



Muchiri & another v Attorney General & 6 others; Selection Panel for Appointment of the Chairperson and Members of the Media Council of Kenya (Interested Party) (Constitutional Petition E040 & E23 of 2023 (Consolidated)) [2025] KEHC 8929 (KLR) (Constitutional and Human Rights) (20 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8929 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E040 & E23 OF 2023 (CONSOLIDATED)**

EC MWITA, J

JUNE 20, 2025

BETWEEN

JAMES MUTAHI MUCHIRI 1ST PETITIONER

ROBERT LEROY OCHIENG 2ND PETITIONER

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF INFORMATION COMMUNICATION AND DIGITAL ECONOMY 2ND RESPONDENT

MEDIA COUNCIL OF KENYA 3RD RESPONDENT

THE NATION MEDIA GROUP 4TH RESPONDENT

KENYA EDITORS GUILD 5TH RESPONDENT

KENYA UNION OF JOURNALIST 6TH RESPONDENT

MEDIA OWNERS ASSOCIATION 7TH RESPONDENT

AND

SELECTION PANEL FOR APPOINTMENT OF THE CHAIRPERSON AND MEMBERS OF THE MEDIA COUNCIL OF KENYA INTERESTED PARTY



Constitutionality of sections 7 and 14 of the Media Council Act which provided for the composition and the removal from office of the chairperson or a member of the Council respectively

The petitioners challenged the constitutionality of sections 7 and 14 of the Media Council Act and the process leading to the appointment of the selection panel and shortlisting of candidates for the Media Council of Kenya. The court found that what the petitioners argued was discrimination, was positive discrimination which was allowed by the Constitution. That was because it was not every organisation that should be represented in the selection panel. Leaving out some organisations was not, in itself, discrimination but an act of necessity for proper functioning and delivery of better results for the benefit of all. The court further found that the petitioners did not plead what ailed section 14 of the Media Council Act and how it was inconsistent with the Constitution.

Reported by Kakai Toili

Constitutional Law – constitutionality of statutes – constitutionality of sections 7 and 14 of the Media Council Act – where section 7 provided for the composition of the Media Council while section 14 provided for the removal from office of the chairperson or a member of the Council – whether section 7(3) of the Media Council Act was discriminatory and thus unconstitutional for providing for 13 out of 40 organisations to nominate members to the selection panel for selecting suitable candidates for appointment to the Council - whether sections 7 and 14 were unconstitutional for limiting public participation and permitting conflicts of interest in the selection process of suitable candidates for appointment to the Council – Constitution of Kenya, articles 2(4) and 27; Media Council Act (Cap. 411B), sections 7, 8(2) and 14.

Civil Practice and Procedure – doctrine of res judicata – nature of the doctrine of res judicata - whether res judicata permitted parties to open the same subject of litigation concerning matters which might have been brought forward because they had been omitted in the previous suit.

Words and Phrases – discrimination – definition of discrimination - the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured - Black's Law Dictionary.

Brief facts

The 2nd respondent, the Cabinet Secretary, Ministry of Information Communication and Digital Economy declared vacancies for the position of members of the 3rd respondent, the Media Council of Kenya (the Council) and appointed a selection panel consisting of persons from various stakeholders as required by law. The members were from Nation Media group; Kenya Editors Guild; Kenya Union of Journalists; Media Owners Association; Consumers Federation of Kenya; Kenya Correspondents Association and the Law Society of Kenya.

The selection panel called for applications from qualified applicants and thereafter published names of the shortlisted applicants in the newspapers. The appointment of members of the selection panel as well as the shortlist of the applicants for the position of members of the council generated public interest leading to filing of the consolidated petitions challenging the constitutionality of the processes as well as some sections of the Media Council Act. The petitioners contended that the selection panel and the shortlisted candidates were conflicted because half of the shortlisted members were full time employees of media houses and, therefore, would not be independent.

The petitioners further asserted that there was no notice to members of the public allowing them to give comments on the suitability of the selection panel. The petitioners sought for among other reliefs; a declaration that the process of appointing and /or nominating members of the selection panel of the Media Council of Kenya violated articles 10 and 47 of the Constitution of Kenya; and an order of *certiorari* quashing the appointment of the selection panel.



Issues

- i. Whether sections 7 and 14 of the Media Council Act were unconstitutional for limiting public participation and permitting conflicts of interest in the selection process of suitable candidates for appointment to the Council.
- ii. Whether section 7(3) of the Media Council Act was discriminatory and thus unconstitutional for providing for 13 out of 40 organisations to nominate members to the selection panel for selecting suitable candidates for appointment to the Council.
- iii. Whether *res judicata* permitted parties to open the same subject of litigation concerning matters which might have been brought forward because they had been omitted in the previous suit.

Relevant provisions of the Law

Media Council Act, Cap. 411B

Section 7 - Composition of the Council

(1) *The Council shall consist of—*

- (a) *a chairperson appointed in accordance with this section;*
- (b) *one person nominated by the Cabinet Secretary;*
- (c) *seven other members appointed in accordance with this section.*

(2) *Within fourteen days of the commencement of this Act, or of the occurrence of a vacancy in the office of chairperson or member, the Cabinet Secretary shall—*

- (a) *by notice in the Gazette and in at least two newspapers of national circulation, declare vacancies in the Council, and invite applications from qualified persons; and*
- (b) *convene a selection panel for the purpose of selecting suitable candidates for appointment as the chairperson or members of the Council.*

(3) *The selection panel referred to under subsection (2), shall comprise of thirteen members nominated by the following organisations—*

- (a) *Kenya Union of Journalists;*
- (b) *Media Owners Association;*
- (c) *Kenya Editor's Guild;*
- (d) *Law Society of Kenya;*
- (e) *Kenya Correspondents Association;*
- (f) *Public Relations Society of Kenya;*
- (g) *National Gender and Equality Commission;*
- (h) *Association of Professional Societies in East Africa;*
- (i) *Consumers Federation of Kenya;*
- (j) *the Ministry responsible for matters relating to media;*
- (k) *Kenya News Agency; and*

(l) *two persons nominated by schools of journalism of recognized universities, one representing public universities and the other representing private universities.*

(4) *their first meeting the Panel shall appoint a Chairperson and a vice-chairperson who shall be of opposite gender.*

(5) *An application in respect of a vacancy declared under subsection (2), shall be forwarded to the selection panel within seven days of the publication of the notice and may be made by—*

- (a) *any qualified person; or*
- (b) *any, person, organization or group of persons proposing the nomination of any qualified person.*

(6) *The selection panel shall, subject to this section, determine its own procedure and the Cabinet Secretary shall provide it with such facilities and other support as it may require for the discharge of its functions under this section.*



(7) The selection panel shall consider the applications, shortlist and publish the names and qualifications of all the applicants and those shortlisted by the Panel in the Gazette and at least two daily newspapers of national circulation within seven days from the expiry of the deadline of receipt of applications under subsection (5).

(8) The selection panel shall interview the shortlisted applicants within fourteen days from the date of publication of the list of shortlisted applicants under subsection (7).

(9) After carrying out the interviews, the selection panel shall select one person qualified to be appointed as chairperson and seven persons qualified to be members of the Council, and forward the names to the Cabinet Secretary.

(10) The Cabinet Secretary shall, within seven days of receipt of the names, by notice in the Gazette, appoint a chairperson and seven members of the Council.

(11) The Cabinet Secretary may reject any nomination solely on any of the grounds set out in section 8(2), whereafter the Cabinet Secretary shall communicate the decision to the selection panel.

(12) Upon receipt of the notice of rejection under subsection (11), the selection panel shall select another person from the list of shortlisted applicants and submit his or her name to the Cabinet Secretary for appointment.

(13) Despite the foregoing provisions of this section, the Cabinet Secretary may, by notice in the Gazette, extend the period specified in respect of any matter under this section by a period not exceeding fourteen days.

(14) In selecting, nominating, approving or appointing the chairperson and members of the Council, the selection panel and the Cabinet Secretary shall—

(a) ensure that the nominees to the Council reflect the interests of all sections of the society;

(b) ensure equal opportunities for persons with disabilities and other marginalized groups; and

(c) ensure that not more than two-thirds of the members shall be of the same gender.

(15) The selection panel shall stand dissolved upon the appointment of the chairperson or members of the Council.

Section 8 - Qualification for appointment as chairperson or member of the Council

(2) A person shall not be qualified for appointment as chairperson or a member of the Council if the person—

(a) is a member of Parliament or county assembly;

(b) is an official of a governing body of a political party;

(c) has at any time within the preceding five years, held a political office;

(d) is an undischarged bankrupt;

(e) has been convicted of a felony;

(f) has benefitted from, or facilitated an unlawful or irregular allocation, acquisition or use of land or other public property; or

(g) has been removed from office for contravening the provisions of the Constitution or any other written law.

Section 14 - Removal from office

(1) The chairperson or a member of the Council shall be removed from office on any of the following grounds—

(a) violation of the Constitution or any other written law, including contravention of Chapter Six of the Constitution;

(b) gross misconduct;

(c) physical or mental incapacity that leads to inability to perform the functions of office;

(d) incompetence or neglect of duty;

(e) bankruptcy;

(f) absence from three consecutive meetings of the Council without justifiable cause;

(g) if the chairperson or a member becomes a director of any media enterprise or holds shares or has any other interest in a corporation, partnership or other body, directly or through another person, if holding those shares or having that interest would result in a conflict of interest with the officer's official duties; or



(b) if the chairperson or member is convicted of a criminal offence and sentence to imprisonment for a period of more than six months without the option of a fine.

(2) A person desiring the removal of the chairperson or a member of the Council on any ground specified in subsection (1) may present a petition, in writing, to the National Assembly setting out the alleged facts constituting that ground.

(3) The National Assembly shall, within seven days, consider the complaint and if satisfied that it discloses a ground under subsection (1) submit the complaint together with its recommendations to the Cabinet Secretary.

(4) On receiving the recommendation made under subsection (3), the Cabinet Secretary shall suspend the member from office pending determination of the petition and shall appoint a tribunal comprising of—

(a) a chairperson who shall be qualified to hold office as a Judge of the High Court;

(b) two persons one man and one woman competent to assess and determine the petition.

