



Law Society of Kenya v Office of the Attorney General & another; Judicial Service Commission (Interested Party) (Constitutional Petition 203 of 2020) [2021] KEHC 454 (KLR) (Constitutional and Human Rights) (10 June 2021) (Judgment)

Law Society of Kenya v Office of the Attorney General & another; Judicial Service Commission (Interested Party) [2021] eKLR

Neutral citation: [2021] KEHC 454 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION 203 OF 2020

JA MAKAU, J

JUNE 10, 2021

IN THE MATTER OF ARTICLES 2(4), 3, 10, 129(1) & (2), 156, 159, 160, 171, 172, 173, 248, 249(1) & (2), 250, 51, 252, 253, 254 & 255 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 2(4), 3, 10, 129(1) & (2), 156, 159, 160, 171, 172, 248, 249(1) & (2) & 255 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF EXECUTIVE ORDER NUMBER NO.1 OF 2020 BY THE PRESIDENT OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF SECTION 4 OF THE LAW SOCIETY OF KENYA (ACT NO. 21 OF 2014)

AND

IN THE MATTER OF ENFORCEMENT AND INTERPRETATION OF THE CONSTITUTION UNDER ARTICLES 258, 259 AND 260 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF THE JUDICIAL SERVICE COMMISSION ACT; THE JUDICATURE ACT; AND ALL SUCH OTHER RELEVANT AND RELATED LEGISLATION



AND

IN THE MATTER OF ARTICLE 26 OF THE AFRICAN CHARTER ON HUMAN
AND PEOPLES RIGHTS; AND PRINCIPLE 12 OF THE UNITED NATIONS
BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY AND
ALL SUCH OTHER RELEVANT INTERNATIONAL LAWS AND PRINCIPLES

BETWEEN

LAW SOCIETY OF KENYA PETITIONER

AND

OFFICE OF THE ATTORNEY GENERAL 1ST RESPONDENT

JOSEPH KINYUA, HEAD OF PUBLIC SERVICE 2ND RESPONDENT

AND

JUDICIAL SERVICE COMMISSION INTERESTED PARTY

Unconstitutionality of Executive Order 1 of 2020 to the extent that it purports to reorganize the Government and set out the Judiciary and its tribunals, commissions, and independent offices as institutions under the functions of ministries and Government departments and other constitutional bodies.

Reported by Beryl Ikamari

***Constitutional Law** - Executive - President - powers of the President - coordination of Government organs and entities - whether the President had powers to transfer and place various tribunals and constitutional commissions under various Ministries and State departments - Constitution of Kenya 2010, articles 131 and 132.*

***Constitutional Law** - constitutionality of Executive Orders - constitutionality of Executive Order No. 1 of 2020 titled 'Organization of the Government of the Republic of Kenya' - claim that the Executive Order purported to reorganize the Government and set out the Judiciary and its tribunals, commissions and independent offices as institutions under the functions of Ministries and Government departments and other constitutional bodies - claim that the Executive Order interfered with the independence of the Judiciary - whether the Executive Order was constitutional - Constitution of Kenya, 2010, articles 10, 27(1), 47, 160, 171, 172, 173 and 249.*

***Civil Practice and Procedure** - parties - misjoinder of parties - whether the misjoinder of parties in a constitutional petition was fatal - Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, rules 5(b) and 5(d)(iii).*

***Civil Practice and Procedure** - pleadings - contents of pleadings - failure by a party to raise an issue in the pleadings - whether a party could raise an issue that was not in the pleadings through submissions.*

Brief facts

Executive Order No. 1 of 2020 titled 'Organization of the Government of the Republic of Kenya' sought to re-organize the Government and it set out the Judiciary and tribunals, commissions and independent offices as institutions under the functions of ministries and Government departments and other constitutional bodies. In particular, the petitioner averred that the restructuring of the Judiciary and the placing of various tribunals and the Judicial Service Commission (JSC) under various ministries and State departments was a threat to judicial financial independence and it was therefore contrary to articles 160, 161, 169, 171 and 173 of the Constitution of Kenya, 2010 (Constitution). The petitioner further stated that the impugned Executive



Order was unconstitutional in as far as it purported to transfer or assign functions and roles to the JSC or its chairperson or any other constitutional commission.

The 1st respondent argued that there was no claim against or relief sought from the Head of Public Service and therefore there was no basis for his joinder in the proceedings. The 1st respondent denied that the Executive Order provided that any constitutional commission or independent office would be under the direction or control of any ministry on behalf of the presidency. The 1st respondent also stated that the Executive Order had not restructured the Judiciary.

The 1st respondent asserted that the President had the overall responsibility for the coordination of all Government organs and entities as provided under articles 131 and 132 of the Constitution. He added that the Constitution set out an elaborate budgetary process with the ultimate decision-making authority being vested in the Legislature.

Issues

- i. Whether the President had powers to transfer and place various tribunals and constitutional commissions under ministries and State departments.
- ii. Whether Executive Order No 1 of 2020 (Revised) was unconstitutional to the extent that it purported to reorganize the Government and set out the Judiciary and its tribunals, commissions and independent offices as institutions under the functions of ministries and Government departments and other constitutional bodies.
- iii. Whether the misjoinder of parties in a constitutional petition was fatal.
- iv. Whether a party could raise an issue that was not contained in the pleadings through submissions.

