Okoiti v Judicial Service Commission & 2 others; Katiba Institute (Interested Party) (Petition 197 of 2018) [2021] KEHC 461 (KLR) (Constitutional and Human Rights) (11 March 2021) (Judgment)

Okiya Omtatah Okoiti v Judicial Service Commission & 2 others; Katiba Institute (Interested Party) [2021] eKLR

Neutral citation: [2021] KEHC 461 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 197 OF 2018

AC MRIMA, J

MARCH 11, 2021

BETWEEN

OKIYA OMTATAH OKOITI ..... PETITIONER

AND

THE JUDICIAL SERVICE COMMISSION ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

THE PARLIAMENT OF KENYA ..... 3RD RESPONDENT

AND

KATIBA INSTITUTE ..... INTERESTED PARTY

Local tribunals established under article 169(1)(d) of the Constitution are to be managed under the Judiciary and not the Executive.

Reported by Beryl Ikamari

Constitutional Law *- constitutional petitions - institution of constitutional petitions - justiciability - claim that local tribunals established under article 169(1)(d) of the Constitution should all be within the competence of the Judicial Service Commission and that it was necessary to pass legislation for the tribunals to be handled as subordinate courts within the Judiciary - whether a constitutional petition that sought reliefs requiring Parliament to pass legislation was justiciable.*

Constitutional Law *- interpretation of the Constitution - interpretation of the term 'local tribunal' as used in article 169(1)(d) of the Constitution - what were the qualities of local tribunals referred to under article 169(1)(d) of the Constitution - Constitution of Kenya 2010, article 169(1) and 172(1)(c).*

Constitutional Law *- separation of powers - separation of powers between the Executive and the Judiciary - exercise of judicial authority by local tribunals established under the Constitution - whether the appointment and removal of members of such tribunals by the Executive violated the principle of separation of powers - whether local tribunals established under article 169(1)(d) of the Constitution should be transited from the Executive to the Judiciary - Constitution of Kenya, 2010, article 169(1) and 172(1)(c).*

Brief facts

The petitioner sought various reliefs from the court with respect to the Constitution, composition and operations of tribunals established pursuant to article 169(1)(d) of the Constitution of Kenya, 2010 (Constitution). He explained that the tribunals should fall within the competence of the Judicial Service Commission and that the fact that some were under the Executive was a violation of the doctrine of separation of powers. The petitioner added that the members of the tribunals were appointed under varied terms of service with the tribunals having different rules of procedure. The petitioner felt aggrieved by the fact that some of the statutes establishing the tribunals did not provide for the rights to appeal to superior courts.

In response, the Judicial Service Commission (JSC) explained that it did not have a role to play in tribunals established under articles 144(3), 150(2), 158(4), 168(5)(a) or (b) and 251(4) of the Constitution. It, however, stated that it had a role to play in the case of local tribunals established under article 169(1)(d) of the Constitution and that such tribunals were part of the Judiciary. The JSC added that there was no transitional legislation on local tribunals but it had managed to transition 20 local tribunals from the Executive to the Judiciary.

The 2nd respondent, the Attorney General, agreed that it was necessary to transition tribunals established under article 169(1)(d) of the Constitution to the Judiciary from various Ministries and Government Departments. The Attorney General stated that although the Tribunals Bill, 2017, which would have provided the legislative mechanism for the transition had been formulated, it was yet to be approved by the Cabinet. The 2nd respondent posited that a declaration of unconstitutionality of the various statutes constituting the tribunals in question, as sought by the petitioner, would deny persons serving in the tribunal a right to fair administrative action and fair hearing. He added that the 6 months transition, as sought by the petitioner, was too short as the financial cycle was midway through its implementation.

The 3rd respondent stated that it was not a mandatory requirement for Parliament to enact a law to govern tribunals in Kenya and that article 261 of the Constitution on the dissolution of Parliament for failure to enact laws was inapplicable to the circumstances. The 3rd respondent also stated that if the petitioner desired the enactment of such a law, he should petition Parliament.

Issues

i. Whether a petition seeking reliefs that required Parliament to pass legislation to transition local tribunals, established under article 169(1)(d) of the Constitution, from the Executive to the Judiciary was justiciable.
ii. What was the nature of local tribunals referred to under article 169(1)(d) of the Constitution?
iii. Whether the appointment and removal of members of the local tribunals under article 169(1)(d) of the Constitution by the Executive violated the principle of separation of powers and violated the right to a fair hearing under article 50 of the Constitution.
iv. Whether the local tribunals established under article 169(1)(d) of the Constitution should be transited to the Judiciary from the Executive.

Held

1. The dispute in question was within the mandate of the 3rd respondent (Parliament) and it could be handled by the 3rd respondent in liaison with the 2nd respondent (the Attorney General.) The petitioner wanted to compel the 2nd and 3rd respondent to take the necessary legislative action. An invitation made to a court to exercise powers with respect to constitutional roles reserved to other organs of Government was barred by the principle of separation of powers and the principle of non-justiciability.

Nonetheless, there were constitutionally permissible situations in which the court could interfere. For example, in situations where fundamental rights and freedoms or other constitutional provisions were violated.

2. Pursuant to article 261(1) of the Constitution and the Fifth Schedule to the Constitution, any legislation whose timeline was not specified under the Constitution was to be passed within five years of the promulgation of the Constitution. Therefore, the laws which were contemplated to be passed under article 169 of the Constitution had to be so passed by August 2015. From the position taken by Parliament, it was clear that it was not keen on passing the necessary legislation. It was obvious that nothing could be forthcoming if the matter was left in the sole hands of Parliament. The petitioner could not, hence, be accorded the appropriate forum to adjudicate the dispute if the matter was left to Parliament.
3. The petitioner alleged a contravention of the constitutional provisions of article 169(2) of the Constitution by the 3rd respondent and the petitioner, therefore raised serious constitutional issues. The petition was not framed in the Bill of Rights language as a pretext to gain entry into court.
4. The petition was ripe for court determination and as such an exception to the principle of non-justiciability and the doctrine of exhaustion was applicable.
5. Article 169 of the Constitution provided a list of subordinate courts and it included local tribunals established by statute, other than the courts established as required under article 162(2) of the Constitution.
6. To understand the context in which the term 'local tribunals' was used in article 169(1)(d) of the Constitution it was necessary to consider the *ejus dem generis rule* of interpretation. That rule assisted the court in reconciling any incompatibility between specific and general words. The rule accomplished the purpose of giving effect to both specific and general words by treating the particular words as indicating the class and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words.
7. Article 169(1) of the Constitution enumerated a class of entities before mentioning the local tribunals. They were Magistrates Courts, the Kadhis' Courts, the Court Martial and any other court. Of much importance was that the title in article 169(1) described subordinate courts to include the local tribunals. Subordinate court were courts subordinate to the superior courts and they dealt with the formal settlement of disputes between parties. Therefore, the local tribunals referred to in the enumeration in article 169(1)(d) of the Constitution were courts of law and they possessed the following qualities; -
    1. They were courts of law;
    2. They were subordinate to the superior courts;
    3. They were not advisory in nature;
    4. They were not administrative tribunals;
    5. They were not presided over by or they did not include a judge of the superior courts in their membership; and,
    6. They were formed under an Act of Parliament.
8. The local tribunals under article 169(1)(d) of the Constitution excluded the following class of tribunals: -
    1. the tribunals formed under the Constitution;
    2. all administrative and advisory tribunals;
    3. All tribunals whose membership included a judge of the superior courts; and
    4. all other informal tribunals not formed under the Constitution or any Act of Parliament.
9. Most of the disputes handled by the local tribunals involved the Executive. As such, the Executive had an obvious advantage as it was responsible for the appointment and removal of the members. In such

circumstances, the Executive ought not to be the appointing authority. Instead, that duty ought to be undertaken by an independent entity.

