



Okoiti v Private Security Regulatory Authority & 5 others; Security Trainers Association of Kenya & 3 others (Interested Parties) (Petition 122 of 2020) [2025] KEHC 9584 (KLR) (Constitutional and Human Rights) (4 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9584 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 122 OF 2020

EC MWITA, J

JULY 4, 2025

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

AND

THE PRIVATE SECURITY REGULATORY AUTHORITY 1ST RESPONDENT

THE BOARD, PRIVATE SECURITY REGULATORY AUTHORITY 2ND RESPONDENT

THE CABINET SECRETARY, MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT 3RD RESPONDENT

THE HON ATTORNEY GENERAL 4TH RESPONDENT

YUSUF MAHAMED FAZUL 5TH RESPONDENT

PROF STEPHEN P. NG'ANG'A 6TH RESPONDENT

AND

SECURITY TRAINERS ASSOCIATION OF KENYA INTERESTED PARTY

KENYA SECURITY INDUSTRY ASSOCIATION INTERESTED PARTY

KENYA ASSOCIATION OF SECURITY PROFESSIONALS INTERESTED PARTY

KENYA NATIONAL SECURITY WORKERS UNION INTERESTED PARTY



JUDGMENT

1. On 5th July 2019, the 3rd respondent (the Cabinet Secretary) gazetted the Private Security (General) Regulations, 2019 (the Regulations) made pursuant to the *Private Security Regulation Act* No. 13 of 2016 (the Act) and the regulations took effect on the same day (5th July 2019). On 11th October 2019, the Protective and Safety Association of Kenya (Protective and Safety Association) petitioned the National Assembly to have the regulations annulled.
2. On 6th November 2019, the National Assembly Committee on Delegated Legislation (the committee) tabled its report on the regulations recommending that the regulations be annulled for lack of adequate public participation; unjustifiable delay in the publication of the regulations or laying them before the National Assembly.
3. The National Assembly concluded debate on the motion for adoption of the report of the committee on 14th November 2019 and adopted the report on 19th November 2019. Pursuant to section 18 of the *Statutory Instruments Act* and Standing Order 210 (4) (b) the regulations stood annulled. Notwithstanding the adoption of the report annulling the regulations, the Cabinet Secretary appointed members of the board of the 1st respondent (the Authority) while on 9th December 2019, the 3rd respondent issued a press statement directing compliance with the regulations.

Petitioner's case

4. The petitioner filed this petition challenging appointment of members of the board of the Authority; the directive by the Cabinet Secretary and the Authority and the actions taken in furtherance of the directive where by a criterion was issued for the vetting of private security companies. Private security companies were also required to furnish the Authority with bank statements, personal data of staff and salary scales.
5. The petitioner argued that the Cabinet Secretary and the Authority proceeded to implement the annulled regulations by appointing independent stakeholder members to the board; conducting inspection of security firms across the country for compliance with the regulations and implementing Private Security Regulatory Authority Training Curriculum based on annulled regulations.
6. The petitioner also argued that Barry Stephen Patrick did not merit for appointment to the board because he was not a citizen of Kenya; that Isaac G.M. Andabwa and Josh Soita appointed to represent registered employee organizations were from one union and Jackson W. Mbuthia and Andrew Solomon appointed to represent registered associations representing private security firms were also from one association.
7. The petitioner asserted that the training curriculum was void as it was executing non-existent regulations. It was also enacted within 14 days without public participation and validation and was not subjected to any piloting before being launched.
8. The petitioner further stated that Yusuf Mahamed Fazul (Fazul) is incompetent to hold office following the findings by the Office of the Ombudsman in its report of November 2016 on investigations into alleged abuse of power and official misconduct by the Executive Director, NGO Coordination Board. Fazul was not eligible for appointment as the CEO and did not meet the requirements under Chapter 6 of *the Constitution*. The recruitment process through which he was appointed was also tainted with conflict of interest hence his appointment should be nullified.