Held

1. Article 259 of the Constitution provided that the Constitution had to be interpreted in a manner that promoted its purposes, values and principles, advanced the rule of law, human rights and fundamental freedoms in the Bill of Rights, permitted the development of the law and contributed to good governance. In determining the constitutionality of any matter complained of, the court would be guided by that provision.
2. Article 249 of the Constitution set out the objects, authority and funding of commissions and independent offices. The commissions and the holders of independent offices were subject only to the Constitution and the law and were independent and not subject to direction or control of any person or authority.
3. Considering the powers of the President as well as the powers of the independent commission, it was clear that the President had no power to transfer functions of constitutionally established institutions.
4. Pursuant to article 10 of the Constitution, all State organs that exercised power had to bow to the will of the people as expressed in the Constitution. Further, as provided under article 3(1) of the Constitution, every person had an obligation to respect, uphold and defend the Constitution and no person could claim or exercise State authority except as authorized under the Constitution. Further, article 2 of the Constitution was to the effect that any law, including customary law, that was inconsistent with the Constitution was void to the extent of the inconsistency and any act or omission in contravention of the Constitution was invalid.
5. Article 161 of the Constitution established the Judiciary as an independent arm of the Government and not a department or a State office falling under any such ministries or State departments. The Constitution provided that the Judiciary consisted of judges of superior courts, magistrates, other judicial officers and staff. Article 173 of the Constitution provided for the Judiciary Fund and ensured that the Judiciary enjoyed financial independence.
6. The petitioner demonstrated that the intended restructures of the Judiciary, an arm of Government, by the Executive arm of the Government, and placing of the various Tribunals and the Judicial



- Service Commission under various ministries and State departments was a threat to judicial financial independence.
7. It was unconstitutional for the President to purport to re-organize Government and set out the Judiciary, commissions, and independent offices as institutions under or functions of ministries, Government departments and other constitutional bodies. The President did not have power to do so and the making of the impugned Executive Order impaired or interfered with the independence of the Judiciary, commissions and independent offices.
 8. The continued implementation of the Executive Order was unconstitutional, illegal and an impediment to the rule of law, right to equal application and protection of the law and judicial independence. The re-organization of the Judicial arm of Government by the Executive interfered with the institutional and structural independence of the Judiciary and it was contrary to the Constitution and the doctrine of separation of powers.
 9. The Constitution provided for the Judiciary and the Judicial Service Commission as independent constitutional organs which were distinct from the Executive, State departments and ministries. Their roles and mandates were also provided for by the Constitution and the Judicial Service Act and those roles and functions were not assignable either by the President or the Executive arm of Government.
 10. From a perusal of the pleadings and court proceedings, there were no grounds affecting the *sub judice* principle nor could the *sub judice* issue be raised through submissions, having not been pleaded, as a party was bound by its pleadings. Further the court record did not support the respondents' contention, that the petitioner informed the court, there existed a similar matter, which was pending determination in Nairobi Constitutional Petition No 228 of 2018 between the same petitioner and the 1st respondent. The alleged petition had not been produced and the court was not able to deal, as such with the issue of *sub judice*.
 11. Independent commissions were designed under the Constitution with specific purposes and they were not accountable to other arms of Government and they secured the separation of powers principle. The independent offices and commissions created under the Constitution were to be viewed as the fourth arm of Government, created to cater for a specific need and they were independent of Government.
 12. The Judiciary, the independent offices and the commissions, just like the Executive were created by the Constitution and they were not to be taken as subservient to the Executive and they should not be reorganized or restructured by the Executive or any other arm of Government to an extent that it would interfere with delivery of its functions..
 13. The independence clause, which was applicable to independent offices and commissions created by the Constitution, provided a safeguard against undue interference with such commissions or offices, by other persons, or other institutions of Government.
 14. Article 160(1) of the Constitution dealt with independence and functions of the Judiciary. It was provided that in the exercise of judicial authority, the Judiciary should be subject only to the Constitution and the law and should not be subject to the control or direction of any person or authority. The principle of supremacy of the Constitution, as provided in article 2 of the Constitution, meant that the court was obligated to invalidate an act, omission or any law which contravened the Constitution. The Executive Order No 1 of 2020 contravened the Constitution and therefore should be struck out to the extent of its inconsistency.
 15. The making of the Executive Order had the effect of impairing and interfering with the independence of the Judiciary, commissions and independent offices. An Executive Order could not be used to broaden or limit a constitutional mandate.
 16. Article 249 of the Constitution was the source of the independence of the various commissions and that was in terms of appointment, operation and security. Independence in decision-making was at the core of the matter. Decisions that were appropriate had to be made by them without any influence from those to whom decision-making power was not given.



17. Article 255(1) of the Constitution made it mandatory that any amendment relating to the independence of the Judiciary, the independence of the commissions and independent offices had to be done through a referendum. The only way to restructure, reorganise or amend any of the independent commissions was by way of a referendum and not gazettelement of an Executive Order.
18. The petitioner's claim against the 2nd respondent, the Head of Public Service, was that he wrote to various Government departments, informing them of the Executive Order and directing the National Treasury to take note of the changes introduced by the Executive Order. The letter also requested for budgetary changes to be made. The petition sought declaratory orders and orders of judicial review against the respondents. It was therefore not correct that there was no basis for the joinder of the Head of Public Service in the petition.
19. Rule 5(d)(iii) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, was to the effect that where the petitioner was in doubt as to the person from whom redress was sought, the petitioner could join two or more respondents so that the question on extent of liability as between all parties could be determined. Further rule 5(b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provided that a petition would not be defeated by reason of misjoinder or non-joinder of parties.

Petition allowed with costs to the petitioner.

