner posited that the amendments were an affront to the independence of the judiciary; usurped the mandate of the JSC and had an effect of amending *the Constitution* by effectively removing NET from being part of the judiciary, a violation of Articles 160(1), 161(1), 162(4), 169(1) (d) and 172 (1) of *the Constitution*.

10. The 1st petitioner relied on section 129 of EMCA, Articles 47, 50(1) of *the Constitution*; article 10 of the Universal Declaration of Human Rights; article 14 (1) of the International Covenant on Civil and Political Rights; and Human Rights Committee's General Comment No. 32, article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32(2007)

11. The 1st petitioner asserted that the new section 125(1) (a) and (5) took away the constitutional mandate of the JSC to promote and facilitate the independence and accountability of the Judiciary. It also infringed on the requirement for merit-based selections or free and fair elections and diversity in the appointments of members of NET contrary to Articles 10,27, 73(1) (a) and 172(2) (a) of *the Constitution*.

12. The 1st petitioner relied on Republic v Attorney General Exparte Tom Odoyo Oloo [2015] eKLR, and Principles IV and V of the Commonwealth (Latimer House) Principles on the Accountability of and the Relationship Between the Three Branches of Government, 2004.

13. The 1st petitioner argued that section 129(3) (d) (e) as amended contradicts the provisions of Articles 42 and 69(1) (a) and (g) of *the Constitution* by diluting the legislative measure of granting an automatic stay order upon filing an appeal by placing a requirement for an application to maintain the status quo upon filing of appeal. This was a retrogressive measure in protecting the right to a clean and healthy environment. The 1st petitioner relied on Kenya Association of Manufacturers & 2 others v Cabinet Secretary- Ministry of Environment and Natural Resources & 3 others [2017] eKLR.

14. The 1st petitioner further relied on the decision in Samuel Kamau Macharia v Kenya Commercial Bank Ltd [2012] eKLR, for the argument that the amended section 129 was unconstitutional for arbitrarily discharging all stay orders previously issued and retroactively divesting already vested rights of parties before NET.

15. The 1st petitioner also argued that the amendment to section 129(4) was a nullity having been made in defiance of conservatory orders issued in Petition 251 of 2017. It also contravened Article 10 of *the Constitution*. The 1st petitioner relied on the decisions in Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Nairobi [1998] eKLR and Benjamin Leonard MacFoy v United Africa Company Ltd (1961) 3 All ER 1169.

16. The 1st petitioner again relied on Josephat Musila Mutua & 9 others v Attorney General & 3 others [2018] eKLR, that it was procedurally invalid for the National Assembly to make fundamental amendments through a Statute Law (Miscellaneous Amendments) Act, depriving the public of the right to reasonable and effective public participation. The Bill was published on 13th November 2017 and later published in the Daily Nation on 2nd and 4th December 2017, giving the public only 5 days to give comments, thereby limiting public participation contrary to Articles 10 and 118 of *the constitution*.

17. According to the 1st petitioner, the amendment to section 129 of affected county governments but there was no concurrence from the Senate. It also exposed the environment to irreversible degradation thereby imposing a substantial burden on the national and county governments in the event of a national disaster. The 1st petitioner relied on the decisions in E W A & 2 others v Director of Immigration and Registration of persons & another [2018] eKLR and Biowatch Trust v Registrar Genetic Resources [2009] ZACC 14.

18. Based on the above arguments, the 1st petitioner sought the following reliefs:

    a. A declaration that the power and the function to appoint the chairperson and other members of the National Environmental Tribunal is an exclusive function of the Judicial Service Commission in accordance with Article 172 (1) (c) and cannot be limited, defined or broadened through statutory sophistry.

    b. A declaration that section 129(4) is unconstitutional because it violates or threatens to violate the principle of sustainable development under Article 10, and the right to a clean and healthy environment guaranteed by Article 42 of *the Constitution* of Kenya and further its retroactive application violates the rule of law principle under Article 10 of *the Constitution*.

    c. A declaration that the amendments made on sections 125 and 129 of the Environmental Management and Coordination *Act No. 8 of 1999* through the Statute Law (Miscellaneous Amendment) Act 2018 were done without meaningful and qualitative public participation in violation of *the Constitution*.

    d. An order invalidating sections 125(1) (b)-(d); section 125(2); section 125(4) (c); section 125(5); and section 129(4) of the Environmental Management Coordination *Act No. 8 of 1999*.

    e. An order directing the Judicial Service Commission to make necessary appointments for the Chairperson and members of the National Environment Tribunal in strict compliance with articles 172(1) (c) and 172 (2) (a) and the *Judicial Service Act*.

    f. Costs of the Petition.

    g. Any other or further relief that this Honourable Court may deem fit and just to grant in the circumstances.

Petition No. 251 of 2017.

19. In this petition, the 2nd petitioner argued that sections 24-32 of the Prevention of Torture Bill did not contain a clause proposing amendments to EMCA. However, section 29 of the Bill sneaked in an amendment to section 129(4) of EMCA.

20. The 2nd petitioner asserted that the amendments were sneaked into the *Prevention of Torture Act* without any public participation; the amendments purported to apply retrospectively rendering stay orders previously granted by NET useless; the amendments militated against the provisions of Articles 42, 69, 70, 71 and 72 of *the Constitution* on environmental protection and did not keep with the

practice of making minor amendments which did not merit publication of a separate Bill since the amendments were controversial and substantial requiring a standalone Bill and subjected to public participation.

21. According to the 2nd petitioner, the amendments through the Prevention of Torture Bill were introduced after NET had granted stay orders in NET Appeal No. 200 of 2017, Okiya Omtatah Okoiti & Another v The National Environment Management Authority & 8 others, to defeat those stay orders.

22. The 2nd petitioner relied on Article 118 of *the Constitution* and the decisions in Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) v Salaries and Remuneration Commission (Petition No. 294 of 2013) [2014] eKLR and *Law Society of Kenya v the Attorney General (Constitutional Petition No. 3 of 2016)* [2016] eKLR

23. The 2nd petitioner again argued that by amending section 129(4) to require aggrieved persons to seek stay orders in the usual manner and convince NET to exercise its discretion, the amendment undermined the precautionary principle.