9. It was the petitioner's further case, that Prof Stephen P. Ng'ang'a continued to serve as the chairperson of the authority contrary to the judicial pronouncement in Judicial Review No. 37 of 2017, Republic v Private Security Regulatory Authority & 2 others Ex Parte Charles Arori (Chief Shopsteward) G4s & 9 others; Stephen P Nganga (Interested Party) [2019] eKLR. The petitioner argued that the respondents' actions violated *the Constitution*, the *Public Service (Values and Principles) Act* No. 1A of 2015 and the *Fair Administrative Action Act*.
10. The petitioner maintained that vetting of private security companies was conducted pursuant to void regulations; there was no mechanism in the Act for vetting to comply with and the dispute resolution mechanism in section 43 of the Act was not appropriate to address grievances in the petition. The petitioner asserted that the appointments were invalid because they were made under annulled regulations. According to the petitioner, the Cabinet Secretary gazetted the regulations on 5th July 2019, but they became void before the midnight on 6th August 2020 for failing to comply with sections 11(1), (2) and (3) of the *Statutory Instruments Act*.
11. The petitioner argued that contrary to section 11(2) (b) of the Act which required representation on the board by both large and small associations (one representing large organizations and the other small and medium ones), all board members were from a consortium of four big multinational companies.
12. The petitioner refuted the claim that Kenya National Private Security Workers Union was the only registered union representing security guards. The petitioner's position was that there are other associations of employees in the private security industry, including the Kenya Union of Commercial Food & Allied workers, Women in Security Kenya, Protective and Safety Association of Kenya and national association of Retired Police Officer Kenya.
13. The petitioner maintained that there is no limitation of time for filing constitutional petitions and that the Chair of the Authority (Prof. Stephen Ng'ang'a) did not have the required 15 years' experience in security matters as required by section 11(3)(c) of the Act. According to the petitioner, there was no evidence of the 1st respondent's accreditation and licensing as trainers as required by section 9(j) of the Act. It was also not possible to formulate the curriculum in the absence of subsidiary legislation operationalizing section 9 of the Act.
14. The petitioner went on to assert that the decision in JR No. 37 of 2017 (supra) is applicable because the judgment was made in rem, and that these are not contempt of court proceedings which must be filed within the case where the order was made. The petitioner relied on Anthony Otiende Otiende v Public Service Commission & 2 others [2016] eKLR and George Ndemo Sagini v Attorney General & 3 others [2017] eKLR to support the position that the regulations become void by an act of law and annulment by the National Assembly.
15. The petitioner argued that the regulations having been voided, it followed that at the time the board was constituted, any function or duty it carried out pursuant to the regulations was void. Reliance was placed on Bedford Quarries v Bough, (1907) 168 Ind. 671, 80 N.E. 539, 14L.R.A. 418; Carr v State (1890) 127 Ind. 204, 26 N.E. 778; L.R.A. 370 and Chicago, Indianmpolia & Louisville Ry. v. Hackett, (1912) 227 U.S. 559, S. Ct., 57 L. Ed.966, among others decisions. In that regard, the petitioner argued, inspecting and vetting security firms under void regulations, including appointments made, violated articles 4(2), 10(2) and 47(1) of *the Constitution*.
16. On lack of public participation, the petitioner relied on articles 1(2), 4(2) and 10(2) (a) of *the Constitution* and decisions in Kenya Human Rights Commission v Attorney General & Another [2018] eKLR; Doctors for Life International v The Speaker of the National Assembly (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006); Minister



of Health and Others v Treatment Action Campaign and Others [2002] 5 LRC 216, 248; Minister of Health & Another v New Clicks South Africa (Pty) Ltd and Others [2006] (2) SA 311 (CC) and Republic v Private Security Regulatory Authority & 2 others Ex parte Charles Arori (Chief Shopsteward) G4s & 9 others; Stephen P. Ng'ang'a (interested Party) eKLR, among others.

17. The petitioner maintained that Prof. Ng'ang'a and Fazul being in office violates the principles in articles 10, 73 and 232 of *the Constitution* and section 5 of the Public Service (Values and Principles) No. 1A of 2015.

18. based on the above averments, the petitioner sought the following relief:

1. A declaration that having been voided by the National Assembly the Private Security (General) Regulations, 2019 are invalid, null and void ab initio and anything based on them is equally invalid, null and void.

2. A declaration that the authority's decision to visit offices of private security companies to inspect and vet them during the nationwide lockdown to contain the COVID-19 pandemic is irresponsible, unreasonable, and unlawful and, therefore, invalid, null and void.

3. An order:

I. Quashing the ongoing process of inspecting and vetting security firms until the Cabinet Secretary enacts Regulations under the Private Security Regulations *Act (No. 13 of 2016)* to guide the process.

II. Quashing the Private Security Regulatory Authority's email containing further criteria for the vetting of private security companies.

III. Quashing the Private Security Regulatory Authority Training Curriculum.

IV. Quashing Gazette Notice No. 10237 of the 28th October, 2019 appointing the independent stakeholder members of the Board of the Private Security Regulatory Authority.

V. Quashing the appointment of Yusuf Mahamed Fazul as the CEO/ Director of the Private Security Regulatory Authority.

VI. Compelling the Cabinet Secretary, Ministry of Interior and Coordination of National Government to enact Regulations under the Private Security Regulations *Act (No. 13 of 2016)* strictly in compliance with law, including by providing for effective public participation.

VII. Compelling the Cabinet Secretary, Ministry of Interior and Coordination of National Government to degazette the appointment vide Gazette No. 6868 of 21st July 2017 of Prof. Stephen P. Ng'ang'a as the Chairman of the Private Security Regulatory Authority.