10. Local tribunals were subordinate courts and their affairs, just like the other subordinate courts, ought to be managed by the Judiciary through JSC. In doing so, the constitutional dictates would be achieved. It would create transparency in the appointment and removal of members of the tribunals which would be done in accordance with the law and the Constitution.
11. The appointment and removal of members of the local tribunals falling under article 169(1)(d) of the Constitution by the Executive contravened the principle of separation of powers and was contrary to article 50(1) of the Constitution. That state of affairs also infringed on the independence of the Judiciary.
12. The local tribunals, which were subordinate courts, under the administration of the Executive ought to be transited to the Judiciary. The rationale for that was provided under article 160(1) of the Constitution which provided that the Judiciary would not be subject to the control or direction of any person in the exercise of judicial authority.
13. The Chief Justice was the head of the Judiciary courtesy of article 161(2)(a) of the Constitution. Article 171 of the Constitution established the JSC. One of the functions of JSC was to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice. JSC, therefore, was supposed to support the Judiciary in discharging its constitutional mandate. In doing so, JSC had to remain true to the Constitution.
14. Members of local tribunals, and in line with the *ejus dem generis rule*, fell within the category of 'other judicial officers' under article 172(1)(c) of the Constitution. Such officers had to be appointed by the JSC. For such appointments to be made by the JSC it was necessary to transition the tribunals to the Judiciary. Under article 169(2) of the Constitution, there was need for a statute to assist in the transition.
15. The 2nd respondent through the Kenya Law Reform Commission (KLRC) undertook steps towards achieving the transition. The KLRC established the Committee on Review of the Rationale for the Establishment of Tribunals in Kenya whose efforts resulted in the formulation of the Tribunals Bill, 2017 which was pending Cabinet approval. Through the JSC, the Judiciary constituted the Judiciary Working Committee on the transition and restructuring of the Tribunals Working Committee. The Committee eventually came up with a Draft Tribunals Bill, 2015. The JSC managed to transition 20 local tribunals from the Judiciary to the Executive. Further, the 3rd respondent engaged the JSC in discussions about the Tribunals Bill 2017.
16. The petitioner's prayer for a declaration of unconstitutionality of any law that did not vest the duty to appoint or remove any members of the local tribunals created under article 169(1)(d) of the Constitution in JSC, was not specific. There were many statutes constituting the tribunals. An order that lacked specificity could have effects that were too detrimental. For instance, those statutes made provision for matters other than the tribunals and annulling them would result in immense disruptions and confusion.
17. The petitioner's prayer for the court to annul all appointments to the tribunals under article 169(1)(d) of the Constitution which was not made by JSC could not be granted as the members it targeted were not parties to the petition. The grant of such an order would therefore, contravene articles 47 and 50(1) of the Constitution.

Petition partly allowed with no orders as to costs.

Orders

i. *The amended petition was justiciable and the court had the jurisdiction to deal with the issues therein.*
ii. *The local tribunals created under article 169(1)(d) of the Constitution were subordinate courts in Kenya.*

iii. *The appointment and removal of members of the local tribunals created under article 169(1)(d) of the Constitution by the Executive violated the principle of separation of powers, contravened the right to fair hearing under article 50 of the Constitution and infringed on the independence of the Judiciary.*

iv. *The local tribunals under article 169(1)(d) of the Constitution had to be transited to the Judiciary and the appointment and removal of their members be undertaken by the Judicial Service Commission.*

v. *A declaration that any new appointment or removal of a member of any of the tribunals under article 169(1)(d) of the Constitution had to be undertaken by the Judicial Service Commission.*

vi. *The Attorney General and Parliament, being the 2nd and 3rd respondents herein, were directed to take proactive steps within their respective dockets towards propagating the Tribunals Bill with a view of transiting the local tribunals under article 169(1)(d) of to the Judiciary. To that end, the Attorney General and Parliament were to file affidavits within 6 months of the judgment detailing the steps taken.*

vii. *Upon filing of the affidavits in (vi) above, the Deputy Registrar of the court was to schedule the matter for mention on the basis of priority.*

Citations

Cases

Kenya

1. *Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others* Constitutional Petition 496 of 2013; [2013] KEHC 6919 (KLR) - (Mentioned)
2. *Communication Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR) - (Explained)
3. *Institute of Social Accountability & another v National Assembly & 4 others* Petition 71 of 2013; [2015] KEHC 6975 (KLR) - (Mentioned)
4. *Judicial Service Comission v Mbalu Mutava & another* Civil Appeal 52 of 2014; [2015] KECA 741 (KLR) - (Explained)
5. *Kenya Ports Authority v William Odhiambo Ramogi & 8 others* Civil Appeal 166 of 2018; [2019] KECA 305 (KLR) - (Mentioned)
6. *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* Petition 3 of 2018; [2021] KESC 34 (KLR) - (Explained)
7. *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* Petition 15 & 16 of 2015 (Consolidated); [2017] KESC 2 (KLR) - (Explained)
8. *Ramogi, William Odhiambo & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* Constitutional Petition 159 of 2018 & Petition 201 of 2019 (Consolidated); [2020] KEHC 10266 (KLR) - (Explained)
9. *Rangal, Lemeguran & 4 others v Attorney General & others* Miscellaneous Civil Application 305 of 2004; [2006] KEHC 713 (KLR) - (Explained)
10. *Swaka, John v Director of Public Prosecutions & 3 others* Constitutional Petition 318 of 2011; [2013] KEHC 5422 (KLR)
11. *Wa Ngugi, Kiriro & 19 others v Attorney General & 2 others* Petition 254 of 2019; [2020] KEHC 8819 (KLR) - (Explained)

South Africa

1. *Affordable Medicines Trust & others v Minister of Health & others* [2005] ZACC 3; 2006 (3) SA 247 (CC) - (Explained)
2. *Minister of Health & others v Treatment Action Campaign (TAC) & others* (2002) 5 SA 721; (2002) 5 LRC 216 - (Explained)

Texts

1. Burke, J., Allsop, P., (Eds) (1953), *Stroud's Judicial Dictionary* London: Sweet & Maxwell 3rd Edn
2. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn p 594

3. Garner, BA., (Ed) (2014), *Black's Law Dictionary* St Paul Minessota: Thomson Reuters 10th Edn para 1737
4. Sutherland, JG., (Ed) (2018), *Statutes and Statutory Construction* London: Forgotten Books 3rd Edn para 4910