Orders

- i. *A declaration was issued that the Executive Order Number 1 of 2020, issued on January 14, 2020, (Revised) purporting to organize the Government and set out the Judiciary and its tribunals, commissions and independent offices as institutions under the functions of ministries and Government departments and other constitutional bodies, specifically, paragraphs (1), (3), (5), (7), (10), (11), (16), (18), (21), (22), (27), and (28) were unconstitutional, null and void and contrary to articles 10, 27(1), 47, 159, 160, 161, 169, 171, 172, 173 and 249 of the Constitution of Kenya, 2010.*
- ii. *An order of judicial review by way of an order of certiorari was granted pursuant to article 23(3)(f) to remove into the court for purposes of quashing portions of the Executive Order Number 1 of 2020 issued on January 14, 2020 (Revised) May 2020 that purported to organize the Government and set out the Judiciary, and its tribunals, commissions and independent offices as institutions under the functions of ministries and Government departments and other constitutional bodies, specifically paragraphs (1), (3), (5), (7), (10), (11), (16), (18), (21), (22), (27), and (28).*

Citations

Cases

Kenya

1. *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another* Petition 628 & 630 of 2014; [2015] KEHC 6984 (KLR) - (Explained)
2. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] 2 KLR 32 - (Explained)
3. *Kamami, Michael Maina & another v Attorney General* Civil Appeal 189 of 2017; [2019] KECA 437 (KLR) - (Explained)
4. *Mati, Jayne & another v Attorney General & another* Petition 108 of 2011; [2011] KEHC 4292 (KLR) - (Explained)
5. *National Land Commission v Attorney-General & 5 others; Kituo Cha Sheria & another (Amicus Curiae)* Advisory Opinion No 2 of 2014; [2015] KESC 3 (KLR) - (Explained)
6. *Ndeda, Bernard James & 6 others v Magistrates and Judges Vetting Board & 2 others* Petition 230, 236, 262, 259, 270, 272 & 323 of 2016; [2018] KEHC 9249 (KLR) - (Explained)
7. *Republic v Paul Kihara Kariuki & 3 others ex parte Law Society of Kenya* Judicial Review 45 of 2020; [2020] KEHC 10142 (KLR) - (Explained)



8. *Wambora & 3 others v Speaker of the Senate & 6 others* Constitutional Petition 7 of 2014; [2014] KEHC 7498 (KLR); [2014] 4 KLR 559 - (Explained)

South Africa

1. *Affordable Medicines Trust and others v Minister of Health and others* (CCT27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC) - (Explained)
2. *Glenister v President of the Republic of South Africa and others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) - (Explained)

Texts

Sihanya, B., (Prof) (2011), *The Presidency and Public Authority in Kenya's New Constitutional Order* Society for International Development, Constitution Working Paper No 2 pp 12-3

Statutes

Kenya

1. Constitution of Kenya articles 1, 2, 3(1)(23)(f); 10; 23(3); 27(1); 47; 131(1)(a)(e)(2)(c); 132(3)(b); 135; 159; 160; 161; 165; 169; 171; 172; 173; 248; 249(2)(b); 252; 255 - (Interpreted)
2. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya Sub Leg) rule 5(b)(iii) - (Interpreted)

Instruments

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981 article 26
2. Basic Principles on the Independence of the Judiciary, 1985 Principle 12

Advocates

None Mentioned

JUDGMENT

Petition

1. The petitioner, Law Society of Kenya, by way of a petition dated June 17, 2020 prays for the following orders:-
 - i. A declaration that the Executive Order, Number 1 of 2020, issued on January 14, 2020 (Revised) purporting to organize the government and set out Judiciary and its tribunal, Commissions and Independent offices as institutions under the functions of ministries and government departments and other constitutional bodies, specifically, paragraphs (1), (3), (5), (7), (10), (11), (16), (18), (21), (22), (27), and (28) are unconstitutional, null and void and contrary to articles 10, 27 (1), 47, 159, 160, 161, 169, 171, 172, 173 and 249 of the [Constitution of Kenya, 2010](#).
 - ii. An order of Judicial Review by way of an order of *certiorari* pursuant to article 23 (3) (f) to remove into the court for purposes of quashing portions of the Executive Order Number 1 of 2020 issued on January 14, 2020 (Revised) May 2020 that purports to organize the government and set out the Judiciary, and its Tribunals, Commissions and Independent offices as institutions under the functions of ministries and government departments and other constitutional bodies, specifically paragraphs (1), (3), (5), (7), (10), (11), (16), (18), (21), (22), (27), and (28).
 - iii. An Order awarding costs of the petition to the petitioner.



- iv. Any other or further orders, writs, directions this court considers appropriate and just to grant for the purpose of the enforcement of the petitioners fundamental rights and freedoms; the enforcement and defence of the Constitution pursuant to article 23 (3) of the Constitution.

Petitioner's Case

2. It is the petitioner's case that the Executive Order No 1 of 2020 titled 'Organization of the Government of the Republic of Kenya'. The petitioner protests to the inclusion of the Judiciary arm of Government, Commission and Independent Offices in the said Executive Order.
3. The petitioner avers that the restructuring of the Judiciary and placing of the various Tribunals and Judicial Service Commission under various Ministries and State Departments is a threat to the judicial financial independence and therefore contrary to articles 160, 161, 169, 171 and 173 of the Constitution of Kenya, 2010.
4. It is further asserted that the Executive Order is thus unconstitutional as far as it purports to restructure and/or organize and/or transfer and/or assign functions and roles to the Judicial Service Commission (JSC) or its Chairman or any such other Constitutional Independent Commission.
5. The petitioner contends that the President of the Republic of Kenya does not have the power to organize the Government and set out the Judiciary, Commissions and Independent Office as institutions under the functions of Ministries, government departments and other constitutional bodies.
6. It is contended that the continued implementation of the Executive Order is therefore unconstitutional and illegal and an impediment to the Rule of Law; the right to equal application and protection of the law; the judicial independence; and the dictates and principles of the *Constitution* as enshrined under article 10. It is further averred that the Executive Order contravenes articles 26 of the African Charter on Human and People's Rights; Principle 12 of the United Nations Basic Principles on the Independence of the Judiciary as read with various international laws and principles.
7. The petition is supported by the affidavit of Mercy K Wambua, the Chief Executive Officer of the petitioner, sworn on June 17, 2020.

