



**Azimio La Umoja One Kenya Coalition Party v President of Kenya & 9 others; Kenya National Commission on Human Rights (Interested Party) (Petition E153 of 2023) [2024] KEHC 8251 (KLR) (Constitutional and Human Rights) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8251 (KLR)

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

**PETITION E153 OF 2023**

**LN MUGAMBI, J**

**JULY 11, 2024**

**BETWEEN**

**AZIMIO LA UMOJA ONE KENYA COALITION PARTY ..... PETITIONER**

**AND**

**THE PRESIDENT OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**SPEAKER OF THE NATIONAL ASSEMBLY ..... 3<sup>RD</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 4<sup>TH</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 5<sup>TH</sup> RESPONDENT**

**NATIONAL INTELLIGENCE SERVICE ..... 6<sup>TH</sup> RESPONDENT**

**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS . 7<sup>TH</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION ..... 8<sup>TH</sup> RESPONDENT**

**COMMISSION FOR ADMINISTRATIVE JUSTICE ..... 9<sup>TH</sup> RESPONDENT**

**INDEPENDENT POLICE OVERSIGHT AUTHORITY ..... 10<sup>TH</sup> RESPONDENT**

**AND**

**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS .... INTERESTED PARTY**



## **The establishment of a Commission of Inquiry into the Shakahola Tragedy by the president was unconstitutional**

*The petition challenged the action by the President of Kenya to establish the ‘Commission of Inquiry into the Shakahola Tragedy’. The court held that the President’s action of establishing a Commission of Inquiry and assigning it the parallel mandate to those assigned by the Constitution to Independent Offices and Commissions and various legislation undermined their powers and authority and was thus unconstitutional. In addition, section 3 of the Commission of Inquiry Act that allowed the President unrestricted discretion to appoint a Judge and assign tasks to such a Judge in the executive branch did not align with the constitutional principle of separation of powers and was therefore a threat to the independence of the Judiciary. To that extent, Section 3 of the Commission of Inquiry Act was unconstitutional.*

Reported by Robai Nasike

**Constitutional Law** – executive – the president – immunity of the president – protection from legal proceedings – joinder of the president to legal proceedings – whether the joinder of the president as a party to the petition, in light of the provisions on immunity from legal proceedings involving the president – Constitution of Kenya, 2010, article 143.

**Constitutional Law** – constitutional commissions – commissions of inquiry – president’s power to set up a commission of inquiry – where the mandate of the commission of inquiry into the Shakahola Tragedy seemed to overlap with the mandates of Independent Constitutional Offices and Commissions – whether the President went beyond the scope of authority granted to him in establishing a Commission of Inquiry into Shakahola Tragedy – whether the president had assigned the Commission of Inquiry into the Shakahola Tragedy the mandates that constitutionally belonged to Independent Constitutional Offices and Commission hence the action violated the Constitution – Constitution of Kenya, 2010, Article 249 (2) (a).

**Constitutional Law** – constitutionality of statutes – the constitutionality of section 3 of the Commission of Inquiry Act – where section 3 of the Commission of Inquiry Act gave the president power to establish a commission of inquiry – whether section 3 of the Commission of Inquiry Act gave the president unrestricted discretion in the establishment of commissions of inquiry, hence was unconstitutional – Commission of Inquiry Act, section 3.

### **Brief facts**

The Petition challenged the action by the President of Kenya of establishing the ‘Commission of Inquiry into the Shakahola Tragedy’. The president allegedly granted it the mandate that usurped the powers of and undermined the authority of established Constitutional institutions, State organs, State Officers and the independence of the Judiciary, hence violating the Constitution. According to the petitioner, one of the key suspects in the ‘Shakahola Massacre’ was arrested following a discovery of bodies on a piece of land that he was linked to in Kilifi County.

On May 4, 2023, the President of Kenya through Gazette Notice No.5660 established a ‘Commission of Inquiry into the Shakahola Tragedy’. The petitioner impugned the President’s action of forming the Commission of Inquiry. The petitioner contended that it amounted to usurpation and undermining of the powers duly assigned to constitutional institutions, State Organs and State Officers. Specifically, the initiative led to usurpation of the powers and mandate of the Judiciary, the National Police Service, the Director of Public Prosecution and the Public Service Commission’s mandate, Parliament, the Independent Police Oversight Authority, and the Kenya National Human Rights Commission. Equally, the petitioner stated that the establishment of the Commission of Inquiry was a breach of the Commission for Administrative Justice’s function to investigate any conduct in state affairs or any act or omission in public administration by any State Organ or State Public Officer. The petitioner further alleged that the action undermined the Senate’s authority in forming an ad-hoc committee whose functions mirrored those of the established Commission of Inquiry. As a consequence, the petitioner faulted the President’s action of forming the Commission of Inquiry into the Shakahola Tragedy for being in contravention of the Constitution.



## Issues

- i. Whether the joinder of the president as a party to the petition, in light of the provisions on immunity from legal proceedings involving the president
- ii. Whether the president went beyond the scope of authority granted to him in establishing a commission of inquiry into the Shakahola tragedy.
- iii. Whether the president had assigned the commission of inquiry into the Shakahola tragedy the mandates that constitutionally belonged to independent constitutional offices and commissions hence the action violated the constitution.
- iv. Whether section 3 of the Commission of Inquiry Act gave the president unrestricted discretion in the establishment of commissions of inquiry, hence was unconstitutional.

## Held

1. The President enjoyed constitutional immunity from legal proceedings under article 143 of the Constitution. The President or a person performing the functions of the office of the President could not be sued during their tenure of office for acts or omissions relating to those functions. Such actions ought to be brought against the President via the Attorney General. The President could not be joined as a party in a suit concerning an act done in the execution of official duties as President. Including the President as a party in the instant petition was thus improper as it was contrary to Article 143 of the Constitution. The 1<sup>st</sup> respondent should not have been joined as a Party in the instant Petition.
2. Article 165 (3) (d) (ii) of the Constitution conferred the High Court with the jurisdiction to determine whether anything said to be done under the authority of the Constitution or any law was inconsistent with or in contravention of the Constitution hence it had the duty to determine the constitutionality and legality of the President's executive decision under the principle of checks and balances. Should the Court find that the President's decision was made outside of the scope of his authority or in violation of constitutional principles and values, the Court must invalidate the decision. The basis for invalidation was Article 2 of the Constitution which proclaimed the Constitution to be the supreme law of the Republic that bound all persons and State Organs at both levels of Government and asserted that no person could claim or exercise State authority except as authorised by the Constitution. Further, any act or omission in contravention of the Constitution was invalid.
3. To enhance greater accountability and the rule of law, the Constitution introduced independent constitutional commissions and offices and gave them specific mandates to boost the observance of constitutional values. It also shielded them from interference in the execution of their mandates from other arms of government or persons. Article 249 (2) (a) of the Constitution provided that the Commissions and holders of Independent Offices were subject only to the Constitution and the law.
4. The terms of reference of the Commission of Inquiry into Shakahola Tragedy were set up by the President on May 4, 2023, through Gazette Notice No.5660. The first four terms of reference were investigative in nature, inquiring into issues of death, human rights abuses, individual/ public institution lapses, and security shortfalls, all related to the Shakahola Tragedy. The investigation of deaths and identification of persons and organizations who bore the greatest responsibility and recommendation of the specific actions to be taken against such persons; was a responsibility that belonged to the National Police Service which had the exclusive mandate to investigate crime. Indeed, the investigation of deaths (homicide) was specifically assigned to the Directorate of Criminal Investigation which was under the National Police Service.
5. Article 245 (4) (b) of the Constitution provided that the Cabinet Secretary could give directions on any matter concerning policy for the National Police Service, but no person could give direction to the Inspector General concerning the investigation of any particular offence or offences. The Constitution however recognized that the Director of Public Prosecution under Article 157 (4) of the Constitution could direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector General shall comply with any such direction. A



- harmonious reading of the Constitution ensured that those provisions sustained each other rather than destroyed the other.
6. It was difficult to see how the action of the President using the powers under the Commission of Inquiry Act could constitutionally confer the mandate of the police to investigate crime and purport to bestow it on a Commission of Inquiry. It was not constitutionally viable to establish a Commission of Inquiry with a parallel mandate of investigating offences of death committed in Shakahola as that was a specific mandate of the police. The appropriation of the 5<sup>th</sup> respondent's specific mandate by the President was evident and could not stand.
  7. One of the terms of reference was the violation of human rights, where the Commission of Inquiry was to inquire into 'torture, inhumane and degrading treatment of members and other persons linked to the Good News.' The interested party, the Kenya National Commission on Human Rights (KNCHR) had the mandate to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated. The powers and functions of the KNCHR were elaborated in the Kenya National Commission on Human Rights Act. By creating a Commission of Inquiry to "inquire into torture, inhumane and degrading treatment of members and other persons linked to the Good News' the 1<sup>st</sup> respondent had unilaterally seized the Interested Party's explicit mandate and allocated it to a Commission of Inquiry he created. That action was thus unconstitutional.
  8. The President should respect the specific mandate given to the Independent Offices and Commissions under the Constitution. He could not create extra-constitutional bodies to undertake specific functions belonging to agencies created by the Constitution. He could not use general powers to override specific powers. Specific or detailed provisions of a legal instrument should prevail over more general provisions. Although the President was under an obligation to embody the observance of human rights in the performance of his responsibilities, that did not give him the latitude to appropriate specific responsibilities assigned to other constitutional bodies.
  9. Taking away the specific duties of a Constitutional or Statutory body and assigning them to a body created by the President was undermining the independent Constitutional bodies and Offices. It was an abrogation of the Constitution. Plucking the various constitutional mandates and unilaterally concentrating them on a Commission of Inquiry was unconstitutional, null and void. Reading the mandates of the CAJ side by side with the terms of reference of the Commission of Inquiry, one could not escape the glaring overlap between the Commission of Inquiry into Shakahola Tragedy, and the Constitutional and Statutory responsibilities of the Commission on Administrative Justice.
  10. The President assigned the Commission of Inquiry into Shakahola Tragedy a mandate that the Constitution specifically set aside for Independent Constitutional bodies and Offices. The President had no authority to confer specific constitutional mandates belonging to Independent Constitutional Commissions and independent offices using the powers derived from a Statute hence that action was unconstitutional.
  11. The Parliamentarians who sat to pass the Commission of Inquiry Act in 1961 were guided by the experiences of the time and could not thus be assumed to have been in tune with Kenya's constitutional values and principles heralded by the promulgation of the Constitution of Kenya 2010. Consequently, the Commission of Inquiry Act was one of those legislations that must be read with necessary modification as required by section 7 of the Sixth Schedule which provided that all laws in force immediately before the effective date continued to be in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.
  12. Unlike pre-2010, the Constitution radiated constitutionalism in which the government had limited powers and neither arm was superior nor subservient to others in the execution of mandated functions. The principle of separation of powers, the expanded Bill of Rights and the national values and principles of governance were key constitutional features. The President could only exercise the powers



- and responsibilities bestowed on him and could not arrogate to himself any of the powers assigned to any other arm or Independent Office or Commission.
13. Turning to the separation of powers doctrine, the 1<sup>st</sup> respondent indicated that before the appointment of Justice Lesiit to the Commission into Shakahola Tragedy, the President consulted with the Chief Justice. That could perfectly be so, but the consultation was out of a pure act of deference, not as a result of any binding legal obligation. Section 3 of the Commission of Inquiry Act did not oblige the President to consult. It did not embody that important constitutional safeguard whenever the President found it necessary to appoint a Judge to undertake such an assignment. The President could exercise that power as he pleased if he decided so, and there lay the threat to the principle of constitutional separation of powers and the independence of the Judiciary.
  14. Such extensive discretionary power to appoint anyone, including a serving Judge for tasks within the executive was a vestige of the past unrestrained executive power that was filtering to even the Judicial arm. To the extent that the President may discretionarily gazette and assign a serving Judge for an assignment within the executive branch as he pleased, was inimical to the separation of powers and a potential threat to judicial independence. The scheme of things signified by section 3 of the Commission of Inquiry Act had no place in the existing constitutional dispensation. Judicial independence as a constitutional value was diluted by unbridled application of section 3 of the Commission of Inquiry Act to the extent that it allowed the President to appoint whomever he pleased, including serving Judges to perform tasks within the executive branch. Section 3 of the Commission of Inquiry Act was a relic of the imperial presidency and was not aligned with the current constitutional values and principles on separation of powers and independence of the Judiciary hence unconstitutional, null and void.
  15. The President's action of establishing a Commission of Inquiry and assigning it the parallel mandate to those assigned by the Constitution to Independent Offices and Commissions and various legislation undermined their powers and authority and was thus unconstitutional. In addition, section 3 of the Commission of Inquiry Act that allowed the President unrestricted discretion to appoint a Judge and assign tasks to such a Judge in the executive branch did not align with the constitutional principle of separation of powers and was therefore a threat to the independence of the Judiciary. To that extent, Section 3 of the Commission of Inquiry Act was unconstitutional.