24. Based on the above arguments, the 2nd petitioner sought the following reliefs:

    a. A declaration that there is no nexus between the Environment Management and Co-ordination Act 1999 and the *Prevention of Torture Act* 2017 to warrant the amendment of Section 129 of the *Environmental Management and Co-ordination Act* 1999 vide section 29 of the *Prevention of Torture Act* 2017.

    b. A declaration that it was improper for drastic amendments affecting the *environmental Management and Co-ordination Act* 1999, which required the publication of a standalone Bill, to be effected via miscellaneous provisions to the totally unrelated the *Prevention of Torture Act*.

    c. A declaration that to the extent that the amendments to section 29(4) of the *Environmental Management and Co-ordination Act* 1999 apply retrospectively, the said amendments violated the principles of natural justice that form the basis of *the Constitution*.

    d. A declaration that the action of introducing the impugned amendment on the floor of the House, when the same was not subject to the bill that was published and was subjected to public participation, was contrary to the letter and spirit of article 10 as read with Article 118 of *the Constitution* and, therefore, null and void ad initio.

    e. A declaration that the amendment to section 129(4) of the *Environmental Management and Co-ordination Act* 1999 vide section 29 of the *Prevention of Torture Act* 2017 is unconstitutional, and therefore, null and void.

    h. An order quashing section 29 of the Torture Act for being unconstitutional and, therefore, null and void.

    i. An order that the costs of this suit be provided for.

    j. Any other relief the court may deem just to grant.

1st respondent's case

25. The Attorney General, (the 1st respondent), informed the Court that they had filed grounds of opposition dated 11th March 2019 and written submissions. These documents are neither in the file nor on the CTS portal.

2nd Respondent's case

26. The National Assembly, (the 2nd respondent), filed grounds of opposition and replying affidavits sworn by Michael Sialai and Jeremiah Ndombi on 22nd September 2017 and 9th November 2018, respectively. With regard to petition 251 of 2017, the 2nd respondent stated that the Prevention of Torture Bill published in the Kenya Supplement No. 187 (National Assembly Bills No. 47) dated 16th November 2016, was sponsored by the leader of majority party.

27. The Bill was read for the first time on 1st December 2016 and was committed to the Departmental Committee on Justice and Legal Affairs in accordance with Standing Order No. 127(1). The Bill was passed with amendments on 6th April 2017 and assented to by the President.

28. The 2nd respondent asserted that section 29 of the *Prevention of Torture Act* was enacted in accordance with the legislative mandate of Parliament under Articles 94(5), 109 and 124 of *the Constitution*. In passing the Bill, the 2nd respondent considered amendments proposed by the leader of the majority party during the Committee stage.

29. The proposal by leader of majority party to introduce a new clause in the Bill was subjected to the requirements of the Standing Orders and then read for a second time, and thereafter voted for by the House to be included in the Bill after justification for its inclusion.

30. The 2nd respondent maintained that the amendment to the Bill was informed by a petition to the Office of the Clerk of the National Assembly which was transmitted to the Office of Leader of the Majority Party to propose inclusion of the concerns raised in an appropriate bill. The leader of majority party had a prior intention to amend section 129(4) of EMCA.

31. The 2nd respondent argued that matters relating to NET as provided for in section 129 of the EMCA and its jurisdiction to hear and determine appeals dated back to 2014 during the consideration of the Environmental Management Co-ordination (Amendment) Bill, 2014.

32. On 11th September, 2014 the leader of majority party proposed amendments to the EMCA Amendment Bill to provide that upon filing an appeal, NET may issue orders maintaining the status quo until the appeal is determined. NET could, however, review the orders on application by any party. The amendment was made on the basis that there was need for NET to have powers to determine whether or not to issue stay orders so as to avoid stalling of projects on frivolous and vexatious applications.

33. The 2nd respondent explained that the amendment was discussed by the Departmental Committee on Environment, Water and Natural Resources on 11th September 2014 and observed that the amendment to section 129 of EMCA was justified and should be adopted in order to give NET judicial discretion to determine whether or not to issue status quo orders and prevent illegitimate appeals. Both Houses of Parliament exhaustively considered the EMCA Bill 2014 and the Bill went through various stages according to the respective Standing Orders of the Houses. However, the amendment was inadvertently not moved at the time when the Amendment Bill was being considered by the 2nd respondent at the Committee of the whole House stage. It was for that reason, that the 2nd respondent included the proposal in the Prevention of Torture Bill, 2016.

34. The 2nd respondent denied that the amended section 129 limits fundamental rights. Instead, the amendment protects the rights of individuals who lost or stood to lose the right to a fair determination of an application for injunction or stay before NET. The amendment also allows a past beneficiary of the automatic status quo order to apply afresh for a determination of the application on merit. It

also allows NET adequate opportunity to evaluate past automatic injunctions and deal with those applications on merit.

35. The 2nd respondent urged the Court not to interfere with its legislative mandate since section 29 of the *Prevention of Torture Act*, 2017 is in conformity with *the Constitution*. There was no breach of the petitioners' constitutional rights.

36. Regarding Petition 268 of 2018, the 2nd respondent argued that the orders sought will contravene the legislative mandate of Parliament provided for in Article 109 of *the Constitution*. The 2nd respondent maintained that the process leading to the enactment of the Statute Law (Miscellaneous Amendments) Act 2018 was lawful; it was sponsored by the leader of majority party and published in the Kenya Gazette Notice Number 172. The Bill was subjected to the first reading on 30th November 2017 and thereafter committed to the various Departmental Committees of the National Assembly for consideration.

37. According to the 2nd respondent, the Departmental Committee on Environment and Natural Resources considered the amendments for submission to the Departmental Committee on Finance and National Planning pursuant to the communication from Speaker issued on 20th February 2018.

38. The 2nd respondent conducted public participation; called for views from the public on 4th December 2017 and the Committee received submissions from the JSC, Cyntonn Real Estate, LLP; Institute for Social Accountability, Kenya Natural Resource alliance, Save Lamu, among other stake holders. The 2nd respondent relied on the decisions in Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11;2006 (12) BCLR 1399 (CC);2006(6) SA 416 (CC); Robert Gakuru & Others v The Governor Kiambu County & 3 others (2013) eKLR; Law Society of Kenya v The Attorney General and 10 others [2016] eKLR; and Commission for the Implementation of *the Constitution* v Senate of Kenya & 2 Others [2013] eKLR, that there was meaningful and effective public participation.

39. The 2nd respondent maintained that the amendment to section 125 was rational since it now gives equal opportunity to members of NET to contest for and elect the chairperson. It also gives the three advocates an opportunity to elect their own chairperson which may help in owning their actions as a tribunal as opposed to a chairperson imposed on them by another institution.

40. With regard to amendment to section 129, the 2nd respondent argued that the amendments were in line with *the Constitution*. The amendments were based on the need for NET to have powers to determine whether or not to grant status quo orders so as to avoid stalling projects based on frivolous and vexatious applications. The amendments did not limit any fundamental rights.

41. The 2nd respondent further argued that Petition No. 251 of 2017 had been overtaken by events and was moot following the enactment of the Statute Law (Miscellaneous Amendments) Act, 2018.