1st Respondent's Case

8. The 1st respondent filed a replying affidavit sworn by Kennedy Ogeto, the Solicitor General in the Office of the Attorney General, dated July 13, 2020. The respondent argues that there is no basis for the joinder of the Head of Public Service in the present proceedings as there is neither any claim made against him nor is any relief sought against him in the petition.
9. It is the 1st respondent's case that nowhere in the Executive Order is it provided that any Constitutional Commission or Independent Office shall be subject to the direction or control of any Ministry on behalf of the Presidency. The Deponent asserts that the allegation that the Executive Order has organised and restructured the judiciary is fallacious and is intended to mislead the court, and the petitioner has failed to demonstrate the same.
10. The 1st respondent contends that the private perception of an individual cannot be the basis for the declaration that the Executive Order is unconstitutional. Moreover, it is argued that the President has overall responsibility and coordination of all government organs and entities as provided under article 131 (1) (a) (e), (2) (c), 132 (b) of the Constitution. The 1st respondent asserts that there are elaborate



budgetary processes set out in law with the ultimate decision-making authority on the same vesting upon the legislature and to that extent, the petitioner's assertions are spurious, far-fetched and remote.

Petitioner's Response

11. The petitioner filed a further affidavit sworn by Mercy K. Wambua dated July 16, 2020, in response to the 1st respondents replying affidavit. The petitioner asserts *inter alia*; that although the President is the Head of the State and Government, that in itself is not a blanket cheque for the President to purport to exercise powers not conferred on him by the Constitution or any such legislation and neither is it a cheque for the President to purport to restructure; reorganise and interfere with the mandate, hierarchical arrangement and organisation of independent constitutional offices and other Arms of Government such as the Judiciary and its various Tribunals.
12. Moreover, it is the petitioner's case that this court has been consistent on the *dictum* that the Executive must function within the limits prescribed by the Constitution and in cases where it has stepped beyond what the law and the Constitution permit it to do, it cannot seek refuge in illegality and hide under the twin doctrines of parliamentary privilege and separation of powers to escape judicial scrutiny.
13. The petitioner argues that the joinder of the Head of Public Service to these proceedings is necessary as he authored the letter whose effect is to notify Treasury of various changes as introduced by the Executive Order and hence to effect budgetary allocations and planning. It is further contended the petition before this court cannot be defeated by reason of misjoinder or non-joinder of parties as the court is required to deal with the proceedings in the matter in dispute.

Petitioner's Submissions

14. The petitioner by way of its Written Submissions dated October 16, 2020, submits that the first issue to be determined is whether the President of the Republic of Kenya has powers to transfer and place various Tribunals and Constitutional Commissions under various Ministries and State Departments.
15. The petitioner submits that the President has no powers to transfer functions of constitutionally-established institutions and that the President must respect, uphold and defend the *Constitution* as stipulated under article 3(1) of the *Constitution*. In support of this proposition the petitioner sought reliance in the decisions in Coalition for Reform and Democracy (CORD) & another v the Republic of Kenya & another; and 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.
16. The petitioner further states that the restructuring of the Judiciary and placing of the various Tribunals and the Judicial Service Commission under various Ministries and State Department is a threat to the judicial financial independence and hence is contrary to articles 160; 161; 169; 171; and 173 of the Constitution.
17. The second question to be answered as per petitioner's submissions is whether Executive Order No 1 of 2020 (Revised) is unconstitutional, null and void to the extent that it purports to organise the government and set out the Judiciary and its tribunals, commissions and Independent Offices as institutions under the functions of ministries and government and other Constitutional bodies.
18. The petitioner urges that Executive Order offends the principle of separation of powers and the independence of the Judiciary, Commissions and independent offices created under the Constitution. In support whereof reference is made to article 249(2)(b) of the Constitution on the independence of the Commissions listed in chapter 15 of the Constitution. Reliance is placed on the decision in Advisory Opinion Reference No 2 of 2014, In the Matter of the National Land Commission [2015] eKLR;



Jayne Mati & another v Attorney General and another- Nairobi Petition No. 108 of 2011; Glenister v President of the Republic of South Africa and others (CCT 48/10) [2011] ZACC 6; Martin Nyaga Wambora v Speaker County Assembly of Embu & 5 others [2014] eKLR.

19. The petitioner submits that the Executive Order does not have powers to broaden nor limit a constitutional mandate. By allowing such amendments, the Judiciary will be perceived by the public to be an appendage of the Executive, which in effect is unconstitutional because it usurps the powers of an independent constitutional commission and/or interferes with the independence of the Judiciary and other Commissions provided for by the Constitution.

Respondents' Submissions

20. The respondents filed written submissions dated February 24, 2021 submitting that the issue of structure and proper interpretation of executive orders issued by the President on the organisation of government is *sub judice* as the same is pending determination before the honourable court in Nairobi Constitutional Petition No 228 of 2018 between the petitioner and the 1st respondent. Reliance is placed on the decision in Republic v Paul Kibara Kariuki, Attorney General & 2 others ex parte Law Society of Kenya [2020] eKLR.
21. The 1st respondent further complains that the entire petition has been premised on the deliberately erroneous private interpretation of the petitioner who for ulterior purposes has sought to read into the Executive Order and issue its own fabricated facts with a view to misrepresent its contents. This is buttressed by the holding by Hon Justice Mativo in Bernard James Ndeda & 6 others v Magistrates and Judges Vetting Board & 2 others [2018] eKLR. The respondent asserts that the Executive Order as stated was to inform the public on the catalogue of government services and which office, department or ministry was responsible for the same.
22. It is the respondents' case that the Executive Order issued pursuant to the provisions of article 132(3) (b) and article 135 of the Constitution is, therefore, *intra vires* Furthermore, nowhere in the executive order are state departments detailed to superintendent over independent offices and commissions as misrepresented by the petitioner. Moreover, it is submitted on the issue of separation of powers that each arm of government may have distinct roles and functions but are interdependent and ought to coordinate and work with other arms and organs. This is supported by the decision of the Supreme Court In the Matter of Interim Independent Electoral Commissions [2011] eKLR.
23. The respondents aver that the petitioner has failed to adduce evidence of similar executive orders having been construed to infringe on the constitutional and statutory mandate of independent commissions, tribunals and state organs disentitles the petitioner. Reliance is placed on the decision in Michael Maina Kamami & another v Attorney General [2019] eKLR.