(5) The tribunal shall consider the petition and if satisfied that it discloses sufficient grounds for removal, recommend to the Cabinet Secretary to remove the member from office.

(6) In determining the petition, the tribunal shall be guided by the principles of fair administrative justice set out in Article 47 of the Constitution.

(7) The Cabinet Secretary shall be bound by the recommendation made by tribunal under this section.

Held

1. A statute or statutory provision was presumed to be constitutional and the burden was on the person alleging constitutional invalidity to prove the invalidity. The court should examine the purpose or effect of the statute or provision. The purpose of enacting a legislation or the effect of implementing the legislation may lead to nullification of the statute or its provision if found to be inconsistent with the Constitution.
2. There was challenge to the constitutionality of the Media Council Act. The first challenge was that the whole Act was unconstitutional because of the process leading to its enactment. That was however rejected by the court. The second challenge was on the constitutionality of some sections of the Act, with mixed results. While sections 3(2)(c) and 6(2)(c) of the Act were found to be unconstitutional, the constitutionality of the other impugned sections was upheld, including section 38(1)(f)(h) of the Act.
3. The fact that the constitutionality of the Media Council Act and some of its provisions were challenged was not in contention and was admitted by all parties. That would have raised the issue of *res judicata*. *Res judicata* was a principle of law which stated that a matter that had been adjudicated by a competent court may not be pursued further by the same parties.
4. From a perusal of the previous litigation, some of the petitioners in that case were now respondents. The respondents in the previous litigation were also respondents therein, including the Attorney General and the Cabinet Secretary. The issue in the previous petitions was on the constitutionality of the Media Council Act and some of its provisions. The issue of constitutionality of the Act and its provisions was at the centre of the previous litigation and the court pronounced itself on those issues with finality. At the time the previous petitions were filed, heard and concluded, the impugned sections in the instant petitions were in existence. The petitioners did not challenge those provisions although they had an opportunity to do so. The Attorney General and Cabinet Secretary, opposed the petitions and supported the constitutionality of the Act.
5. Although there was litigation and a determination was made, and the petitioners had an opportunity to raise the issues raised in the instant matter in that litigation, *res judicata* would not permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward, only because they had, from negligence, inadvertence, or even accident, omitted part of their case, it was important for the court to determine the issue of constitutionality of the impugned sections to bring the issue to a conclusion, at least in the court, concerning the constitutionality of section 7



- and 14 of the Media Council Act. That was also so, because the issue of *res judicata* was not raised or argued by parties in the court.
6. Section 7(1) of the Media Council Act merely constituted the Council and the petitioners did not say what was unconstitutional about it. The petitioners did not point out what was unconstitutional about section 7(2) in so far as it conferred on the Cabinet Secretary powers to declare vacancies and convene the selection panel. They did not point out which article of the Constitution it contravened or infringed. The petitioners did not demonstrate any problem with all the subsections in section 7 of the Media Council Act. A reading of the petitioners' arguments showed that their concerns were really with regard to section 7(3) of the Media Council Act.
 7. Section 7(3) of the Media Council Act was on the selection panel for purposes of receiving and interviewing applicants for the position of chairperson and member of the Council. Article 27 of the Constitution granted everybody equality before the law and equal protection and equal benefit of the law thus, prohibiting discrimination. Article 27(4) specifically prohibited the State from directly or indirectly discriminating against any person on any grounds including, race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress language or birth.
 8. For a statute or its provision to be declared unconstitutional, it must be inconsistent with, or in contravention of, the Constitution. That was the edict in article 2(4) of the Constitution. In that respect, a statute or its provisions would be declared unconstitutional if the purpose of enacting the statute or the provision or the effect of its implementation violated rights and fundamental freedoms or was inconsistent with, or in contravention of, the Constitution.
 9. Section 7(3) of the Media Council Act provided for composition of the selection panel and identified organisations that should nominate members to the panel for purposes of receiving application and conducting interviews for the position of chairperson and members of the Council. The purpose of the Media Council Act and therefore the section, was to give effect to article 34(5) of the Constitution. The purpose was to ensure that there was an independent body that would set media standards and regulate and monitor compliance with those standards. The effect of the section must be to have a panel that would conduct interviews and get competent people as chairperson and members of the Council.
 10. Although a casual assessment of the petitioners' arguments on discrimination may appear genuine, that only 13 out of 40 organisations were to appoint members to the selection panel, that was not negative discrimination. A selection panel must have a reasonable and manageable number. Even though there may be 40 organisations or even more, there may not be a selection panel comprising 40 or more members. That would not only be a big number, but also a nightmare in terms of logistics and resource availability. In governance matters, everybody could not be in Government as that was simply impossible. That was why a few members were given a chance to do some tasks on behalf of the general membership.
 11. To amount to discrimination, there must be demonstration of differential and favourable treatment of one person or group of persons as opposed to the other. It was the negative treatment that was outlawed by the Constitution. The Constitution disallowed negative discrimination but not every discrimination. What the petitioners argued was discrimination, was positive discrimination which was allowed by the Constitution. That was because it was not every organisation that should be represented in the selection panel. Leaving out some organisations was not, in itself, discrimination but an act of necessity for proper functioning and delivery of better results for the benefit of all. In that respect, there was no discrimination or constitutional infirmity in section 7(3) of the Media Council Act.
 12. Members of the panel, though recommended and selected by organizations identified by law, they did not act for their own interest or interests of the nominating organizations, but public interest in general and interest of the industry in particular. Members of the selection panel came from different organisations with diverse interests. Regarding the specific individuals that were said to be associated



- with media houses or entities, those were professionals on their own right and may not necessarily listen to employers. They were bound by the Constitution and the law to act independently and professionally to ensure that there was an independent media.
13. Section 14(1)(g) of the Media Council Act took care of the issue of conflict of interest as one of the grounds that disqualified a person from being chairperson or a member of the Council or for his removal from office. Moreover, section 14(2) of the Act provided for removal of such a person stating that a person desiring the removal of the chairperson or a member of the Council on any ground specified in subsection (1) may present a petition, in writing, to the National Assembly setting out the alleged facts constituting that ground. The petitioners did not demonstrate that any of the persons they alleged would be susceptible to conflict of interest, fell within section 14(1)(g) to be disqualified from applying for the position of chairperson or member of the Council.
 14. There must be precision in constitutional litigation to enable parties to respond to the issues at hand so that the court could make the correct determination on those issues. A petitioner must plead with as much precision as possible on the articles of the Constitution said to have been violated and the manner of the alleged violation. The petitioners did not plead what ailed section 14 of the Media Council Act and how it was inconsistent with, or in contravention of, the Constitution. In the circumstances, the petitioners' claim that section 14 was unconstitutional was not demonstrated and the claim failed.
 15. If the Attorney General and the Cabinet Secretary were of the view that the impugned sections were constitutionally infirm, they could take steps and initiate amendments.
 16. The law provided the names of applicants and those shortlisted should be published in the Gazette and newspapers with nationwide circulation. That was meant for public information and if anyone had a problem with an applicant, nothing stopped him or her from informing the selection panel which may consider the issue and decide whether it could disqualify the applicant. Under section 7(11) of the Media Council Act, the Cabinet Secretary may reject any nomination solely on any of the grounds set out in section 8(2) of the Media Council Act and communicate the decision to the selection panel.
 17. The consolidated petitions were unmeritorious. There was no demonstration that sections 7 and 14 of the Media Council Act were unconstitutional, or that the selection panel or shortlisted members for the position of the council were conflicted. There was no proof of discrimination either.

Consolidated petitions dismissed; each party shall bear their own costs.

Citations

Cases

1. Apollo Mboya v Attorney General, National Assembly & Senate (Petition 472 of 2017; [2018] KEHC 6933 (KLR)) — Followed
2. Center for Rights Education and Awareness & others v John Harun Mwangi & 6 others (Civil Appeal 74 & 82 of 2012; [2012] KECA 249 (KLR)) — Explained
3. Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR)) — Explained
4. Dr. Patrick Njoroge v Nation Media Group (Complaint No. 7 of 2021) — Mentioned
5. Governor of Kericho County v Kenya Tea Development Agency & 30 others Exparte KTDA Management Services Limited (Petition 18 of 2014; [2016] KEHC 2278 (KLR)) — Followed
6. Gwer & 5 others v Kenya Medical Research Institute & 3 others (Petition 12 of 2019; [2020] KESC 66 (KLR)) — Followed
7. Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya and 6 others (Civil Appeal 224 of 2017; [2017] KECA 436 (KLR)) — Followed
8. Jacqueline Okeyo Manani & 5 others v Attorney General & another (Petition 36 of 2018; [2018] KEHC 9395 (KLR)) — Explained
9. James Nyasora Nyarangi & 3 others v Attorney General (Anti-Corruption and Economic Crime Petition 298 of 2008; [2008] KEHC 3906 (KLR)) — Explained