42. On the constitutionality of the impugned amendments, the 2nd respondent maintained that the Statute Law (Miscellaneous Amendments) Bill, 2017 was passed in accordance with *the Constitution* and Standing Orders. The 2nd respondent relied on the decisions in Murang'a Bar Operators and Another v Minister of State for Provincial and Internal Security and 2 others [2011] eKLR and Mugambi Imanyara and another v Attorney General & 5 others [2017] eKLR.

43. The 2nd respondent maintained that there is no law barring it from enacting legislation through a Statute Law (Miscellaneous Amendments) Act and the scope of amendments is not limited to minor amendments as the petitioners alleged.

44. The 2nd respondent relied on Article 186 (1) of *the Constitution*; section 22 of Part I of the Fourth Schedule to *the Constitution* and the decisions in Pevans East Africa Limited & Another v Chairman, Betting Control & Licensing Board &7others [2018] eKLR and National Assembly of Kenya & another v Institute for Social Accountability & 6 others [2017] eKLR to argue that the amendments did not require concurrence of the Senate. The amendments were made within the mandate of the national government; *the Constitution* has allocated the duty to determine whether legislation concerns the counties to the Speakers of both Houses of Parliament and any interference from the Court would be usurpation that mandate.

45. The 2nd respondent again relied on Articles 117, 124 and 165(3) (d) (ii) of *the Constitution*, the *Parliamentary Powers and Privileges Act*, 2017 and the decisions in John Harun Mwau v Andrew K. Mullei & 3 Others [2009] eKLR; Prebble v Television New Zealand Limited [1195] 1 AC 32; Speaker of the Senate & another v Attorney General & 4 others [2013] eKLR and Patrick Ouma Onyango & 12 others v Attorney General and 2 others [2005] eKLR, to urged the Court not to interfere with its mandate unless there is a violation or threat to violate *the Constitution*, which has not been demonstrated.

1st Interested party's case

46. The 1st interested party (the JSC) filed a replying affidavit sworn by Anne A. Amadi on 29th January 2019 in support of the consolidated petitions. The JSC stated that the amendments to EMCA through the Statute Law (Miscellaneous Amendment) Act 2018 disregarded Articles 169(1) (d) and 172(1) (c) of *the Constitution*.

47. According to the JSC, the amendments should have vested the power of appointment of the other members of NET with it in conformity with Article 169(1) (d) of *the Constitution*. The effect of the amendments is that NET comprised of five members would have three members appointed by the Cabinet Secretary in violation of *the Constitution*. This means the three members could influence the election of the chairperson and the operations of NET thereby undermining its independence contrary to Articles 160(1), 161(1), 162(4), 169(1) (d) and 172(1) (c) of *the Constitution*.

48. The JSC asserted that the amendments to section 125(1) and (5) undermined the independence of the Judiciary and was an affront to its constitutional mandate. Even prior to the amendments to section 125(1) (a) of EMCA, section 7 (1) and (2) of the Sixth Schedule to *the Constitution* vested on it the responsibility of appointing members of NET. The amendments also violated the supremacy clause in Article 2(4) of *the Constitution*.

49. The JSC relied on the decisions in Karahunga v Attorney General [2014] UGCC 13; Speaker of the Senate & Another v Attorney General & Others (Advisory Opinion Reference No.2 of 2013) [2013] eKLR and Hugh Glenister v President of the Republic of South Africa & 11 Others CCT No. 48 /10 for the argument that the amendments to sections 125(1) and (5) of the EMCA set a bad precedent that would erode and diminish the constitutional mandate of the JSC.

50. Relying on Article 2(4) of *the Constitution* and the decisions in Law Society of Kenya v Attorney General & Another [2016] eKLR; Timothy Njoya & 17 others v Attorney General & 4 Others [2013] eKLR and Philip K. Tunoi & another v Judicial Service Commission & Another [2015] eKLR, the JSC argued that the Statute Law (Miscellaneous Amendments) Act, 2018 was subject to *the Constitution* and in the event there is a conflict between the provisions of a statute and *the Constitution*, *the Constitution* prevails

51. The JSC contended that the object of the Statute Law Miscellaneous (Amendments) Act was intended to correct anomalies, inconsistencies, outdated terminologies or errors which are minor and noncontroversial amendments to a number of statutes at once. In so far as it substantively amended EMCA, the amendments are invalid. The JSC relied on the decision in Law Society of Kenya v Attorney General & Another (supra) and urged the Court to allow the petition.

5th and 9th interested parties' case

52. The 5th and 9th interested parties opposed the consolidated petitions through grounds of opposition. They contended that under section 13 of the *Interpretation and General Provisions Act*, the sections of the *Prevention of Torture Act* that amended EMCA which are the subject of Petition No. 251 of 2017 remain amended rendering the cause of action moot.

53. The 5th and 9th respondents maintained that in enacting the Statute Law (Miscellaneous Amendments) Act 2018, the National Assembly lawfully discharged its mandate under Article 94(1) of *the Constitution*. They asserted that the period granted for the public to consider and give views on the Bill was reasonable and there was adequate public participation.

54. The 5th and 9th interested parties argued that the amendments to sections 125 and 129 of EMCA constituted minor amendments and were properly included in the Statute Law (Miscellaneous Amendments) Act 2018. According to the 5th and 9th interested parties, the amendment to section 125 of EMCA requiring the chairperson and vice chairperson to be elected in a democratic manner was consistent with Articles 10(2)(a) and 50 of *the Constitution*.

55. The 5th and 9th interested party took the position that the petitioners did not specifically plead the manner in which the amendments to section 129 of EMCA threatened the precautionary principle. They maintained that amendments to sections 125 and 129 did not require concurrence of the Senate.

56. The 2nd, 3rd, 4th, 6th and 11th interested parties did not file responses and did not take part in these proceedings.

Determination

57. Upon considering the consolidated Petitions and arguments by parties, I have identified the following issues for determination. Whether EMCA could be amended through the *Prevention of Torture Act*; whether the amendment of sections 125 and 129 through the Statute Law (Miscellaneous Amendments) Act, 2018 violated *the Constitution*; whether there was meaningful public participation and whether the amendment to section 129(4) of EMCA could act retrospectively.

Amendments through the *Prevention of Torture Act*

58. The petitioners argued that although sections 24-32 of the Prevention of Torture Bill did not contain an intention and clause for amending section 129 of EMCA, section 29 of the Prevention of Torture Bill sneaked in an amendment to section 129(4) of EMCA without public participation. The amendment purported to apply retrospectively rendering status quo orders previously granted by NET useless. This they argued, militated against Articles 42, 69, 70, 71 and 72 of *the Constitution* on environmental protection. Further, that the amendment did not keep with the practice of making minor amendments which did not merit publication of a separate Bill.