*Petition allowed.*

### **Orders**

- i. *A declaration was issued that the decision of the President of the Republic of Kenya made on May 4, 2023, in the Kenya Gazette No. 5660 establishing the Commission of Inquiry into Shakahola Tragedy and attempting to confer powers of Independent Constitutional Commissions and Offices (the respondents and the Interested Party) to the said Commission of Inquiry was unconstitutional, null and void.*
- ii. *A declaration was issued that to the extent that section 3 of the Commission of Inquiry Act gave the President unrestrained discretionary power to appoint a serving Judge to the Commission of Inquiry undermined the principle of separation of powers and was a threat to the independence of the Judiciary and was therefore unconstitutional, null and void.*
- iii. *An order of certiorari was issued quashing the Kenya Gazette No. 5660 made on May 4, 2023, by the President of the Republic of Kenya.*
- iv. *There shall be no orders as to costs.*

### **Citations**

#### **Cases**

#### **Kenya**



1. *Alai, Robert v Attorney General & another* Petition 174 of 2016; [2017] KEHC 6090 (KLR) - (Explained)
2. *Attorney-General & 2 others v Ndiir & 79 others; Dixon & 7 others (Amicus Curiae)* Petitions 12, 11 & 13 of 2021; [2022] KESC 8 (KLR) (Consolidated) - (Explained)
3. *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* Petitions 628, 630 of 2014 & 12 of 2015; [2015] eKLR (Consolidated) - (Explained)
4. *Coalition for Reforms and Democracy (CORD) v Attorney General; International Institute for Legislative Affairs & Katiba Institute (Interested Parties)* Petition 476 of 2015; [2019] KEHC 10892 (KLR) - (Explained)
5. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 15 (KLR) - (Explained)
6. *Council of County Governors v Attorney General & Independent Electoral and Boundaries Commission* Constitutional Petition 56 of 2017; [2017] KEHC 6395 (KLR) - (Mentioned)
7. *Council of Governors & 47 others v Attorney General & 6 others* Reference 3 of 2019; [2019] KESC 65 (KLR) - (Explained)
8. *Council of Governors & 6 others v Senate* Petition 413 of 2014; [2015] KEHC 6967 (KLR) - (Explained)
9. *Gatirau, Peter Munya v Dickson Mwenda Kithinji & another* Petition 2 of 2014; [2014] KESC 49 (KLR) - (Explained)
10. *In the Matter of Interim Independent Electoral Commission* Constitutional Application 2 of 2011; [2011] KESC 3 (KLR) - (Explained)
11. *In the Matter of the National Gender and Equality Commission* Reference 1 of 2013; [2014] KESC 42 (KLR) - (Explained)
12. *Judicial Service Commission v Salaries and Remuneration Commission & another* Petition 274 of 2016; [2018] KEHC 4765 (KLR) - (Explained)
13. *Kamau, Michael Sistu Mwaura v Ethics & Anti-Corruption Commission & 4 others* Civil Appeal 102 of 2016; [2017] KECA 406 (KLR) - (Explained)
14. *Karua, Martha Wangari v Independent Electoral & Boundaries Commission & 3 others* Civil Appeal 12 of 2018; [2018] KECA 41 (KLR) - (Explained)
15. *Kimaru & 17 others v Attorney General & another; Kenya National Human Rights and Equality Commission (Interested Party)* Petition 226 of 2020; [2022] KEHC 114 (KLR) - (Explained)
16. *Law Society of Kenya v Attorney General & 2 others* Constitutional Petition 313 of 2014; [2016] KEHC 5096 (KLR) - (Explained)
17. *Law Society of Kenya v Attorney General & another* Petition 4 of 2019; [2019] KESC 16 (KLR) - (Explained)
18. *Mate, Justus Kariuki & another v Martin Nyaga Wambora & another* Civil Appeal 24 of 2014; [2014] KECA 376 (KLR) - (Explained)
19. *Njoya, Timothy & 17 others v Attorney General & 4 others* Petition 137 of 2011; [2013] KEHC 6000 (KLR) - (Explained)
20. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Attorney General (Intended Amicus Curiae)* Presidential Election Petition 1 of 2017; [2017] KESC 36 (KLR) - (Explained)
21. *Owira, Rose & 23 others v Attorney-General & 6 others* Constitutional Petition 410 of 2018; [2020] KEHC 10190 (KLR) - (Mentioned)
22. *Rawal, Kalpana H & 2 others v Judicial Service Commission & 2 others* Civil Application 11 & 12 of 2016; [2016] KESC 4 (KLR) - (Explained)
23. *Republic v Commission on Administrative Justice Ex parte Stephen Gathuita Mwangi* Miscellaneous Civil Cause 128 of 2016; [2017] KEHC 9244 (KLR) - (Explained)



24. *Republic v Fazul Mahamed & 3 others Ex-Parte Okiya Omtatab Okoiti* Miscellaneous Civil Application 617 of 2017; [2018] KEHC 9435 (KLR) - (Explained)
25. *Speaker, Nairobi City County Assembly & another v Attorney General & 3 others* Reference 1 of 2021; [2021] KESC 52 (KLR)
26. *Thirdway Alliance Kenya & another v Kinyua & 2 others; Kimani & 15 others (Interested Parties)* Constitutional Petition 451 of 2018; [2020] KEHC 7887 (KLR) - (Explained)

### **South Africa**

1. *City of Cape Town v Premier, Western Cape, and Others* (5933/08) [2008] ZAWCHC 52; 2008 (6) SA 345 (C) - (Explained)
2. *South African Association of Personal Injury Lawyers v Heath Willem Hendrick and 3 Others* (CCT27/00) [2000] ZACC 22; 2001 (1) SA 883; 2001 (1) BCLR 77 - (Explained)

### **India**

*Hamdard Dawakhana v Union of India Air* [1960] AIR 554, 1960 SCR (2)671 - (Explained)

### **United States**

*Mistretta v United States* 488 US 361 (1989) - (Mentioned)

### **Regional Court**

*Attorney General v Anyang Nyong'o & 10 others* Application No 5 of 2007 - (Mentioned)

### **Statutes**

#### **Kenya**

1. Commission on Administrative Justice Act (cap 7J) section 3 - (Interpreted)
2. Commissions of Inquiry Act (cap 102) - (Interpreted)
3. section 3, 8, 42
4. Constitution of Kenya articles 1(2); 2; (3)(a)(b); 2(1); 10; 25(a); 25(d); 29; 59; 129(2);131(2)(e), (4); 143(2); 157; 159 (1); 160 (1); 162; 169 (1) (d); 234(2); 233 (1)(2); 242; 248; 249; 245; 254; Schedule Sixth- (Interpreted)
5. Independent Policing Oversight Authority Act (cap 86) sections 4, 7, 29 - (Interpreted)
6. Kenya National Commission On Human Rights Act (cap 71) In general - (Cited)
7. National Police Service Act (cap 11A) section 106(1) - (Interpreted)
8. Office of the Director of Public Prosecutions Act (cap 6B) In general - (Cited)
9. Prevention of Torture Act (cap 88) sections 3, 12(1) - (Interpreted)
10. Public Order Act (cap 56) - (Interpreted)
11. Public Service Commission Act (cap 185) section 74 - (Interpreted)

### **Advocates**

*Paul Mwangi and Company Advocates* for the petitioner.

*Emmanuel Bitta* State Counsel, for the 2nd respondent.

*Victor Mule*, Deputy Director of Public Prosecutions, for the 4th respondent.

*Elizabeth Musembi* for the 9<sup>th</sup> respondent.

*Mr Kinoti* for the 10<sup>th</sup> respondent.

## **JUDGMENT**

### **Introduction**

1. The petition dated May 8, 2023 is supported by the petitioner's affidavit in support sworn on even date. The petition challenges the action by the President of Kenya to establish the 'Commission of



Inquiry into the Shakahola Tragedy' and granting it the mandate allegedly that usurp the powers of, and undermine the authority of established constitutional institutions, State organs, State Officers and the independence of the Judiciary hence a violation of the Constitution.

2. Accordingly, the petitioner seeks the following reliefs against the respondents:
  - a. A declaration that the decision of the President of Republic of Kenya in Kenya Gazette Notice No 5660 made on May 4, 2023, purportedly to establish a Commission of Inquiry called "Commission of Inquiry Into the Shakahola Tragedy" is an usurpation by the President of the Sovereignty of the People of Kenya by attempting to donate powers duly donated by the Constitution of Kenya to Constitutional Institutions, State Organs and State Officers to his own personal nominees identified, nominated, empowered and mandated at his absolute whim and discretion and consequently is an initiative by the President to undermine the constitutional mandate and authority of those constitutional institutions, state organs and state officers.
  - b. A declaration that the formation of the Commission of Inquiry into the Shakahola Tragedy is a usurpation of the powers and undermining of authority of Judiciary under article 159(1), 160(1), 162 and 169(1)(d) of the Constitution.
  - c. A declaration that the formation of the Commission of Inquiry into the Shakahola Tragedy is a usurpation of the powers and undermining of authority of the Public Service Commission under article 233(1) and 234(2) of the Constitution.
  - d. A declaration that the formation of the Commission of Inquiry into the Shakahola Tragedy is a usurpation of the powers and undermining of authority of the National Intelligence Service under article 242 of the Constitution.
  - e. A declaration that the formation of the Commission of Inquiry into the Shakahola Tragedy is a usurpation of the powers and undermining of authority of the Senate which has already commissioned an ad-hoc Committee to investigate the Shakahola Massacre whose mandates have been duplicate.
  - f. A declaration that the formation of the Commission of Inquiry into the Shakahola Tragedy is a usurpation of the powers and undermining of authority of the Independent Policing Oversight Authority under section 7 of the Independent Policing Oversight Authority Act of 2012.
  - g. A declaration that the formation of the Commission of Inquiry into the Shakahola Tragedy is a usurpation of the powers and undermining of authority of the Kenya National Human Rights and Equality Commission under article 59 of the Constitution.
  - h. A declaration that the formation of the Commission of Inquiry into the Shakahola Tragedy is a usurpation of the powers and undermining of authority of the Director of Public Prosecutions under article 157 of the Constitution.
  - i. A declaration that the formation of the Commission of Inquiry into the Shakahola Tragedy is a usurpation of the powers and undermining of authority of the Inspector-General under article 245 of the Constitution.
  - j. A declaration that Commissions of Inquiry Act of 1962 (Revised in 2010) be declared unconstitutional.



- k. A declaration that section 3 of the *Commissions of Inquiry Act* of 1962 (Revised in 2010) is in contravention with the *Constitution* therefore null and void.
- l. An order awarding costs of the petition to the petitioner.
- m. This court be pleased to issue such further orders writs and directions that this court may consider appropriate in the circumstance for the purpose of protecting the *Constitution* and all state organs.