10. John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015; [2021] KESC 39 (KLR)) — Followed
11. Kenya Commercial Bank Limited & another v Muiri Cofee Estate Limited & 3 others (Motion 42 & 43 of 2014 (Consolidated); [2016] KESC 6 (KLR)) — Explained
12. Law Society of Kenya v Attorney General & 2 others (Civil Appeal 96 of 2014; [2019] KECA 344 (KLR)) — Followed
13. Legal Advice Centre & 2 others v County Government of Mombasa & 2 others; Mombasa County Public Rental Etates Council & another (Interested Parties) (Civil Appeal 46 of 2017; [2018] KECA 381 (KLR)) — Followed
14. Mugo & 14 others v Matiang'i & another; Independent Electoral and Boundary Commission of Kenya & 19 others (Interested Parties) (Constitutional Petition 4 of 2019; [2022] KEHC 158 (KLR)) — Explained
15. Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of energy & 17 others (Constitutional Petition 305 of 2012; [2015] KEHC 473 (KLR)) — Followed
16. National Assembly of Kenya & another v Institute for Social Accountability & 8 others (Civil Appeal 92 & 97 of 2015 (Consolidated); [2017] KECA 170 (KLR)) — Followed
17. Nation Media Group Limited & 6 others v Attorney General & 5 Others (Petition 30 & 31 of 2014; [2014] KEHC 7183 (KLR)) — Followed
18. Nation Media Group Limited and Others v Attorney General & Others (Petition 30 & 31 of 2014 (Consolidated); [2016] KEHC 7689 (KLR)) — Explained
19. Nelson Andayi Havi v Law Society of Kenya & 2 others (Petition 607 of 2017; [2018] KEHC 8791 (KLR)) — Followed
20. Okiya Omtatah Okoiti & 3 others v Nairobi City County & 5 others ([2014] eKLR) — Followed
21. Okiya Omtatah Okoiti & another v Kenya Power and Lighting Company Limited & 4 others (Petition 392 of 2018; [2020] KEHC 2508 (KLR)) — Followed
22. Okoiti v Attorney General & 5 others (Constitutional Petition E364 of 2020; [2021] KEHC 439 (KLR)) — Followed
23. Orix Oil (Kenya) Limited v Paul Kabeu & 2 others (Civil Suit 191 of 2008; [2014] KEHC 5086 (KLR)) — Followed
24. peter K Waweru v attorney General (Misc. Civ Appli 118 of 2004; [2006] eKLR) — Explained
25. Phillips & others v National Director of Public Prosecutions ((CCT 55/04) [2005] ZACC 15; 2006 (2) BCLR 274 (CC); 2006 (1) SA 505 (CC); 2006 (1) SACR 78 (CC)) — Explained
26. Rai & 3 others v Rai & 4 others (Petition 4 of 2012; [2014] KESC 31 (KLR)) — Followed
27. Republic v Attorney General & 2 others exparte Tom Odoyo Oloo (Miscellaneous Application 28 of 2016; [2016] KEHC 3255 (KLR)) — Followed
28. Republic v County Government of Kiambu Ex parte Robert Gakuru & Jamofastar Welfare Association (Judicial Review 434 of 2015; [2016] KEHC 7642 (KLR)) — Followed
29. Republic v Fazul Mahamed & 3 others exparte Okiya Omtatah Okoiti (Miscellaneous Civil Application 617 of 2017; [2018] KEHC 9435 (KLR)) — Followed
30. Republic v Independent Electoral and Boundaries Commission Exparte National Super Alliance (NASA) Kenya and 6 others (Judicial Review 378 of 2017; [2017] KEHC 4663 (KLR)) — Followed
31. Robert N. Gakuru & Others v Governor Kiambu County & 3 others (Petition 532 of 2014; [2014] KEHC 7516 (KLR)) — Followed
32. Samuel Muigai v Nation Media Group (Complaint No. 5 of 2018) — Mentioned
33. Stanley Kaunga Nkarichia v Meru Teachers College (through the Chairman B.O. G & John Koome Mugambi (Civil Appeal 84 of 2011; [2016] KEHC 6806 (KLR)) — Followed
34. Teachers Service Commission v Kenya National Union of Teachers (KNUT);Ministry of Labour & Social Protection (Interested Party) (Petition 151 of 2018; [2019] KEELRC 1230 (KLR)) — Followed



35. Tom Ochieng Wayumba v Director of Public Prosecutions (Constitutional Petition 112 of 2018; [2019] KEHC 7107 (KLR)) — Followed
36. Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); With Kenya Human Rights Commission & another (Amicus Curiae) (Petition 229 of 2012; [2012] KEHC 2480 (KLR)) — Followed
37. Victor Adhiambo Ayieko and Others v Nation Media Group (Complaint No. 1 of 2022) — Mentioned
38. William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (Constitutional Petition 159 of 2018; [2021] KEHC 3392 (KLR)) — Followed
39. R v Big M. Drug Mart Ltd (1986 LRC (Const.) 332, [1985] 1 SCR 295) — Explained
40. Kigula & others v Attorney General ([2005] 1 E.A 132) — Explained
41. Ndynabo v Attorney General of Tanzania ([2001] EA 495) — Explained
42. Olum and another v Attorney General ([2002] EA) — Explained
43. Henderson v Henderson ((1843) 67 ER 313) — Followed
44. US v Butler (US 1, [1936]) — Explained

Statutes

1. Civil Procedure Act (cap 21) — section 7, 27(1) — Interpreted
2. Constitution of Kenya, 2010 — article 2(4); 3; 10; 10(2); 20 ; 20(4); 21; 24; 27(4); 34; 34(5); 35; 47; 73(2)(b)(c); 165(3)(d)(i); 201 — Interpreted
3. Fair Administrative Action Act (cap 7L) — section 4, 5 — Interpreted
4. Kenya Information and Communication (Amendment) Act (cap 411A) — Interpreted
5. Leadership And Integrity Act (Cap 185C) — section 16(1); 16(2) — Interpreted
6. Media Council Act (Cap. 411B) — section 3(2)(a); 4; 6(2)(c); 7 ; 7(2); 7(3); 7(6); 8; 10; 11; 14; 14(1) (g); 14(2); 38(1) (f) (h) — Interpreted
7. Public Officer Ethics Act (Cap 185B) — section 12 — Interpreted

Texts

1. Garner, BA., Black, HC., (Ed) (2014), Black’s Law Dictionary (St Paul, Minnesota: Thomson Reuters 10th Edn)

International Instruments

1. Banjul Declaration of Principles on Freedom of expression in Africa, 2002

Advocates

None mentioned

JUDGMENT

Introduction

1. The Cabinet Secretary, Ministry of Information Communication and Digital Economy declared vacancies for the position of members of the Media Council of Kenya (the Council) and appointed a selection panel consisting of persons from various stakeholders as required by law. The members were from Nation Media group; Kenya Editors Guild; Kenya Union of Journalists; Media Owners Association; Consumers Federation of Kenya; Kenya Correspondents Association and the Law Society of Kenya.



2. The selection panel called for applications from qualified applicants by 3rd February 2023. Thereafter, the panel published names of the shortlisted applicants in the newspapers on 10th February 2023. Interviews were scheduled to commence on 15th February 2023 and conclude on 24th February 2023.
3. The appointment of members of the selection panel as well as the shortlist of the applicants for the position of members of the council generated public interest leading to filing of two petitions challenging the constitutionality of the processes as well as some sections of the *Media Council Act, 2013* (the Act) The petitions were E040 of 2023 by James Mutahi Muchiri and E23 of 2023 by Robert Leroy Ochieng, (The 1st and 2nd petitioners respectively). The two petitions were consolidated with petition E040 of 2023 designated as the lead file.
4. The petitions are against the Attorney General, the Cabinet Secretary of Information Communication and Digital Economy, Media Council of Kenya, the Nation Media Group, Kenya Editors Guild, Kenya Union of Journalists and Media Owners Association, as the 1st to 7th respondents. The Selection Panel for appointment of the chairperson and members of the Media Council of Kenya was joined as the interested party.

The 1st petitioner's case- E040 of 2023

5. James Mutahi Muchiri, the 1st petitioner, contended that the selection panel and the shortlisted candidates were conflicted, a violation article 34(5) of the *Constitution* as read with sections 7, 11 and 14 of the *Act*. This was because half of the shortlisted members were full time employees of media houses and, therefore, would not be independent.
6. According to the 1st petitioner, members who are potentially conflicted yet were shortlisted were Charles Erick Oduor a fulltime employee of 4th respondent and Secretary General of the 6th respondent and Roselyne Ndisi Oballa also a fulltime employee of the 4th respondent. Members of the panel who are conflicted were Charles Erick Oduor and Churchill Moses Otieno Auma.
7. It was the 1st petitioner's case, that based on the above facts, some of the potential candidates would have voices in the selection panel that would speak for them. Further, that some of the shortlisted candidates would possibly not prioritize public interest above their personal and commercial interests as they were employees of organisations that they would be regulating with a potential conflict of interest and a violation of Article 10 of the *Constitution*.
8. The 1st petitioner asserted that Article 47 of the *Constitution* and section 5 of the *Fair Administrative Actions Act, 2015* were violated because there was no notice to members of the public allowing them to give comments on the suitability of the selection panel. The 1st petitioner urged the court to intervene and avert a violation of Articles 10, 20, 21, 34, 35, 47 and 201 of the *Constitution*.
9. The 1st petitioner asserted that the Attorney General gave a legal opinion to the Cabinet Secretary, Ministry of Information, Communication and the Digital economy on the need to guide the recruitment process for the chairperson and members of the Media Council of Kenya and the interpretation and implication of section 14(1) (g) of the *Act*. The Attorney General was of the opinion that employees of a media house and leadership enterprises are deemed to have interest in the corporation and are therefore precluded from serving in the council based on the conflict-of-interest situation that may arise from the fact that the Media Council receives complaints about media houses.
10. The 1st petitioner averred that the Attorney General advised the Cabinet Secretary that having an interest in the media house for whatever reason which might cause a potential conflict of interest



situation in the functioning of the Media Council precluded a person from being eligible to be considered for membership in the council unless that person ceased to hold such an interest.

11. Based on the above arguments, the 1st petitioner sought the following relief:
 - A. A declaration that the process of appointing and /or nominating members of the selection panel of the Media Council of Kenya violated articles 10 and 47 of the Constitution of Kenya.
 - B. A declaration that the final shortlist for appointment to the Board of the Media Council of Kenya violates articles 2, 3, 10, 20(4), 34, 35, 47 and 201 of the Constitution of Kenya.
 - C. An injunction barring the respondents from commencing, concluding or in any other way progressing the process of appointment of new members of the Media Council of Kenya.
 - D. An order of certiorari to bring to this court for purposes of quashing the appointment of the selection panel for members of the Media Council of Kenya as well as the Gazette Notice of 10th February 2023 shortlisting candidate for selection to the Board of the Media Council of Kenya.
 - E. An order of Mandamus compelling the Attorney General to commence the review of the Media Council Act 2013 to align its letter with the spirit of the Constitution within the next twelve (12) months.
 - F. The costs of this petition be borne jointly and severally by the respondents.