Statutes

Kenya

1. Capital Markets Authority Act (cap 485A) In general - (Cited)
2. Constitution of Kenya articles 1(1)(3)(c); 3; 10(2); 20(4)(5); 23(3)(b); 24(3); 26(1); 27; 47; 50(1); 73(2)(a); 97(1)(c); 119; 144(3); 150(2); 158(4); 159(1)(2); 162(2); 165; 168(5)(a)(b); 169(1)(2)(a)(b)(c)(d); 171; 172(2)(a)(b); 232(1)(g); 251(4); 261(1); Schedule 5- (Interpreted)
3. Gold Mines Development Loans Act (cap 311) In general - (Cited)
4. Insurance Act (cap 487) In general - (Cited)
5. Interpretation and General Provisions Act (cap 2) section 23(3)(b) - (Interpreted)
6. Land Control Act (cap 302) In general - (Cited)
7. Land Disputes Tribunals Act (repealed) (cap 303A) In general - (Cited)
8. Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (cap 301) In general - (Cited)
9. Magistrates' Court Act (cap 10) In general - (Cited)
10. Non-Governmental Organizations Co-ordination Act (cap 134) In general - (Cited)
11. Petition to Parliament (Procedure) Act (cap 7E) In general - (Cited)
12. Prisons Act (cap 90) In general - (Cited)
13. Restrictive Trade Practices, Monopolies and Price Controls Act In general - (Cited)
14. Seeds and Plant Varieties Act (cap 326) In general - (Cited)
15. State Corporations Act (cap 446) In general - (Cited)
16. Sugar Act, 2001 (Act No 10 of 2001) In general - (Cited)
17. Tourist Industry Licensing Act (cap 381) In general - (Cited)
18. Transport Licensing Act (Repealed) (cap 404) In general - (Cited)
19. Value Added Tax Act (cap 476) In general - (Cited)
20. Water Act (cap 372) In general - (Cited)
21. Wildlife Conservation and Management Act (cap 376) In general - (Cited)

South Africa

Co-operatives Act, 2005 (Act No 14 of 2005) In general - (Cited)

South Africa

Co-operatives Act, 2005 (Act No 14 of 2005) In general - (Cited)

Advocates

Miss Lipo for the 1st respondent

Mr Moimbo for the 2nd respondent

Mr Mbarak for the 3rd respondent

Mr Dudley Ochiel for the interested party

JUDGMENT

Introduction:

1. The gist of the amended petition subject of this judgment is the Constitution, composition and operation of the local tribunals in Kenya.

2. The petitioner, Okiya Omtatah Okoiti, posits that all tribunals in Kenya must be constituted and regulated by the Judicial Service Commission, the 1st respondent herein (hereinafter referred to as 'the 1st respondent or JSC').

The Petition:

3. It is the petitioner's case that Tribunals in Kenya suffer lack of unanimity in many aspects. Although the Tribunals fall under article 169(1)(d) of the *Constitution*, many of them are under the direct control and regulation of the Executive. To him, that infringes on the principle of separation of powers as, in most cases, the Executive is a party to the disputes before such Tribunals. The petitioner contends that the Tribunals as constituted have varied terms of service and different rules of procedure. That, whereas some adopt formal procedure akin to that of courts, others are informal thus impacting negatively on access to justice and equal justice to all.

4. The petitioner is further aggrieved that some of the Tribunals do not provide for, and as such, violate a litigant's right of appeal to superior courts. In addition, the petitioner contends that the respondents have, without any reasonable cause, failed and/or refused to transition the Tribunals from the Executive arm to the Judiciary in accordance to the Constitution.

5. In the main, the amended petition prays for the following: -

   (i) A declaration that:

      a) Tribunals established pursuant to article 169(1)(d) of the *Constitution of Kenya, 2010* are not part of the Executive machinery, nor are they independent adjudicatory bodies, but are subordinate courts which are an integral part of the Judiciary.

      b) The Judicial Service Commission is exclusively responsible for appointing and removing member of the tribunals established pursuant to article 169(1)(d) of the *Constitution of Kenya 2010*, for establishing their rules of procedure and for doing anything incidental thereto to ensure their smooth operations as courts of law.

      c) The doctrine of separation of powers under the Constitution of Kenya is an absolute bar to the Executive and its agencies, or any other entities who are not the Judicial Service Commission, being mandated by Parliament to appoint or remove any members of tribunals crated under article 169(1)(d) of the *Constitution of Kenya, 2010*.

      d) Any law which vests in the executive and its agencies, or in any other entities who are not the Judicial Service Commission, the mandate to appoint or remove any members of tribunals created under article 169(1)(d) of the *Constitution of Kenya 2010* is unconstitutional and, therefore, invalid, null and void *ab initio*.

      e) The budget for tribunals should be a line budget in the Judiciary.

      f) Parliament has failed to enact necessary legislation pursuant to article 169(2) to give effect to article 169(1)(d) within the time specified in the Fifty Schedule to the Constitution.

   (ii) An Order

      a. Annulling all appointments to tribunals created under article 169(1)(d) of the *Constitution* which were not made by the Judicial Service Commission through a competitive process.

a1. Compelling Parliament and the Attorney-General to enact legislation pursuant to article 169(2) to give effect to article 169(1)(d) of the *Constitution* within three months, and to report the progress to the Chief Justice.

a2. That if Parliament fails to enact legislation pursuant to article 169(2) to give effect to article 169(1)(d) of the *Constitution* within three months, the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament.

b. Compelling the Judicial Service Commission to immediately but not later than three months re-constitute all tribunals created under article 169(1)(d) of the *Constitution* upon Parliament enacting legislation pursuant to article 169(2) to give effect to article 169(1)(d).

c. Suspending order (a) above for a period of six months to allow for a smooth transition.

d. Compelling the respondent to bear the costs of this suit.

(iii) Any other relief the court may deem just to grant.

6. The petitioner tendered oral submissions in the matter.

The Responses:

7. The amended petition is opposed and conceded to in equal measure.

8. The 1st respondent filed a replying affidavit sworn on August 30, 2028 by Anne Amadi, the Chief Registrar of the Judiciary and the Secretary to JSC.

9. JSC took the position that it has no role to play in respect of constitutional Tribunals created under articles 144(3), 150(2), 158(4), 168(5)(a) or (b) and article 251(4) of the *Constitution*. In the case of local tribunals as under article 169(1)(d) of the *Constitution*, JSC posits that the Tribunals are indeed subordinate courts within the Judiciary by virtue of articles 1(3)(c), 20(4) & (5) 24(3), 50(1), 159(1) &2 164(3)(b), 165, 169(1)(d), 171 and 172 of the *Constitution*. These Tribunals are, hence, subject to control by JSC.

10. Despite lack of transitional legislation on the local tribunals, JSC enumerated the efforts it has so far taken to ensure that those tribunals are transited into the Judiciary. It also acknowledges that its efforts led to the transitioning of 20 local tribunals from the Executive to Judiciary and that it is now JSC which deals with the appointment and removal of the members of those tribunals. JSC vehemently denied that it has failed to put in place the necessary legislative measures to transit the Tribunals since the legislative mandate is vested with the Parliament.

11. The 1st respondent also filed written submissions and a List of Authorities both dated May 18, 2020. It, *inter alia*, prayed for an order in the nature of structural interdict.

12. The 2nd respondent, the Hon. Attorney General, partly opposed the petition. It relied on the affidavit of Joash Dache, the Commission Secretary of the Kenya Law Reform Commission and Chairperson of the Committee on Review of the Rationale for the Establishment of Tribunals in Kenya.

13. The 2nd respondent agrees with the petitioner that under article 169(1)(d) of the *Constitution* local tribunals are classified as subordinate courts. It also agrees that the local tribunals need to be transited to the Judiciary from the various Ministries and Government Departments. However, to attain this,

the 2nd respondent contends that an Act of Parliament pursuant to article 162(2) of the *Constitution* is to be enacted.