VIII. Compelling the respondents to pay the costs of this suit. IX. Any other relief the court may deem just to grant.

1st 2nd, 5th and 6th respondents' case

19. The 1st, 2nd, 5th and 6th respondents opposed the petition through a replying affidavit sworn by Fazul. The respondents stated through the replying affidavit that vetting of private security companies



- was conducted pursuant to the provisions of the Act; the 1st and 2nd respondents' decision was in compliance with *the Constitution* and the Act and the complaints about vetting are premature for failing to comply with section 43 of the Act. Section 43 is on appeals against decisions of the Authority to the Cabinet Secretary.
20. The respondents took the position that pursuant to the Public Order (State Curfew) Order, 2020, licensed security firms were listed among persons exempt from the application of the curfew regulations. For that reason, in undertaking their mandate, the 1st and 2nd respondents were obligated to ensure that only licensed security firms were within the exemption.
 21. The 1st, 2nd, 5th and 6th respondents argued that the vetting conducted did not include any physical contact; was done with full appreciation of the Ministry of Health guidelines and in conjunction with other national security institutions, including Kenya Revenue Authority and National Police Service.
 22. Regarding the development of a training curriculum, they argued that as a statutory function of the 1st respondent, it was carried out pursuant to sections 9(i), (j) and (k) of the Act and not the Regulations. 9(i) provides for encourage and promote efficiency and responsibility in the rendering private security services; (j) set standards and accredit institutions offering training of security service providers and prospective security service providers to ensure a high-quality training and (k) set standards to encourage equal opportunity employment practices in the private security services industry. They further argued that the curriculum was developed following broad consultations with over 200 security companies and representatives of industry players thus, it was lawful and valid.
 23. The 1st, 2nd, 5th and 6th respondents maintained that the petitioner did not adduce evidence to rebut the regularity presumption. They relied on *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018] eKLR and *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* [2020] eKLR.
 24. The 1st, 2nd, 5th and 6th respondents again relied on the decision in *Independent Electoral and Boundaries Commission & 4 others v David Ndii & 82 others; Kenya Human Rights Commission & 4 others (Amicus Curiae)* [2021] eKLR, to submit that vetting, registration and licensing was conducted in accordance with national values and principles of governance in article 10 (2) of Constitution. The petitioner did not adduce evidence to show violation of article 47 of *the Constitution*.
 25. Regarding the appointment of board members, these respondents asserted that the appointment was the result of broad consultations with relevant stakeholders, including Kenya Private Security Workers Union; Kenya Security Industry Association and Kenya Alliance of Residents Associations. Stakeholders complied with their internal procedures before submitting names of nominees after which the 3rd respondent appointed members of the board on 31st October 2019 in accordance with section 11(2) of the Act before the regulations were annulled on 19th November 2019.
 26. The 1st, 2nd, 5th and 6th respondents maintained that Jackson was nominated by Kenya Association of Security Professionals while Andrew was nominated by Kenya Security Industry Association. Joash Soita and Isaac Andabwa were nominated by the only registered Private Security Workers Union representing both large-scale and small-scale employees. The nomination of Eng. Bernard Muriuki to represent the resident associations was consultative, open, transparent and competitive while the appointment of Barry Steven was not prohibited since he is a representative of the Kenya Private Sector Alliance which comprises both citizens and non-citizens. He was thus, nominated by Kenya Private Sector Alliance to the board.
 27. The 1st, 2nd, 5th and 6th respondents took the position, that Fazul's recruitment was competitive and complied with the Act, which stipulates the procedure for appointment and removal of the CEO



which the petitioner ought to pursue. They maintained that the challenge to the appointment of the chairperson is an abuse of the court process as it should have been brought up in Judicial Review No. 37 of 2017 (*supra*).

28. The 1st, 2nd, 5th and 6th respondents relied on several decisions, including *Republic v Benjamin Jomo Washiali, Majority Chief Whip, National Assembly & 4 others Ex parte Alfred Kiptoo Keter & 3 others* [2018] eKLR; *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR; *Raila Odinga v Independent Electoral and Boundaries Commission & 3 others* [2013] KESC 6 (KLR) and *John Harun Mwau v Attorney General* (2015) eKLR.

3rd and 4th respondents' response

29. The 3rd and 4th respondents opposed the petition through a replying affidavit sworn by Dr. (Eng.) Karanja Kibicho, CBS, Principal Secretary, Ministry of Interior and written submissions. The 3rd and 4th respondents argued that prior to the appointments, the 3rd respondent made general regulations to provide for the procedure for appointing representatives under section 11 (1) (b)(vi) and (vii), among other requirements. The regulations were widely circulated for public participation after which they were gazetted and became part of the subsidiary legislation. They were, however nullified on 19th November 2019 for, among other reasons, lack of public participation.
30. Regarding the appointments, the 3rd and 4th respondents urged that they were transparent and complied with *the Constitution*, the Act and the regulations before they were annulled. The Authority carried out broad consultations with relevant stakeholders, including Kenya Private Security Workers Union, Kenya Security Industry Association and Kenya Alliance of Residents Associations.
31. The 3rd and 4th respondents maintained that relevant stakeholders conducted elections and submitted names of their nominees to the Cabinet Secretary for appointment after adequate consultation among major stakeholders in compliance with their internal procedures for nominating representatives to the board.
32. The 3rd and 4th respondent asserted that Barry Stephen Patrick represents Kenya Private Sector Alliance which comprises both Kenyans and non-Kenyans thus, his appointment was proper in law. Jackson Mbuthia and Andrew Solomon are not from one association while Josh Soita and Isaac Andabwa were nominated by the only registered Private Security Workers Union representing both large scale and small-scale employees. They were appointed them to the board on 31st October 2019 pursuant to section 11 (1) and (2) of the Act and the regulations which were still in force at the time.
33. The 3rd and 4th respondents maintained that the petitioner is guilty of delay and did not come to court with unclean hands. The petition was filed five months after the regulations had been annulled on 19th November 2019 and nine months after the regulations had been gazetted by the Cabinet Secretary. The petitioner did not also demonstrate how the appointments violated articles 27 and 232 of *the Constitution*.
34. The 3rd and 4th respondents maintained that Fazul's appointment as CEO was done in compliance with *the Constitution* and the Act. The Gazette Notice dated 28th October 2019 appointing the nominees was done in compliance with *the Constitution*, the Act and the regulations before they were annulled. In their view, annulling of the regulations did not affect actions taken prior to the annulment. They relied on section 11(4) of the *Statutory Instruments Act* and the decision in *George Ndemo Sagini v Attorney General & 3 others* [2017] eKLR.