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12. The 2nd petitioner also averred that those shortlisted for the position members of the Media Council of Kenya Board were conflicted because some of them were full time employees of the 4th respondent.
13. The 2nd petitioner identified conflicted members of the select panel linked to the 4th respondent as Emmanuel Juma, Macharia Gaitho and Oscar Obonyo. Emmanuel Juma was a former employee of the 4th respondent and was appointed by the CEO of the 4th respondent; Macharia Gaitho was a contracted employee of the 4th respondent and was nominated by the president of the 5th respondent who had previously worked with the 4th respondent. Oscar Obonyo was a contracted employee of the 4th respondent and was nominated by Charles Erick Oduor, a fulltime employee of the 4th respondent and his colleague.
14. The shortlisted members linked to the 4th respondent were Roselyne Ndisi Obalia, Charles Erick Oduor and Churchill Moses Otieno Auma. Roselyne Ndisi Oballa and Charles Erick Oduor were fulltime employees of the 4th respondent. Churchill Moses Otieno Auma had recently retired from the 4th respondent and nominated a former colleague to the selection panel. He was appearing before his appointee and 3 colleagues at work.
15. The 2nd petitioner asserted that the 5th respondent being a media enterprise, was subject to regulatory oversight by the Media Council of Kenya and all its members were subject to accreditation and oversight by the Council. However, three members of the section panel, namely; Emmanuel Juma, Oscar Obonyo and Macharia Gaitho were its members and, therefore, would sit in the selection panel and appoint colleagues to the Medial Council.
16. It was the 2nd petitioner's case that Charles Erick Oduor, nominated a member of the section panel was Erick Odour's colleagues at the 4th respondent as was Macharia Gaitho, hence he would be appearing before colleagues.



17. The 2nd petitioner argued that based on the foregoing, articles 10 and 34(5) the Constitution would be violated, since applicants for the position of chairperson and members of council would be appearing before colleagues leading to conflict of interest
18. It was the 2nd petitioner's position that the 4th respondent, having been found guilty of gross violation of the Constitution and the Code of Ethics for the practice of Journalism, defied the orders of the Media Complaints Commission in Complaint No. 5 of 2018- *Samuel Muigai v Nation Media Group*; Complaint No. 1 of 2022- *Victor Adhiambo Ayieko and Others v Nation Media Group* and Complaint No. 7 of 2021- *Dr. Patrick Njoroge v Nation Media Group*.
19. The 2nd petitioner stated that while media houses in Kenya expect to be regulated and oversighted by an independent body, they would be regulated by one of their own, the 4th respondent, which is a threat to press freedom and amounted to unfair competition. The 2nd petitioner asserted that there would be conflict of interest and violation of the principles in Articles 10 of the Constitution.
20. The 2nd petitioner further asserted that there was a violation of Article 47 of the Constitution and section 5 of the Fair Administrative Action Act because there was no notice to the public allowing the public to give comments on the suitability of members of the panel.
21. The 2nd petitioner urged the court to allow the petition to avert a violation of Articles 10, 20, 34, 35, 47 and 201 of the Constitution and sought the following relief:
 - a. A declaration that the process of identifying the members of the selection panel is an illegality and violates the Constitution and the written law and should be disbanded.
 - b. A declaration that the final shortlist for appointment to the Board of the Media Council of Kenya as published on 10th February 2023 violates articles 2, 3, 20(4), 34, 35, 47 and 201 of the Constitution of Kenya 2010 and section 14 of the Media Council of Kenya Act 2013.
 - c. An order quashing the appointment of the selection panel for Board Members of the Media Council of Kenya and the final shortlist for appointment to the Board of the Media Council of Kenya and other activities or processes undertaken by the selection panel.
 - d. An order barring the respondents from proceeding in any other way in the process of appointment of new Members of the Media Council of Kenya Board.
 - e. An Order barring the 4th respondent from sending his employees or agents to any process leading to the appointment of members of the Media Council of Kenya Board.
 - f. A declaration that sections 7 and 14 of the Media Council Act 2013 are vague and subject to misinterpretation and abuse and thus unconstitutional, null and void.
 - g. An order of mandamus compelling the Attorney General and the National Assembly to commence the review of the Media Council Act 2013 to align its letter with the spirit of the Constitution within the next twelve (12) months to allow for the recruitment of an independent and competent Media Council of Kenya Board.
 - h. The costs of this petition be borne by the respondents.

1st and 2nd respondent's response

22. The 1st and 2nd respondents opposed the petition through a replying affidavit sworn on their behalf by Prof. Edward W. Kisiangani (Ph.D) and written submissions. He stated that they were not involved in and could not interfere with the selection process and or the decision of the selection panel. By dint



of section 7(6) of the *Act*, the selection panel determines its own procedures and the 2nd respondent only provides logistical and other support the selection panel may require in order to discharge of its mandate.

23. According to the 1st and 2nd respondents, the 2nd respondent's role was to declare vacancies, provide support to the selection panel and appoint the chairperson and members of the 3rd respondent who comply with requirements once names of deserving candidates have been sent, a mandate they discharged.
24. The 1st and 2nd respondents took the view, that declaring vacancies in the Kenya Gazette; publishing, vacancies in the newspapers and the ministry's website and calling for applications from qualified persons for the position of chairperson and members of the council, are inbuilt mechanisms for public participation.

3rd respondent's response

25. The 3rd respondent filed a replying affidavit sworn by David Omwoyo and written submissions. The 3rd respondent acknowledged the concerns raised in the petition regarding the composition of the selection panel and the shortlisting process of the candidates for appointment to the Council. The 3rd respondent noted that the nomination and selection process for members of the selection panel was initiated by the 2nd respondent and the selection panel was constituted by nominating entities as required by section 7(3) of the *Act*.
26. The 3rd respondent emphasized that membership of the Council is important and must comply with the provisions of Articles 10 and 34 of the *Constitution*. In that regard, the selection, recruitment and the appointment process should be open, transparent, and competitive.
27. The 3rd respondent further stated that the recruitment process should be beyond reproach; apprehension of interference; conflict of interest or manipulation. The 3rd respondent acknowledged the importance of ensuring that individuals appointed to are suitable for the role and in line with Article 34 (5)(a) and (b) of the *Constitution*. The 3rd respondent supported any efforts to address any issue that may have arisen during the selection process.

4th respondent's response

28. The 4th respondent opposed the petition through a replying affidavit sworn by Sekou Owino and written submissions. It was stated that the 4th respondent had interest in the membership of the council and did not influence the selection process. According to the 4th respondent, there are no restrictions to any of its employees wishing to be member of the 3rd respondent.

5th respondent's response

29. The 5th respondent also opposed the petition through a replying affidavit sworn by Rosalia Omungo and written submissions. It was the 5th respondent's position that the petition is misguided, frivolous and an abuse of the court process.
30. According to the 5th respondent, the process of establishment, composition and qualification for appointment to the board of the Media Council under section 7(2) of the *Act* is clear. Section 7(2) mandates the 2nd respondent to invite applications for and appoint a selection panel for the purposes of selecting suitable persons for appointment as chairperson or members of the council.



31. The 5th respondent maintained that the selection panel contemplated by the *Act* is comprised of thirteen persons nominated by twelve organizations: Kenya Union of Journalists; Media Owners association; Kenya editor's Guild; the Law Society of Kenya; Kenya Correspondents Association; Public Relations of Kenya; National Gender and Equality Commission; Association of Professional Societies in East Africa; Consumer Federation of Kenya; Ministry of ICT; Kenya News Agency and Public and Private Universities.
32. The 5th respondent took the view, that the procedure prescribed under the Act that the organisations should follow when nominating members to the selection panel is a preserve of the organisations' respective internal processes. The allegation that the selection panel was improperly constituted has no basis.
33. The 5th respondent asserted that the petitioners did not prove the allegation that its nominee to the selection Panel (Mr. Macharia Gaitho), was nominated without following due process or disregarded the law. The nomination was a collective decision of its council and not that of its president as alleged.
34. Regarding the allegation of conflict of interest, the 5th respondent maintained that the intention of the law on the composition of the selection panel for appointment of members of the Council was to ensure it comprises of stakeholders in the media industry and advances industry led regulatory mechanism as guided by the Act.
35. According to the 5th respondent, qualifications for appointment as chairperson or member of the Council are provided for in the Act-knowledge and experience in journalism, public relations and communication fields among others. The allegation that some of the shortlisted persons were affiliated to particular media houses and therefore not fit to hold office in the Council is mistaken.
36. The 5th respondent took the position that under section 11 of the Act, the petitioners had not proved how a pre-existing relationship between some of the members of the selection panel and some of the shortlisted candidates would lead to impartial or biased decision making if those candidates were ultimately appointed on account of their qualifications.
37. The 5th respondent asserted that members of some of the organisations are mostly journalists or in one way or another affiliated with a media enterprise. Based on this fact, the petitioners' argument that its nominee, Mr. Macharia Gaitho is unfit to sit in the selection panel on account of his relationship with the 4th respondent has no basis in law.

6th respondent's response

38. The 6th respondent opposed the consolidated petitions through a replying affidavit sworn by Charles Eric Oduor and written submissions. The 6th respondent also maintained that the consolidated petitions are frivolous, vexatious and an abuse of the court process.
39. The 6th respondent stated that the 3rd respondent is a statutory body established as required by article 34 (5) of the *Constitution*; its operations, powers, duties and obligations are provided for in the Act; section 7 of the *Act* prescribes the process of constituting the Council and section 8 sets out qualifications and disqualifications to serve as a member of the Council.
40. The 6th respondent maintained that constitutionality of the Act and its provisions was determined and affirmed in *Nation Media Group Limited and Others v Attorney General & Others* [2016] eKLR thus, it is not available for a decision by this court. According to the 6th respondent, by letter dated 29th November 2022, the 2nd respondent, in compliance with section 7 (2) (b), invited the organizations listed in section 7(3) to submit names for appointment to the selection panel.