**Petitioner’s Case- (Azimio La Umoja One Kenya Coalition Party)**

- 3. According to the petitioner, Paul McKenzie Nthenge, one of the key suspects in ‘Shakahola Massacre’ was arrested on April 15, 2023 following a discovery of four bodies a piece of land that he was linked to in Kilifi County. As revelations of more missing persons around the Coastal Town of Malindi were volunteered by the members of the public, investigations were launched by the police on April 21, 2023. On April 23, 2023; 12 more bodies in 7 graves were discovered in Shakahola village within a compound.
- 4. By gazette notices number 52 and 53 of 2023 published on April 25, 2023, the Cabinet Secretary for Interior and Coordination of National Government declared Chakama Ranch, LR 13472/1 measuring 20418 Ha, situated in Lango Baya Division, Malindi Sub-County, of Kilifi County, a disturbed area pursuant to section 106(1) of the *National Police Service Act* (cap 11A) and section 8 of the *Public Order Act* (cap 56) of the Laws of Kenya. The areas were also declared a crime scene hence access by the public was restricted unless with the permission of the Operations Commander. More security officers were deployed to aid is search and rescue operation which led to more finds.
- 5. The Senate reacted by setting up an ad-hoc committee on April 27, 2023 to among others investigate the proliferation of religious organizations and the circumstances that led to the death of 95 people in Shakahola, Kilifi County. The Senate Committee, led by its Chairperson Senator Dunson Mugatana and the Senate Speaker visited Chakama Ranch in Shakahola on April 30, 2023.
- 6. As at May 1, 2023; 109 bodies had been recovered and the post-mortem was commenced at Malindi Sub-County Hospital Mortuary. Paul McKenzie alongside his wife, Rhoda Maweu, Pastor Ezekiel Odero of New Life Church and 24 other persons were arrested for various criminal offences and investigations were still on course.
- 7. On May 4, 2023, the President of Kenya through Gazette Notice No 5660 established a ‘Commission of Inquiry into the Shakahola Tragedy’ whose mandate was to: inquire into the matter of the deaths, torture, inhumane and degrading treatment of members and other persons linked to the Good News International Church in Kilifi County; establish the circumstances under which the deaths, torture, inhumane and degrading treatment occurred; inquire into the legal, institutional, administrative, security, and intelligence lapses that may have contributed to the occurrence of the Shakahola Tragedy; identify, the persons and organizations who bear the greatest responsibility for the Shakahola Tragedy; and to recommend specific actions that should be taken against them; recommend legal, administrative, or other forms of accountability action against any public official whose actions or omissions are established to have willfully or negligently contributed to the occurrence of the Shakahola Tragedy; inquire into the factors that lead to the rise of that particular religious extremist institution; as well as the factors that give rise to such religious extremist institutions, cults, or occultist groups, and other formations that foster negative religion-based activities generally; recommend legal, administrative, institutional, and regulatory reforms aimed at preventing the occurrence of future situations of deaths or gross violations of the rights and welfare of persons by religious



- extremist institutions, cults, or occultist groups, and other formations that foster negative religion-based activities; and consider, perform, or advise on any other matter or subject ancillary to the above.
8. The petitioner in this petition impugns the President's action of forming this Commission of Inquiry. The petitioner contends that it amounts to usurpation and undermining of the powers duly assigned to constitutional institutions, state organs and state officers and who are named as the respondents herein by substituting them with his own personal nominees and vesting them with the authority, at his absolute will and discretion, to carry out these functions.
  9. The petitioner cites the violation of the doctrine of separation of powers in relation to the Judiciary and contends that judicial power can be exercised only by the Judiciary and the Independent Tribunals established under the Constitution of Kenya, further that, only the Judicial Service Commission that is empowered by the Constitution to recruit qualified persons to perform the mandate delegated to the Judiciary under the Constitution. That the appointment of a sitting Judge as the Chairperson of the Commission of Inquiry by the President undermines the authority of the people of Kenya in the Judiciary and is a usurpation of the Judicial Service Commission's mandate.
  10. The petitioner contested the constitutionality of section 3 of the Commissions of Inquiry Act and in the main the whole Act for empowering the 1<sup>st</sup> respondent to constitute a body that performs judicial functions.
  11. In a like manner, the granting to the Commission the mandate to identify, based on evidence laid before it, persons and organizations who bear the greatest responsibility and the action that should be taken against them including admonition, regulatory actions, reparations, or recommendation for criminal investigation and prosecution is, according to the Petitioner, a usurpation of the National Police Service, the Director of Public Prosecution's and Public Service Commission's mandate. It was the position of the petitioner that it is the Public Service Commission which has the exclusive mandate to decide on the issues of discipline of public officers, not a Commission of Inquiry.
  12. The petitioner averred that only Parliament has oversight mandate over the National Intelligence Service hence the 1<sup>st</sup> respondent's decision is a violation of the National Assembly's authority and the National Intelligence Service function which is security intelligence.
  13. Concerning the Independent Police Oversight Authority, the petitioner's assertion was that the Commission of Inquiry's mandate was an appropriation of the Authority's function of providing civilian oversight over the work of the police in Kenya.
  14. Similarly, in so far as the Commission of Inquiry is empowered to inquire into deaths, torture, inhumane and degrading treatment of members and other persons linked to the Good News International Church in Kilifi County, it usurps the authority of the Kenya National Human Rights Commission given by article 59 of the Constitution which among others gives the Kenya National Human Rights Commission the power to promote the protection, and observance of human rights in private and public institutions; and, to monitor, investigate and report on the observance of human rights in all spheres of life; to receive and investigate complaints about alleged abuses of human rights and to take steps to secure appropriate redress where human rights have been violated.
  15. Equally the petitioner stated that establishment of the Commission of Inquiry is a breach of the Commission for Administrative Justice function to investigate any conduct in state affairs, or any act or omission in public administration by any state organ or state public officer.
  16. The Petitioner further alleged that action undermines the Senate's authority in forming an ad-hoc committee whose functions mirror those of the established Commission of Inquiry.



17. As a consequence, the petitioner faulted the President’s action of forming the Commission of Inquiry into the Shakahola Tragedy for being in contravention of the Constitution.

### **1<sup>st</sup> Respondent’s Case- (The President of Kenya)**

18. The 1<sup>st</sup> respondent did not file a response on the strength of the decision in Supreme Court Petition No 12 of 2021 as consolidated with petitions 11 and 13 of 2021; *Attorney-General & 2 others v David Ndiu & 79 others*.

### **2<sup>nd</sup> Respondent’s Case- (The Hon Attorney General)**

19. The 2<sup>nd</sup> respondent defended itself through the grounds of opposition dated May 16, 2023 as follows:
- i. Pursuant to the binding decision of the Supreme Court in Petition No 12 of 2021 as consolidated with petitions 11 and 13 of 2021; *Attorney-General & 2 others v David Ndiu & 79 others* (the BBI case) His Excellency the President’s immunity from the current proceedings was affirmed and therefore he cannot be a respondent as proposed by the petitioner.
  - ii. The application is not maintainable because it contravenes the legal principle of ‘omnia presumuntur rite et solemniter esse acta, donec probetur in contrarium’; all acts are presumed to be rightly done” until proven to the contrary, which proof may only be established after a full hearing.
  - iii. The President acted as provided in the Commissions of Inquiry Act (chapter 102) of the Laws of Kenya buttressing the legal presumption on regularity and propriety of his Excellency the President’s action.
  - iv. At the time of the President’s action and institution of the present proceedings, the Commissions of Inquiry Act is the obtaining law as provided in section 7(1) of the sixth schedule to the Constitution.
  - v. The court having declined issuance of an interim conservatory orders in the first instance, the same is not available as it would constitute a review of the decision of the court when such review has not been properly sought.
  - vi. Issuance of the orders against parties who are not privy to the proceedings would contravene the principles of natural justice.
  - vii. As provided in article 1(2) of the Constitution, sovereign power may be exercised through the people’s elected representatives including the Parliament and the President (see articles 1(3)(a) and (b).
  - viii. The establishment of the Commission of Inquiry and the terms thereof are compatible with the constitutional principles on the exercise of executive authority provided in article 129 (2) of the Constitution that the same shall be exercised with the principle of service to the people and for their well-being and benefit.
  - ix. The establishment of the Commission of Inquiry and the terms thereof are in consonance with the constitutional authority of the President provided in article 131(2)(e) which provides that the President shall ‘ensure protection of human rights and fundamental freedoms and the rule of law’.



- x. Further as provided in article 132(4) of the Constitution, the President is vested with the authority to perform any other executive function provided in the Constitution or national legislation which includes the Commissions of inquiry Act.
  - xi. The petitioner has not demonstrated a *prima facie* case in the petition.
  - xii. The petitioner has not demonstrated any real prejudice that will be suffered if the orders sought are not granted.
  - xiii. Inquiry into the Shakahola tragedy enhances constitutional values and principles.
  - xiv. It is in the greater public interest for the Commission of Inquiry to inquire into the Shakahola tragedy as opposed to there being no such inquiry as proposed by the petitioner.
  - xv. The petitioner has not demonstrated in any way how the Commission of Inquiry's actions will in any way prevent any of the enumerated public bodies in the petition from conducting or carrying out their respective functions.
20. The 2<sup>nd</sup> respondent also filed a replying affidavit by Felix Koskei, the Chief of Staff and Head of Public Service sworn on June 13, 2023 in which the joinder of the President of Kenya in this matter was opposed in view of Supreme Court Petition No 12 of 2021 as consolidated with Petitions 11 and 13 of 2021; *Attorney-General & 2 others v David Ndii & 79 others*; the primary basis of that objection being that, the joinder of the 1<sup>st</sup> respondent in these proceedings is contrary to the provisions of article 163(7) and 143(2) of the Constitution.
21. He deposed that article 132(1)(c)(i) and (ii) of the Constitution obligates the President to ensure realization of the national values articulated under article 10 of the Constitution. Further that, article 131(2)(e) of the Constitution imposes an obligation on the President to ensure protection of human rights and fundamental freedom and article 132(4) of *the Constitution* empowers the President to perform any executive function provided for in the Constitution or in any national legislation.
22. The 2<sup>nd</sup> respondent contended that President's constitutional role under the above cited provisions is independent of similar roles constitutionally assigned to various persons and institutions including independent constitutional commissions hence the reason why article 254 of the Constitution mandates independent commissions to render their own reports for similar functions hence, the President's role and those of Constitutional Commissions are not mutually exclusive, and that the Constitution contemplates collegiality, mutual cooperation and collaboration for the promotion and advancement of national values and principles. As such, the Petitioner's argument that this role is mandated to specific bodies is regressive and antithetical to the spirit of the Constitution in light of the principles of constitutional interpretation. Moreover, article 2(1) of the Constitution binds every person to the provisions of the Constitution while article 3 requires every person to uphold, respect and defend the Constitution.
23. Further, it is contended that section 3 of the Commissions of Inquiry Act states that whenever the President considers it advisable to do so, may issue a commission under the Act appointing it to inquire into the conduct of any public officer or into any matter that is in public interest. The 2<sup>nd</sup> respondent maintained that this Act gest its legal authority from section 7(1) of the sixth schedule of the Constitution. Emphasis was laid to the fact that this Act has not been declared unconstitutional and thus enjoys the presumption of constitutionality.



24. That the scale of death toll, cruelty, the inhumane and depravity of the actions has attained national notoriety that shocked the conscience of the Nation and may be judicially noticed. That at the time the affidavit was sworn, already 258 bodies had been exhumed (and counting).
25. That the tragedy exposed the existence of religious extremists' organizations, sects, cults and other similar outfits in Kenya. For this reason, the 2<sup>nd</sup> respondent avers that, the President in exercise of both constitutional authority and powers expressly conferred under the Commission of Inquiry Act, established in public interest and within the President's independent constitutional mandate to ensure protection of human rights, established a Commission of Inquiry to provide solutions.
26. That in opting for the appointment of a Commission of inquiry, the President was conscious of the fact that a Commissions of inquiry are free of many institutional impediments which at times constrain the operation of various arms of Government.
27. The 2<sup>nd</sup> respondent denied the petitioner's notion that the Commission usurps Judiciary's mandate. Further, that the appointment of a Judge in a Commission of Inquiry is also stated to be a common occurrence and hence the Petitioner's argument is speculative and without legal basis. That the appointment of Hon. Lady Justice Lesiit as the Chairperson was with the leave of the Head of Judiciary contrary to the petitioner's allegations.
28. Similarly, it was argued that there is no legal basis that only the Senate can hold an inquiry into matters of public governance and public welfare to the exclusion of any other person or body.

### **3<sup>rd</sup> Respondent's Case- (The Speaker of the National Assembly)**

29. Equally, the 3<sup>rd</sup> respondent in opposition to the petition filed grounds of opposition dated May 17, 2023 on the premise that:
  - i. The petitioner has not met the threshold for grant of conservatory orders as set by the Supreme Court of Kenya in the case of *Gatirau Peter Munya v Dickson Mwendwa Kitbinji & 2 others* (2014) eKLR as against the operationalization of the Commission of Inquiry into the Shakahola Tragedy.
  - ii. It is in the greater public interest for the Commission of Inquiry to inquire into the Shakahola tragedy as opposed to there being no such inquiry as proposed by the petitioner.
  - iii. The grant of conservatory orders as sought by the petitioner will have irreversible consequences on the quality of the findings in the final Report such that even if the petition is eventually dismissed, any inquiry will not be the same as it will now be from a historical perspective and material facts and information may be distorted. On the other hand, nothing would stop this court from staying the implementation of any recommendations made by the Commission of Inquiry.
  - iv. The petitioner has not demonstrated any real prejudice that maybe suffered if the orders sought are not granted.
  - v. Time being of essence into the inquiry, conservatory orders at this stage are not appropriate
  - vi. The President of the Republic of Kenya is obligated to exercise executive Authority in a manner that puts the wellbeing of the Kenyan Citizens at the fore front as guaranteed under article 129(2) of the *Constitution* and the same shall be exercised with the principle of service to the people.