59. According to the 2nd petitioner, the amendments through the Prevention of Torture Bill were introduced a day after NET had granted stay orders in NET Appeal No. 200 of 2017, Okiya Omtatah

Okoiti & Another vs The National Environment Management Authority & 8 others, to defeat those orders.

60. The respondents argued that Petition No. 251 of 2017 had been overtaken by events and was moot following the enactment of the Statute Law (Miscellaneous Amendments) Act, 2018. Regarding the amendment to section 129(4), the respondents supported the amendment and argued that section 29 of the *Prevention of Torture Act* was enacted in accordance with the legislative mandate of Parliament under Articles 94(5), 109 and 124 of *the Constitution*. A new clause was introduced to the Bill and subjected to the requirements of the Standing Orders. It was voted by the House to be included in the Bill following justification for the inclusion.

61. According to the respondents, the amendment was intended to ensure that NET has powers to determine whether or not to issue stay orders so as to avoid stalling of projects based on frivolous and vexatious applications. The 2nd respondent admitted that the Prevention of Torture Bill, 2016 as published did not include a proposal to amend section 129(4) of EMCA. The proposed amendment was introduced on the floor of the House.

62. I have perused the Prevention of Torture Bill, 2016. It was said to be:

> A Bill for AN ACT of Parliament to give effect to Article 25 (a) and 29(d) of *the Constitution* and to the principles of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; to provide for the prevention, prohibition and punishment of acts of torture and cruel, inhuman or degrading treatment or punishment; reparations to victims of torture and cruel, inhuman or degrading treatment or punishment; and for connected purposes.

63. The Bill did not contain a proposal for amending any of the sections in EMCA. This fact was also admitted by the 2nd respondent who stated that the proposal to include an amendment to section 129(4) of EMCA was introduced on the floor of the House. The amendment to section 129(4) of EMCA changed the position regarding maintaining status quo on an appeal being filed before NET.

64. Prior to the impugned amendment, section 129(4) provided as follows:

> Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.

The import of subsection (4) was that once an appeal was filed before NET, there would be an automatic status quo in the matter until the appeal was heard and determined.

65. Section 29 of the *Prevention of Torture Act* introduced an amendment to section 129 of EMCA as follows:

Section 29; The *Environmental Management and Co-ordination Act* is amended in section 129 by deleting subsection (4) and substituting therefor the following new subsections-

(3) upon any appeal to the Tribunal under this section, the Tribunal may if satisfied-

(a) upon application by any party, issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined;

(b) upon application by any party, review any orders under paragraph *(a)*.

(4) Any status quo automatically maintained by virtue of the filing of any appeal prior to the commencement of subsection (4) shall lapse upon commencement of this section unless the

Tribunal, upon application by a party to the appeal issues fresh orders maintaining the status quo in accordance with subsection (4).

66. It is important to point out here, that from the preamble to the Bill, there was no express intention to amend any sections in EMCA. Further, EMCA could not be said to be connected with the *Prevention of Torture Act*. Sections 27 to 30 of the Bill were clear on the statutes and sections that were to be amended, (or repealed as the case may be), to bring them into conformity with the Preventions of Torture Act.

67. The statutes to be amended were: The Schedule to the Extradition (Contiguous and Foreign governments) Act; The *Extradition (Commonwealth Countries) Act*; The Chiefs Act and The *Children Act*.

68. In the memorandum of objects and reasons, the Bill stated that the principal object of the Bill was to implement Kenya's obligation under the United Nations Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment and all other international conventions to which Kenya is a party.

69. The Bill further sought to establish the necessary institutional mechanisms for the support and assistance of victims of torture and cruel, inhuman or degrading treatment or punishment to ensure just and effective punishment of offenders convicted of offences under the Act.

70. The memorandum of objects and reasons also stated that Part V (clauses 25-32) would, among others, amend or repeal some sections of the statutes referred to in the memorandum. EMCA was not one of those statutes since it was not in any way connected with prevention of torture. It was therefore not available for the 2nd respondent to amend a statute through a Bill that had no connection or nexus with such a statue.

71. The other issue taken up by the petitioners was that the amendment was not subjected to public participation; was to act retrospectively; affect orders that had already been issued by NET and reopened those cases for reconsideration to the disadvantage of parties in whose favour status quo orders had been issued.

72. The 2nd respondent maintained that the amendment was proper since NET would have discretion to reconsider applications and determine whether to issue fresh status quo orders or not. On public participation, the 2nd respondent maintained that the amendment was made in accordance with Standing Orders without stating whether or not public participation was conducted.

73. There is no denial that no intention was expressed in the Bill to amend EMCA. The 2nd respondent admitted as much and stated that the amendments were introduced on the floor of the House. The 2nd respondent did not in any way suggest that there was public participation with regard to the amendment to section 129 of EMCA. The argument that the amendment was to act retrospectively was also not contested as it is clearly discernible from the text of the amendment. All the 2nd respondent stated was that NET would have an opportunity to reconsider applications and determine whether or not to reissue status quo orders.

74. The 2nd respondent could not introduce amendments to EMCA on the floor of the House which had nothing to do with the Bill that had been subjected to public participation and was being debated, without conducting fresh public participation on those particular amendments. This was clearly and without a doubt, in violation of Articles 10 and 118 of *the Constitution*.

75. Regarding retroactivity, the amendment was to affect status quo orders that had been issued on filing of appeals. The general rule is that the law is always forward looking and an amendment should not affect already accrued rights.

76. In Republic v Registrar of Companies & 2 others; Ex Parte Schindler Limited [2020] eKLR, the court stated on the issue:

> [22.] The general rule is that, in the absence of an express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted so as not to take away rights actually vested at the time of their promulgation. A further reason for its existence is that the creation of new obligation or an imposition of new duties by the Legislature is not lightly assumed. Thus, a statute is presumed not to apply retrospectively, unless it is expressly or by necessary implication provided otherwise in the relevant legislation. Unless a contrary intention appears from new legislation which repeals previous legislation, it is presumed that no repeal of an existing statute has been enacted in relation to transactions completed prior to such existing statute being repealed.

I agree with the above exposition of the law.

77. With regard to the case at hand, I agree with the petitioners that to the extent that the impugned amendment was to set aside all status quo orders already issued in favour of parties and reopen such matters for fresh applications for status quo, was clearly in violation of the principle of non-retroactivity application of the law. The amendment was to affect already accrued rights of parties who had obtained status quo orders, without affording them a hearing, in violation of their accrued rights.