41. After internal consultations guided by its Constitution and by-laws, the 6th respondent's executive committee settled on Oscar Obonyo to be a member of the selection panel. The 13 organizations listed in section 7(3) of the Act submitted names of their representatives selected in accordance with their own internal rules and procedures.
42. Regarding the allegation that Oscar Juma and others are all members of the Editors Guild, the 6th respondent contended that members of the selection panel could not be faulted for belonging to multiple organizations as that is their right under Articles 36 of the Constitution.
43. Responding to the petitioners' contention that representatives of Media Owners Association, Kenya Editors Guild, Kenya Union of Journalists, Private Universities and Public Universities in the selection panel were not procedurally chosen was not backed by evidence. The 6th respondent maintained that after the 2nd respondent declared vacancies for the position of chairperson and members of the council and convened the panel to receive applications, Mr. Oduor applied for the position of chair and member of the council and was successful. Upon conclusion of the interviews, the selection panel was expected to forward names of the person selected to be chairperson and the persons selected to be members of the Council to the 2nd respondent for formal appointment.
44. According to the 6th respondent, section 11 (7) empowers the Cabinet Secretary to reject any or all nominees on the grounds set out in section 8(2). In that respect, the consolidated petitions are premature as they purport to pre-empt the decisions of the selection panel and the Cabinet Secretary.
45. Regarding the allegation that the selection panel did not provide an opportunity for receiving public comments, the 6th respondent stated that the selection panel's address was publicly accessible and the panel publicized the names of the applicants and the shortlisted candidates in accordance with the law. Out of 7 candidates who applied for the position of chairperson and 41 applicants shortlisted for member of the council, the petitioners only took issue with Mr. Odur's candidature, that of Roselyne Oballa and Churchill Otieno. The individuals the petitioners singled out hold qualifications required under section 8(1) of the Act and were thus, eligible for appointment as chairperson and member of the Council.
46. The 6th respondent contended that pursuant to Article 34 (5) of the Constitution and section 8(2) of the Act, the petitioners did not demonstrate that any of the shortlisted individuals were unfit or disqualified from appointment as chairperson and or members of the Council.
47. The 6th respondent took the view, that the petitioners' argument that its representative, if selected, would interfere with the mandate of the Media Complaints Commission for the benefit of the 4th respondent is unfounded since the Media Complaints Commission is an independent institution that determines its own procedures and rules.

The 7th respondent's response

48. The 7th respondent and the interested party did not file responses to thus petition

Submissions

49. The consolidated petitions were disposed of through written submissions with brief oral highlights.

1st petitioner's submissions

50. The 1st petitioner submitted maintaining that some of the persons appointed to the selection panel and nominees for membership to Council were conflicted. The 1st petitioner argued that if successful,



- they would be charged with regulating themselves which amounts to a violation of article 34 of the Constitution, section 14 of the Act and section 16(1) of the Leadership and Integrity Act, 2012.
51. The 1st petitioner submitted that the appointment of the selection panel was on ad hoc basis and failed to comply with articles 10 and 47 of the Constitution as read with the Fair Administrative Action Act. No public notice was issued calling for comments from stakeholders on the suitability of the nominated persons.
 52. The 1st petitioner took the position that by allowing persons who were conflicted, including Macharia Gaitho and Emmanuel Juma, to sit on the selection panel and also not raising any issue regarding conflict of interest of shortlisted potential members of the Council, the 1st and 2nd respondents violated article 3 of the Constitution. Failure to act in a manner that is prescribed by law was both unlawful and unfair thereby constituting unfair administrative action.
 53. The 1st petitioner asserted that in the event the conflicted selection panel proceeded to appoint chairperson and members of the Council, the council would be inherently biased and conflicted and its decisions ultimately biased and unfair which would lead to a violation of article 34 of the Constitution.
 54. The 1st petitioner further asserted that contrary to section 4 of the Fair Administrative Action Act, the 1st and 2nd respondents acted unlawfully in allowing such conflict to exist in the selection panel and the shortlisted persons. The entire process, the 1st petitioner argued, lacked transparency and fairness and, therefore, amounted to bad governance and consequently unfair administrative action. The 1st petitioner relied on the decision in Republic v Fazul Mahamed & 3 others exparte Okiya Omtatah Okiiti [2018] eKLR.
 55. The 1st petitioner again relied on Mugo & 14 others v Matiangi & another; Independent Electoral and Boundary Commission & 19 others (Interested Party) [2022] KEHC 158 (KLR) for the proposition that there was neither communication of the appointment of the selection panel nor an opportunity for the public and other members of the media fraternity not represented under section 7 of the Media Council Act to give comments about the membership of the selection panel, contrary to section 4(3) of the Fair Administrative Action Act. In the petitioner's view, there was no public participation thus, the entire process lacked transparency and openness.
 56. The 1st petitioner argued that section 7(3) of the Act is unconstitutional and discriminatory for violating articles 10(2) and 27 (4) of the Constitution for requiring only 13 organizations to nominate members of the selection panel despite there being over forty organizations in the media industry. The 1st petitioner relied on the decision in Apollo Mboya v Attorney General & 2 others [2018] eKLR.
 57. The 1st petitioner again relied on section 27(1) of the Civil Procedure Act and the decisions in Orix Oil (Kenya) Limited v Paul Kabeu & 2 others [2014] eKLR and Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR to urge the court to allow the petition with costs.

2nd petitioner's submissions

58. The 2nd petitioner submitted that articles 10(2), 24 and 27 of the Constitution were violated in the process leading to the appointment of the selection panel due to lack of public participation. The 2nd petitioner relied on the decisions in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR; Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya and 6 others [2017] eKLR; Republic v County Government of Kiambu Exparte Robert Gakuru & another [2016] eKLR; [2016] KEHC 7642 (KLR) and Nelson Andayi Havi v Law Society of Kenya & 2 others [2018] eKLR.



59. The 2nd petitioner argued that the selection panel as constituted could not conduct a process that would lead to an independent board because it was conflicted. Reliance was placed on the decision in *Okoiti v Attorney General & 5 others* [2021] KEHC 439 (KLR). According to the 2nd petitioner, article 34 of the *Constitution* was violated and is threatened with further violation. The 2nd petitioner maintained that the panel is composed of persons who have direct stake in the actions of the council.
60. It was the 2nd petitioner's position that there was need for a review of the process of selecting member of the selection panel so that it is not left to the 2nd respondent and a few associations only. The 2nd petitioner argued that to achieve equality, it would be necessary to harmonise sections 7 and 14 of the *Act* with article 34 of the *Constitution*. The 2nd petitioner relied on article 23(3) of the *Constitution* and urged the court to allow the petition.

1st and 2nd respondents' submissions

61. The 1st and 2nd respondents submitted that there was no conflict of interest in the persons appointed to the selection panel and those shortlisted for appointment as chairperson and members of the Council. They relied on section 14 (1) (g) of the *Act* and the decision in *Kigula & others Attorney General* [2005] 1 E.A 132 (at page 133), to argue that employees of media houses and the leadership of media enterprises and/or associations are deemed to have an interest in the corporation and therefore precluded from serving in the Council.
62. They further argued that the selection panel should be alive to the provisions of section 14(1) (g) and 8 of the *Act* as read with article 73(2) (b) and (c) of the *Constitution* and section 16(1) and (2) of the *Leadership and Integrity Act* when undertaking the process.
63. In matters of recruitment and/or selection for appointment to a public office, the 1st and 2nd respondents submitted that it was both a constitutional and statutory imperative that the recruiting or selecting agency adheres to situations that avoid conflict of interest either in the composition or selection panel of the persons seeking the public positions. Reliance was placed on the decision in *eachers Service Commission v Kenya National Union of Teachers (KNUT); Ministry of Labour & Social Protection (Interested Party)* [2019] eKLR.
64. Regarding avoidance of conflict of interest in appointment to public office, they relied on *Republic v Attorney General & 2 others exparte Tom Odoyo Oloo* [2016] eKLR. Counsel submitted that the issue raised in the consolidated petitions regarding conflict of interest was addressed by the Attorney General in an advisory dated 23rd February 2023 to the 2nd respondent. The advisory concluded that the selection panel was enjoined to make an independent assessment of the objectivity and impartiality of all persons seeking to either be chairperson or member of the Council. Where an instance is demonstrated which would amount to a conflict of interest situation in the functioning of the council, the person would not be eligible to be considered for membership of the council unless the person had ceased to hold such interest.
65. According to the 1st and 2nd respondents, the advisory also pointed out that public officers in the two levels of government are precluded from seeking chairperson or membership of the Council under section 7(1) of the *Act*.
66. It was submitted that section 7(3) of the *Act* is unconstitutional for being discriminatory by providing for only 13 stakeholders from whom members of the selection panel are to be drawn out of the 40 stakeholders in the industry. They Counsel urged for order in the form of a structural interdict to give Parliament and the 1st respondent time within which amendments can be initiated.



3rd respondent's submissions

67. The 3rd respondent submitted, citing articles 34(5) and 73 of the Constitution and the Leadership and Integrity Act on the need for its independence. Counsel noted that the 3rd respondent's independence starts with the independence and integrity of the process leading to the appointment of members of the council.
68. The 3rd respondent took the view, that in as much as the 2nd respondent acted in accordance with section 7(2) (b), this court should render itself on the constitutionality of section 7(3) of the Act. The 3rd respondent further acknowledged the concerns raised in the consolidated petitions on the composition of the selection panel and the shortlisting process of the candidates for appointment as chairperson and members of the Council. According to the 3rd respondent, the issue had also been raised in Nation Media group Limited & 6 others v Attorney General & 5 others [2016] eKLR.
69. The 3rd respondent posited that while it was not disputed that the nomination and selection process for members of the selection panel was initiated as required by section 7(2) (b) of the Act, the court has jurisdiction under article 165(3) (d) (i) to determine whether the process as provided for in the Act was in contravention of the Constitution or any other law.
70. The 3rd respondent took the view, that since the office of the chairperson and members of the Council is very crucial, recruitment, selection and appointment process ought to comply with articles 10 and 34 of the Constitution.
71. The 3rd respondent argued that owing to the 3rd respondent's mandate, the recruitment process of members of the Council ought to be beyond reproach, apprehension of interference, conflict of interest or manipulation in any way. It should also resonate with the dictates of article 34(5) of the Constitution.
72. According to the 3rd respondent, despite section 7 of the Act providing for 13 organizations which should nominate persons to the selection panel, there are over 35 organizations in its register. All bodies and parties involved in the nomination of members of the selection panel and ultimately in the recruitment process of council members have an obligation to consider whether the applicants or nominees meet the qualification and criteria set in the Constitution and the Act. Reliance was placed on the decision in Trusted Society of Human Rights Alliance v Attorney General & 2 others [2012] eKLR.
73. The 3rd respondent urged the court to review the process for legality, including examination of the process to determine if the 2nd respondent and the nominating bodies conducted a proper inquiry to ensure that the persons selected and nominated met the constitutional threshold. Reliance was placed on National Assembly of Kenya & another v The Institute for Social Accountability and 6 others [2017] eKLR.
74. The 3rd respondent cited section 12 of the Public Officers Ethics Act, 2003 to argue that the petitioners' allegations are serious and would affect any reasonable person's assessment of the integrity or suitability of the individuals named as part of the selection panel or members of the Council. This requires a proper inquiry before appointment.
75. The 3rd respondent again urged the court to consider the 1st respondent's advisory opinion, that in discharging its mandate and as required by article 34(5) of the Constitution, there should be freedom from control by government, political interest, or commercial interests. It should reflect the interest of all sections of the society. Reliance was placed on the Banjul Declaration of Principles on Freedom of expression in Africa, 2002.