35. The 3rd and 4th respondents posited that the petitioner should have filed an application for contempt in Judicial Review No. 37 of 2017 (supra). They relied on Samuel Kahiu v Jecinta Akinyi Soso Assistant County Commissioner Iloodokilani Ward/Division & another [2018] eKLR to support this position.

1st Interested party's response

36. The 1st interested party filed a replying affidavit sworn by George Odhiambo in opposition to the petition. The 1st interested party took the position that the curriculum was developed and published by the 2nd respondent in line with its functions under section 9 of the Act. The curriculum was based on the Act and was published 4 months before the regulations were annulled.
37. The 1st interested party contended that the objectives of the curriculum are in line with the objects of sections 3 and 9 of the Act which have not been questioned. In that regard, it was argued, annulling the regulations did not interfere with the implementation of the Act or performance of the functions of the 1st and 2nd respondents.
38. According to the 1st interested party, the Act gave the 1st and 2nd respondents discretion to come up with ideas, actions and plans that give effect to the objects of the Act. The development of the curriculum was just one of the strategies. It was not an ultra vires decision since it was to promote the development of the private security service industry as required by section 9(e), (g) and (j) of the Act.
39. The development of the curriculum was not rushed as alleged; there was sufficient public participation during the 4 days consultative meeting (from 12th March 2019 to 15th March 2019); the meeting was convened by various private security providers attended by more than 20 firms and the 1st respondent at Kenya School of Government. Views given on the curriculum were discussed at length.
40. The 1st and 3rd interested parties did not file submissions.
41. The 2nd and 4th interested parties informed the court that they had filed responses but there are responses in the CTS. They did not also file written submissions.

4th interested party's submissions

42. The 4th interested party submitted that the appointment of board members was done in accordance with the Act and regulations then in force. Reliance was placed on the decision in Republic v Registrar of Companies & 2 others; Ex Parte Schindler Limited [2020] eKLR that the prayers in the petition are contrary to the rules of interpretation.
43. The 4th interested party argued that there was no violation of *the Constitution*; the petitioner failed to appreciate the history of the private security sector and the previous conduct and injustice suffered where unions were directly affected and or addressed the rights of the private security sector.
44. The 4th interested party relied on the decisions in Nairobi Metropolitan PSV Sacco Union Limited & 25 others v County of Nairobi Government & 3 others [2013] eKLR and Minister of Health and Another vs New Clicks South Africa (Pty) Ltd and Others (CCT 59/2004) [2005] ZACC 14, that the petitioner did not outline violations on public participation.
45. Regarding the appointments of Isaac Andabwa and Josh Soita, the 4th interested party contended that the appointments were made on the basis that the 4th interested party union was registered and its sole purpose was to represent all private security personnel in the matter of the Private Security Workers in Kenya. Elections were conducted and the preferred candidates were appointed in accordance with internal procedures of the board.



46. The 4th interested party took the position, that the petitioner failed to take steps to ensure compliance with the recommendation by the National Assembly in relation to the Report of the Committee. Reliance was placed on *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* (2017) eKLR.

Determination

47. Upon considering the pleadings and arguments by parties, I have distilled the following issues for determination, namely; whether the appointments were done in compliance with *the Constitution* and the Act and whether the development of the curriculum was lawful.

Appointments

48. The petitioner argued that the committee's report was adopted on 19th November 2019 and pursuant to section 18 of the *Statutory Instruments Act* and Standing Order 210 (4) (b), the regulations stood annulled. Despite the adoption of the report annulling the regulations, the 3rd respondent appointed members of the board which was unlawful.
49. The petitioner queried the appointment of Barry Stephen Patrick on grounds that he is not a Kenyan citizen; Isaac G.M. Andabwa and Joash Soita who were appointed to represent registered employee organizations because they were from one union and Jackson W. Mbuthia and Andrew Solomon appointed to represent registered associations representing private security firms because they were also from one association. The respondents maintained that the appointments were made while the regulations were still in force and were thus, lawful.
50. Section 11 (1) of the Act states that the board of the Authority is to comprise; (a) a Chairperson appointed by the President; (b) principal secretaries responsible for internal security, finance and labour; a representative of National Police service; a representative of National Intelligence Service; two members of registered associations representing employees organisations elected in accordance with regulations prescribed by the Cabinet Secretary; two members of registered organisations representing private security firms elected in accordance with regulations prescribed by the Cabinet Secretary; one member nominated by registered resident associations to represent interests of residents and one member nominated by the Kenya Private Sector Alliance.
51. According to section 11(1), registered associations representing employees' organisations elect two members; registered organisations representing private security firms elect two members; registered resident associations nominate one member to represent interests of residents and one member is nominated by the Kenya Private Sector Alliance. The two members from registered associations representing employees' organisations and the two from registered organisations representing private security firms have to be elected in accordance with regulations prescribed by the Cabinet Secretary. That means there must be regulations in force to guide how those members are elected. The other members of the board are identified by virtue of the organisations they represent or offices they hold.
52. The petitioner argued that the regulations having been annulled there were no regulations for purposes of undertaking the appointment exercise. The petitioner further argued that some of the people appointed were not suitable to hold office.
53. Both sides agree that the regulations were annulled on 19th November 2019. The petitioner argued that since the regulations were annulled, the appointments were void ab intio. The respondents maintained that the appointments were made before the annulment thus, they were lawful.