78. That is not all: The amendment would result into unintended consequences by causing further delays as NET would face a floodgate of applications leading to delays in determination of the pending appeals. What would for example happen where status quo orders had been issued, the appeal had been heard and a decision reserved. Such state of affairs never anticipated in judicial proceedings would interfere with the progression of cases. The amendment would also violate the principle in Article 159 (2)(b) that justice should not be delayed.

Statute Law Miscellaneous (Amendments) Act, 2018

79. The petitioners argued that the Statute Law (Miscellaneous Amendments) Act, 2018 was used to introduce fundamental changes on the functioning of NET; affect functions of county governments under the Fourth Schedule to *the Constitution* and the duty of the State to protect the environment thereby indirectly amending other legislations, including The *Judicial Service Act*. According to the petitioners, a Statute Law (Miscellaneous Amendments) Act is only used to make minor changes but not to introduce substantive amendments to statutes which would otherwise require stand-alone Bills.

80. The petitioners further argued that the amendments to section 125 of EMCA took away the powers of the JSC to appoint the chairperson and members of NET; the amendments violated the right to a fair hearing before an independent and impartial tribunal as the amendments introduced appointment of members of NET otherwise than by the JSC.

81. The petitioners further argued that just like the amendments introduced by The *Prevention of Torture Act*, the amendment to section 129 (3) and (4) of EMCA, removed automatic status quo on filing of appeals before NET and were to apply retrospectively by requiring parties to make fresh applications for status stay orders.

82. The petitioners asserted that section 129(3) (d) (e) as amended contradicted the provisions of Articles 42 and 69(1) (a) and (g) of *the Constitution* by diluting the legislative measure of granting automatic status quo orders on filing an appeal by requiring that an application for maintaining status quo be made once an appeal is filed. This, they argued, was a retrogressive measure in protecting the right to a clean and healthy environment.

83. The petitioners maintained that the amendments were void because they were made in contravention of existing conservatory orders that had been issued in petition No. 251 of 2017.

84. The respondents on their part, asserted that the process leading to the enactment of the Statute Law (Miscellaneous Amendments) Act, 2018 was lawful; the Bill was published in the Kenya Gazette; was subjected to the first reading on 30th November 2017 and thereafter committed to Departmental Committees for consideration.

85. According to the respondents, the Departmental Committee on Environment and Natural Resources considered the amendments to EMCA for submission to the Departmental Committee of Finance and National Planning pursuant to the communication from the Speaker issued on 20th February 2018. The 2nd respondent then conducted public participation; called for views from the public on 4th December 2017 and the Committee received submissions from among others, the JSC, Cyntonn Real Estate LLP; Institute for Social Accountability, Kenya Natural Resource alliance and Save Lamu.

86. The Bill went through the second reading on 13th March 2018 and 14th March 2018 and was committed to the Committee of the whole House and read a third time on the same day and passed. It was assented to by the President on 4th April 2018.

87. Regarding amendments to section 125, the respondents maintained that the amendments were rational since they give equal opportunity to members of NET to contest for, and elect the chairperson and vice chairperson. They also give the three advocates an opportunity to elect a chairperson of their choice as opposed to a chairperson imposed on them by another institution.

88. On the amendments to section 129, the respondents argued that the amendments were in line with *the Constitution*; the amendments were based on the need for NET to have powers to determine whether or not to grant status quo orders so as to avoid stalling projects based on frivolous and vexatious applications. The amendment to section 129(4) did not limit any fundamental rights.

89. I have considered respective parties' arguments on the amendments made through the Statute Law (Miscellaneous Amendments) Act, 2018. The first issue here, is whether it was appropriate to amend EMCA through the Statute Law (Miscellaneous Amendments) Act. Whereas the petitioners and 1st interested party argued that it was not, the 2nd respondents and the 5th and 9th interested parties took the position in favour of using the Statute Law (Miscellaneous Amendments) Act.

90. A Statute Law (Miscellaneous Amendments) Act, as the name suggest, is used to make minor changes to several laws at the same time as an omnibus legislation. The amendments are supposed to be minor and not substantive in the sense that they do not affect the substance of the laws affected. The changes to be made may be clerical and correction of errors or terminologies that would not require substantive and stand-alone Bills. In other words, a Statute Law (Miscellaneous Amendments) Act should not be used to make substantive amendments which would otherwise require stand-alone Bills and extensive public participation.

91. Addressing this issue in *Law Society of Kenya v the Attorney General, Constitutional Petition No. 3 of 2016*,[2016]eKLR the Court stated that "omnibus amendments in the form of Statute Law

Miscellaneous legislations ought to be confined only to minor non-controversial and generally housekeeping amendments."

92. This position was followed in Josephat Musila Mutua & 9 others v Attorney General & 3 others [2018] eKLR, where the Court stated that a Statute Law (Miscellaneous Amendments) Act should not be used to make serious or substantial amendments to a statute or legislation. A statute Law (Miscellaneous Amendments) Act is used for correcting errors, inconsistencies or anomalies in a statute. The Court observed that substantive amendments should be introduced through a normal Bill and be subjected to public participation where the amendments are critical and affect rights and fundamental freedoms.

93. In the present petition, there is no dispute that the amendments were introduced through a Statute Law (Miscellaneous Amendments) Act. The amendments were not aimed at correcting errors, inconsistencies or anomalies in the statute. They were substantive and affected the composition of NET and its functioning which should have been done through a stand-alone Bill and subjected to meaningful and effective public participation.

94. The respondents argued that public participation was conducted and for that reason, the amendments complied with *the Constitution*. To this, the petitioners countered that there was no reasonable, meaningful and effective public participation.

Public participation

95. Public participation is one of the national founding values in Article 10. Article 118(b) of *the Constitution* provides that Parliament "shall facilitate public participation and involvement in the legislative and other business of parliament and its committees." That is, public participation is not an option but a constitutional imperative in the legislative processes.

96. While the petitioners argued that members of the public were not give sufficient time to engage and present their views, the respondents posited that the public submitted views on the Bill in compliance with *the Constitution*.

97. According to the petitioners, the Bill was first published in the Kenya Gazette on 13th November 2017. It was then published in the Daily Nation on 2nd and 4th December 2017 giving the public only 5 days to give their comments which limited public participation in violation of Articles 10 and 118 of *the Constitution*.

98. Whether or not there was public participation is a question of fact and the burden is on the State organ responsible to conduct public participation to demonstrate that indeed, there was reasonable, meaningful and effective public participation. Since *the Constitution* obligates Parliament to facilitate public participation in its legislative processes and other businesses, public participation must be real and not an illusory. It must not be done to merely fulfil a constitutional requirement. People must be given a reasonable opportunity to have meaningful engagement and give views that would have an effect in the legislative outcome.