Analysis and Determination

24. I have carefully considered the petitioner's and respondents pleadings; the rival submission and authorities in support of rival submissions and from the above the following issues arise for consideration:-
- a) Whether the President of the Republic of Kenya has powers to transfer and place various Tribunals and Constitutional Commissions under various Ministries and State Departments.
 - b) Whether the *Executive Order No 1 of 2020* (Revised) is unconstitutional, null and void to the extent that it purports to reorganize the government and set out the judiciary and its tribunals,



commissions and independent offices as institutions under the functions of ministry and government departments and other constitutional bodies.

- c) Whether Head of Public Service is properly joined and should have been joined as a party.

A. Whether the President of the Republic of Kenya has Powers to Transfer and Place Various Tribunals and Constitutional Commissions under various ministries and State Departments.

25. In the *Executive Order No 1 of 2020* titled Organization of Government of Republic of Kenya it is urged by the Petitioners purports to “organize” and “restructure” the Judiciary, the Public Service Commission, Teachers Service Commission, the National Police Service Commission, Parliamentary Service Commission, Judicial Service Commission, Independent Boundaries and Electoral Commission, Office of the Director of Public Prosecutions, Ethics and Anti-Corruption Commission; Commission on Administrative Justice, the National Land Commission; the Office of Controller of Budget, Commission on Revenue allocation; Salaries and Remuneration Commission, Kenya National Commission on Human Rights and National Gender and Equality commission. It is urged by the Petitioner the effect of the said order is thus:-
- i) That the Government shall be organized as set out in the order.
- ii) That the order contains portfolio responsibilities and changes made in the Structure of Government.
- iii) That the order assign functions and institutions among ministries and State Departments and
- iv) That the order superseded executive order No 1 of 2018 (Revised) issued in July 2018.
26. This honourable court in considering the Constitutionality of any issue before it, is alive that it should always interpret the Constitution in accordance with the provisions of article 259 of the Constitution, which provides that Constitution shall be interpreted in a manner that:-
- a) Promotes its purposes, values and principles
- b) Advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights
- c) Permits the development of the law and
- d) Contributes to good governance.
27. The authority of the President is set out under article 131 of the Constitution and functions of the President under article 132 of the *Constitution of Kenya*. Article 249 of the *Constitution* sets out the objects, authority and funding of commission and independent offices among which is to protect the sovereignty of the people and promote Constitution. The commissions and the holders of independent offices are subject only to this constitution and the law and are independent and not subject to direction or control of any person or authority. Article 252 of the *Constitution* sets out the general functions and powers of each commission.
28. Looking at the powers of the President and function, as well as, powers of the Independent commissions, it is clear that the President, has no power to transfer functions of constitutionally established institutions. This proposition was enunciated in the case of *Coalition for Reform and Democracy (CORD) & another v the Republic of Kenya & another* where the court stated *inter alia*; at paragraph 125 that:-

“Under article 1 of the *Constitution* sovereign power belongs to the people and it is to be exercised in accordance with the Constitution. That sovereign power is delegated to



Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. There is however a rider that the said organs must perform their functions in accordance with the constitution. Our constitution having been enacted by way of a referendum, is the direct expression of the people's will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the Constitution... Article 2 of the Constitution provides for the binding effect of the Constitution on State Organs and proceed to decree that any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid..."

29. Our Kenyan Constitution 2010, having been enacted by way of a referendum, it is the direct expression of people's will. Under article 10 it is provided, that National values and Principles of Governance in this article, binds all state organs, state officers, public officers and all person whenever any of them:-
- a) Applies or interpret this Constitution.
 - b) Enacts, applies or interprets any law or
 - c) Makes or implements public policy decision.
30. It therefore follows that all state organs in exercising their delegated powers must bow to the will of the people as clearly expressed in the constitution It is further expressly provided under article 3(1) of the Constitution, that every person has an obligation to respect, uphold and defend this Constitution and, that no person may claim or exercise state authority except as authorized under this Constitution.
31. It is therefore correct to note that article 2 of the Constitution provides for binding effect of the Constitution on state organs and proceeds to decree that any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of this Constitution is invalid. By virtue of provisions of article 3(1) of the Constitution, it clearly follows that every person including the President of the Republic of Kenya has an obligation to respect, uphold and defend the Constitution.
32. In the case of 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 as follows:-
- “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.” (emphasis added)
33. In the instant petition, it is noted that by virtue of placing the Tribunals and Constitutional Independent offices, under various departments and ministries, is clear the intention is to have the said offices adopted under various departments and ministries and further, that they shall be overrun by respective ministries and Departments in charge and that such budgetary allocations and financial desires among others, shall be done pursuant to in line with direction and criteria to be set by respective ministries and Departments involved. I do not agree with the respondents contention that to the contrary that is not the intention.