54. The regulations were gazetted on 5th July 2019 and took effect on the same day. However, on 11th October 2019 the National Assembly was petitioned to annul the regulations for lack of sufficient public participation and late tabling. The committee on delegated legislation considered the petition and tabled its report on 6th November 2019 recommending that the regulations be annulled for lack of adequate public participation; unjustifiable delay in their publication or laying before the National Assembly. The National Assembly adopted the report to annul the regulations on 19th November 2019. According to the petitioner, the regulations stood annulled pursuant to section 18 of the *Statutory Instruments Act* and Standing Order 210 (4) (b).
55. Section 18 of the *Statutory Instruments Act* on annulment of a statutory instrument, provides as follows:
- When a report on a statutory instrument has been tabled in Parliament, the statutory instrument shall be deemed to be annulled if Parliament passes a resolution to that effect.”
58. It was on the basis of the above provision that the petitioner argued that the National Assembly having adopted the report to annul the regulations on 19th November 2019, the regulations stood annulled and there were no regulations in force for purposes of enforcing the Act. The respondents took the view, that appointments were made before the regulations were annulled.
59. Further, that the appointments were transparent and complied with *the Constitution*; the Act and the regulations before they were annulled. The Authority carried out broad consultations with relevant stakeholders, including Kenya Private Security Workers Union, Kenya Security Industry Association and Kenya Alliance of Residents Associations. Relevant stakeholders conducted elections in compliance with their internal procedures for nominating representatives and submitted names of their nominees to the Cabinet Secretary for appointment.
56. Section 11 (1) of the *Statutory Instruments Act* requires every Cabinet Secretary responsible for a regulation-making authority to ensure that within seven sitting days after publication of a statutory instrument, a copy of the instrument is transmitted to the responsible clerk for tabling before the relevant House of Parliament.
57. Subsection (2) states that notwithstanding subsection (1) and pursuant to legislative powers conferred on the National Assembly under article 109, all regulation making authorities have to submit copies of all statutory instruments for tabling before the National Assembly. Under subsection (3), the responsible clerk has to register or cause to be registered every statutory instrument submitted to the respective House(s) for tabling or laying.
58. Subsection (4) is material, that if a copy of a statutory instrument that supposed to be laid before the relevant House of Parliament is not so laid as required, the statutory instrument “shall cease to have effect immediately after the last day for it to be so laid without prejudice to any act done under the statutory instrument before it became void.”
59. The regulations were gazette on 5th July 2019 and took effect the same day. Although the petitioners attempted to argued that that the regulations became void for not being laid before Parliament as required by section 11(4). The petitioner states in his affidavit that the regulations were nullified on 19th November 2019. If the regulations had become void before the National Assembly adopted the report on 19th November 2019, there would have been no point for consideration of the petition by the committee and the debate and adoption of the report by the National Assembly. The regulations were annulled by the National Assembly following the adoption of the committee’s report to that effect on 19th November 2019.