14. The concerted efforts taken by the 2nd respondent in liaison with the 1st respondent to come up with the Tribunal Bill, 2017 were enumerated. The Bill is about to be taken to the cabinet for approval.

15. On the remedies sought by the petitioner, the 2nd respondent posits that the declaration of unconstitutionality of the various statutes constituting the Tribunals will deprive persons serving in those tribunals their right to fair administrative action and fair hearing.

16. The period of 6 months prayed for the transition, is deposed to be too short since financial/fiscal cycle is mid-way its implementation and that the financing of the transition of the tribunals must be budgeted for. The 2nd respondent called for the dismissal of the petition, but added that if the declaration of unconstitutionality is issued, then the court ought to consider structural interdicts instead and allow for a period of 2 years to fastrack the passage of the Tribunals Bill into law.

17. The 2nd respondent further relied on the decisions in *John Sakwa v Director of Public Prosecutions, Attorney General & 2 others* [2013] eKLR and *The Institute of Social Accountability & another v National Assembly & 4 others* [2015 eKLR in urging the court to suspend any declaratory orders of unconstitutionality and instead give the parties time to regularize the transitional regime.

18. The 3rd respondent opposed the amended petition. It filed Grounds of Opposition on February 13, 2019.

19. The 3rd respondent posits that there is no mandatory requirement for Parliament to enact any specific or general law governing tribunals in Kenya. As such, the amended petition does not disclose any violation of the Constitution and ought to be dismissed.

20. It denied that article 261 providing for the dissolution of Parliament for failure to enact laws apply to this case because all such laws required to govern the Judiciary under schedule five to the Constitution have so far been enacted including the *Magistrates Court Act, 2015* as required under article 169(1) a-c of the *Constitution*.

21. The 3rd petitioner contends that if the petitioner is of the view that there should be a general codifying law regulating tribunals, then the right avenue would be, to first petition Parliament under article 119 of the *Constitution* and the *Petitions to Parliament Act, 2012* for the enactment of the said law.

22. It is also submitted that there is no need of any court supervision as Parliament is in the process of dealing with the Tribunals Bill and that the petition is caught up by the doctrine of exhaustion and ripeness.

23. The 3rd respondent denies that JSC has the mandate to appoint all the members of all Tribunals as alleged. It submits that the petition ought to be dismissed. However, in the event the petition is sustained, then the court is called upon to consider issuance of structural interdicts.

Issues for Determination:

24. Having carefully considered the material presented before court by the parties including the submissions and the decisions referred to, I discern the following issues for determination: -

    (i) Whether the Petition is Justiciable.

    (ii) The nature of the local tribunals under article 169(1)(d) of the *Constitution*.

(iii) Whether the appointment and removal of members of the local tribunals under article 169(1)(d) of the *Constitution* by the Executive violate the principle of separation of powers and violates the right to fair hearing under article 50 of the *Constitution*:

(iv) Whether the local tribunals under article 169(1)(d) of the *Constitution* should be transited to the Judiciary:

(v) Remedies.

25. I will deal with the issues in seriatim.

(i) Whether the Petition is Justiciable:

26. The issue of non-justiciability is raised by the 3rd respondent. It is hinged on the doctrines of ripeness and exhaustion.

27. A three judge bench in Nairobi Constitutional Petition No 254 of 2019, *Kiriro Wa Ngugi & 19 others v Attorney General & 2 others* [2020] eKLR comprehensively addressed the entire concept of non-justiciability. The concept entails the doctrines of Political Question Doctrine, the Constitutional-Avoidance Doctrine; and the Ripeness Doctrine.

28. Speaking to Ripeness doctrine, the learned judgesstated as follows: -

> 107. The doctrine focuses on the time when a dispute is presented for adjudication. The *Black's Law Dictionary* 10th Edition, [*supra*] at page 1524 defines ripeness as:
>
> The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made
>
> 108. Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies.
>
> 109. The Court of Appeal in *National Assembly of Kenya & another v Institute for Social Accountability & 6 others* Nairobi Civil Appeal 92 of 2015 [2017] eKLR, faulted the constitutional court for adjudicating upon hypothetical matters. The court held:
>
> > [72] The broad questions which were raised in the consolidated petitions, namely, – division of functions, powers and authority; the equitable sharing of revenue of national government, whether the Amendment Bill concerned county government and the role of the Senate in the legislative process, are questions which relate to inter-governmental relations and which should have been raised by either government in the appropriate forum and in case of a dispute such a dispute should have been resolved by the designated institutions through the prescribed mechanism. This is one peculiar case where the Constitution stipulates that a dispute should be in essence be resolved by other institutions through a prescribed mechanism before the jurisdiction of the High Court can be invoked.

[74] Furthermore, questions such as division of functions, division of revenue, legislative process and budget process are essentially political questions which fall within the political question doctrine; and which the Constitution has assigned to other political institutions for resolution and created institutions and mechanisms for such resolution.

110. In *National Assembly of Kenya & another v The Institute for Social Accountability & 6 others* [*supra*] the Court of Appeal held:

[73] Since there was no actual live dispute between the national and county governments about CDF and if any, the mechanisms for resolving such disputes was not employed, the questions which were brought to High Court for determination had not reached constitutional ripeness for adjudication by the court. In reality, TISA and CEDGG invented a hypothetical dispute which was brought to court in the guise of unconstitutionality of CDFA.

111. In *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* Nairobi Constitutional Petition No 453 of 2015 [2016] eKLR, Onguto J stated:

[27] Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases..... The court is prevented from determining an issue when it is too early or is simply out of apprehension, hence the principle of ripeness. An issue before court must be ripe, through a factual matrix for determination.

29. On the doctrine of exhaustion, a 5-Judge Bench in Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with Constitutional Petition No 201 of 2019 [2020] eKLR elaborately dealt with the doctrine. The court stated as follows: -

52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This encourages alternative dispute resolution mechanisms in line with article 159 of the Constitution and was aptly elucidated by the High Court in *R v Independent Electoral and Boundaries Commission* (IEBC) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the court opined thus:

42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by

any law must be strictly adhered to since there are good reasons for such special procedures.

43. While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.

This is *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that:

> It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The ex parte applicants argue that this accords with article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.

30. The court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R v Independent Electoral and Boundaries Commission* (IEBC) & others *ex parte* The National Super Alliance Kenya (NASA) (*supra*), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

> What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited case (*supra*), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the *Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau & 9 others v Aelous (K) Ltd and 9 others*.)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and allow the suit to proceed before it. It is also essential for the court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

62. In the instant case, the petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.

31. The foregoing was buttressed by the Court of Appeal in Mombasa Civil Appeal No 166 of 2018 *Kenya Ports Authority v William Odhiambo Ramogi & 8 others*[2019] eKLR.

32. There is no doubt that the dispute in the amended petition falls squarely within the mandate of the 3rd respondent which can be accomplished in liaison with the 2nd respondent.

33. It is also clear that the petitioner seeks to inter-alia to compel the 2nd and 3rd respondents to take steps to enact the necessary legislation towards the transitioning of the Tribunals.