- vii. The petitioner has not demonstrated in any way how Commission of Inquiry's actions will in any way prevent any of the stated public bodies in the petition from conducting or carrying out their respective functions.

#### **4<sup>th</sup> Respondent's Case- (The Director of Public Prosecutions)**

30. In response, the 4<sup>th</sup> respondent, filed its grounds of opposition dated May 17, 2023 and further grounds of opposition dated June 26, 2023. The first set is on the grounds that:
  - i. The 4<sup>th</sup> respondent, is an independent office holder under article 157(10) as read with article 248(1) of the Constitution and consequently does not require the consent of any person or authority for the commencement of any proceedings and in the exercise of his powers and functions, does not act under the directions and/or control of any person or authority.
  - ii. The petition and the application are an abuse of the court process and are incompetent in law for misjoinder. The 4<sup>th</sup> respondent shall at the earliest opportunity raise a preliminary objection on a point of law to be expunged and removed as a Respondent in the proceedings.
  - iii. The subject matter of the application and the petition are a grave misapprehension of the law, as the Commission of Inquiry as set up by the 1<sup>st</sup> respondent is designed to gather information on the administrative failures that occurred in government as numerous Kenyans died under horrible circumstances and disappeared without any public Officials charged with security in either the national government or the County government noticing their disappearance.
  - iv. This court should take judicial notice of Kenya Gazette Legal Notices Number 5660 titled "In the Matter of a Commission of Inquiry into the Shakahola Tragedy" published on May 4, 2023 and the ambit and scope of the Commission of Inquiry.
  - v. The Commission of Inquiry into the Shakahola Tragedy is not a usurpation of the powers of either the Director of Criminal Investigations, or the 4<sup>th</sup> respondent or the powers of any other constitutional entity.
  - vi. The purpose of the Commission as outlined in the gazette notice is for the Commission to "establish the circumstances under which the deaths and inhumane torture occurred".
  - vii. The purpose of the Commission is also captured as to "recommend legal administrative or other forms of accountability action against any public official whose actions or omissions are established to have willfully or negligently contributed to the Shakahola tragedy".
  - viii. The petitioner is mistaken in its understanding of the law, as a commission of inquiry can exist in a separate plane as the criminal justice process without usurping the powers of actors in the criminal justice sector.
  - ix. After the completion of the investigations being conducted by the Directorate of Criminal Investigations, the results thereof shall be forwarded to the 4<sup>th</sup> respondent for perusal, analysis and advise in accordance with the relevant laws. Pursuant to the perusal and analysis of the evidence, the 4<sup>th</sup> respondent shall execute its mandate in accordance with article 157 of the Constitution.
  - x. The criminal justice actors, especially the 4<sup>th</sup> respondent shall not be influenced in any way by the work done by the Commission of Inquiry into the tragedy.



- xi. It is improper of the petitioner to include the 4<sup>th</sup> respondent as a respondent as has nothing to respond to in the petition as he and his officers are not part of the impugned Commission of Inquiry.
  - xii. The only interaction between the 4<sup>th</sup> respondent and the Shakahola tragedy has been that the 4<sup>th</sup> respondent and some of his officers have been offering prosecution guided investigational advice to the Directorate of Criminal Investigations team. This is an action steeped within the law and in furtherance to the public good.
  - xiii. The 5<sup>th</sup> respondent is properly vested with investigative powers by the Constitution and that after concluding his investigations a criminal file with recommendations will be forwarded to the office of the 4<sup>th</sup> respondent for perusal and recommendations as to whether further police action is required or the matter will be prosecuted.
  - xiv. It is in the public interest that the investigations being conducted by the Directorate of Criminal Investigations and the separate inquiry into how the tragedy occurred and was not noticed or stopped by public officials is investigated and continues by both.
  - xv. The 4<sup>th</sup> respondent opposes the award of costs to the petitioner.
  - xvi. The 4<sup>th</sup> respondent vigorously opposes the granting of any of the orders sought by the petitioner.
  - xvii. The petitioner will not be prejudiced in any way if the orders sought are not granted.
31. In the further grounds, the 4<sup>th</sup> respondent posited that:
- i. The 4<sup>th</sup> respondent, is an independent office holder under article 157(10) as read with article 248(1) of the Constitution and consequently, does not require the consent of any person or authority for the commencement of any proceedings and in the exercise of his powers and functions, does not act under the directions and/or control of any person or authority.
  - ii. The 4<sup>th</sup> respondent has no oversight role over the 1<sup>st</sup> respondent as that is a preserve of Parliament and the Judiciary as the three arms of government act as a system of checks and balances against each other.
  - iii. The office of the 4<sup>th</sup> respondent has no role in the establishment or day to day activities of the impugned commission of inquiry.
  - iv. The role of the fourth respondent is primarily to exercise powers of state prosecution.
  - v. We reiterate as we had stated in our first grounds of opposition dated May 17, 2023 that that the Commission of Inquiry as established by his Excellency the 1<sup>st</sup> respondent does not have an investigative role but instead plays an inquisitorial role. This is well captured in the gazette notice which established Commission to establish the circumstances under which the deaths and inhumane torture occurred.
  - vi. The purpose of the Commission of inquiry is not to usurp the powers of the Director of Public Prosecutions as the gazette notice was not couched in a manner to usurp the role of the Director of Public Prosecutions.
  - vii. Even if the impugned gazette notice was couched in manner to attempt to usurp the powers of the Director of Public Prosecutions, a gazette notice cannot veto the will of the Kenyan people as expressed in article 157 of the Constitution. The grundnorm reigns supreme.



- viii. We rigorously oppose the award of costs to the petitioner.
- ix. We vigorously oppose the granting of any of the orders sought by the petitioner.
- x. The petitioner will not be prejudiced in any way if the orders sought are not granted.

#### **5<sup>th</sup> and 6<sup>th</sup> Respondents case- (The Inspector General of Police & The National Intelligence Service)**

- 32. The 5<sup>th</sup> and 6<sup>th</sup> respondents' responses are not in the court file or Court Online Platform (CTS).
- 33. The Kenya National Commission on Human Rights was initially the 7<sup>th</sup> respondent but it converted into an interested party, but the serialization of the parties did not change to maintain consistency. There was thus no 7<sup>th</sup> respondent in the petition.

#### **8<sup>th</sup> Respondent's Case- (The Public Service Commission)**

- 34. Dr Simon K Rotich the 8<sup>th</sup> respondent's Chief Executive Officer filed a replying affidavit sworn on September 5, 2023 in response to the petition. He posits that according to the Terms of Reference, the Commission of Inquiry can only recommend legal, administrative or any other form of accountability action against a public official but cannot take any disciplinary action against a public officer.
- 35. The 8<sup>th</sup> respondent stated that the disciplinary function is the preserve of the 8<sup>th</sup> respondent in line with article 234(2) of the *Constitution* as read with Part XII of the Public Service Commission. As such, it contends that any purported disciplinary action taken by the Commission of Inquiry would be unconstitutional.
- 36. In the same manner, it is stated that the disciplinary of a public officer can only be conducted by an authorized officer or lawful appointing authority, with the 8<sup>th</sup> respondent retaining the definitive authority on appeal as envisaged under section 74 of the *Public Service Commission Act*.
- 37. The 8<sup>th</sup> respondent stated that the commission's recommendations in respect of a public officer's conduct have to be subjected to due process to determine the public officer's guilt as required by the law. As such, such a recommendation cannot lead to an automatic sanction of the public officer.
- 38. In closing, the 8<sup>th</sup> respondent asserted that it had been wrongly joined in this matter as no order had been sought against it in the petition hence the case against the 8<sup>th</sup> respondent lacks merit and ought to be dismissed.

#### **9<sup>th</sup> Respondent (The Commission on Administrative Justice)**

- 39. The Commission on Administrative Justice filed a replying affidavit through the Commission's Chief Executive Officer, Mercy K. Wambua who affirmed that the Commission is established under article 59 (4) of the *Constitution* and section 3 of the Administrative Justice Act, 2011 with the mandate to investigate any conduct in state affairs, or any act or omission in public administration by any state organ, state or public officer in national and county government that may result in any impropriety or prejudice. That its statutory powers include inquiring into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehavior, inefficiency or ineptitude within the public service.
- 40. The 9<sup>th</sup> respondent stated that the issues arising from the unfortunate Shakahola tragedy are cross-cutting and required a multi-sectoral approach with various entities that include the independent bodies constituted to perform specific responsibilities as assigned by the *Constitution* and relevant enacting laws. The 9<sup>th</sup> respondent stated that it was considering the various issues that had arisen in



relation to Shakahola incident in line with its mandate. Further, that the petitioner had not alleged any violation of constitutional rights and fundamental freedoms against it in the petition.

### **10<sup>th</sup> Respondent's Case- (The Independent Police Oversight Authority)**

41. In reaction to the petition, the 10<sup>th</sup> respondent through its Director, Elema Halake filed a replying affidavit sworn on 2 August 4, 2023. It is asserted that contrary to the ordinary nature of a petition, the instant petition seeks to protect the mandate of the 10<sup>th</sup> respondent as like the other respondents hence no adverse claim has been made against it. In light of this, the 10<sup>th</sup> respondent contends that the petitioner's claim for costs against it is baseless as there is no claim that it violated its rights and the matter is in public interest.
42. The 10<sup>th</sup> respondent is stated that it is currently conducting investigations into Shakahola tragedy to determine whether it occurred due to the laxity or dereliction of duty on the part of members of the National Police Service. Upon conclusion and in line with section 29 of the [Independent Policing Oversight Authority Act](#), the 9<sup>th</sup> respondent will make the appropriate recommendations to the various state agencies.
43. That in view of the Shakahola tragedy's underlying causes; remedial measures require a multi-sectoral approach that should not be constrained by the shackles of each body's mandate. According to the 9<sup>th</sup> respondent, this avenue has been provided for through the Commission of Inquiry's broad mandate. It is noted that the relevance and efficacy of Commissions' of Inquiry have also been recognized in caselaw.
44. In this regard, it stated that the Commission's recommendations will support the 10<sup>th</sup> respondent's mandate. Furthermore, it is stated that the mandate of enforcing human rights and fundamental freedoms is not the exclusive mandate of constitutional commissions and independent officers but all, including the 1<sup>st</sup> respondent as authorized under article 131(2)(e) of the [Constitution](#).
45. The 10<sup>th</sup> respondent further stated that the [Constitution](#) of Kenya Review Commission (CKRC) (2005) and the Committee of Experts on Constitutional Review (2010) did not take issue with Commissions of Inquiry as established under the [Commissions of Inquiry Act](#). Accordingly, the 1<sup>st</sup> respondent's mandate is stated to be complementary to the mandate of the constitutional commissions, independent offices and agencies. To this end, the 10<sup>th</sup> respondent opposed the notion that its mandate has been usurped by the establishment of the Commission of Inquiry.
46. In reply the 10<sup>th</sup> respondent also filed its grounds of opposition dated May 17, 2023 on the basis that:
  - i. The 10<sup>th</sup> respondent has been wrongfully enjoined in the notice of motion application and the petition.
  - ii. The notice of motion application and the petition do not disclose any cause of action against the 10<sup>th</sup> respondent as no adverse claims have been against the 10<sup>th</sup> respondent.
  - iii. The 10<sup>th</sup> respondent has no oversight mandate over the 1<sup>st</sup> respondent, neither does it have any role in the establishment or otherwise of the commission of inquiry.
  - iv. The notice of motion application and petition is about the petitioner/applicant opposition to the actions of the 1<sup>st</sup> respondent in establishing a commission of inquiry.
  - v. There is no claim made that the 10<sup>th</sup> respondent has violated any constitutional rights and fundamental freedoms of the petitioner or anyone else in any way shape or form.



- vi. The notice of motion application and petition therefore simply serve to embarrass the 10<sup>th</sup> respondent.
- vii. The 10<sup>th</sup> respondent will therefore at the earliest instance in accordance with the Constitution of Kenya (protection of rights and fundamental freedoms) Practice and Procedure rules, 2013 seek to be struck off from the application and petition.
- viii. The petitioner had not demonstrated any prima facie case with a likelihood of success.
- ix. The petitioner has failed to demonstrate any prejudice he will suffer if the interim conservatory orders are not granted.
- x. The application does not meet threshold for the grant of any of the orders sought.