60. There is no dispute that action had already been taken pursuant to the regulations prior to annulment. In that regard, as subsection (4) states, where the statutory instrument becomes void, that does not prejudice prior actions taken pursuant to the statutory instrument before becoming void.
61. The petitioner's position that the regulations were null and void ab initio to the point of affecting actions that had been taken prior to annulment cannot be correct. The appointments having been made before the regulations were annulled annulment of the regulations could not affect those appointments, taking into account section 11(4) of the *Statutory Instruments Act*. I do not think the petitioner's position would be in accord with the law given that the law is clear that voiding of a statutory instrument will not be prejudicial to any act taken before a statutory instrument is voided. In that regard, appointments made prior to 19th November 2019 remained lawful in terms of section 11(4) of the *Statutory Instruments Act*. In any event, case, I note that the impugned appointments were made in October 2019 and it was not argued that those appointed were still in office. I therefore find no fault in the appointments perse.
62. The other argument by the petitioner was that Barry Stephen Patrick not being a citizen could not be appointed thus, his appointment violated the law. The petitioner further argued that Jackson Mbutia and Andrew Solomon are from the same association so were Joash Soita and Isaac Andabwa. The 3rd and 4th respondents and interested parties took a contrary view, asserting that Barry Stephen Patrick represents Kenya Private Sector Alliance which comprises both Kenyans and non-Kenyans and his appointment was proper in law; Jackson Mbutia and Andrew Solomon are not from one association while Joash Soita and Isaac Andabwa were nominated by the only registered Private Security Workers Union representing both the large and small scale employees. The 3rd respondent appointed them to the board on 31st October 2019 pursuant to section 11 (1) and (2) of the Act and the regulations which were still in force.
63. The petitioner's argument that Barry Stephen Patrick is not a Kenyan citizen and could not be appointed to the board does not in my view, raise a genuine legal challenge. I have carefully read section 11(1)(vi) and (vii) which provides that the organizations mentioned elect their representatives for appointment to the board. The section does not restrict those to be elected as representatives to citizens only. The Petitioner did not point out any constitutional or statutory provision that disqualifies a non-citizen from being elected as a representative under subsection (1)(b)(vi) or (vii). It was left to the discretion of the organizations to identify their representatives and elect persons they felt would represent their interests.
64. Where positions are reserved for citizens, *the Constitution* or the applicable law provides in no uncertain terms that the person to be appointed or elected to such position(s) must be a citizen. A good example is with regard to the position of chairperson of the board where section 11(3) provides clearly and, in no uncertain terms, that "person shall be qualified for appointment as Chairperson of the Board if the person -"is a citizen of Kenya."
65. In that respect, it would be stretching the argument beyond the law if it were to be taken without reference to any law that merely because Barry Stephen Patrick is not a citizen could not be appointed yet he is allowed to reside in Kenya and was chosen as a representative of the Kenya Private Sector Alliance which has both citizens and non-citizens.
66. If the petitioner's challenge regarding the appointment of Barry Stephen Patrick was to be accepted in the absence of a clear statutory provision barring a non-citizen from being appointed to the board, it would border on potential discrimination based on social origin which is prohibited by *the Constitution*. I find no merit in the argument regarding appointment of Barry Stephen Patrick.



67. The other argument is that Jackson Mbuthia and Andrew Solomon are from the same association and so are Joash Soita and Isaac Andabwa. The respondents denied this assertion maintaining that Jackson Mbuthia and Andrew Solomon are from different association while Joash Soita and Isaac Andabwa were nominated by the only registered Private Security Workers Union representing both large and small-scale employees.
68. The argument that Jackson Mbuthia and Andrew Solomon are from the same association was refuted by the respondents who maintained that the two are from different associations, Kenya Association of Security Professionals and Kenya Security Industry Association, respectively. Whether the two are from the same association is disputed thus, is a question of fact that cannot be determined based on affidavit evidence. In that regard, the court cannot determine the veracity of either sides' assertion. In any event, as the court pointed out earlier, the appointments having been made on 28th October 2019, it was not argued that these people were still in office or their term had expired. For avoidance of doubt, the law (section 11(1)(b)(vi)(vii)) is clear and leaves no ambiguity regarding identification and appointment of members of the board which has to be in accordance with regulations prescribed by the Cabinet Secretary.
69. Regarding the appointment of Joash Soita and Isaac Andabwa who the petitioner argued that are from the same organization, the respondents and interested parties maintained that they were nominated by the only registered private security workers union representing both large and small-scale employees.
70. Section 11(1)(b)(vi) provides for two members of registered associations representing employee organizations to be elected in accordance with regulations prescribed by the Cabinet Secretary. The petitioner's argument that these two were from the same organization was denied by the respondents who stated that the two are nominees of the only registered private security workers union representing both large and small scale employees. The respondents' assertion seems to vaguely admit the petitioner's position because, according to the respondents, Joash Soita and Isaac Andabwa were nominated by the "only registered private security workers union" representing both large and small-scale employees.
71. The issue of whether Joash Soita and Isaac Andabwa are from the same association as the petitioner stated or were nominated by the only registered union representing large and small-scale employees is again a question of fact. That is; it would require evidence to demonstrate whether indeed, there is only one registered association of employee organizations in the country or they are more than one. If there are more than one registered association of employee organizations, the impugned appointment would be contrary to law.
72. However, in the absence of evidence to that effect, I say no more on this issue. This is because section 11(2) is clear that the Cabinet Secretary is required to make regulations to provide the procedure for appointment of members of the board and, in particular, to regulate appointment of the representatives under subsection (1) (b)(vi) and (vii) and ensure that the appointment is representative of industry players and "if possible, provide rotational appointment to ensure representation of small and large scale firms and associations." The regulations having been annulled, there is nothing before this court to show that the appointment of Joash Soita and Isaac Andabwa violated the law by not taking into account representation of small and large scale firms and associations.