34. Whereas an invitation of this court to exercise its powers against the constitutional roles reserved for two organs of government is barred by the principle of non-justiciability and is also an affront to the doctrine of separation of powers, there are constitutionally permissible situations where this court may interfere. It does so if there is actual or threatened violation of the rights and fundamental freedoms guaranteed under the Constitution, or in instances where it is demonstrated that there are violations of other provisions of the Constitution whose enforcement are not mere 'bootstraps' or merely framed in Bill of Rights language as a pretext to gain entry to the court.

35. A careful reading of the parties' pleadings, submissions and decisions referred to reveal that there is consensus that the local tribunals under article 169(1)(d) of the *Constitution* are surbodinate courts. Under sub-article 2, Parliament shall enact legislation conferring jurisdiction, functions and powers on the surbodinate Courts.

36. Pursuant to article 261(1) of and the fifth schedule to the *Constitution*, any legislation whose timeline was not specified under the Constitution was to be passed within five years of the promulgation of the Constitution. It is common knowledge that the Constitution of Kenya was promulgated in August 2010. Therefore, constitutionally speaking, the laws which were contemplated to be passed under article 169 of the *Constitution* had to be so passed by August 2015. It is now 6 years post the calibrated constitutional timeline.

37. One of the petitioner's contention is that Parliament has not enacted the required legislation since the promulgation of the Constitution 11 years ago. Parliament on its part contends that there are no timelines set for such enactment. The Parliament's contention is, hence, settled by the express provisions of article 261(1) of and the Fifth Schedule to *Constitution* which provides for a maximum period of five years within which any other legislation required to be passed under the Constitution must be so passed. From the position taken by Parliament, it is clear that Parliament is not keen on passing the necessary legislation. It is obvious that nothing may soon be forthcoming if this matter is

left in the sole hands of Parliament. The petitioner cannot, hence, be accorded the appropriate forum to adjudicate the dispute if the matter is left to Parliament.

38. The petitioner is in essence alleging contravention of article 169(2) of the *Constitution*. The petition raises serious constitutional issues and their resolution is not mere bootstraps. Further, the petition is not merely framed in Bill of Rights language as a pretext to gain entry to the court. In other words, the Petition is ripe for court's determination. As such, the exception to the principle of non-justiciability must be upheld.

39. This court will, therefore, not lend a deaf ear to a party who knocks on its legal doors alleging infringement or threat to infringement of its rights and fundamental freedoms as guaranteed under the Bill of Rights or contravention or threats of violation of the Constitution unless the applicability of the principle of non-justiciability is otherwise proved.

40. In the circumstances of this case, there are valid and holding exceptions to the principle of non-justiciability and the doctrine of exhaustion. This court is, hence, vested with the requisite jurisdiction to deal with the petition.

41. The issue is hence answered in the affirmative.

(ii) The nature of the Local Tribunals under article 169(1)(d) of the Constitution:

42. The *Black's Law Dictionary,* 10th Edition at paragraph 1737 defines a Tribunal as follows: -

    1. A court of justice or other adjudicatory body.

    2. The seat, beat, or place where a judge sits.

43. The dictionary also defines an administrative tribunal as follows: -

    1. A court-like decision-making authority that resolves disputes, esp. those in which one disputant is a government agency or department; an administrative agency exercising *quasi-judicial function*.

    2. A government division established to implement legislative policy.

44. A committee was set-up by the 2nd respondent through the Kenya Law Reform Commission to undertake *inter alia* a comprehensive status analysis of the existing tribunals in Kenya. That was sometimes in June 2014. The committee tendered its report titled The Report of the Committee on the Review of the Rationale for the Establishment of Tribunals in Kenya (hereinafter referred to as 'the KLRC Report') sometimes in December, 2015. The KLRC Report noted that there are over 60 Tribunals in Kenya. These tribunals are variously created by Acts of Parliament.

45. According to article 1(1) of the *Constitution*, all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution. In sub-article 3 the sovereign power is delegated to the following organs: -

    (a) Parliament and the legislative assemblies in the county governments;

    (b) The National executive and the executive structures in the county governments; and

    (c) The Judiciary and independent tribunals.

46. Article 3 obligates every person to respect, uphold and defend the Constitution. In article 10, the Constitution creates the national values and principles of governance that bind all state organs,

state officers, public officers and all persons whenever any of them applies or interprets cases the Constitution, enacts, applies and interprets any law or makes or interprets public policy decisions.

47. Chapter 10 of the *Constitution* is on the Judiciary. Article 159(1) states as follows: -

> Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

48. Article 169 of the *Constitution* states as follows: -

(1) The subordinate courts are-

(a) the Magistrates courts

(b) the Kadhis' courts

(c) the Courts Martial; and

(d) any other court or local tribunal as may be established by an act of parliament, other than the courts established as required by article 162(2)

(2) Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause 1

49. The foregoing lists the surbodinate courts in Kenya. They are the Magistrates Courts, the Kadhis Courts, the Court Martial and any other court or local tribunal established by law.

50. In order to understand the context in which the term 'local tribunal' is used in article 169(1)(d) of the *Constitution*, there is need to look at one of the rules of interpretation. That is the *ejus dem generis* rule.

51. The *ejus dem generis* rule is an interpretational principle in law. It is a rule of construction that guides court in reconciling any incompatibility between specific and general words.

52. *Stroud's Judicial Dictionary* 3rd Edition, defines the principle as follows:

> Where a statute, or other document, enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces 'other' persons or things – the word 'other' will generally be read as 'other such like', so that the persons or things therein comprised may be read as ejus dem generis with, and not of a quality superior to, or different from, those specifically enumerated.

53. The *Black's Law Dictionary*, Garner A Bryan, 9th Edition, Thomson Reuters 2009 at page 594 defines the doctrine in the following manner: -

> A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items on the same class as those listed. For example, in the phrase horses, cattle, sheep, pigs, goats, or any other farm animals, the general language or any other farm animals –despite its seeming breadth- would probably be held to include only four-legged, hoofed mammals typically found on farms, and thus would exclude chickens.

54. Therefore, where general words follow specific words in an enumeration describing the legal subject, *ejus dem generis* principle requires that the general words are construed to embrace only objects similar in nature to those enumerated by the preceding specific words.

55. The rule, therefore, accomplishes the purpose of giving effect to both the specific and the general words by treating the particular words as indicating the class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words.

56. In his treatise titled *Sutherland Statutory Construction* 3rd Edition, 1984, Horrack Sutherland states at paragraph 4910 that for the doctrine to apply, the following conditions must exist: -

(i) That statute contains an enumeration by specific words;

(ii) The members of the enumeration constitute a class;

(iii) The class is not exhausted by the enumeration;

(iv) A general term follows the enumeration; and

(v) There is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires.

57. The Court of Appeal in Nairobi Civil Appeal 351 of 2012 *Commissioner for the Implementation of the Constitution v Attorney General & 2 others* [2013] eKLR clearly brought out the application of the doctrine. Before it was the question whether 'the marginalized' fell within the category of persons named in article 97(1)(c) of *the Constitution*. The said article is in respect of Membership of the National Assembly and states as follows: -

97.