### **Interested Party's Case**

- 47. The interested party filed a replying affidavit by its Chief Executive Officer, Dr Benard Mogesa. He states that among the Commission of Inquiry's mandate is to: Inquire into the matter of deaths and torture, inhumane and degrading treatment of members and other persons linked to the Good News International Church in Kilifi County within the Republic of Kenya; and to establish the circumstances under which the deaths, torture, inhumane and degrading treatment occurred.
- 48. The interested party stated that this role is constitutionally and statutorily mandated to the Interested party hence is a blatant violation of both the Constitution and the statute. Besides, the interested party is also required to implement key legislations falling within its mandate such as the Prevention of Torture Act (2016) which is An Act of Parliament that is designed to give effect to article 25(a) and 29(d) of the Constitution.
- 49. Section 3 of Prevention of Torture Act provides the scope to which the applies to include: offences of torture and other cruel, inhuman or degrading treatment or punishment where the alleged offender is a citizen of Kenya; the offence was committed in any territory under the control or jurisdiction of Kenya or the victim is a citizen of Kenya. Section 12(1) of the Act vests the interested party with the mandate to investigate such matters, summon persons, receive reports from the public, liaise with public entities and advise the government.
- 50. The interested party stated that when the Shakahola Tragedy arose, it initiated its investigative mandate and has been monitoring the situation using several methodologies. Additionally, the interested party appeared before the Senate Ad-Hoc Committee on July 3, 2023 and submitted a detailed advisory opinion on its interventions in respect to the tragedy. In addition, the Interested Party is also involved in Criminal Case No E500 of 2023: *Republic vs Kennedy Were and 64 others* where the court instructed it to submit progress reports on the welfare of the victims currently sheltered at Sajahanadi Rescue Centre.
- 51. In light of the foregoing, the interested party argues that the 1<sup>st</sup> respondent's action of ridding its mandate to inquire into allegations of torture and inhuman treatment is not only illegal but also a duplication of roles and a waste of public resources since the Commission of Inquiry is being tasked with functions already vested in the independent bodies and constitutional Commissions.
- 52. The interested party equally challenges the constitutionality and relevance of the Commission of Inquiry under the Commission of Inquiry Act in the context of the Independent Constitutional Commissions under the Constitution. This is anchored on the notion that pre-2010 these Commissions of Inquiry were politically influenced by the Executive and were not financially



independent. This is in comparison to the current Commissions which retain autonomy in their mandates and curtail duplication of roles.

53. These sentiments were also echoed in the Final Report of the Constitution of Kenya Review Commission (2005) and the Final Report of the Committee of Experts on Constitutional Review (2010).

### **Petitioner's Submissions**

54. The firm of Paul Mwangi and Company Advocates on behalf of the petitioner filed submissions dated October 6, 2023. Counsel sought to discuss a number of issues being: whether the 1<sup>st</sup> respondent enjoys immunity from these proceedings; whether the appointment of a sitting Judge to the Commission of Inquiry into the Shakahola Tragedy is unconstitutional; whether the establishment of the Commission of Inquiry on the Shakahola Tragedy constitutes an usurpation of powers and undermining of authority of constitutional bodies and state organs under the Constitution and whether section 3 of the Commission of Inquiry Act of 1962(Revised in 2010) is unconstitutional.
55. On the first issue, counsel answered in the negative. It was submitted that the 1<sup>st</sup> respondent as a State Officer is subject to court scrutiny over his constitutional functions. Counsel noted that the petitioner has a right to institute such court proceedings under article 258 of the Constitution. Further that the court has a duty to intervene where a State Officer violates the Constitution as held in Council of Governors & others v the Senate (Petition No 413 of 2014).
56. On judicial independence, the petitioner submitted that the appointment of a sitting judge by the 1<sup>st</sup> respondent to preside over the Commission of inquiry amounts to usurpation of judicial independence, is unconstitutional and against the rule of law. It was argued that the President in doing so assumed the functions of the Judicial Service Commission. Further that the appointment compromises the Judge's authority since the findings of the Commission of Inquiry, an inferior tribunal, can be challenged before the High Court. In accepting the appointment, it was submitted that the Hon Lady Justice Lesit has subjected herself to the control of the President, a fact that compromises judicial independence.
57. Counsel relied in the recommendations of the Report of Judicial Commission Inquiry into the Golden Affair as chaired by the then Hon Justice SEO Bosire. The recommendation stated that:
- “ 43. We recommend that before the issue is finally settled, no judge should be appointed to head or participate in a public inquiry unless the Chief Justice has first satisfied himself that the nature of the intended public enquiry has no political implication and signified his consent to the appointment.”
58. Reliance was also placed on Kalpana H Rawal & 2 others v Judicial Service Commission & 3 others (2016) eKLR.
59. On unconstitutionality of section 3 of the Commission of Inquiry Act, the Petitioner submitted that the establishment of the Commission of Inquiry takes away the constitutional powers of various constitutional bodies which undermines their authority. It was submitted that the Commission of Inquiry's mandate is a duplication of the mandate and roles of the respondents named in the petition and the issue thus is who takes precedence or should stand down. According to counsel, the body that should stand down is the Commission of Inquiry as it is the one that has usurped the respondents constitutional mandate.



60. The petitioner cited *Law Society of Kenya v Attorney General & 2 others* (2016) KLR to buttress this assertion where the court held:

“Where therefore a question arises as to whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution, it falls on the laps of this court pursuant to article 165(3)(d)(ii) to determine the issue. This is due to the fact that under the current constitutional dispensation, the *Constitution* is supreme and all arms of the Government must bow to the *Constitution* as decreed under article 2(1) and (2) the *Constitution*. Therefore, there is only supremacy of the *Constitution* and given that the *Constitution* is supreme, every organ of state performing a constitutional function must perform it in conformity with the *Constitution*.”

61. The other element of unconstitutionality of section 3 of the *Commissions of Inquiry Act* was in relation to the section 7 of the Sixth Schedule to the *Constitution*. The Petitioner argued that the statute dates back to 1961 before the promulgation of the *Constitution* and was not amended to bring it into conformity with the *Constitution*. Reliance was placed in *Timothy Njoya & 17 others v Attorney General & 4 others* (2013) eKLR where it was held that:

“... This legislation was enacted before the promulgation of the current Constitution. The Act however, must, by virtue of section 7 of the sixth schedule, be brought into conformity with the *Constitution*. As a result, any legislation made by parliament or agreement that is made in violation of the provisions of the *Constitution* is void.”

62. Similar reliance was also placed in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2014) eKLR.

63. It was further argued that the constitutionality of the statutes passed before the promulgation of the *Constitution* is envisaged under schedule 6, section 7(1) of the *Constitution*. It is to the effect that all pre-existing laws shall continue in force only to the extent they are in conformity to the *Constitution*. The petitioner maintained that the impugned decision taken on the basis of the Commission of Inquiry Act was not in conformity with the *Constitution* as violates the mandate and functions of the respondents and the doctrine of separation of powers.

#### **1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> Respondents’ Submissions**

64. These respondents submissions are not in the court file or Court online portal (CTS).

#### **2<sup>nd</sup> Respondent’s Submissions**

65. State Counsel, Emmanuel Bitta filed submissions dated October 24, 2023. The 2<sup>nd</sup> respondent objected to the joinder of the President in these proceedings by relying on the Supreme Court of Supreme Court Petition No 12 of 2021 as consolidated with petitions 11 and 13 of 2021; *Attorney-General & 2 others v David Ndi and 79 others* where it was determined that the President cannot be sued either in his public or private capacity in any legal proceedings.

66. The 2<sup>nd</sup> respondent submitted that the President’s action of appointing the Commission of Inquiry was a valid exercise of his legal authority given by article 132(4) of *the Constitution*. Similarly, that article 131(2)(e) of the *Constitution* imposes a mandatory obligation on the President to ensure the protection of human rights and fundamental freedoms and the rule of law. Equally that article 10 of the *Constitution* obligates all State organs, State Officers (including the President), public officers in the exercise of their duties to observe the principles of human dignity, social justice, inclusiveness, equality,



human rights, good governance, accountability and protection of the marginalized. Correspondingly, that under article 132(1)(c)(i) & (ii) of the Constitution, the President has a mandatory distinct and independent role of ensuring the realization of the national values prescribed in article 10 of the Constitution and to take specific measures to ensure their realization.

67. Reliance was placed in Thirdway Alliance Kenya & another v Kinyua & 2 others; Kimani & 15 others (Interested Parties) (Constitutional Petition 451 of 2018) [2020] KEHC 7887 (KLR) (Constitutional and Human Rights) (4 March 2020) (Judgment) where it was held that:

“From the above articles, it is clear that respecting, upholding and safeguarding the Constitution, safeguarding the sovereignty of the Republic, promoting and enhancing the unity of the nation, promoting respect for the diversity of the people and communities of Kenya and ensuring the protection of human rights and fundamental freedoms and the rule of law are the primary constitutional duties required of the President under article 131(2) of the Constitution. To underscore the seriousness and importance of the above duties, article 132(1)(c)(i) obligates the President once every year to report, in an address to the nation, on all the measures taken and the progress achieved in the realization of the national values, referred to in article 10.....the power that the President exercises is an executive power under the Constitution which requires particular consideration if I may borrow the words of the majority decision in *Masethla v President of the Republic of South Africa*. [48] The exercise of executive power should not be constrained by the requirements which are essentially the hallmark requirements of administrative action. The exercise of the power in question constitutes executive action and not administrative action which is only constrained by the principle of legality and by the requirement of rationality.”

68. Further support was also placed on Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission & 4 others (2017) eKLR.
69. Furthermore, counsel called the court to observe section 3(1) of the Commissions of Inquiry Act which provides that the President, whenever he considers it advisable so to do, may issue a commission under the Act appointing a commissioner or commissioners and authorizing him or them, or any specified quorum of them, to inquire into the conduct of any public officer or the officer or the conduct or management of any public body, or into any matter into which an inquiry would, in the opinion of the President, be in the public interest. Counsel pointed out that this Statute has never been declared unconstitutional. Moreover that this Act has been also recognized by the courts as seen in Rose Owiya & 23 others-vs- Attorney-General & another; Kenya National Commission on Human Rights & 4 others (Interested Parties) (2020) eKLR.
70. Reliance was also placed in Raila Odinga and others v Independent Electoral and Boundaries Commission and 4 others & Attorney General & another Petition No 1 of 2017 (2017) eKLR where the Supreme Court upheld the maxim *omnia presumuntur rite et solemniter esse acta, donec probetur in contrarium* which means all acts are presumed to be rightly done until proven to the contrary. It is his argument thus that this maxim applies to the actions of the President in appointing the Commission of Inquiry.
71. Similarly, the 2<sup>nd</sup> respondent highlighted section 7 of the Transitional and Consequential Provisions in the sixth schedule to the Constitution, which provides that all laws in force immediately before the effective date of the Constitution shall continue in force thereby validating the applicability of the Act under the new constitutional dispensation.



72. The 2<sup>nd</sup> respondent submitted that the *Commissions of Inquiry Act* is not unique to Kenya as many other jurisdictions have similar statutes, an example being, Seychelles.
73. On appointment of a sitting Judge, Hon. Lady Justice Lesiit, to be the Chairperson of the Commission of Inquiry, the 2<sup>nd</sup> respondent submitted that this also not unique to Kenya and does not violate the *Constitution*, instead, it was contended by the 2<sup>nd</sup> respondent that it lends credibility and impartiality to the inquiry and facilitates greater public participation for the public good. Furthermore, it gives the process, the immeasurable advantage of benefiting from her training, research and experience which is particularly useful to the inquiry in the evaluation of facts. The 2<sup>nd</sup> respondent relied on the case of *Martha Wangari Karua & another v Independent Electoral & Boundaries Commission & 3 others* (2018)eKLR where it was held that:
- “...judges are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.”
74. Further support was also placed in *AG v Anyang Nyong'o and Others* (2007) EA 12 and *Mistretta v United States*, 488 US 361.
75. In conclusion, counsel submitted that no law provides that only the Senate or any other body can to the exclusion of any other person or body direct or hold an inquiry into matters of public governance and welfare. It is noted that the Commission of Inquiry's mandate is to inquire into matters of public importance. As such, it is counsel's submission that the petitioner has failed to make out a case for the orders sought and so the Petition should be dismissed with costs.