Appointment of CEO and Chairperson

73. The petitioner again attacked the appointment of Fazul as the CEO arguing that he is incompetent to hold office following the findings by the Office of the Ombudsman in its report of November 2016 following investigations into alleged abuse of power and official misconduct by the Executive



- Director, NGO Coordination Board. The petitioner maintained that Fazul was not eligible for appointment as the CEO and did not meet the requirements under Chapter 6 of *the Constitution*. The recruitment process through which he was appointed was also tainted with conflict of interest hence his appointment should be nullified.
74. It was the petitioner's further case, that Prof Stephen P. Ng'ang'a continued to serve as the Chairperson of the Authority contrary to judicial pronouncement in Judicial Review No. 37 of 2017, Republic v Private Security Regulatory Authority & 2 others Ex Parte Charles Arori (Chief Shop steward) G4s & 9 others; Stephen P Nganga (Interested Party) [2019] eKLR. According to the petitioner, the respondents' actions violated *the Constitution*, the *Public Service (Values and Principles) Act* and the *Fair Administrative Action Act*.
 75. The respondents and interested parties denied that the appointment of the chairperson and the CEO violated *the Constitution* or the law. They maintained that the appointment was constitutional and lawful; Fazul is qualified under section 18(2) and met the requirements under Chapter 6 of *the Constitution* and has requisite experience.
 76. The appointment of the CEO is provided for in section 18 of the Act which requires that the appointment be competitive; a person should hold a degree from a recognised university in Kenya in the discipline of public administration and management; law; Business administration or security studies; meets requirements of Chapter Six of *the Constitution* and has at least ten years experience, five of which should be experience at senior management level.
 77. The petitioner's main concern was that Fazul did not meet the requirements in Chapter Six of *the Constitution*. According to the petitioner, the report of November 2016 by CAJ found Fazul to be culpable of integrity and was not therefore suitable. The respondents and interested parties maintained that Fazul was competitively appointed and met the requirements in Chapter Six of *the Constitution*.
 78. Integrity is a virtue in our Constitution. Article 73 on leadership and integrity provides at Clause for guiding principles of leadership and integrity which include; selection on the basis of personal integrity, competence and suitability and accountability to the public for decisions and actions.
 79. The petitioner assailed Fazul's appointment on grounds of integrity and relied on a report by the Commission on Administration of Justice (CAJ) of November 2016, for the argument that Fazul did not meet the requirement of Chapter Six of *the Constitution* on integrity. The respondents and interested parties defended Fazul's integrity arguing that he met the requirements.
 80. I have perused a copy of the report from an investigation by CAJ into alleged abuse of power and official misconduct by the Executive Director, NGO Coordination Board made in November 2016. The report makes several key determinations on the appointment of Fazul as the Executive Director of NGO Board and his conduct in that capacity. Of importance to this petition, was a recommendation that Fazul should not hold public office for violating Chapter Six of *the Constitution* of Kenya- Leadership and integrity. He presented false information during interview and even after securing the position, he abused power by committing several maladministration. CAJ further recommended that DCI institute investigations against Fazul for presenting forged documents and false information to secure the position.
 81. The downside of the report is that the copy attached to the petition is not dated. The forward has serial No. CAJ NO. 35/2016. It also contains this information:
Signed this.....day of November 2016
Dr. Otiende Amollo, EBS



Chairperson of the Commission on Administrative Justice
(Office of Ombudsman)

The report does not have a date when the Chairperson signed it since the space provided for the date is blank. It was not explained why the date is missing thus, leaving the court unsure whether the document attached to the petition is a correct copy of the report.

82. However, that notwithstanding, if CAJ made a finding of fact that Fazul violated Chapter Six of *the Constitution*, that would disqualify him from holding office. Under section 8 of its establishing Act, on of the functions, CAJ is to inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehaviour, inefficiency or ineptitude within the public service. It can recommend appropriate remedies and actions against persons or bodies to which the Act applies.
83. Section 42 states that after investigations CAJ may among others, recommend to the complainant and to the relevant governmental agency or other body concerned in the alleged violations, other appropriate methods of settling the complaint or to obtain relief. In this case a recommendation was made that Fazul should not hold public office and that the Directorate of Criminal investigations investigate the forgery committed.
84. CAJ is not a busybody but a commission with mandate to discharge under the law. Its recommendations are relevant to upholding integrity in the public service and cannot be wished away as doing so, would render CAJ redundant. In that regard, if indeed CAJ recommended that Fazul should not hold public office, appointing him as CEO of the board was inappropriate and the board failed to uphold the requirements in chapter Six of *the Constitution* as read with section 18 of the Act. However, due to the omissions noted in the attached report, I say no more on the appointment of Fazul as the CEO.

Chairperson

85. The appointment of Prof. Stephen Ng'ang'a as chairperson of the board was also queried on grounds that he was not supposed to hold office by virtue of the decision in Judicial Review No. 37 of 2017. The respondents argued that the petitioner should have pursued contempt of court proceedings in that Judicial Review case and cannot raise the issue in this petition.
86. Appointment of chairperson is provided for in section 11(3) of the Act which provides for the requirements and qualifications for one to be appointed chairperson. The person must be a citizen of Kenya; must meet the requirements of Chapter Six of *the Constitution* on integrity; must have served in the public service with distinction and has at least fifteen years experience in security matters.
87. I have perused the decision in Judicial Review 37 of 2017 by the Employment and Labour Relations Court delivered on 26th April 2019. That case concerned the appointment of Prof. Ng'ang'a as chairperson. The applicants had sought an order of certiorari to call into court and quash Gazette No. 6868 of 21st July 2017 appointing Pro. Stephen Ng'ang'a as Chairperson of the Private Security Regulatory Authority. The Court (Onesmus Makau, J.), heard the case, agreed with the applicants and issued an order of Certiorari quashing Gazette Notice 6868 issue on 21st July 2017.
88. The essence of that decision was that Prof. Nganga ceased to hold office unless that decision was stayed or set aside. The Gazette Notice appointing Prof. Ng'ang'a ceased to exist the moment the court issued an order of certiorari quashing it. In that respect, there is no Gazette Notice No. 6868 of 21st July 2017 for this court to quash. If Prof. Ng'ang'a continued to serve after his appointment had been quashed



that is an issue of governance and violation of a court order for he would be in office illegally. Such an issue ought to be pursued differently and not through these proceedings and in the manner the issue has raised.