(1) The national Assembly consists of-

(c) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with article 90, to represent special interests including the youth, persons with disabilities and workers; and

58. The learned judges of appealspoke to *ejus dem generis* in reference to the High Court decision in *Rangal Lemeguran & others v Attorney General & others* [2006] eKLR, where in interpreting the term special interests the High Court observed as follows: -

> Although the *Constitution* does not define special interests contemplated by section 33(1) [of the former Constitution] they include those interests which have not been taken care of by the election process and which are vital to the effectiveness of the democratic elections in terms of adequate representation for all-in a democracy. In other words, the special interests mean those interests which the normal electioneering process has failed to capture and represent.

59. The judges then agreed with the proposition that 'the marginalized' fell into the group anticipated by the article 97(1)(c) of the *Constitution*. The judges had the following to say on the doctrine: -

> .... there are some clear categories of people that qualify to be viewed as representing special interests, namely:
>
> (i) ethnic minorities
>
> (ii) the youth;

(iii) the blind;

(iv) the deaf;

(v) the physically disabled.

We can on our part add that religious minorities, linguistic or cultural minorities and racial minorities fall seamlessly into the category of special interests while the Constitution has also in the wisdom of the framers and the people of Kenya made inclusion of "workers" as a special interest group.

From what we have said so far, it should be obvious that for a class of persons to qualify to be called a special interest worthy of special representation under our constitutional framework, they must be a class as can fairly be said to have suffered marginalization and disadvantage keeping them away from the centre of the political process. That, to us, is the logical, rational nexus that at once attracts and glues such a class into proper location in both section 34(9) of the Elections Actand article 97(1) (c) of the Constitution.

That being our view of the matter, we agree with the appellant that an interpretation of article 97(1)(c) of the *Constitution* invites the application of the ejus dem generis rule. The youth, persons with disabilities and workers clearly fall in the category of the marginalized, the disadvantaged and the vulnerable-those not sufficiently empowered to muscle their way, generally speaking, into the inner sanctums of political and state power. They are the natural underdogs in the rough and tumble of the political jungle more likely than not to be elbowed out of the centre and off the field unless special affirmative and protective measures be taken to aid them.

60. Back to this case, article 169(1) of the *Constitution* enumerates a class of entities before mentioning the local tribunals. They are Magistrates Courts, the Kadhis Courts, the Court Martial and any other court. Of much importance is that the title in article 169(1) describes surbodinate courts to include the local tribunals.

61. The entities Magistrates Courts, the Kadhis Courts, the Court Martial and any other court fall under a special class. They are surbodinate courts. These surbodinate courts are surbodinate to the superior courts and deal with formal settlement of disputes between parties. They are not advisory in nature and are set-up with the adversarial system of dispute resolution in mind. As such, the local tribunals referred to after the enumeration in article 169(1)(d) of the *Constitution* can only be courts in law.

62. The local tribunals, therefore, possess the following qualities: -

(i) They are courts of law;

(ii) They are surbodinate to the superior courts;

(iii) They are not advisory in nature;

(iv) They are not administrative tribunals;

(v) They are not presided over by or include a judge of the superior courts in their membership;

(vi) They are formed under an Act of Parliament;

63. The foregoing analysis, therefore, excludes the following class of Tribunals: -

(a) The Tribunals formed under the Constitution;

(b) All administrative and advisory tribunals;

(c) All tribunals whose membership includes a judge of the superior courts;

(d) All other informal tribunals not formed under the Constitution} or any Act of Parliament.

64. Examples of Tribunals which do not fall under article 169(1)(d) of the *Constitution* include: -

(i) Tribunal created under article 144(3) and 150(2) of *Constitution* for the removal of the President or Deputy President on grounds of incapacity;

(ii) Tribunal created under article 158(4) of the *Constitution* for the removal of the Director of Public Prosecutions;

(iii) Tribunal created under article 168(5)(a) or (b) of the *Constitution* for the removal of the Chief Justice or other Judges of the superior courts;

(iv) Tribunal created under article 251(4) of the *Constitution* for the removal of commissioners or holders of independent offices.

(v) Any administrative Tribunal;

(vi) Any informal tribunal.

65. From the above analysis, it is clear that the local tribunals created under article 169(1)(d) of the *Constitution* are subordinate courts and not advisory or administrative tribunals. These local tribunals are created under statutes.

(iii) Whether the Appointment and Removal of members of the Local Tribunals under Article 169(1)(d) of the Constitution by the Executive Violate the Principle of Separation of Powers and Violates the Right to Fair Hearing under Article 50 of the Constitution:

66. As stated above, the local tribunals contemplated under article 169(1)(d) of the *Constitution* must be anchored in Acts of Parliament or statutes. Such constituting statutes ought to provide for *inter alia* the constitution, appointment, removal and the term of the members of those tribunals.

67. The manner of appointment and removal of the members of the local tribunals is one of the disputes in this matter.

68. The petitioners posit that in most of the local tribunals, which are surbodinate courts, the members are appointed and removed by the Executive instead of the Judiciary through the JSC. The petitioner further posits that such state of affairs does not only infringe upon the doctrine of separation of powers, but also infringes the rights of those whose disputes are dealt with under those tribunals in terms of the right to fair hearing under article 50 and the right to a fair administrative action under article 47 of the *Constitution*. It is contended that the manner in which the members of the local tribunals are appointed further infringes upon the basic structure of the Constitution.

69. In buttressing the argument, the petitioner argues that in most cases the Executive is a party in those disputes hence the impartiality of the members of the local tribunals is always highly compromised. It is also contended that the members are also removed at the whim of the Executive or in instances where the members do not champion the interests of the appointing authority.

70. The petitioner also avers that the appointments are in breach of articles 73(2)(a), 172(2)(a) & (b) and 232(1)(g) as read with articles 10(2) and 27 of the *Constitution*, as they are not done through a

competitive, objective and inclusive process thus stripping them of impartiality and independence. He posits that such appointments must be made by JSC.

71. In response, whereas JSC supports the transition of the local tribunals to the Judiciary, it submits that according to section 31 and 33 of the sixth schedule to the *Constitution* and section 23(3)(b) of the *Interpretation and General Provisions Act*, the statutes which govern the appointments made in the impugned Tribunals are yet to be repealed and as such the appointments would still be valid as a matter of law.

72. JSC further submits that the best way forward is that pending the regularization of the Local Tribunals, any appointments and removal of members of such tribunals be undertaken by itself.

73. The 2nd respondent did not respond to the issue. Instead, it threw its weight on the efforts made by the respondents towards transitioning of the local tribunals into the Judiciary.

74. The 3rd respondent maintained that the petition be disallowed.

75. From the pleadings and the parties' submissions, there is a general consensus that indeed the need for separation of powers between the Executive and the Judiciary in respect to the local tribunals is necessary. I echo the position.

76. There is no doubt that most of the disputes handled by the local tribunals involve the executive. As such, the executive has an obvious advantage given that it is the one responsible with the appointMent and removal of the Members. In such circumstances, the executive ought not to be the appointing authority. Instead, that duty ought to be undertaken by an independent entity. As said, justice should not only be done, but should also be seen to be done.

77. It is worth-noting that such a state of affairs where the Executive overreaches and takes over the mandate of the Judiciary infringes on the independence of the Judiciary.

78. The converse is the remedy. Since the local tribunals are surbodinate courts, then their affairs, just like the other surbodinate courts, ought to be managed by the Judiciary through JSC. In doing so, the constitutional dictates shall be achieved. Needless to say, there will be transparency in the appointments of members. The removal of members will also be done in accordance withthe Constitution and the law. In sum, there will be compliance with the Constitution.