#### **4<sup>th</sup> Respondent's Submissions**

76. Deputy Director of Public Prosecutions Victor Mule, filed submissions dated December 21, 2023. The joinder of the President was objected to by the 4<sup>th</sup> respondent on the basis of the Supreme Court Petition No 12 of 2021 as consolidated with Petitions 11 and 13 of 2021: *Attorney General & 2 others vs David Ndii & 79 others*.
77. The 4<sup>th</sup> respondent disputed the assertion that the Commission of Inquiry undermines the 4<sup>th</sup> respondent's mandate for permitting the Inquiry to recommend to the President persons for prosecution. According to counsel, establishment of the Commission of Inquiry is lawful and does not interfere with the 4<sup>th</sup> respondent's mandate as alleged.
78. The 4<sup>th</sup> respondent contended that the petitioner has failed to demonstrate how the Commission and the 1<sup>st</sup> respondent have usurped and undermined the 4<sup>th</sup> respondent's prosecutorial powers which are protected under the *Constitution*, the *Office of the Director of Public Prosecutions Act*, No 3 of 2013 and various policy instruments. The 4<sup>th</sup> respondent insisted that the 4<sup>th</sup> respondent is not acquiescent to the Commission's influence as operates independently by virtue of article 157(10) of the *Constitution* and has actually been prosecuting the perpetrators of the Shakahola tragedy independently.
79. The 4<sup>th</sup> respondent submitted that the Commission of Inquiry established under the Kenya Gazette Number 5660 of May 4, 2023 does not have an investigative role, but that what it has is an inquisitorial on the administrative and security lapses that may have occurred and how their recurrence can be avoided.
80. It was also noted that the President is empowered to establish such Commissions as provided under section 3 of the *Commissions of Inquiry Act*. For these reasons, the 4<sup>th</sup> respondent submitted that the petition lacks merit and should thus be dismissed.



## 9<sup>th</sup> Respondent's Submissions

81. The Advocate for the 9<sup>th</sup> respondent, Elizabeth Musembi filed submissions dated January 5, 2024 on the issue of whether the Commission of Inquiry has the mandate to investigate into the issues arising from the Shakahola Tragedy.
82. The 9<sup>th</sup> respondent submitted that it is a constitutional Commission established under article 59(4) and section 3 of the Commission on Administrative Justice Act of 2011 and charged with the mandate to investigate any conduct in state affairs, or any act or omission in public administration by any state organ, state or public officer in national and county government, that may result in any impropriety or prejudice.
83. Reliance was placed in *Republic v Commission on Administrative Justice ex parte Stephen Gathuita Mwangi* (2017)eKLR where the Court affirmed its mandate as follows:
- “It is therefore clear that one of the functions of the respondent is to inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehavior, inefficiency or ineptitude within the public service.”
84. Accordingly, it was submitted that it is the 9<sup>th</sup> respondent's mandate to investigate issues of maladministration within the public administration such as dereliction of duty by the relevant office bearers as the Shakahola Tragedy as envisaged under article 59(2) of the *Constitution* and section 8 of the Commission on Administrative Justice Act. Upon conclusion of this investigation the 9<sup>th</sup> respondent is required to submit its Report to Parliament as provided under section 8(c) as read with section 42 of the Act.
85. Counsel further stressed that the intention of the drafters of the *Constitution* in establishing independent Commissions was to ensure that they deliver their mandate and to provide checks and balances over the other arms of government. Particularly, that article 249 of the *Constitution* is keen on having the Commissions protect the sovereignty of the people, secure the observance by all State organs of democratic values and principles and promote constitutionalism.
86. Reliance was placed in Supreme Court Advisory Opinion Reference No 2 of 2014, *In the Matter of the National Land Commission* (2015) eKLR where the superior Court stated that:
- “It is a matter of which we take judicial notice that the real purpose of the "independence clause", with regard to Commissions and independent offices established under the *Constitution*, was to provide and safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the *Constitution* as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The *Constitution* established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights. and public participation. The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the "independence clause".



87. Additional support was had on the *Judicial Service Commission v Salaries and Remuneration Commission & another* (2018) eKLR.
88. It is counsel's submissions therefore that the 9<sup>th</sup> respondent should be accorded an opportunity to undertake and perform its mandate and functions in line with the relevant constitutional and legislative provisions, by investigating and inquiring into the Shakahola Tragedy.

### 10<sup>th</sup> Respondent Submissions

89. Mr Kinoti for the 10<sup>th</sup> respondent relied on the replying affidavit of Elena Alake sworn on August 24, 2024, the written submissions dated December 5, 2023 together with the list of authorities.
90. He argued that the 10<sup>th</sup> respondent is established under the *Independent Policing Oversight Authority Act* (IPOA) to provide critical oversight over the police by conducting investigations into criminal complaints against the police officers or matters of disciplinary misconduct which are not the powers that were given to the commission of inquiry going by its terms of reference as all what the Commission is required to do is make recommendations for investigation.
91. Mr. Kinoti affirmed that under section 4 of the IPOA Act, the 10<sup>th</sup> respondent is independent.

### Interested Party's Submissions

92. The interested party in support of the petition filed submissions dated November 2, 2023 where the issues for determination were identified as: whether the appointment of a sitting judge in a Commission of Inquiry undermines judicial independence and violates separation of powers; whether the mandate vested on the Commission of Inquiry into the Shakahola Tragedy encroaches on the constitutional and statutory duty conferred on the interested party and whether Commissions of Inquiries, and by extension the *Commissions of Inquiry Act*, is constitutionally tenable within the context of the *Constitution*.
93. The interested party submitted that judicial officers in active service cannot under any circumstance preside over Commissions of Inquiry without undermining judicial independence as couched under article 160 of the *Constitution* and infringing the separation of powers contemplated by the *Constitution*. Reliance was placed in *Kimaru and 17 others v Attorney General and another; Kenya National Human Rights and Equality Commission (Interested Party)* (2022) eKLR where it was held that:
- “As regards the doctrine of separation of powers, in his separation of powers theory, Montesquieu had sought to address the eternal mischief of abuse of power by those to whom it is entrusted. He observed [The Spirit of the Laws (1948)]:
- When the legislative and Executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, there is no liberty if the power of judging is not separated from the legislative and Executive, there would be an end to everything, if the same man or the same body were to exercise those three powers.”
94. Other cases cited in support were: *Justus Kariuki Mate v Martin Nyaga Wambora* (2017) eKLR; *In the Matter of the National Gender and Equality Commission* (2014) eKLR; *Speaker Nairobi City County Assembly & another v Attorney General & 3 others (Interested parties)* (2021) eKLR and the *Council of Governors & 47 others v Attorney General & 6 others* (2019) eKLR.



95. It was noted that whereas the 2<sup>nd</sup> respondent submitted that the practice of appointing judges to these commissions was not novel, the reality of the legality of this practice has been put to test in various jurisdictions. In South Africa for example the court in *South African Association of Personal Injury Lawyers v Heath Willem Hendrick & 3 others* 2001(1) SA 883 (CC) which was relied on observed as follows:
- “The principle of separation of powers is not necessarily compromised whenever a particular judge is required to perform non- judicial functions. (as may be the case in a Commission of Inquiry). The performance of a non-judicial function incompatible with judicial office would however not be permissible. This is consistent with what this court said in *President of the Republic of South Africa and others v South African Rugby Football Union and others* where it stated that judicial officers may, from time to time, carry out administrative tasks but noted that there may be circumstances in which the performance of administrative functions by judicial officers infringes the doctrine of separation of powers”.
96. Similar reliance was had on the *City of Cape Town v Premier, Western Cape, and others* 2008 (6) SA 345 (C) which noted that the test is whether or not a particular function by a judge, is incompatible with the judicial office and whether the function is of such a nature that public confidence in the independence or impartiality of a judge to carry out judicial functions is threatened.
97. In this regard, the interested party urged the court to apply a constitutional interpretation that does not favour a formalistic or positivistic approach as held by the Supreme Court in *Re Matter of the Interim Independent Electoral Commission Constitutional* Application No 2 of 2011. Similar reliance was also placed in the constitutional interpretation adopted in *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* (2015) eKLR.
98. In the second issue, the interested party submitted that the mandate entrusted on the Commission of Inquiry is a direct encroachment on its constitutional and statutory functions vested in it, as detailed in its replying affidavit. Accordingly, it was contended that the actions of the 1<sup>st</sup> respondent in vesting the Commission of Inquiry with the mandate to inquire into the matter of the deaths and torture inhumane and degrading treatment of members and other persons linked to the Good News International Church in Kilifi County and establish the circumstances thereunder is not only unconstitutional as it is a duplication of roles already constitutionally vested in the Interested Party but also violates the constitutional principles of efficient utilization of public resources.
99. On the final issue, the interested party relying on article 2(4) of the *Constitution* submitted that any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid. In its opinion, section 3(1) of the *Commission of Inquiry Act* contradicts the spirit and letter of the *Constitution* for a number of reasons. First, it enables the exercise of broad discretionary powers by the President without any restrictions and checks or balances by other arms of government. Second, section 3(1) does not define the scope of the persons or subject matter that may be subjected to the inquiry and is based purely on the President's discretion. Thus it argued that the discretion granted under section 3(1) of the Act violates several dictates and principles of the *Constitution* including devolution and sharing of power, institutional independence, public participation, accountability and transparency and hence is unconstitutional.
100. In this regard, counsel relied on the principles of constitutional and statutory interpretation as discussed in *Council of County Governors v Attorney General & another* (2017) eKLR and *Robert Alai*



*v The Hon Attorney General & another* (2017) eKLR. To this end, the interested party submitted that the petition is meritorious and hence should be allowed.

### **Analysis and Determination**

101. In my view, the key issues that arise for determination in this matter are as follows:

- i. Whether the 1<sup>st</sup> respondent was properly joined in this suit.
- ii. Whether the 1<sup>st</sup> respondent's decision of establishing the Commission of Inquiry into the Shakahola tragedy was unconstitutional on the basis of alleged arbitrary usurpation of the respondents' and the interested party's mandate.
- iii. Whether the *Commissions of Inquiry Act* is unconstitutional.
- iv. Whether petitioner is entitled to the reliefs sought.

### **Whether the joinder of the President of Kenya this Petition is proper**

102. The President enjoys constitutional immunity from legal proceedings by pursuant to article 143 which states as follows:

Protection from legal proceedings

1. Criminal proceedings shall not be instituted or continued in any court against the President or a person performing the functions of that office, during their tenure of office.
2. Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution.
3. Where provision is made in law limiting the time within which proceedings under clause (1) or (2) may be brought against a person, a period of time during which the person holds or performs the functions of the office of the President shall not be taken into account in calculating the period of time prescribed by that law.
4. The immunity of the President under this article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity.

103. This provision was judicially considered by the Supreme Court of Kenya in the case of *Attorney-General & 2 others v Ndiu & 79 others; Prof. Rosalind Dixon & 7 others (Amicus Curiae)* (Petition 12, 11 & 13 of 2021 (Consolidated) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) which held as follows:

- “ 32. The immunity of the President was unlike that of the other state actors. The President not only enjoys functional immunity like all public officials who perform state duties, which protected them from civil liability for official functions, he also enjoyed sovereign immunity as the Head of State and the single representation of the sovereignty of the Republic.
33. it was only sovereign immunity that could immunize anyone against both civil proceedings and criminal liability because any other immunity would be related to official functions and therefore would inherently be a 'qualified immunity'. That was the only explanation why all other public officials would



be liable to criminal prosecutions even while in office, but the President would not only not have criminal proceedings instituted against them, but also any criminal proceedings that may have been ongoing would be discontinued in the duration of the President's tenure of office.

34. It was the sovereign immunity that the Head of State, like all heads of states, enjoys that makes article 143(4) relevant in that, the immunity should be waived by consent of the Republic through ratification of a treaty that forbade such immunity. Likewise, that was also why this immunity (from any proceedings, and especially from criminal liability) is limited to the duration during which the person represents the sovereignty of the Republic, and expires upon expiry of such term.”

104. The court went on to further elaborate as follows:

“...The import of article 143(2) of the Constitution with respect to protection of the President was as follows:

- a. Immunity did not extend to acts or omission of sitting President done in purely personal capacity not connected with his office
- b. The immunity was only in respect to acts or omissions connected with the office and functions of that office
- c. Where an action or inaction/omission was in official capacity but bereft of any constitutional authority or power whatsoever or was in fact done in gross violation or serious violation of the Constitution then it was actionable against the President in person but only after he has left office.
- d. For acts and omissions falling under (c) above and which had to be questioned or challenged immediately, the President could be sued, not in his personal name, but through the Attorney General.

The superior courts below fell in error in their interpretation and application of article 143(2) of the Constitution by holding that civil proceedings could be instituted against the President or a person of the President during their tenor of office in respect of anything done contrary to the Constitution. Civil proceedings could not be instituted against the President or a person performing the functions of the office of President during their tenure of office in respect of anything done or not done contrary to the Constitution. Such proceedings could be instituted against the President vide the Attorney General...”