Training curriculum

89. The petitioner again argued that despite the annulment of the regulations, the Cabinet Secretary issued a press statement on 9th December 2019 directing compliance with the regulations. The petitioner maintained that the training curriculum was void for executing non-existent regulations. The curriculum was also enacted within 14 days without public participation and validation and was not subjected to any piloting before being launched. The respondents did not refute the petitioner's contention that the curriculum was implemented after the regulations had been annulled. Their position was that the respondents were implementing the law and not the regulations. They argued that there was public participation and consultations and a meeting was held to come up with the curriculum.
90. Section 18 of the *Statutory Instruments Act* provides in plain language that when a report on a statutory instrument has been tabled in Parliament and adopted, the statutory instrument is deemed to be annulled. From the legal standpoint, the regulations stood annulled the moment the committee's report was adopted by the National Assembly on 19th November 2019. In that respect, the directive by the Cabinet Secretary on 9th December 2019 that the regulations be complied with had no basis in law. Annulled regulations could not be implemented. I agree with the petitioner to the extent that any activities taken in furtherance of annulled regulations was a nullity and of no legal effect.
91. Regarding development of a training curriculum, the positions taken by parties were different. Whereas the petitioner argued that the curriculum was to enforce or execute non-existent regulations, the respondents and interested parties took the view, that the curriculum was based on the provisions of the Act and not the annulled regulations.
92. The Act provides for general actions to be taken while regulations are for specific actions. The Act contains several provisions, including on registration of private security firms, qualifications and requirements for registrations as well as training. For instance, section 9 provides for the functions of the Authority which include, among others, formulation and enforcement of standards for the conduct of the private security services industry; register and license all persons involved in or conducting private security services in Kenya; maintain a data bank of the operations, conduct and employment history of persons registered and licensed under the Act and determine, prescribe and enforce minimum standards of occupational conduct in respect of the private security services industry. Section 38 provides for inspection as may be necessary to establish whether an applicant meets the requirements for registration, while section 54 provides for inspection of books and documents.
93. The petitioner argued that steps taken in furtherance of the directive, including issuing a criterion for the vetting of private security companies and demanding that private security companies furnish the Authority with bank statements, personal data of staff and salary scales were without legal basis. According to the petitioner, both the Cabinet Secretary and the Authority proceeded to implement annulled regulations by conducting inspection of security firms across the country for compliance with the regulations and implementing Private Security Regulatory Authority Training Curriculum based on annulled regulations.
94. As it emerges from the sections referred to such as sections 9; 38 and 54, they provide for activities that can be conducted under the Act. What cannot be implemented is what was to be done under the regulations. The petitioner did not point out which activities were to be done under the regulations



and which particular regulations but were done despite annulment of the regulations. Indeed, anything done under the regulations after they were annulled would be illegal. However, the petitioner did not assist the court in pointing out clearly which activities were to be undertaken pursuant to the regulations in order for the court to determine whether they were implemented before or after annulment.

Conclusion

95. Having considered the pleadings, arguments, decisions relied on, *the Constitution* and the law, the only viable point proven and upon which the petitioner can succeed is on the fact that the National Assembly having annulled the Private Security (General) Regulations, 2019, they became invalid, null and void on the day the report was adopted, namely 19th November 2019. Anything done on the basis of the regulations after 19th November 2019 would equally be invalid, null and void. However, actions taken under provisions of the Act and not the regulations would not be affected.
96. The appointment of board members of the Authority was made before the regulations were annulled and was therefore lawful. The Appointment of Mohammed Fazul would be against *the Constitution* and the law save that the documents relied on were not confirmed as authentic due to lack of vital specific details. The appointment of Prof. Stephen Ng'ang'a as Chairperson of the Authority was annulled in Judicial Review 37 of 2017 by virtue of that decision, he ceased to hold office. This court cannot issue another order of certiorari over the same issue. The rest of the issues raised including seeking prayers on them such as visiting security firms during covid seem to have been overtaken by events and are not available for this court's action.
97. In the circumstances and based on the above conclusions, the only order the court considers appropriate to grant and which it hereby does is:
 - a. A declaration that the National Assembly having annulled the Private Security (General) Regulations, 2019 they became invalid, null and void and anything done based on the regulations after annulment on 19th November 2019 is equally invalid, null and void. For avoidance of doubt, actions taken pursuant to the provisions of the Act and not the regulations would not be affected.
 - b. Costs being discretionary and this petition having been brought in the public interest each party shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY 2025

E C MWITA

JUDGE

JUDGMENT PETITION 122 OF 2020