34. It is noted that the impugned Executive Order herein was made pursuant to the *Constitution of Kenya 2010*, is only limited to Ministries and Government Departments as contemplated under article 132(3) (b) of the *Constitution* and not to the other arms of Government, including the Judiciary, the legislature or any such independent constitutional commissions and offices.
35. Article 161 of the *Constitution* establishes the Judiciary as an independent arm of the Government and not a department or a state office falling under any such ministries or State Departments. The Constitution clearly provides that Judiciary consists of judges of superior courts, magistrates, other judicial officers and staff.
36. Article 169 of the *Constitution* establishes subordinate courts which include:-
- a) The Magistrates' Courts
 - b) The Kadhis' Courts
 - c) The Courts Martial and
 - d) Any other courts or local tribunals as may be established by an Act of Parliament, other than the courts established as required by article 162(2) of the *Constitution*.
37. Judiciary fund is provided for under article 173 of the *Constitution*. Under this article the Judges enjoys financial independence where it is stipulated as follows:-
- a) There is established a fund to be known as the Judiciary Fund which shall be administered by the Chief Registrar of the Judiciary;
 - b) The Fund shall be used for administrative expenses of the Judiciary and such other purposes as may be necessary for the discharge of the functions of the Judiciary.
 - c) Each financial year, the Chief Registrar shall prepare estimates of expenditure for the following year, and submit them to the National Assembly for approval.
 - e) On approval of the estimates by the National Assembly, the expenditure of the Judiciary shall be a charge on the Consolidation Fund and the funds shall be paid directly into the Judiciary Fund.”
38. The respondents contend that the petition is premised on a lack of appreciation of the purpose and effect of the Executive Order in issue. They further contend that there has never been any allegation or instance of the Executive Order or Organization of government being a basis of enactment of any constitutional function of any agency. Indeed they contend none of the commissions and independent offices mentioned in the Petition have ever alleged or alleges the same. It is however insisted in this Petition that Petitioner has clearly set out the effect of the Executive Order issued, which include changes made in the structure of the Government, assigning functions and institutions among ministries and state departments and which Order suspends Executive Order No 1 of 2018. Further a threat of violation of the Constitution is sufficient justification for taking up constitutional action.
39. I find that the petitioner has demonstrated that the intended restructures of the Judiciary, an arm of government, by Executive arm of the government, and placing of the various Tribunals and the Judicial service Commission under various Ministries and state department is a threat to the judicial financial independence. This has not been shown by the respondents to be based on any Constitutional



provisions save respondents denying such an intention. I find the Executive Order herein is contrary to the clear provisions of article 160, 161, 169, 171 & 173 of the Constitution of Kenya 2010. I find, further that it is unconstitutional for the President of the Republic of Kenya to purport to organize Government and set out Judiciary, Commissions, and Independent offices as institutions under or functions of ministries, government departments and other constitutional bodies. I am satisfied as per Constitutional provisions referred to herein-above, that the president does not have any such powers, and therefore the making of the impugned Executive Order herein impairs or interferes with the Independence of the Judiciary; Commissions and Independent Offices.

40. I further find and hold that further and/or continued implementation of the Executive Order herein is accordingly unconstitutional; illegal and impediment of the Rule of Law; the right to equal application and protection of the law and judicial independence.
41. Article 2(4) and 165(3)(d)(1) of the Constitution is clear and gives this court the power to invalidate any law, act or omission that is inconsistent with the Constitution.
42. The petitioner in this petition has demonstrated, that His Excellency the president of the Republic of Kenya has unilaterally purported to restructure and re-organize the Judicial arm of the Government and other constitutional offices, thus altering and / or interfering with the provisions of the Constitution, 2010 and thus offending the doctrine of separation of powers and further interfering with the institutional and structural independence of the Judicial arm of Government and various Constitutional independent offices.
43. I find that His Excellency the president of the Republic of Kenya by purporting to restructure and to organize and or transfer functions and or direct and or co-ordinate the functions of the Judiciary, through the Executive Order, the Executive Order is unconstitutional, null and void and contrary to articles 10, 27(1), 47, 160, 171, 172, 173 and 249 of the Constitution of Kenya 2010.
44. The Constitutional provisions are clear that the Judiciary and the Judiciary Service Commission are Independent constitutional organs as established under the Constitution and are clearly distinct from the Executive, state departments and Ministries, and their roles and mandates are specifically provided for pursuant to the Constitution and the Judiciary Service Commission Act, and therefore their roles and functions are not assignable to them by either the president or Executive Arm of the Government.

B. Whether the executive order No 1 of 2020 (revised) is Unconstitutional, null and void to the extent that it purports to reorganize the government and set out the judiciary and its tribunals, commissions and independents offices as institutions under the functions of ministry and government departmens and other constitutional bodies.

45. The respondents in opposition of this petition field grounds of opposition dated July 7, 2020 setting out 8 grounds of opposition. Looking at the grounds none of them mentions existence of Petition No 228 of 2018, now mentioned in the respondents submissions.
46. The respondents submit that the issue of structure and proper interpretation of Executive Order issued by the President on organization of government is *sub judice* as the same is pending determination before the honourable court in Nairobi constitutional Petition No 228 of 2018 between the petitioner and the 1st respondent, which petition the respondent contended, that Petitioner informed the honourable court of it, in urging for issuance of conservatory orders. The respondent urges that the effect is that there is active litigation between the very same parties over the same subject matter in previously instituted proceedings.