79. I must reiterate that any exercise of power must be in accordance with the Constitution. In *Affordable Medicines Trust and Others v Minister of Health and Others* [at para 18] [2005] ZACC 3; 2006 (3) SA 247 (CC) at paras 49, 75 and 77, Ncgobo CJ held thus: -

> The exercise of public power must therefore comply with the Constitution}}, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. In this sense the Constitution entrenches the principle of legality and proVides the foundation for the control of public power.

80. The South African Constitutional Court in *Minister of Health and others v Treatment Action Campaign and others* (2002) 5 LRC 216, 248 further held that: -

> and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfil the rights in the Bill

> of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by the Constitution itself.

81. In this case, it is clear that the appointment and removal of members of the local tribunals falling under article 169(1)(d) of the *Constitution* by the Executive contravenes the principle of separation of power and is contrary to article 50(1) of the *Constitution*. That state of affairs also infringes on the independence of the Judiciary.

(iv) Whether the Local Tribunals under article 169(1)(d) of the Constitution should be Transited to the Judiciary:

82. Flowing from the foregoing issue, there is no dispute that the local tribunals, which are surbodinate courts, currently under the administration of the executive ought to be transited to the Judiciary.

83. The rationale thereof is in article 160(1) of the *Constitution*. The article states as follows: -

> In the exercise of judicial authority, the Judiciary, as constituted by article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.

84. The Chief Justice is the head of the Judiciary courtesy of article 161(2)(a) of the *Constitution*. Article 171 of the *Constitution* establishes the JSC. One of the functions of JSC is to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice. JSC, therefore, is supposed to support the Judiciary in discharging its constitutional mandate. In doing so, JSC must remain true to the Constitution. As stated in See the Court of Appeal in *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR) : -

> ... JSC is not part of the national executive as defined in article 130(1). Thus, although JSC is not a substructure of the national executive to which sovereign power is delegated, it is nevertheless subject to the Constitution and the law and like other independent commissions and independent offices, has the duty to protect the sovereignty of the people (see article 249(1)(a).

85. Another function of JSC is in article 172(1)(c) of the *Constitution*. It provides as follows: -

> appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament;

86. Having demonstrated that the local tribunals are part of the surbodinate courts, suffice to say that the members of such tribunals, and in line with the *ejus dem generis* rule, fall within the category of 'other judicial officers' under article 172(1)(c) of the *Constitution*. Such officers must, hence, be appointed by JSC.

87. In order to enable such appointments to be undertaken as commanded by the Constitution, there is no doubt that the local tribunals must be transited to the Judiciary. According to article 169(2) of the *Constitution*, there is need for an Act of Parliament to aid in the transition.

88. As said, the position is agreed upon by the respondents. Each of the respondents has undertaken steps towards achieving the transition. JSC has through the Judiciary constituted the Judiciary Working

Committee on the transition and restructuring of the Tribunals Working Committee. The Committee eventually came up with a Draft Tribunals Bill, 2015. As at now, JSC has managed to spearhead the transition of 20 local tribunals from the executive to the Judiciary.

89. On its part, the 2nd respondent through the Kenya Law Reform Commission established the Committee on Review of the Rationale for the Establishment of Tribunals in Kenya. The effort resulted in the Tribunals Bill, 2017 which Bill is still in the deliberative stages and is scheduled to be presented to the Cabinet.

90. There is evidence that the 3rd respondent through its Justice and Legal Affairs Committee has had dealings with JSC towards discussing the Tribunals Bill, 2017.

91. Section 3 of the Tribunal Bill, 2017 provides as follows: -

> The purpose of this Act is to provide a legislative framework to-
>
> a. Rationalize and regulate Tribunals
>
> b. Streamline the governance and operations of Tribunals;
>
> c. Provide for a reasonable standard for establishment of Tribunals
>
> d. Set appropriate qualifications for chairpersons and members of Tribunals;
>
> e. Bring all Tribunals under a single administrative regime and coordinate the functions of Tribunals.
>
> f. Enhance access to justice; and
>
> g. Improve quality of service delivery by Tribunals.

92. The Bill further make many other provisions towards attaining the transition. Of particular importance is that section 20 of the Bill provides for the appointment of the Chairpersons and members of the Tribunals by JSC.

93. In sum, for the reason that the local tribunals established under article 169(1)(d) of the *Constitution* are surbodinate courts, then they must be transited to the Judiciary.

(v)Remedies:

94. This case presents a unique set of circumstances. Whereas this court appreciates the call to jolt into action the other arms of Government to fulfil their constitutional mandates, the court must be cautious not to overstep its bounds. In other words, this court should not take over the functions of the other constitutional organs in the name of upholding the Constitution.

95. The Petitioner prays for a declaration of unconstitutionality of any law that does not vest the duty to appoint or remove any members of the local tribunals created under article 169(1)(d) of the *Constitution* in JSC.

96. Currently, there are so many statutes constituting the tribunals. The prayer sought is not specific. The petitioner seeks an *omnibus* order. The danger of granting such an order is the lack of specificity whose effects may be too detrimental. For instance, the constituting statutes make provision for other matters and issues as well. Annulling the entire statutes and not the specific sections thereof, will result to immense disruptions and confusions. Further, the inevitable question is why should the sections which have nothing to do with the appointment and removal of the members of the tribunals in the various statutes be annulled? This court declines the invitation by the petitioner.

97. There is also a prayer to annul all appointments to the tribunals under article 169(1)(d) of the *Constitution* which were not made by JSC. I, as well, find some difficulty in granting the order. The reason is that those targeted members did not participate in this petition. Granting such an order will, hence, be in contravention of articles 47 and 50(1) of the *Constitution*.

98. The petitioner further prays for an order to compel Parliament and the Hon Attorney General to enact the necessary legislation under article 169(2) of the *Constitution* within 3 months.

99. Whereas JSC and the 2nd respondent posit for a longer period of 1 year and 2 years respectively due to the process involved in the law-making process, the 3rd respondent takes the position that the Constitution does not provide for the time within which such a legislation ought to be made. As such, the 3rd respondent contends that the process should be left in the hands of the respondents.

100. The 3rd respondent's argument is squarely countered by article 261(1) of and the fifth schedule to the *Constitution* which obligated Parliament to pass any legislation which no timelines had been set in the Constitution within 5 years of the promulgation of the Constitution.

101. The Constitution has by now been in place for the last 11 years. During that period, the progress, if any, has been very minimal. It is not clear, from the approach proposed by the 3rd respondent, how long it will take for the legislation to be put in place. This is, therefore, a case which, in my view, calls for the court's supervision in the nature of structural interdicts.

102. The Supreme Court of Kenya in Petition No 3 of 2018, *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] eKLR, considered the place of structural interdicts as an effective remedy in certain specific constitutional disputes.

103. In that case, the appellant, Mitu-Bell Welfare Association instituted a suit in the High Court on behalf of the residents of Mitumba village, who lived near Wilson Airport, Nairobi. It claimed violation of the rights to shelter and housing of the said residents when they were evicted and their houses destroyed by the respondents.

104. Before the Supreme Court was the question whether the High Court was right in directing the Honourable Attorney General and The Commissioner for Lands to provide, 'by way of affidavit, within 60 days of judgment, the current state policies and programmes on provision of shelter and access to housing for the marginalized groups such as the residents of informal and slum settlements.'