105. In its submissions, the petitioner had urged this court to hold that the 1<sup>st</sup> respondent is a state office and is therefore not subject to immunity. However, the finding of the Supreme Court is categorical in it states “the President or a person performing the functions of the office of President” cannot be sued during their tenure of office for acts or omissions relating to those functions but that such actions be brought against the President via Attorney General. The President cannot thus be joined as a party in a suit in relation to an act done in execution of official duties as President. By constitutional command, article 163(7), all courts, other than the Supreme Court, are bound by the decisions of the Supreme Court and this court therefore has no option but follow this precedent on this issue. The inclusion of the President as a party in the instant petition is thus improper as it is contrary to article 143 of the Constitution. I thus agree with the submission that the 1<sup>st</sup> respondent ought not to have been joined as a party in this petition.



**Whether the 1<sup>st</sup> Respondent's decision of establishing the Commission of Inquiry into the Shakahola tragedy was unconstitutional on the basis of alleged arbitrary usurpation of the Respondents' and Interested Party's mandate and infringement of the doctrine of separation of powers**

106. This court has to examine the mandate of the Commission of Inquiry into the Shakahola Tragedy as against the Constitutional mandates of the respondents and the interested party and determine if the President the powers of the named independent offices and Commissions were in fact usurped as alleged by the petitioner.
107. The President has a constitutional mandate assigned to the office. Article 131(2) of the Constitution spells out the President's constitutional responsibilities as follows:
- (2) The President shall--
- a. respect, uphold and safeguard this Constitution;
  - b. safeguard the sovereignty of the Republic;
  - c. promote and enhance the unity of the nation;
  - d. promote respect for the diversity of the people and communities of Kenya; and
  - e. ensure the protection of human rights and fundamental freedoms and the rule of law.
108. Further, the President under article 132(4) of the Constitution is authorized to undertake the following functions inter alia:
- a. perform any other executive function provided for in this Constitution or in national legislation and, except as otherwise provided for in this Constitution, may establish an office in the public service in accordance with the recommendation of the Public Service Commission;
  - b. receive foreign diplomatic and consular representatives;
  - c. confer honours in the name of the people and the Republic;
  - d. subject to article 58, declare a state of emergency; and
  - e. with the approval of Parliament, declare war.
109. In exercise of this executive power, the President is required to be guided by the principles set out under article 129 of Constitution as follows:
1. Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution.
  2. Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.
110. It was submitted by the 2<sup>nd</sup> respondent that the constitutional basis for establishment of Commissions of Inquiry is derives partly from the President's broad constitutional executive authority and specifically from the Commission of Inquiry Act.
111. A major contention by the petitioner is however was that the President went beyond the scope of authority granted to him in establishing a Commission of Inquiry into Shakahola Tragedy when he assigned it the mandate that constitutionally belongs to Independent Constitutional Offices and Commission hence the action violated the Constitution. The petitioner argument is that the President



- cannot invoke a statute to appropriate constitutional responsibilities belonging to independent constitutional bodies and offices and assign them to a Commission of Inquiry he has established.
112. This court, under article 165(3)(d)(ii) is conferred with the jurisdiction to determine whether anything said to be done under the authority of *the Constitution* or any law is inconsistent with or in contravention of the *Constitution* hence it has the duty to determine the constitutionality and legality of the Presidents' executive decision under the principle of checks and balances. Should the court find that the President's decision was made outside of the scope of his authority or in violation of constitutional principles and values, the court must invalidate decision.
113. The basis for invalidation will be article 2 of the *Constitution* which proclaims the *Constitution* to be the supreme law of the Republic that binds all persons and state organs at both levels of Government and asserts that no person may claim or exercise State authority except as authorized by *the Constitution*. Further, any act or omission in contravention of the *Constitution* is invalid.
114. The Supreme Court reaffirmed the court's mandate to determine constitutionality of decisions made under authority of the *Constitution* in *Re The Matter of the Interim Independent Electoral Commission* Advisory Opinion No 2 of 2011 where it held that:
- “...The effect of the *Constitution*'s detailed provision for the rule of law in the process of governance, is that legality of executive or administrative actions is to be determined by courts, which are independent of the executive branch...”
115. Similar position was echoed in the *Coalition for Reforms and Democracy (CORD) v Attorney General; International Institute for Legislative Affairs & another (Interested Parties)* (2019) eKLR in which the court observed:
- “... The primary duty of the court in this regard is to uphold the *Constitution* and the law, which we must apply impartially and without fear, favour or prejudice...”
116. The question therefore becomes, did the President appropriate the constitutional responsibilities of the respondents and assigned them to the Commission of Inquiry into Shakahola Tragedy in violation of the *Constitution*?
117. In examining this question, one has to closely examine the terms of reference of the respondents *vis-à-vis* those of Commission of Inquiry. However, before venturing there, I will first address the issue that apart from the interested party, none of the respondents came forward to acknowledge that indeed any of its mandates had been appropriated by the President and conferred to the Commission of Inquiry as alleged by the petitioner.
118. It is however worth noting that the petition was brought in public interest. Article 3 of the *Constitution* obligates every person to respect, uphold and defend the *Constitution*. Article 258(1) gives every person the right to institute court proceedings if the *Constitution* has been contravened, or is threatened with contravention. If a constitutional organ or fails to defend its constitutional mandate that is threatened; that might be a potential risk to constitutionalism and the rule of law and any well-meaning person may take up the matter for that mandate does not exist to that body's benefit but the public. It is intended to promote and uphold constitutionalism and the rule of law for the benefit of the public. If therefore, there is acquiescence on the part of the constitutional body concerned, any person has a constitutional



duty to bring proceedings protect the mandate and safeguard constitutionalism and the rule of law. In *Republic v Fazul Mahamed & 3 others ex-parte Okiya Omtatab Okoiti* (2018) eKLR, it was held that:

“7. ... a failure to exercise power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the Rule of Law...”

119. Indeed, article 2 of the *Constitution* reinforces this position by providing that any act or omission in contravention of this Constitution is invalid.

120. To enhance greater accountability and the rule of law the *Constitution* introduced the independent constitutional commissions and offices and gave them specific mandates to booster the observance of constitutional values. It also shielded them from interference in execution of their mandates from other arms of government or persons. Article 249(2)(a) of *the Constitution* provides that the Commissions and holders of Independent Offices are subject only to the *Constitution* and the law. In the Supreme Court Advisory Opinion Reference No 2 of 2014, in the Matter of the National Land Commission (2015) eKLR the court affirmed this position as follows:

“It is a matter of which we take judicial notice, that the real purpose of the “independent clause,” with regard to the Commissions and Independent offices established under the *Constitution*, was to provide a safeguard against undue interference with such Commissions or Offices, by other persons, or institutions of government. Such a provision was incorporated in the *Constitution* as an antidote, in the light of regrettable memories of an all-powerful Presidency, since independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of individual. The *Constitution* established the several independent Commissions alongside the judicial branch, entrusting to them special governance mandates of critical importance in the new dispensation: they are the custodians of fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights and public participation. The several independent Commissions and offices are intended to serve as ‘people’s watchdogs’ and, to perform this role effectively, they must operate without improper influences, fear, favour: this indeed, is the purpose of the independence clause.”

121. It is against this backdrop that I must now turn to consider if the formation of the Commission of Inquiry into Shakahola Tragedy by the President amounted to usurpation of the respondents and the interested party mandate under the *Constitution* and/or legislation.

122. In considering what would be the constitutional implication, I will be guided by the principles set out in article 259 of the *Constitution* which among others require that “whenever we interpret the *Constitution*, must adopt the approach that promotes its purposes, values and principles and contributes to good governance.”

123. The terms of reference of the Commission of Inquiry into Shakahola Tragedy set up by the President of the Republic of Kenya on the May 4, 2023 through Gazette Notice No 5660 were as follows: inquire into the matter of the deaths, torture, inhumane and degrading treatment of members and other persons linked to the Good News International Church in Kilifi County; establish the circumstances under which the deaths, torture, inhumane and degrading treatment occurred; inquire into the legal, institutional, administrative, security, and intelligence lapses that may have contributed to the occurrence of the Shakahola Tragedy; identify, the persons and organizations who bear the greatest responsibility for the Shakahola Tragedy; and to recommend specific actions that should be taken against them; recommend legal, administrative, or other forms of accountability action against any



public official whose actions or omissions are established to have willfully or negligently contributed to the occurrence of the Shakahola Tragedy; inquire into the factors that lead to the rise of that particular religious extremist institution; as well as the factors that give rise to such religious extremist institutions, cults, or occultist groups, and other formations that foster negative religion-based activities generally; recommend legal, administrative, institutional, and regulatory reforms aimed at preventing the occurrence of future situations of deaths or gross violations of the rights and welfare of persons by religious extremist institutions, cults, or occultist groups, and other formations that foster negative religion-based activities; and, consider, perform, or advise on any other matter or subject ancillary to the above.

124. I will take the first four listed terms of reference, namely: inquire into the matter of the deaths, torture, inhumane and degrading treatment of members and other persons linked to the Good News International Church in Kilifi County; establish the circumstances under which the deaths, torture, inhumane and degrading treatment occurred; inquire into the legal, institutional, administrative, security, and intelligence lapses that may have contributed to the occurrence of the Shakahola Tragedy; and, identify, the persons and organizations who bear the greatest responsibility for the Shakahola Tragedy; and to recommend specific actions that should be taken against them.
125. The first four terms of reference that I have clustered are investigative in nature, inquiring into issues of death, human rights abuses, individual/ public institutions lapses, security shortfalls, all related to Shakahola Tragedy. It was to be followed by recommendations to the appointing authority.
126. On investigation of deaths and identification of persons and organizations who bear the greatest responsibility and recommendation of the specific actions to be taken against such persons; Under the [Constitution](#) and the [National Police Service Act](#), No 11A of 2011 that responsibility belongs to the National Police Service which has the exclusive mandate to investigate crime. Indeed, investigation of deaths (homicide) is specifically assigned to Directorate of Criminal Investigation which is under the National Police Service.
127. The National Police Service is established under article 243 (1) of the [Constitution](#) and operationalized under the [National Police Service Act](#), No 11A of 2011 under which the Directorate of Criminal Investigations is created and conferred with the following mandate at Section 35 among others:
  - a. Collect and provide criminal intelligence
  - b. Undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime and cybercrime among others
128. Article 245(4)(b) of the [Constitution](#) provides the Cabinet Secretary may give directions on any matter concerning policy for the National Police Service, but no person may give direction to the Inspector General with respect to the investigation of any particular offence or offences. The [Constitution](#) however recognizes the Director of Public Prosecution under article 157(4) of the [Constitution](#) can direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector General shall comply with any such direction. Harmonious reading of the [Constitution](#) ensures these provisions sustains each other rather than destroy the other. Given these the constitutional and statutory position discussed, it is difficult to see how the action of the President using the powers under the Commission of Inquiry Act can constitutionally confer the mandate of the police to investigate crime and purport to bestow it on a Commission of Inquiry. It is not constitutionally viable to establish a Commission of Inquiry with parallel mandate of investigating offences of death committed in Shakahola as that is a specific mandate of the police. The appropriation of the 5<sup>th</sup> respondent's specific mandate by the President is clearly evident and cannot thus stand.