47. I have perused the pleadings and court proceedings, and contrary to respondents submissions, I have not found the grounds being said to be affecting the *sub judice* principle nor can *sub judice* issue be raised through submissions, having not been pleaded, as a party is bound by its pleadings. Further the court record do not support the respondents' contention, that the petitioner informed the honourable court, there existed similar matter, which was pending determination in Nairobi Constitutional Petition No 228 of 2018 between the same petitioner and 1st respondent. The alleged petition has not been produced and this court is not able to deal, as such with the issue of *sub judice*. For the above reasons I decline to proceed to consider the issue as it is not pleaded and each party is bound by its own pleadings.
48. The petitioner contends that the Executive Order No 1 of 2020 (Revised) offends the principle of separation of powers and the independence of the Judiciary, Commissions, and independence offices created under the [Constitution of Kenya 2010](#). The Executive Order has introduced various changes to the structure of the executive and further charges have been introduced in the structures of the Judiciary, as an arm of government and other independent commissions. Article 248 of the Constitution sets out several commissions and independent offices. Article 249(2)(b) of the [Constitution](#) clearly stipulates that the commissions and independent offices, are independent and not subject to direction or control by any person or authority. It is further provided, that the duty of the commissions and independent offices is to protect the sovereignty of the people, ensure that all state organs adhere to and observe the democratic values and principles as well as promoting constitutionality.
49. To buttress the aforesaid the petitioner sought to rely on the Supreme Court Advisory Opinion Reference No 2 of 2014, [in the Matter of the National Land Commission](#) [2015] eKLR, in its opinion, it quoted number of scholars Where the Court stated;-
- “(Prof Bruce Ackerman, ‘The New Separation of Powers’ (2000) 113(3) Harvard Law Review 633[9]; Prof BM Sihanya ‘Constitutional Implementation in Kenya 2010-2015: Challenges and Prospects’, FES Occasional Paper No 5(2011), at page 38] have advanced the argument that contemporary Constitutions have constituted a fourth arm of Government, in the form of independent bodies Which they refer to as the ‘integrity branch’, ‘constitutional watchdogs’ or ‘democracy branch’. Prof Sihanya has argued that the [Constitution of 2010](#) creates a fourth arm of Government in the form of commissions and independent offices, with express provisions outlining their independence from other arms of Government.
- (163) The perception of commissions as a fourth arm of Government is canvassed by Professors PLO Lumumba and LG Franceschi in their work, *The Constitution of Kenya, an Introductory Commentary*, 2014 (page 19); they observe that the newly formed commissions and independent offices carry out functions which were previously performed by the traditional arms of Government; and hence the framers of the Constitution must have deliberately intended that certain Government functions be separated from the familiar arms of Government, in order to promote transparency, fairness and objectivity.”
50. The Independent Commission were redesigned under the Constitution with specific purpose, thus to make them not accountable to other arms of the Government and accordingly secured the separation of powers principle. It therefore follows that all independent offices and commissions created by the



Constitution are to be viewed as a fourth arm of the Government, which is created to cater for a specific need, but ultimately Independent of Government. It follows that the Judiciary and these Commissions as well as Independent offices, are created by Constitution, just like the Executive, and should therefore not be treated or taken as being subservient to the Executive and should not be recognised or restructured by the Executive and / or any other arm of the government to an extent that it will interfere with delivery of its functions.

51. The court in laying down the purpose of independence clause when it pertains to commissions and independent offices address itself in (*In Re IIEC*) *supra* thus:-

“The real purpose of the ‘independence clause’, with regard to 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 other institutions of Government. Such a provision was incorporated in *the Constitution* as 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’. While bearing in mind that the various Commissions and independent offices are required to function free of subjection to direction or control by any person or authority’, we hold that this expression is to be accorded its ordinary and natural meanings; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. ...For due operation in the matrix, ‘independence’ does not mean ‘detachment’, ‘isolation’ or ‘disengagement’ from other players in public governance.” (Emphasis added)

52. [*In Re IIEC*] (*supra*) confirms our Constitutional provision for separation of power by holding in paragraph 53 thus:

“Separation of powers is an integral principle in Kenya’s Constitution: for instance, Chapter 8 is devoted to the Legislature; Chapter 9 to the Executive; and Chapter 10, on the Judiciary, provides (article 160(1) that:

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.”

53. It is clear from the above-quoted authorities and provisions of the *Constitution of Kenya 2010*, that the impugned acts by the President through the Executive Order No 1, purporting to restructure the Judiciary and Independent Commissions by setting them out as independent offices, institutions under the Ministries and government departments is unconstitutional. I find the making of the Executive Order has the effect of impairing and interfering with the independence of the Judiciary, Commissions and independent offices. I find further that an Executive Order does not have any powers to broaden nor limit a constitutional mandate. I find by upholding such an amendments, the Judiciary,



an arm, of Government, will be perceived by the public as a whole to be an appendage of the Executive, which in effect is unconstitutional, as it would usurp the powers of an independent Constitutional Commission and / or interfere with the independence of the Judiciary and other Commissions, provided for by the Kenya *Constitution 2010*.

54. Article 160(1) of the *Constitution* deals with independence and functions of the Judiciary. It is clearly provided that in the exercise of Judicial authority, the Judiciary shall be subject only to the Constitution and the law and shall not be subject to control or direction of any person or authority. I find and hold, that the principle and supremacy of Constitution, as provided in article 2 of the Constitution, means that this court is obligated to invalidate an act, omission or any law which contravenes the Constitution. I find that the Executive Order No 1 of 2020 contravenes the Constitution and therefore should be struck out to the extent of its inconsistency.
55. The *Constitution of Kenya 2010*, has clearly established provisions on independence of Judiciary. Articles 1(3); 160(10); 161; 166(1)(a); 172 and 248(2) of the *Constitution*, provides, that the Constitutional Commissions and holders of Independent offices are independent and are not subject to direction or control by any person or authority. The petitioner in buttressing on this critical role of the Judiciary and independent Commissions in the Constitutional Order referred to article 255(1) of the *Constitution*, which provides, if an amendment relates to the independence of the Judiciary and the Commission, it must be passed by way of a referendum. The petitioner further placed reliance in a South African Constitutional Court in *Glenister v President of the Republic of South Africa and other* (CCT 48/10) [2011] ZACC 6, where it was held that, the Constitution should be the court's "starting point" on an inquiry on what type/extent of separation of powers is, in an instant case. Reliance was similarly placed on Prof Ben Sihanya's *The Presidency and Public Authority in Kenya's New Constitutional Order* (Society for International Development, Constitution Working Paper No 2, 2011) pp 12-3 where it was stated thus:-

"Article 248 of the 2010 Constitution establishes nine Commissions and independent offices... These Commissions differ from Commissions in the 1969 Constitution because they have an express provision outlining their independence from other arms of government and they are administratively and financially delinked form the executive.