105. In the Court of Appeal, the foregoing directive by the High Court was held to be erroneous on the ground that the court was *functus officio* upon rendering its judgment. The Court of Appeal faulted the High Court for delivering a judgment then reserving outstanding matters to be dealt with by the same court. It emphasized that, save for limited exceptions provided in law, delivery of judgments marked the end of litigation and jurisdictional competence of the court.

106. In resolving the above diametrically opposed findings, the Supreme Court delimited the place of structural interdicts. It first examined the powers of the High Court in respect of the orders it can issue pursuant to article 23(3) and 165(3)(d) of the *Constitution* and in so doing it made reference to its earlier decision in Petition No 14, 14A, 14B and 14C of 2014 (Consolidated), *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*; where it was observed that: -

> .... a close examination of these provisions (article 23(3) and 165(3)(d) of the Constitution) shows that the Constitution requires the court to go even further than the US Supreme

Court did in the *Marbury*, and that article 23(3) grants the High Court powers to grant appropriate relief "including" meaning that this is not an exhaustive list....

107. The court further reproduced the findings in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* where orders in the nature of structural interdicts were issued as follows: -

(d) The 1st appellant shall, in exercise of its statutory powers, and within 90 days of the date hereof, consider the merits of applications for a BSD licence by the 1st, 2nd, and 3rd respondents, and of any other local private sector actors in the broadcast industry, whether singularly or jointly.

(e) The 1st appellant (CAK) shall, in exercise of its statutory powers, ensure that the BSD licence issued to the 5th appellant herein, is duly aligned to Constitutional and statutory imperatives.

(f) The 1st appellant (CAK), in exercise of its statutory authority, shall, in consultation with all the parties to this suit, set timelines for the digital migration, pending the International Analogue Switch-Off Date of June 17, 2015.

(g) Upon the course of action directed in the foregoing orders (d & e) being concluded, the 1st appellant (CAK) shall notify the court through the Registry; and the Registrar shall schedule this matter for mention on the basis of priority, before a full Bench.

108. To further buttress propriety of structural interdicts, the learned judges referred to its decision in Petition No 15 & 16 of 2015; [2017] eKLR; *Francis Karioko Muruatetu another v Republic* where the following orders were made: -

(b) This matter is hereby remitted to the High Court for re-hearing on sentence only, on a priority basis, and in conformity with this judgment.

(c) The Attorney General, the Director of Public Prosecutions and other relevant agencies, shall prepare a detailed professional review in the context of this judgment and Order made with a view to setting up a framework to deal with sentence-re-hearing of cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this court on the same.

109. The learned judges, however, gave a rider on the manner in which structural interdicts or supervisory orders must be exercised. It gave the following parameters: -

(122) Having stated thus, we hasten to add that, interim reliefs, structural interdicts, supervisory orders or any other orders that may be issued by the courts, have to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other State Agency vested with a constitutional or statutory mandate to enforce the order. Most importantly, the court in issuing such orders, must be realistic, and avoid the temptation of judicial overreach, especially in matters policy. The orders should not be couched in general terms, nor should they be addressed to third parties who have no constitutional or statutory mandate to enforce them. Where necessary, a court of law may indicate that the orders it is issuing, are interim in nature, and that the final judgment shall await the crystallization of certain actions.

110. Taking cue from the foregoing findings and directions, it is clear that the High Court in *Mitu-bell* case (*supra*) was right in issuing orders for parties to report back to court post-judgment. Accordingly, this court is vested with jurisdiction to issue structural and supervisory interdicts in order to uphold the Constitution.

111. This petition being one of such instances, this court shall consider such a relief.

112. On costs, as the matter is a public interest litigation, there shall be no order as to costs.

Disposition:

113. Flowing from these findings and conclusions, the disposition of the amended petition dated December 18, 2018 is as follows:

(a) The amended petition is justiciable and this court has the jurisdiction to deal with the issues therein.

(b) The local tribunals created under article 169(1)(d) of the *Constitution* are surbodinate Courts in Kenya.

(c) The appointment and removal of members of the local tribunals created under article 169(1)(d) of the *Constitution* by the Executive violates the principle of separation of powers, contravenes the right to fair hearing under article 50 of the Constitution and infringes on the independence of the Judiciary.

(d) The local tribunals under article 169(1)(d) of the *Constitution* must be transited to the Judiciary and the appointment and removal of their members be undertaken by the Judicial Service Commission.

(e) A declaration hereby issues that any new appointment or removal of a member of any of the Tribunals under article 169(1)(d) of the *Constitution* must be undertaken by the Judicial Service Commission. For certainty, such local tribunals include: -

a) Board of Review established under the *Prisons Act*

b) Business Premises Tribunal established under the *Landlord and Tenant (Shops, Hotels & Catering Establishments Act*)

c) Provincial Land Control Appeals Board established under the *Land Control Act*.

d) Central land Control Appeals Board established under the *Land Control Act*

e) *Mines Development Loans Act*

f) Seed and Plants Tribunal established under *Seeds and Plant Varieties Act*

g) Sugar Arbitration Tribunal established under the *Sugar Act*

h) Water Resources Management Authority established under the *Water Act*

i) Water Appeal Board established under the *Water Act*

j) Water Service Board established under the *Water Act*

k) Wildlife Conservation and Management Services Appeals Tribunal established under the *Wildlife Conservation and Management Act*

l) Tourist Appeal Board established under the *Tourist Industry Licensing Act*

m) Transport Licensing Appeal Tribunal established under *Transport Licensing Act*

n) State Corporations Appeals Tribunal established under the *State Corporations Act*

o) Value Added Tax Appeals Tribunal established under *Value Added Tax Act*

p) Capital Markets Tribunal established under the *Capital Markets Authority Act*

q) Insurance Appeals Tribunal established under the *Insurance Act*

r) Co-operative Tribunal established under the *Co-operatives Act*

s) Hotels and Restaurants Appeals Tribunal established under the Hotels and Restaurants Act

t) Kenya Bureau of Standards established under the Standards Act

u) Restrictive Trade Practices Tribunal established under the *Restrictive Trade Practices, Monopolies and Price Controls Act*

v) Land Disputes Tribunals established under the Land Disputes Tribunal

w) Land Disputes Appeal Committee established under the *Land Disputes Tribunals Act*

x) Non-Government Organizations Co-ordination Board established under the *Non-Governmental Originations Co-ordination Act*

(f) The Hon Attorney General and the Parliament, being the 2nd and 3rd respondents herein, are hereby directed to take proactive steps within their respective dockets towards propagating the Tribunals Bill with a view of transiting the local tribunals under article 169(1)(d) of the *Constitution* to the Judiciary. To that end, the Hon Attorney General and the Parliament shall file affidavits within 6 months of this judgment detailing the steps taken.

(g) Upon filing of the affidavits in (f) above, the Deputy Registrar of this court shall schedule this matter for mention on the basis of priority.

(h) There shall be no order as to costs.

114. Those are the orders of this court.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF MARCH, 2021

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:-

Okiya Omtatah Okoiti, the petitioner in person.

Miss Lipo, Counsel for the 1st respondent.

Mr. Moimbo, Counsel for the 2nd respondent.

Mr. Mbarak, Counsel for the 3rd respondent.

Mr. Dudley Ochiel, Counsel for the interested party.

Elizabeth Wamboi – Court Assistant.