76. Regarding public participation, reliance was placed on *Robert N. Gakuru & others v Governor Kiambu County & 3 others* [2014] eKLR; *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR; *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of energy & 17 others* [2015] eKLR and *Okiya Omtatah Okoiti & 3 others v Nairobi City County & 5 others* [2014] eKLR to submit that there is need to amend section 7 of the Act to allow other organisations in the sector not listed, to participate in the nomination of members to the selection panel.
77. The 3rd respondent urged the court to use rationality and reasonable test to review the nomination and selection process to determine if it met the constitutional threshold and make appropriate orders. The 3rd respondent relied on section 27(1) of the *Civil Procedure Act* and the decision in *Stanley Kaunga Nkarichia v Meru Teachers College & another* [2016] eKLR on costs.

4th respondent's submissions

78. The 4th respondent submitted that the main issue for determination is whether the 4th respondent asserted its influence on the membership of the Council. Counsel cited section 8 of the *Act* to argue that any persons who meets the qualifications is free to apply.
79. The 4th respondent maintained that its employees are free to participate in the activities of the media fraternity and that their membership does not represent its interests. Further, there is no evidence that it influenced appointment of members of the Council. The 4th respondent urged the court to dismiss the petition with costs.

5th respondent's submissions

80. The 5th respondent submitted that the selection process was conducted in strict compliance with both the *Constitution* and the Act on the constitutional mandate for an independent media regulator as envisioned by article 34 (5) of the *Constitution*.
81. The 5th respondent argued that section 14(1) (g) of the *Act* was not designed to disqualify a candidate outright, but rather to ensure that any potential conflict was managed in a transparent and measured manner, thereby upholding the integrity of the regulatory process. Reliance was placed on the decision in *Republic v Attorney General & 2 others ex parte Tom Odoyo Oloo* [2016] eKLR.
82. It was the 5th respondent's position that the statutory scheme of the Act is both reasonable and effective in addressing conflicts of interest. The petitioners' assertion that the process was flawed due to conflict of interest is unfounded and a misapprehension of the intended remedial measures in the Act.
83. The 5th respondent took the view, that the petitioners' contention that the selection process contravened articles 23, 20(4), 34, 35, 47 and 201 of the *Constitution* was misplaced. The process was executed in accordance with the procedure prescribed by the Act thereby meeting the constitutional criteria for an independent media regulator. The 5th respondent relied on the decisions in *Nation Media Group Limited & 6 others v Attorney General & 5 Others* [2014] eKLR and *Communications Commission of Kenya & 5 others v Royal Media Services & 5 others* [2014] eKLR.
84. The 5th respondent took the further position that sections 7 and 14 of the *Act* have a clear intent and precision and are meant to safeguard the integrity of the appointment process of members of the media regulator. Section 7 outlines the procedure for declaring vacancies, convening the selection panel and effecting appointments while section 14 provides a detailed mechanism for managing conflict of interest.



85. The 5th respondent maintained that where administrative or statutory provisions are perceived to be deficient or ambiguous, such issues should be addressed by Parliament through legislative amendment and not through judicial intervention. Reliance was placed on the decision in *Law Society of Kenya v Attorney General & 2 others* [2019] eKLR.
86. The 5th respondent again cited the decision in *Tom Ochieng Wayumba v Director of Public Prosecutions* [2019] eKLR, urging the court to apply reasoning therein to sections 7 and 14 of the *Act*. It was submitted that any perceived vagueness in those provisions does not render them unconstitutional; that any perceived ambiguity should be resolved in favour of preserving the statute's purpose, rather than being used to invalidate the provisions.
87. The 5th respondent maintained the position that the consolidated petitions are premature because the petitioners had not exhausted the administrative remedies available under the Act. Counsel relied on the decisions in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR; *R v Independent Electoral and Boundaries Commission Exparte National Super Alliance (NASA) Kenya and 6 others* [2017] eKLR; *Governor of Kericho County v Kenya Tea Development Agency & 30 others Exparte KTDA Management Services Limited* [2016] eKLR and *Okiya Omtatah Okoiti & another v Kenya Power and Lighting Company Limited & 4 others* [2020] eKLR.

6th respondent's submissions

88. The 6th respondent agreed with the position taken by the 5th respondent. The 6th respondent cited the decision in *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR for the argument that the responsibility of proving violation of the *Constitution* or the law is on the petitioners. The 6th respondent argued that there was compliance with the process outlined in section 7 of the *Act*.
89. According to the 6th respondent, the petitioners did not plead nor demonstrate any incompatibility between the impugned sections and articles of the *Constitution*. There was also no legal basis for the petitioners' assertion that Eric Charles Oduor, Churchill Moses Otieno Auma and Roselyne Oballa were conflicted; would be conflicted or did not meet the requirements in section 8 of the Act.
90. On conflict of interest, the 6th respondent argued that there was nothing to suggest that the named individuals were directors or shareholders in the 4th respondent or any other media enterprise. No basis had been demonstrated for the assertion that the selection process for members of the Council violated article 34(5) of the *Constitution* or any other constitutional provision.
91. The 6th respondent relied on the decision in *William Odhiambo Ramogi & 3 others v attorney General & 4 others; Muslims for Human Rights & 2 others (Interested parties)* (*supra*) to contend that the petitioners did not exhaust the administrative remedies provided for in the *Act*. Counsel urged the court to dismiss the petitions with costs.

Determination

92. Having considered the pleadings, responses and arguments made on behalf of the parties, I have identified two issues for determination; namely; whether sections 7 and 14 of the *Act* are unconstitutional and whether the process leading to appointment of the selection panel and shortlisting of applicants for position of chairperson and member of the Council violated the *Constitution* and or the law.



constitutional validity of sections 7 and 14

93. The petitioners argued that sections 7 and 14 are unconstitutional because the process envisioned under section 7 does not allow public participation thus, violates the tenets in Article 10 of the *Constitution*. Further, according to the petitioners, there is an element of discrimination in section 13(1) (2) in that only 13 organisations are permitted to appoint persons to the selection panel despite there being more than 40 organisations.
94. The petitioners' position was vaguely supported by the 1st and 2nd respondents, while the 3rd respondent's position was ambiguous. While the 3rd respondent's counsel informed the court during the hearing that the 3rd respondent would not take a position in the matter, the response and submissions filed on its behalf seemed to support the petitions in some respects.
95. The 4th, 5th and 6th respondents opposed the petitions, arguing that the sections are constitutional and that the process appointing the selection panel and shortlisting applicants for the positions of chairperson and members of Council complied with the *Constitution* and the law. They further argued that the issue of constitutionality of the impugned sections had been determined in *Nation Media group Limited & 6 others v Attorney General & 6 others* [2016] eKLR. The petitioners and 1st, 2nd and 3rd respondents also appeared to vaguely admit the fact that the issue was dealt with in that case.
96. Before dealing with the issue of the constitutional validity of the impugned sections, it is important to mention the principles that the court should bear in mind when determining the constitutional validity of a statute or statutory provisions.
97. First; a statute or statutory provision is presumed to be constitutional and the burden is on the person alleging constitutional invalidity to prove the invalidity. In *Ndinyabo v Attorney General of Tanzania* [2001] EA 495, the court held that an Act of Parliament is constitutional, and the burden is on the person who contends otherwise to prove the contrary.
98. Second; the court should examine the purpose or effect of the statute or provision. The purpose of enacting a legislation or the effect of implementing the legislation may lead to nullification of the statute or its provision if found to be inconsistent with the *Constitution*.
99. In *Olum and another v Attorney General* [2002] EA, the court stated;
- 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.
100. In *R v Big M. Drug Mart Ltd*, 1986 LRC (Const.) 332, [1985] 1 SCR 295, 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.

101. It is also useful to bear in mind the words of the US Supreme Court in *US vs Butler* 297 US 1, [1936] that:

When an Act of congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of government has only one duty; to lay the article of the *Constitution* which is invoked besides the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This Court neither approves nor condemns legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the *Constitution*; and having done that, its duty ends.

102. In *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR, the Court observed that in determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned Act which should be discerned from the intention expressed in the Act itself.
103. With these principles in mind, we turn to consider constitutional validity of the impugned provisions. However, there is the first argument that the issue of constitutional validity of the sections was determined in *Nation Media Group Limited & 6 others v Attorney General & 4 others; Consumer Federation of Kenya & 4 others (Interested Parties)* (Petition 30 & 31 of 2014 (Consolidated)) [2016] KEHC 7689 (KLR).
104. I have perused the decision in the above matter. The judgment arose from two petitions Nos. 30 and 31 of 2014 consolidated with Judicial Review Miscellaneous Application No. 31 of 2014. The petitions challenged the constitutionality of the *Media Council Act*, 2013 while the Judicial Review application challenged the actions by the Cabinet Secretary, Ministry of Information, Communications and Technology seeking to recruit members of the Council and the Media Complaints Commission as being violative of statute. The petitioners also complained that the contents of the statutes violated the constitutional guarantees to freedom of expression and of the media contained in articles 33 and 34 of the *Constitution*. In that regard, they challenged the establishment, functions, powers and composition as well as the manner of appointment of members of the Complaints Commission, among others.
105. The bench comprising of Lenaola, Mumbi Ngugi and Korir, JJ (as they then were) considered arguments by parties in the consolidated petitions and identified 3 main issues for determination. Of relevance to this petition was issue (c) namely; whether the provisions of the *Media Council Act* and the *Kenya Information and Communication (Amendment) Act* are unconstitutional.”
106. The court considered the issue regarding sections 3(2)(a) as read with sections 4 and 6(2)(c) of the *Media Council Act* that were challenged. The court held that:
- (159) In the circumstances, and in the absence of justification for the provision as required under Article 24, our finding is that section 3(2)(a) of the *Media Council Act*, to the extent that it requires that in exercise of the right to freedom of expression, the persons specified under section 4 of the Act “shall reflect the interests of society” is an unjustified limitation of the right to freedom of expression and is therefore unconstitutional.