The Commissions and independent offices check presidential and public authority at two levels. The first is that the general Constitutional mandates of all Commissions under article 249 are to protect the sovereignty of the people, secure the observance by all state organs of democratic values and principles, and promote Constitutionalism. Second, the Constitutional Commissions have been mandated with specific Constitutional powers that under 1969 Constitution were presidential powers, or were statutory powers commandeered, usurped or abrogated by the President." (Emphasis Added)

56. Upon considering the above-authority and the *Constitution*, I find that article 249 of the Kenya *Constitution 2010* is the source of the Independence of the Various Commissions and this is in terms of appointment, operation and security, which is to mean, that the independence of decision making is the core of the matter. The decisions that are appropriate must be made by them and by them without any influence from those to whom the decision making power is not given. To buttress this proposition the petitioner rely in the case of *Martin Nyaga Wambora v Speaker County Assembly of Embu & 5 others* [2014] eKLR where the court expressed itself at page 5 thus:

"...In this case, this court is acutely aware that the three arms of Government that is to say the Executive, the Legislature and the Judiciary have their respective mandates clearly set



out in the Constitution and that as far as possible, each arm of government must desist from encroaching on the functions of the other arms of Government. In fact, the court's position has always been that it can only interfere with the exercise of the Executive and the Legislature's mandates, if it is alleged and demonstrated that they have threatened to act or have acted in contravention of the letter and spirit of Constitution....”

57. Further to the aforesaid article 255(1) of the *Constitution of Kenya 2010*, makes it mandatory, that any amendment relating to the independence of the Judiciary, the Independence of the Commission and Independent offices shall be through a referendum. I therefore find and hold that the only way to restructure, re-organise or amend any of the independent commissions is by way of a referendum and not gazettelement of an Executive Order.
58. It should also be noted, that the making of such Executive Orders by the Executive, constitute administrative action as it amounts to implementing administrative polices, which fully require full adherence to the spirit and letter of the applicable laws. I find the Executive Order purporting to re-organize government structures, including independent commissions, is illegal and unconstitutional, in so far as any amendment or restructuring to independent commissions are concerned, as it should be carried out by way of a referendum. I find that the Executive Order, has not conformed to the constitution; and as such the Constitution must overrule the Executive Order. I find the Executive Order No 1 of 2020 (revised titled “organization of Government of Republic of Kenya”) is a blatant violation of the *Constitution of Kenya 2010* and the same ought to be struck out.

C. Whether head of public servie is properly joined and whether should have been joined as a party.

59. The respondents through a replying affidavit by Kennedy Ogeto, dated July 13, 2020, under paragraph 3 deponed, that there is no basis for the joinder of the Head of Public Service in the present proceedings, as there is neither any claim made against him nor is there any relief sought against him in the petition.
60. The petitioner through further affidavit by Mercy K Wambua, sworn on July 16, 2020, states under paragraph 5, that contrary to the assertions by Solicitor General, that the joinder of the Head of Public Service, to these proceedings, is necessary as he authorised the letter, whose effect is to notify the Treasury of various changes as introduced by the Executive Order and therefore to effect budgeting allocations and planning.
61. Upon perusal of the petition, under paragraph 43 of the petition, it is averred that the 2nd respondent wrote to various Government Departments, informing them of the Executive Order, and further directing the National Treasury, to take note of the various changes as introduced by the Executive Order. The letter requested for making of necessary changes in the Budgetary allocations. The order sought in the petition are declaratory orders and Judicial Review against the respondents. It is not correct therefore to urge that there are no basis for joinder of the Head of Public Service and that there is no claim made against him.
62. Further rule 5(d)(iii) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, (otherwise referred to as “The *Mutunga* Rules”) provides that the following procedure shall apply with respect to addition, joinder, substitution and striking out of parties; that where the petitioner is in doubt as to the person from whom redress should be sought, the petitioner may join two or more respondents in order, that the question as to whom of the respondents is liable, and to what extent may be determined as between all parties. Further rule 5(b) of the *Mutunga* Rules, provides that no petition shall be defeated by reason of the mis-joinder or non-joinder of parties and the court may in any proceedings deal with the matter in dispute. In view of the aforesaid whether



the 2nd respondent was properly joined or not do not in my view, defeat the petition nor is it fatal. I find no basis on this issue. I dismiss the same.

63. The petitioner's petition is meritorious and I proceed to grant the following orders:-

- a) A declaration be and is hereby issued that the Executive Order Number 1 of 2020, issued on January 14, 2020, (Revised) purporting to organize the government and set out Judiciary and its Tribunals, Commissions and Independent offices as institutions under the functions of ministries and government departments and other constitutional bodies, specifically, paragraphs (1), (3), (5), (7), (10), (11), (16), (18), (21), (22), (27), and (28) are unconstitutional, null and void and contrary to articles 10, 27 (1), 47, 159, 160, 161, 169, 171, 172, 173 and 249 of the *Constitution of Kenya, 2010*.
- b) An order of Judicial Review by way of an order of *certiorari* be and is hereby granted pursuant to article 23(3)(f) to remove into the Court for purposes of quashing portions of the Executive Order Number 1 of 2020 issued on January 14, 2020 (Revised) May 2020 that purports to organize the government and set out the Judiciary, and its Tribunals, Commissions and Independent offices as institutions under the functions of ministries and government departments and other constitutional bodies, specifically paragraphs (1), (3), (5), (7), (10), (11), (16), (18), (21), (22), (27), and (28).
- c) Costs of the petition to the petitioner.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF JUNE, 2021.

J. A. MAKAU

JUDGE