99. I agree with the Court's observation in the case of Moses Munyendo & 908 Others v The Attorney General and Minister for Agriculture [2013] eKLR, that the National Assembly has a broad measure of discretion on how to achieve the object of public participation and that how public participation is effected will vary from case to case. However, it must be clear that a reasonable level of participation was afforded to the public.

100. In Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR, the Court stated that public participation ought to be real and not illusory and ought not to be treated as a

mere formality for the purposes of fulfilment of the Constitutional dictates. It behoves the body enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively.

101. In Kiambu County Government & 3 others v Robert N. Gakuru & Others [2017] eKLR, the Court of Appeal affirmed the High Court decision and stated:

> [20.] The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. *The Constitution* in Article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation.

102. In Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11, Ngcobo, J. stated that facilitation of public involvement in the legislative process means taking steps to ensure that the public participate in the legislative process.

103. In Glenister v President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6, the Court held that:

> For the opportunity afforded to the public to participate in a legislative process to comply with section 118(1), the invitation must give those wishing to participate sufficient time to prepare. Members of the public cannot participate meaningfully if they are given inadequate time to study the Bill, consider their stance and formulate representations to be made. Two principles may be deduced from the above statement. The first is that the interested parties must be given adequate time to prepare for a hearing. The second relates to the time or stage when the hearing is permitted, which must be before the final decision is taken. These principles ensure that meaningful participation is allowed. It must be an opportunity capable of influencing the decision to be taken. The question whether the notice given in a particular case complies with these principles will depend on the facts of that case.

104. The principle laid in the above decisions is that a reasonable opportunity is offered to the members of the public and all interested parties so that they know about the issue and have an adequate say on it.

105. Public participation being a founding value recognized in Article 10 of *the Constitution*, Article 118 provides for public participation and involvement in the legislative businesses making it a constitutional imperative in all legislative processes.

106. The petitioners argued that members of the public were only given 5 days within which to receive the Bill, read and present their submissions. The respondents did not deny that members of the public were only given 5 days to submit views. According to the 2nd respondent who was responsible for facilitating public participation, submissions were received from, among others, the JSC, Cyntonn Real Estate, LLP; Institute for Social Accountability, Kenya Natural Resource alliance and Save Lamu.

107. In my respectful view, 5 days could not have been sufficient time for members of the public to obtain the Bill, read and understand it, prepare and submit their views on an important issue like amending EMCA. The amendments to sections 125 and 129(4) of EMCA were significant since they were to affect the functioning of NET; the right to a clean and health environment and environmental protection and were to affect accrued rights, namely; orders of status quo that had been granted pending determination of appeals before NET. The public needed more time to read and understand

the Bill so that they could give meaningful views that would inform the outcome of the legislation given the effect the intended amendments were to have on the environmental, justice and accrued rights.

108. I am persuaded, and I agree with the petitioners, that it was not proper for amendments to EMCA to be effected through a Statue Law (Miscellaneous Amendments) Act given the broad nature of those amendments and their effects. The amendments should have been made through a stand-alone Bill so that members of the public would have sufficient time to participate and have an adequate say on the legislative process.

109. That notwithstanding, even though there was an attempt towards conducting public participation, it could not be said to have been reasonable, meaningful and effective public participation. The 5 days given to the public to submit views was in short, a mere formality for the purposes of appearing to have fulfilled a constitutional requirement, a contravention of the essence of Article 10 as read with article 118 of *the constitution*.

Constitutional validity of the amendments to sections 125 and 129

I. Section 125

110. The petitioners took issue with the amendments to section 125 on the appointment of members of NET arguing that they violated Articles 159(1), 169(1) and 172 of *the Constitution*. According to the petitioners, the amendments require that the chairperson be elected by members of NET; all members are to be appointed by the Cabinet Secretary and may be removed by Cabinet Secretary.

111. Prior to the amendments, the chairperson was nominated by the JSC though was appointed by the Cabinet Secretary. The amendments have effectively taken away the mandate of the JSC to appoint the chairperson and members of NET. The 1st interested party (the JSC) supported the petitioners' position while the 2nd respondent denied that the amendments violated *the Constitution*.

112. There are established principles to consider when called upon to determine whether a statute or its provision is constitutionally invalid. There is a general but rebuttable presumption that a statute or its provision is constitutional and the burden is on the person alleging unconstitutionality to prove the invalidity. This is because it is assumed that the legislature, as the peoples' representative, understands the problems people face and therefore enacts legislations with the intention of solving those problems.

113. It was thus, held in Ndynabo v Attorney General of Tanzania [2001] EA 495, that an Act of Parliament is constitutional and that the burden is on the person who contends otherwise to prove the country.

114. Purpose or effect is also used to determine constitutional validity of a statute or statutory provision. The purpose of enacting a legislation or the effect of its implementation may lead to nullification of a statute or provision if found to be inconsistent with *the constitution*. In this regard the Court stated in Olum and another v Attorney General [2002] EA thus:

> To determine the constitutionality of a section of a statute or Act of parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by *the Constitution*, the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by *the Constitution*, the impugned statute or section thereof shall be declared unconstitutional.

115. In The Queen v Big M. Drug mart Ltd, 1986 LRC (Const.) 332, the Supreme Court of Canada stated that:

> Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus, validity.

116. See also Centre for Rights Education and A wareness & another v John Harun Mwau & 6 others [2012] eKLR for the position that in determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned Act, which can be discerned from the intention expressed in the Act itself.

117. Prior to the impugned amendments, section 125 provided as follows:

1. There is established a Tribunal to be known as the National Environment Tribunal which shall consist of the following persons-
    a. a chairman nominated by the Judicial Service Commission who shall be a person qualified to be a judge of the High Court of Kenya;
    b. an advocate of the High Court of Kenya nominated by the Law Society of Kenya;
    c. a lawyer with professional qualifications in environmental law appointed by the minister; and
    d. two persons who have demonstrated exemplary academic competence in the field of environmental management appointed by the minister.
2. All appointments to the Tribunal shall be by name and by gazette Notice issued by the Minister.
3. The members of the Tribunal shall be appointed at different times so that the expiry dates of their respective terms of office shall fall at different times.
4. The office of a member shall become vacant-
    a. at the expiry of three years from the date of his appointment;
    b. if he accepts any office the holding of which, if he were not a member of the Tribunal, would make him ineligible for appointment to the office of member of the Tribunal;
    c. if he is removed from membership of the Tribunal by the Minister for failure to discharge the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour; and
    d. if he resigns the office of member of the Tribunal.