107. Regarding section 6(2) (c) the court held (at paragraph 173), that the section is unconstitutional for being coached in a manner that is vague and broad that is likely to limit the freedom of expression.
108. There was further challenge to section 38(1) (f) (h) of the *Media Council Act* (on penalties). However, the court found that the provisions did not violate the *Constitution*-(paragraph 235).
109. It is true from the above analysis, that indeed there was challenge to the constitutionality of the *Media Council Act*. The first challenge was that the whole Act was unconstitutional because of the process leading to its enactment. This was however rejected by the court. The second challenge was on the constitutionality of some sections of the Act, with mixed results. While sections 3(2)(c) and 6(2) (c) were found to be unconstitutional, the constitutionality of the other impugned sections was upheld, including section 38(1)(f)(h).
110. The fact that the constitutionality of the *Media Council Act* and some of its provisions were challenged is not in contention and was admitted by all parties. That, in my view, would have raised the issue of res judicata. Res judicata is a principle of law which states that a matter that has been adjudicated by a competent court may not be pursued further by the same parties.
111. Section 7 of the *Civil Procedure Act* provides that;
- No court shall, try, any suit or issue in which the matter directly in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or issue in which such issue has been subsequently raised, and has been heard and finally determined by such court.
112. In *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* (Motion No 42 of 2014) [2016] eKLR, the Court of Appeal stated that:
- Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights.
113. In *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR), the Supreme Court (at para 57) cited the words of Wigam V-C in *Henderson v Henderson* (1843) 67 ER 313 thus:
- Where a given matter becomes the subject of litigation, in and adjudication by, a court of competent jurisdiction, the court requires the parties to the litigation to bring forward their whole case, and will not, (except under special circumstances), permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject litigation, and which parties, exercising reasonable diligence, might have brought forward at the time. (underlining)
114. The Supreme Court then stated:



- (58) [W]henever the issue of res judicata is raised, the court will look at the decision claimed to have settled the issue in question; the entire pleadings and record of that previous case and the instant case to ascertain the issues determined in the previous case, and whether these are the same issues in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title, and whether the previous case was determined by a court of competent jurisdiction.
115. A perusal of the previous litigation shows that some of the petitioners in that case are now respondents. The respondents in the previous litigation are also respondents herein, including the Attorney General and the Cabinet Secretary. The issue in the previous petitions was on the constitutionality of the [Media Council Act](#) and some of its provisions. The issue of constitutionality of the Act and its provisions was at the centre of the previous litigation and the court pronounced itself on those issues with finality.
116. At the time the previous petitions were filed, heard and concluded, the impugned sections in the present petitions were in existence. The petitioners did not challenge these provisions although they had an opportunity to do so. The Attorney General and Cabinet Secretary, opposed the petitions and supported the constitutionality of the Act.
117. The view of this court is that although there was litigation and a determination was made, and that the petitioners had an opportunity to raise the issues raised here in that litigation as was opined by Wigan V-C, *Henderson v Henderson* (supra) that res judicata will not “permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case”, it is important for the court to determine the issue of constitutionality of the impugned sections to bring the issue to a conclusion, at least in this court, concerning the constitutionality of section 7 and 14 of the [Media Council Act](#). This is also so, because the issue of res judicata was not raised or argued by parties in this court.

Section 7

118. The petitioners argued that section 7 of the [Act](#) is unconstitutional and discriminatory for violating articles 10(2) and 27(4) of the [Constitution](#) on public participation and discrimination. This is because the section provides for only 13 organizations from whom members of the selection panel may be drawn, despite there being over forty organizations in the media industry. Further that the selection panel as constituted was conflicted, to come up with an independent board. The Attorney General supported this view while the 3rd respondent did not take a position on the issue. The 4th, 5th and 6th respondents maintained that the section is constitutional; that the panel was not conflicted and that there is no discrimination or violation of articles 10(2) and 27(4) of the [Constitution](#).
119. Section 7(1) is in relation to the [Constitution](#) of the Council, providing that the Council shall consist of—
- (a) a chairperson appointed in accordance with this section;
 - (b) one person nominated by the Cabinet Secretary;
 - (c) seven other members appointed in accordance with this section.
120. Section 7(1) merely constitutes the Council. The petitioners did not say what is unconstitutional about it.
121. Section 7(2) states that within fourteen days of the commencement of the [Act](#), or of the occurrence of a vacancy in the office of chairperson or member, the Cabinet Secretary shall—



- a. by notice in the Gazette and in at least two newspapers of national circulation, declare vacancies in the Council, and invite applications from qualified persons; and
 - b. convene a selection panel for the purpose of selecting suitable candidates for appointment as the chairperson or members of the Council.
122. Section 7(2) merely confers on the Cabinet Secretary the powers to declare vacancies in the position of chairperson and member of the Council within 14 days following occurrence of a vacancy, call for applications and convene the selection panel. for the purpose of selecting suitable candidates for appointment as the chairperson or members of the Council. The petitioners again did not point out what is unconstitutional about section 7(2) in so far as it confers on the Cabinet Secretary powers to declare vacancies and convene the selection panel. They did not point out which article of the Constitution it contravenes or infringes.
123. Section 7(3) states that the selection panel shall comprise of thirteen members nominated by the following organisations—(a)Kenya Union of Journalists; (b) Media Owners Association; (c) Kenya Editor’s Guild; (d)Law Society of Kenya; (e) Kenya Correspondents Association; (f) Public Relations Society of Kenya; (g)National Gender and Equality Commission; (h) Association of Professional Societies in East Africa; (i) Consumers Federation of Kenya; (j)the Ministry responsible for matters relating to media; (k)Kenya News Agency; and (l) two persons nominated by schools of journalism of recognized universities, one representing public universities and the other representing private universities.
124. Section 7(4) requires that in their first meeting the selection panel should appoint a Chairperson and a vice- chairperson who shall be of opposite gender. Subsection (4) really has no problem and the petitioners did not show what the problem is with section 7(4) that would make it constitutionally infirm.
125. Section 7 (5) again provides that an application in respect of a vacancy declared under subsection (2), shall be forwarded to the selection panel within seven days of the publication of the notice and may be made by—(a) any qualified person; or (b) any, person, organization or group of persons proposing the nomination of any qualified person.
126. Under section 7(6), the selection panel will determine its own procedure and the Cabinet Secretary is required to provide the selection panel with such facilities and other support as it may require for the discharge of its functions. Section 7(7) requires the selection panel to consider the applications, shortlist and publish names and qualifications of all the applicants and those shortlisted by the Panel in the Gazette and at least two daily newspapers of national circulation within seven days from the expiry of the deadline for receipt of applications.
127. Section 7(8) provides that the selection panel shall interview the shortlisted applicants within fourteen days from the date of publication of the list of shortlisted applicants. Section 7(9) states that after carrying out the interviews, the selection panel shall select one person qualified to be appointed as chairperson and seven persons qualified to be members of the Council, and forward the names to the Cabinet Secretary. Under section 7(10), the Cabinet Secretary has seven days after receiving the names, by notice in the Gazette, to appoint a chairperson and seven members of the Council. Section 7(11) provides that the Cabinet Secretary “may reject any nomination solely on any of the grounds set out in section 8(2), whereafter the Cabinet Secretary shall communicate the decision to the selection panel.”
- 128.



- (12) Upon receipt of the notice of rejection under subsection (11), the selection panel has to select another person from the list of shortlisted applicants and submit his or her name to the Cabinet Secretary for appointment. Section 7 (13) states that despite the foregoing provisions of this section, the Cabinet Secretary may, by notice in the Gazette, extend the period specified in respect of any matter under the section by a period not exceeding fourteen days.
129. Section 7(14) provides that in selecting, nominating, approving or appointing the chairperson and members of the Council, the selection panel and the Cabinet Secretary shall— (a) ensure that the nominees to the Council reflect the interests of all sections of the society; (b) ensure equal opportunities for persons with disabilities and other marginalized groups; and (c) ensure that not more than two-thirds of the members are of the same gender. The selection panel shall stand dissolved upon the appointment of the chairperson or members of the Council. (s.7(15).
130. I have considered the petitioners arguments regarding the constitutionality of section 7 of the *Act*. As already pointed out in respect of some of the subsections, the petitioners did not demonstrate any problem with all the subsections in section 7. A reading of the petitioners’ arguments shows that their concerns are really with regard to section 7(3).
131. Section 7(3) is on the selection panel for purposes of receiving and interviewing applicants for the position of chairperson and member of the Council. The section provides that the selection panel shall comprise of thirteen members nominated by—Kenya Union of Journalists; Media Owners Association; Kenya Editor’s Guild; Law Society of Kenya; Kenya Correspondents Association; Public Relations Society of Kenya; National Gender and Equality Commission; Association of Professional Societies in East Africa; Consumers Federation of Kenya; the Ministry responsible for matters relating to media; Kenya News Agency; and two persons nominated by schools of journalism of recognized universities, one representing public universities and the other representing private universities.
132. The petitioners’ grievance as can be seen from their arguments, is that whereas there are more than forty registered organisations in the industry, only thirteen out of the forty organisations are allowed to nominate members to the selection panel. This, they argued, was discriminatory and a violation of article 27(4) of the *Constitution*.
133. Article 27 grants everybody equality before the law and equal protection and equal benefit of the law thus, prohibiting discrimination. Article 27(4) specifically prohibits the state from directly or indirectly discriminating against any person on any grounds including, race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress language or birth. The petitioners’ argument was that because section 7(3) only allows thirteen groups to nominate members to the selection panel, it amounts to negative discrimination making section 7 unconstitutional.
134. For a statute or its provision to be declared unconstitutional, it must be inconsistent with, or in contravention of, the *Constitution*. That is the edict in article 2(4) of the *Constitution*. In that respect, a statute or its provision will be declared unconstitutional if the purpose of enacting the statute or the provision or the effect of its implementation violates rights and fundamental freedoms or is inconsistent with, or in contravention of, the *Constitution*.
135. Section 7(3) provides for composition of the selection panel and identifies organisations that should nominate members to the panel for purposes of receiving application and conducting interviews for the position of chairperson and members of the Council. The purpose of the Act and therefore the section, is to give effect to article 34(5) of the *Constitution*. The purpose is to ensure that there is an independent body that will set media standards and regulate and monitor compliance with those