129. In regard to violation of human rights violations which was also enumerated in the terms of reference, the Commission of Inquiry was to inquire into ‘torture, inhumane and degrading treatment of members and other persons linked to the Good News.’
130. The interested party herein (previously, the 7<sup>th</sup> respondent) is the Kenya National Commission on Human Rights. It is created pursuant to article 59(1) of the Constitution and given various roles. Article 59(1)(e) gives the KNCHR the mandate to “receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated”
131. Parliament enacted the Kenya National Commission on Human Rights Act No 14 of 2011 which in its preamble provides that
- “it is an Act of Parliament to restructure the Kenya National Human Rights and Equality Commission and to establish the Kenya National Commission on Human Rights pursuant to article 59(4) of the Constitution....to provide powers functions of the Kenya National Commission on Human Rights, and for connected purposes.”
132. Among the functions of the Kenya National Commission on Human Rights is what is provided at section 8(e) of the Act, which is “on its own initiative or on the basis of complaints investigate or research matter in respect of human rights, and make recommendation to improve the functioning of State Organs”
133. Besides these mandates, there is also the Prevention of Torture Act, 2017 which under section 2, provides that reference to the Commission in the Act means the Kenya National Commission on Human Rights established under Section 3 of the Kenya National Commission on Human Rights Act, 2011. The preamble states that “it is an Act of Parliament to give effect to article 25 (a) and 29(d) of the Constitution and to the principles of convention against torture and other cruel, inhuman or degrading treatment or punishment; to provide for the prevention, prohibition and punishment of acts of torture and cruel, inhuman or degrading treatment or punishment; reparations to victims of torture and cruel, inhuman or degrading treatment or punishment; and for connected purposes...”
134. Part of the powers and functions of the Commission under section 12(1)(a) is to “investigate alleged violations of the provisions of the Act upon receipt of complaint or on its own motion.” Further, under 12(f) it is the responsibility of the Commission to recommend effective measures for prevention of torture and cruel, inhuman and degrading treatment and punishment.”
135. Evidently therefore, by creating a Commission of Inquiry to “inquire into torture, inhumane and degrading treatment of members and other persons linked to the Good News’ the 1<sup>st</sup> respondent had unilaterally seized the interested party’s explicit mandate and allocated it to a Commission of Inquiry he created. That action was thus unconstitutional.
136. To the contention by the second respondent that the 1<sup>st</sup> respondent actions did not amount to usurpation in view of article 130(1)(b) which vests the President with the executive authority and article 131(1)(e) that requires him to ensure protection and observance of human rights and fundamental freedoms, I find the contention untenable. The President should respect the specific mandate given to the Independent Offices and Commissions under the Constitution. He cannot create extra constitutional bodies to undertake that specific functions belonging to agencies created by the Constitution. He cannot use general powers to override specific powers. The Latin maxim, ‘generalia specialibus non derogant,’ meaning ‘specific or detailed provisions of a legal instrument should prevail over more general provisions’ displaces the contention by the 2<sup>nd</sup> Respondent. My view is therefore is that the although the President is under an obligation embody the observance of human rights in the



performance of his responsibilities, that does give him the latitude to appropriate specific responsibility assigned other constitutional bodies.

137. The 2<sup>nd</sup> respondent further argued that the performance of these duties by the Commission of Inquiry does not hinder but does compliment the work of the *Constitution* Commissions and Independent Offices. I disagree. Taking away the specific duties of a Constitutional or Statutory body and assigning them to a body created by the President is undermining the independent Constitutional bodies and Offices. It is an abrogation of the *Constitution*. Plucking the various constitutional mandates and unilaterally concentrating them on a Commission of Inquiry is unconstitutional, null and void.
138. The above result is reached when you compare the terms of reference of the Commission of Inquiry with those of the 9<sup>th</sup> respondent, the Commission on Administrative Justice. Some of the terms of reference of the Commission of Inquiry into Shakahola Tragedy were as follows:

“Inquire into the legal, institutional, administrative, security and intelligence lapses that may have contributed to the occurrence of the Shakahola Tragedy” and “Recommend legal, administrative, or other forms of accountability action against any public official whose actions or omissions are established to have willfully or negligently contributed to the occurrence of Shakahola Tragedy.”

139. Yet Under article 59 2)(h) of the *Constitution*, it is the responsibility of the Commission established under this article “to investigate any conduct in State affairs, or any act or omission in public administration in any sphere of government, that the alleged or suspected to be prejudicial or improper or result in any impropriety or prejudice, 59(2)(i) to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct and 59(2)(j) to report on complaints investigated and to take remedial actions. These functions are reinforced under Section 8 of the Commission on Administrative Justice Act. Reading these mandates side by side, one cannot escape the glaring overlap between what the Commission of Inquiry into Shakahola Tragedy was do, and the Constitutional and Statutory responsibilities of the Commission on Administrative Justice.
140. On the basis of these findings, I am satisfied that the President assigned the Commission of Inquiry into Shakahola Tragedy a mandate that the *Constitution* specifically set aside for Independent constitutional bodies and Offices as demonstrated in the foregoing. The President had no authority to confer specific constitutional mandates belonging to Independent Constitutional Commissions and independent offices based using the powers derived from a Statute hence that action is unconstitutional.

#### **Whether the *Commissions of Inquiry Act* is unconstitutional**

141. The principles of constitutional interpretation are set out under article 259 of the *Constitution* which provides as follows:
1. This Constitution shall be interpreted in a manner that--
    - a. promotes its purposes, values and principles;
    - b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
    - c. permits the development of the law; and
    - d. contributes to good governance.



2. If there is a conflict between different language versions of this Constitution, the English language version prevails.
  3. Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking...
142. The principle of purpose and effect applies in determining the constitutionality impugned statute. This principle was discussed *Law Society of Kenya v Attorney General & another*, Supreme Court. Petition 4 of 2019 (2019) eKLR, by the Supreme Court which held:

“... In construing whether statutory provisions offend the constitution, courts must therefore subject the same to an objective inquiry as to whether they conform with the Constitution... In addition to the above, and to fully comprehend whether a statutory provision is unconstitutional or not, its true essence must also be considered. This gives rise to the second principle which is the determination of the purpose and effect of such statutory provision. In other words, what is the provision directed or aimed at? Can the intention of the drafters be discerned with clarity? These were our sentiments expressed in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Supreme Court Petition 26 of 2014 (2014) eKLR, where we opined that purposeful interpretation should be given to statutes so as to reveal the intention of the Legislature and Statute itself...”

143. The 2<sup>nd</sup> respondent urged this court to be guided by the presumption of constitutionality of the President’s action. The petitioner on the other hand submitted that the presumption of constitutionality does not arise considering that the the Commission of Inquiry Act dates back to 1961 before the promulgation of the current Constitution in 2010 hence the legislators could not have had the present state of affairs in mind at the time when the Act was enacted.
144. Discussing the principle of constitutionality, the Supreme Court of India in *Hamdard Dawakhana v Union of India Air* (1960) AIR 554, 1960 SCR (2)671 stated as follows:

“In examining the constitutionality of a statute it must be assumed that the legislature understand and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment.”

145. Guided by the above, it is my take with that the Parliamentarians who sat to pass the Commission of Inquiry Act in 1961 were guided by the experiences of the time and cannot thus be assumed to have been in tune with our constitutional values and principles heralded by the promulgation of the Constitution of Kenya 2010. Consequently, the Commission of Inquiry Act is one of those legislations that must be read with necessary modification as required by section 7 of the sixth schedule which provides that:

“..All law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution...”



146. The question therefore becomes, does section 3 of the Commission of Inquiry Act, section 3 under which the President established the Commission of Inquiry into Shakahola Tragedy advance the values and principles of our constitution in this day and age?

147. The objective of the Commission of Inquiry Act as stated in its preamble is to inquire into and report on matters of a public nature referred to them by the President, to prescribe their powers, privileges and duties, and to provide for other matters relating thereto.

148. In this regard, the Act under section 3(1) provides as follows:

The President, whenever he considers it advisable so to do, may issue a commission under this Act appointing a commissioner or commissioners and authorizing him or them, or any specified quorum of them, to inquire into the conduct of any public officer or the conduct or management of any public body, or into any matter into which an inquiry would, in the opinion of the President, be in the public interest.

149. Section 3 gives the President immeasurable prerogative powers to

“inquire into the conduct of any public officer or the conduct or management of any public body or into any matter which an inquiry would, in the opinion of the President, be in the public interest”

150. In the *Rose Owira & 23 others v Attorney-General & another; Kenya National Commission on Human Rights & 4 others (Interested Parties)* [2020] eKLR the court asserted the usefulness of Commissions of Inquiry by making reference to a Canadian decision which held thus:

“... One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover “the truth”. Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide ranging investigative powers. In following their mandates, commissions of inquiry are, ideally, free from partisan loyalties and better able than Parliament or the legislatures to take a long term view of the problem presented. Cynics decry public inquiries as a means used by the government to postpone acting in circumstances which often call for speedy action. Yet, these inquiries can and do fulfil an important function in Canadian society. In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public.

Undoubtedly, the ability of an inquiry to investigate, educate and inform Canadians benefits our society. A public inquiry before an impartial and independent commissioner which investigates the cause of tragedy and makes recommendations for change can help to prevent a recurrence of such tragedies in the future, and to restore public confidence in the industry or process being reviewed.”

43. I would think that where there is widespread failure by a State agency to properly execute its mandate, a commission of inquiry would be a viable



option for finding out what the problem is and providing solutions so as to avoid future recurrences of the identified problem.”

151. Unlike pre-2010, our Constitution radiates constitutionalism in which government is limited powers and neither arm is superior or subservient to other in execution of mandated functions. The principle of separation of powers, the expanded the Bill of rights and the national values and principles of governance are key constitutional features. The President can only exercise the powers and responsibilities of bestowed on him and cannot arrogate to himself any of the powers assigned to any other arm or Independent Office or Commission.
152. Turning to the separation of powers doctrine, the 1<sup>st</sup> respondent through the replying affidavit sworn by Head of the Public Service, Mr Felix Kosgei swore that prior to the appointment of Justice Lesiit to the Commission into Shakahola Tragedy, the President consulted with the Chief Justice. That may perfectly be so, but the consultation was out of a pure act of deference, not as a result of any binding legal obligation. Section 3 of the Commission of Inquiry Act does not oblige the President to consult. It does not embody this important constitutional safeguard whenever the President finds it necessary to appoint a Judge to undertake such an assignment. The President can exercise that power as he pleases if he decides so, and there lies the threat to the principle of constitutional separation of powers and the independence of the Judiciary.
153. Such extensive discretionary power to appoint anyone, including a serving Judges for tasks within the executive ia vestige of the past unrestrained executive power that was filtering to even the Judicial arm. To the extent that the President may discretionary gazette and assign a serving Judge for an assignment within the executive branch as he pleases, that is inimical to the separation of powers and a potential threat to judicial independence. The scheme of things signified by section 3 of the *Commission of Inquiry Act* has no place in the present constitutional dispensation. Judicial independence as a constitutional value is diluted by unbridled application of section 3 of the Commission of Inquiry Act to the extent that it allows the President to appoint whomsoever he pleases, including serving Judges to perform tasks within the executive branch. The Commentary on The Bangalore Principles of Judicial Conduct, September 2007, UNODC discourages that kind of camaraderie at page 48 of the book by observing as follows:
- “... The movement back and forth between high-level executive and legislative positions and the judiciary promotes the very kind of function-blending that the concept of separation of powers intends to avoid. That blending is likely to affect the judge’s perception, and the perception of the officials with whom the judge serves, regarding the judge’s independent role. Even if it does not, such service will adversely affect the public perception of the independence of the courts from the executive and legislative branches of government. Such employment is different from a judge serving in the executive or legislative branch before becoming a judge, and serving in those positions after leaving judicial office. In these cases, the appointment and the resignation processes provide a clear line of demarcation for the judge, and for observers of the judicial system, between service in one branch and service in another...”
154. It is the finding of this court that section 3 of the *Commission of Inquiry Act* is a relic of the imperial presidency, is not aligned with the current constitutional values and principles on separation of powers and independence of the Judiciary hence unconstitutional, null and void.
155. In conclusion, the petition succeeds on two main grounds. First, the President’s action in establishing a Commission of Inquiry and assigning it the parallel mandate to those assigned by the *Constitution* to



Independent Offices and Commissions and various legislation undermines their powers and authority and is thus unconstitutional. Second, section 3 of the Commission of Inquiry Act that allows the President unrestricted discretion to appoint a Judge and assigning tasks to such a judge in the executive branch does not align with constitutional principle of separation of powers and is therefore a threat to the independence of the Judiciary. To that extent, section 3 of the Commission of inquiry Act is unconstitutional.

**Disposition**

156. Consequently, the court grants the following reliefs:

- a. A declaration is issued that the decision of the President of the Republic of Kenya made on May 4, 2023 in the Kenya Gazette No 5660 establishing the Commission of Inquiry into Shakahola Tragedy and attempting to confer powers of Independent Constitutional Commissions and Offices (the respondents and the interested party herein) to the said Commission of Inquiry is unconstitutional, null and void.
- b. A declaration is hereby issued that to the extent that section 3 of the Commission of Inquiry Act gives the President unrestrained discretionary power to appoint a serving judge to the Commission of Inquiry undermines the principle of separation of powers and is a threat to the independence of the Judiciary and is therefore unconstitutional, null and void.
- c. An order of *certiorari* is hereby issued quashing the Kenya Gazette No 5660 made on May 4, 2023 by the President of the Republic of Kenya.
- d. This being a public interest litigation there shall be no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF JULY, 2024.**

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**L N MUGAMBI**

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**JUDGE**