118. Following the amendments, section 125 now provides:

(1) There is established a Tribunal to be known as the National Environment Tribunal which shall consist of the following members-

(a) a person nominated by the Judicial Service Commission, who shall be a person qualified for appointment a judge of the Environment and Land Court of Kenya;

(b) an advocate of the High Court of Kenya nominated by the Law Society of Kenya;

(c) a lawyer with professional qualifications in environmental law appointed by the Cabinet Secretary; and

(d) three persons with demonstrated competence in environmental matters, including but not limited to land, energy, mining, water, forestry, wildlife and maritime affairs.

(2) All appointments to the Tribunal shall be by name and by Gazette Notice issued by the Cabinet Secretary.

(3) The members of the Tribunal shall be appointed at different times so that their respective dates of their terms of office shall fall at different times.

(4) The office of a member of the Tribunal shall become vacant –

(a) at the expiration of three years from the date of his appointment;

(b) if he accepts any office the holding of which, if he were not a member of the Tribunal, would make him ineligible for appointment to the office of a member of the Tribunal;

(c) if he is removed from membership of the Tribunal by the Cabinet Secretary for failure to discharge the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour and

(d) if he resigns the office of member of the Tribunal.

(5) The members of the Tribunal shall, in their first meeting, elect from amongst themselves a Chairperson to the Tribunal from amongst the persons appointed under paragraphs (a), (b) and (c) of subsection (1) and a Vice Chairperson to the Tribunal from amongst all members.

(6) The Chairperson and Vice Chairperson shall of opposite gender.

(7) In the absence of the Chairperson, the Vice Chairperson shall serve as the acting Chairperson for the duration of the absence of the Chairperson and the acting Chairperson shall perform such functions and exercise such powers as if that person were the Chairperson.

(8) In the absence of both the Chairperson and the Vice Chairperson, the members of the Tribunal present may nominate, from among themselves, a person to act as the Chairperson, which person shall have the training and qualifications in the field of law and such person, while acting as the Chairperson, shall perform such functions and exercise such powers as if that person were the Chairperson.

(9) The Chairperson may designate the Vice Chairperson and two other members to constitute a separate sitting of the Tribunal.

119. Prior to the impugned amendments, the chairperson was nominated be the JSC while the Law Society of Kenya nominated one lawyer. The Cabinet Secretary appointed three members. The amendments introduced the position of Vice Chairperson and changes to the composition of the Tribunal and appointment of the Chairperson. It also introduced the mode of appointing Vice Chairperson.

120. The amendments took away the mandate of the JSC to appoint the Chairperson. The Cabinet Secretary is now to appoint four persons so that the Tribunal would have six members who are to elect

the Chairperson and Vice Chairperson. All members of the Tribunal will be appointed by the Cabinet Secretary and may be removed by the Cabinet Secretary.

121. Article 159(1) which falls under Chapter 10 of *the Constitution* headed "The Judiciary", provides that Judicial authority is derived from the people and vests in, and is to be exercised by the courts and "tribunals" established by or under *the Constitution*.

122. In that respect, Article 160(1) provides for the independence of the Judiciary so that in the exercise of judicial authority, the Judiciary is only subject to *the Constitution* and the law and is not subject to the control or direction of any person or authority. Tribunals thus, fall under the subordinate court in accordance with Article 162(4) as read with Article 169(1)(d) being "any other court or local tribunal as may be established by an Act of Parliament." This placed all tribunals under the Judiciary after the effective date (27th August 2010).

123. NET is a tribunal established under EMCA and falls under the Judiciary. In that regard, Article 172(1) of *the Constitution* provides that the JSC is to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice and "shall-(c) appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates and other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament."

124. Members of Tribunals are "other Judicial officers" within the Judiciary who are to be appointed, disciplined and removed by the JSC in accordance with the *Judicial Service Act*, an Act of Parliament which provides for the administration of the Judiciary.

125. The amendments to the section 125 of EMCA to take away the mandate of appointing members of NET from the JSC and place that mandate to the Cabinet Secretary, as well as the manner of appointing the chairperson and vice chairperson was inconsistent with *the Constitution*.

126. It is important to also point out that as section 125 stood before the amendments, violated the principles of the independence of the judiciary and the mandate of the JSC. Although EMCA came into force before the 2010 Constitution, after the effective date, section 7 (1) of the Sixth Schedule to *the Constitution* requires that all law in force immediately before that date would continue to be in force but should be construed with the alterations, adaptations, qualifications and exceptions necessary to bring the law into conformity with *the Constitution*.

127. Section 7(2) is clear that if with respect to any matter-

(a) a law that was in effect before the effective date assigns responsibility to that matter to a different State organ or public officer, and

(b) a provision of this constitution that is in effect assigns responsibility for that matter to a different State organ or public officer,

The provisions of this Constitution prevail to the extent of the conflict.

128. Tribunals were transited to and became part of the Judiciary. In that respect, appointments of members and officers of tribunals though previously assigned to other public officers, became the constitutional mandate of the JSC. It follows, and I agree with the petitioners, that the amendments to section 125 of EMCA purporting to place the mandate of appointing members of the NET under the Cabinet Secretary violated Articles 159(1), 160(1), 162(4), 169(1)(d) and 172(1)(c) of *the Constitution*.

II. Section 129(4)

129. The petitioners again took issue with the amendments to section 129(3) and (4) to take away automatic orders of status quo once an appeal is filed before NET. They also faulted the requirement that the amendment to subsection (4) apply retrospectively to orders of status quo that had been issued and were in force so that such orders would stand set aside and parties would have to make fresh applications for consideration by NET.

130. The respondents supported the amendments, arguing that they gave NET power and discretion to consider application for stay orders when an appeal is filed before it pending the hearing and determination of the appeal. NET could also review the orders on application by a party.

131. Prior to the amendment, section 129(3) and (4) provided that upon any appeal, the tribunal may-

a. Confirm, set aside or vary the order or decision in question;

b. Exercise any of the powers which could be exercised by the Authority in the proceedings in connection with which the appeal is brought; or

c. Make such other order, including on costs as it may deem just.

4. Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.

132. That meant an automatic status quo would issue once an appeal was filed before NET. This was intended to protect interests of the parties by maintaining the substratum of the case pending the hearing and determination of the appeal.

133. After the amendment, section 129(3) and (4) provide as follows:

(3) upon any appeal, the Tribunal may-

(a) confirm, set aside, vary the order or decision in question.

(b) exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or

(c) make such order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just,

(d) if satisfied upon application by any party, issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined;

(e) if satisfied upon application by any party, review, any orders made under paragraph *(a)*.

(4) Any status quo automatically maintained by virtue of the filing of any appeal prior to the commencement of subsection (3) shall lapse upon commencement of this section unless the Tribunal, upon application by a party to the appeal, issues fresh orders maintaining the status quo in accordance with subsection (3)(a).