- standards. The effect of the section must be to have a panel that will conduct interviews and get competent people as chairperson and members of the Council.
136. Although a casual assessment of the petitioners' arguments on discrimination may appear genuine, that only thirteen out of forty organisations are to appoint members to the selection panel, this is not negative discrimination. A selection panel must have a reasonable and manageable number. Even though there may be forty organisations or even more, there may not be a selection panel comprising 40 or more members. This will not only be a big number, but also a nightmare in terms of logistics and resource availability. In any governance matters, you cannot have everybody in government as that is simply impossible. That is why a few members are given a chance to do some tasks on behalf of the general membership.
137. *Black's Law Dictionary* defines discrimination as
- The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.
138. In *peter K Waweru v attorney General* [2006] eKLR, the court defined discrimination to mean:
- [A]ffording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
139. In *Jacqueline Okeyo Manani & 5 others v Attorney General & another* [2018] eKLR, the court added that:
- [28]. [D]iscrimination simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based on such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups.
140. To amount to discrimination, there must be demonstration of differential and favourable treatment of one person or group of persons as opposed to the other. It is the negative treatment that is outlawed by the *Constitution*. This view was aptly stated in *James Nyasora Nyarangi & 3 others v Attorney General* [2008] eKLR, that "Discrimination which is forbidden by the *Constitution* involves an element of unfavourable bias. Thus, firstly on unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the *Constitution*."
141. It must therefore be clear that the *Constitution* disallows negative discrimination but not every discrimination. What the petitioners argue is discrimination, is positive discrimination which is allowed by the *Constitution*. This is because it is not everyone organisation that should be represented in the selection panel. Leaving out some organisations is not, in itself, discrimination but an act of necessity for proper functioning and delivery of better results for the benefit of all. In that respect, I see no discrimination or constitutional infirmity in section 7(3) of the Act.



Conflict of interest

142. The petitioners also raised the issue that members of the selection panel or the applicants for the positions of member of the Council are conflicted. They argued that since members of the selection panel are from the media industry and the applicants are also from the industry, there would be conflict of interest either in the selection panel or the Council. The petitioners asserted that some of the applicants would be appearing before colleagues for interview and members of the Council would be regulating employers.
143. Members of the panel, though recommended and selected by organizations identified by law, they do not act for their own interest or interests of the nominating organizations, but public interest in general and interest of the industry in particular. Members of the selection panel come from different organisations with diverse interests, including in the academia, law, professional societies and even the Consumers Federation. In fact, members of the panel from Kenya Union of Journalists; Media Owners Association and Kenya Editor’s Guild who would appear to be associated with known media industry players are the minority in the selection panel and therefore may not necessarily influence the outcome on the people recommended for the position of chairperson and members of the Council.
144. It is also important to observe that under section 7 (5) an application in respect of a vacancy declared under subsection (2), (for chairperson or member of the Council) to the selection panel, may be made by—
- (a) any qualified person; or
 - (b) any person, organization or group of persons proposing the nomination of any qualified person. The section is clear that the positions are open to any qualified persons and do not limit the applicants for the positions of chairperson and members of the Council to those in the media industry only. In that respect, I do not see any constitutional infirmity either in the law, or in the composition of membership of the Council.
145. Regarding the specific individuals that are said to be associated with media houses or entities, the short answer is, that these are professionals on their own right and may not necessarily listen to employers. They are bound by the Constitution and the law to act independently and professionally to ensure that there is an independent media.
146. In fact, section 14(1)(g) takes care of the issue of conflict of interest as one of the grounds that disqualify a person from being chairperson or a member of the council or for his removal from office. The section is clear that the chairperson or a member of the Council shall be removed from office on any of the following grounds-
- (g) “if the chairperson or a member becomes a director of any media enterprise or holds shares or has any other interest in a corporation, partnership or other body, directly or through another person, if holding those shares or having that interest would result in a conflict of interest with the officer’s official duties.”
147. Moreover, section 14 (2), of the Act provides for removal of such a person stating that: “a person desiring the removal of the chairperson or a member of the Council on any ground specified in subsection (1) may present a petition, in writing, to the National Assembly setting out the alleged facts constituting that ground.”



148. The petitioners did not demonstrate that any of the persons they allege will be susceptible to conflict of interest, fall within section 14(1)(g) to be disqualified from applying for the position of chairperson or member of the Council.

Section 14

149. Section 14 is on the removal of chairperson or member of council from office. Section 14 (1) provides that the chairperson or a member of the Council shall be removed from office on any of the following grounds—(a) violation of the *Constitution* or any other written law, including contravention of Chapter Six of the *Constitution*; (b) gross misconduct; (c) physical or mental incapacity that leads to inability to perform the functions of office; (d) incompetence or neglect of duty; (e) bankruptcy; (f) absence from three consecutive meetings of the Council without justifiable cause; (g) if the chairperson or a member becomes a director of any media enterprise or holds shares or has any other interest in a corporation, partnership or other body, directly or through another person, if holding those shares or having that interest would result in a conflict of interest with the officer's official duties; or (h) if the chairperson or member is convicted of a criminal offence and sentenced to imprisonment for a period of more than six months without the option of a fine.
150. Under section 14 (2), a person desiring the removal of the chairperson or a member of the Council on any ground specified in subsection (1) may present a petition, in writing, to the National Assembly setting out the alleged facts constituting that ground. Section 14 (3) requires the National Assembly to consider the complaint within seven days and if satisfied that it discloses a ground under subsection (1) submit the complaint together with its recommendations to the Cabinet Secretary. Upon receiving the recommendation from the National Assembly, section 14(4), requires the Cabinet Secretary to suspend the member from office pending determination of the petition and shall appoint a tribunal comprising of a chairperson who is qualified to hold office as a Judge of the High Court; two persons one man and one woman competent to assess and determine the petition.
151. Section 14 (5) provides that the tribunal shall consider the petition and if satisfied that it discloses sufficient grounds for removal, recommend to the Cabinet Secretary to remove the member from office. Section 14 (6) provides that in determining the petition, the tribunal shall be guided by the principles of fair administrative justice set out in article 47 of the *Constitution*. Section 14 (7) states that the Cabinet Secretary shall be bound by the recommendation made by tribunal.
152. It has long been held that there must be precision in constitutional litigation to enable parties respond to the issues at hand so that the court can make the correct determination on those issues. That is, a petitioner must plead with as much precision as possible on the articles of the *Constitution* said to have been violated and the manner of the alleged violation.
153. In *Phillips & others v National Director of Public Prosecutions* [2005] ZACC 15; 2006(1) SA 505(CC), the Constitutional Court of South Africa stated;
- The constitutional challenge should be explicit, with due notice to all affected. This requirement ensures that all interested parties have an opportunity to make representations; that the relevant evidence, if necessary, be led, and that the requirement of separation of powers be respected.
154. The Supreme Court of Kenya reiterated this position in *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, stating (at para 349) that "... the necessity of a link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened, and the manifestation of contravention or infringement....plays a positive



role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

155. The petitioners did not plead what ails section 14 and how it is inconsistent with, or in contravention of, the *Constitution*. The petitioners merely urged the court to declare the section unconstitutional without demonstrating how and to what extent it offends the *Constitution* to fall afoul of article 2(4). In the circumstances, the petitioners’ claim that section 14 is unconstitutional was not demonstrated and the claim fails.
156. If the Attorney General and the Cabinet Secretary were of the view that the impugned sections are constitutionally infirm, they could take steps and initiate amendments.
157. Regarding the claim that there was no public participation in the process of nominating applicants for the position of chairperson and member of the council, the law provides the names of applicants and those shortlisted should be published in the Gazette and newspapers with nationwide circulation. This is meant for public information and if anyone has a problem with an applicant, nothing stops him or her from informing the selection panel which may consider the issue and decide whether it could disqualify the applicant.
158. In any case, under section 7(11), the Cabinet Secretary “may reject any nomination solely on any of the grounds set out in section 8(2) and communicate the decision to the selection panel. The section provides that a person is not qualified for appointment as chairperson or a member of the Council if the person—is a member of Parliament or county assembly; is an official of a governing body of a political party; has at any time within the preceding five years, held a political office; is an undischarged bankrupt; has been convicted of a felony; has benefitted from, or facilitated an unlawful or irregular allocation, acquisition or use of land or other public property; or has been removed from office for contravening the provisions of the *Constitution* or any other written law.
159. In the circumstances, I am not persuaded that the petitioner made out a case on any of the grounds raised in mounting this constitutional challenge.

Conclusion

160. In conclusion, having considered the consolidated petitions, responses and arguments by parties, this court comes to the conclusion that the consolidated petitions are unmeritorious. There was no demonstration that sections 7 and 14 of the *Media Council Act* are unconstitutional, or that the selection panel or shortlisted members for the position of the council are conflicted. There was no proof of discrimination either.

Disposition

161. The consolidated petitions are declined and dismissed. This being a public interest litigation, each party shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE 2025

E C MWITA

JUDGE

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JUDGMENT PETITIOIN NO. E 040 OF 2023