134. Of significance, was the amendment to section 129(4) EMCA to render any status quo orders that had been previously issued on the appeal being filed to have lapsed and requiring parties to apply afresh before NET and NET to consider whether to issue fresh orders maintaining the status quo or not. This amendment was the same amendment that had been introduced through the *Prevention of Torture Act*.

135. As the Court has already stated earlier in this judgment, the law is always forward looking and should not act retrospectively where it is to affect rights and fundamental freedoms. Before the amendment, section 129(4) provided for automatic status quo once an appeal was filed. This did not only maintain the substratum of the appeal, it also conferred rights on parties once the status quo orders were issued. The purpose and effect of the amendment was to take away this right and leave parties in a precarious position, notwithstanding the stage their appeals may have reached. The fact that the intention of the amendment was to take away accrued rights is not sustainable in a democratic society governed by the rule of law.

136. As the Court stated in The Queen v Big M. Drug mart Ltd (supra), both purpose and effect are relevant in determining constitutionality. an unconstitutional purpose or an unconstitutional effect will invalidate legislation as the object is realized through impact produced by the operation and applications of the legislation.

137. There was no explanation why an accrued right was to be taken away in the manner the amendment suggested and without according those with accrued rights ha hearing. This was legislative arbitrariness in violation of the rights of parties and an interference with the independence of the Judiciary in general, and NET in particular.

138. The amendment would also bring in unintended consequences in that all matters before NET where orders had been issued by operation of the law, would all of a sudden be reopened and NET would have to face numerous applications for status quo. For instance, what would happen where there is an order of status quo, the appeal had been heard and a decision reserved. Would NET suspend preparing a decision and go back to consider an application for status quo. This, in my view, IS a clear case of legislative interreference with judicial independence.

139. The petitioners again argued and, it is not disputed, that the amendments were made despite subsisting conservatory orders issued in Petition No. 251 of 2017 prohibiting coming into effect section 29 of the *Prevention of Torture Act* which had amended section 129(4), taking away automatic status quo once an appeal was filed before NET and requiring parties to file fresh applications for consideration by NET.

140. Indeed, the record shows that the Court Mativo J, (as he then was) had issued a conservatory order in Petition 251 of 2017 suspending section 29 of the *Prevention of Torture Act*, thereby suspending the amendments to section 129(4). The National Assembly was and still is a party in Petition No 251 of 2017 where the orders were issued. That notwithstanding, and despite the orders being in place, the National Assembly (2nd respondent), went ahead and introduced the same amendments that had been suspended, in 129(4) of EMCA. The National Assembly not only acted in violation of a subsisting court order, it also acted in bad faith with the intention of circumventing the Court order, an action that was null and void.

141. In this respect, and as Lord Denning stated in Macfoy v United Africa Co. Ltd (1961) 3 All ER 1169, "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad."

142. *The Constitution* places judicial authority on the Courts so that court orders must be respected by all. The National Assembly was bound by the orders of the court suspending the amendments made to section 129(4) of EMCA. Enacting similar amendments to the same law when Petition 251 of 2017 was pending and the conservatory orders still in place, amounted to acting in contravention of court orders, an act that fell afoul *the Constitution* rendering the amendments invalid.

143. I once again I agree with the petitioners that the amendments violated *the Constitution* and are invalid in terms of Article 2(4) of *the Constitution*.

Conclusion

144. Having considered the consolidated Petitions; responses and arguments by parties; as well as *the Constitution*, the law and the decisions relied on, I come to the following conclusions. First, the amendments to sections 125 and 129 of Environmental Management and Coordination Act through Statute Law (Miscellaneous Amendments) Act, 2018 were not subjected to reasonable, meaningful and effective public participation. The period of five (5) days allowed for public participation was not sufficient for members of the public to receive the Bill, read, prepare and submit meaningful views for purposes of effective participation.

145. Second, the amendments of section 125 of the Environmental Management and Coordination Act to remove appointment of chairperson and members of the National Environment Tribunal and their removal from the Judicial Service Commission and to place their appointment and removal to the Cabinet Secretary violated Articles 159 (1), 161(1), (162(4), 169(1) (d) and 172(1) of *the Constitution* as read with Section 7 (1) and (2) of the Sixth Schedule to *the Constitution*; amounted to interference with Judicial independence and the independence of the Judicial Service Commission.

146. Third, the amendment to section 129 of the Environmental Management and Coordination Act through the Statute Law (Miscellaneous Amendments) Act 2018 during the subsistence of court orders suspending section 29 of the *Prevention of Torture Act* which had introduced similar amendments, violated court orders and are unlawful.

147. Fourth, the amendment to section 129 (4) of Environmental Management and Coordination Act through the *Prevention of Torture Act* which had no nexus with the Environmental Management and Coordination Act and without public participation, violated Articles 10 and 118 of *the Constitution*.

Disposal

148. Based on the above conclusions, the court makes the following declarations and orders which it considers appropriate:

    1. A declaration is hereby issued that the amendments to section 129(4) of Environment al Management and Co-ordination Act, 1999 through section 29 of the *Prevention of Torture Act*, 2017 and without public participation violated Articles 10 and 118 of *the Constitution* was unconstitutional and invalid.

    2. A declaration is hereby issued that the amendments to section 129(4) of the *Environmental Management and Co-ordination Act* 1999 requiring the amendments to apply retrospectively, violated the principles of natural justice, sustainable development and the rule of law under Article 10 as well as accrued rights thus, is un constitutional, null and void.

    3. A declaration is hereby issued that the appointment of the chairperson, members and staff of the National Environmental Tribunal is the exclusive constitutional mandate of the Judicial Service Commission in accordance with Article 172 (1) (c) of *the Constitution* as read with the *Judicial Service Act*. To that extent, the amendments to section 125 of the Environmental Management Coordination Act, to place the mandate to appoint and remove members of the Tribunal on the Cabinet Secretary is unconstitutional, null and void.

    4. A declaration is hereby issued that the amendments to sections 125 and 129 of the Environmental Management and Coordination Act 1999 through the Statute Law (Miscellaneous Amendments) Act, 2018 were done without reasonable, meaningful,

qualitative and effective public participation in violation Articles 10 and 118 of *the Constitution*; court orders and are therefore invalid.

5. The Judicial Service Commission is at liberty to exercise its mandate to appoint members of the National Environment Tribunal where necessary or as circumstances demand in compliance with Articles 172(1) (c) and 172 (2) (a) and the *Judicial Service Act*.

6. The consolidated petitions having been brought in public interest, the appropriate order to make is that each party shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF FEBRUARY 2025

E C MWITA

JUDGE