



**Wahome v Attorney General & 2 others (Petition E277 of 2020) [2021] KEHC 73 (KLR)
(Constitutional and Human Rights) (23 September 2021) (Judgment)**

Alice Muthoni Wahome v Attorney General & 2 others [2021] eLR

Neutral citation: [2021] KEHC 73 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E277 OF 2020

AC MRIMA, J

SEPTEMBER 23, 2021

BETWEEN

ALICE MUTHONI WAHOMÉ PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

SECRETARY TO THE CABINET 2ND RESPONDENT

MOHAMMED BADI 3RD RESPONDENT

The decision to allow the Director-General of the Nairobi Metropolitan Services to attend Cabinet meetings and Cabinet committee meetings is unconstitutional.

Reported by Beryl Ikamari

***Civil Practice and Procedure** – pleadings – constitutional petitions – form and content - what considerations should be met in drafting a petition alleging constitutional violations*

***Statutes** – interpretation of statutes – principles of interpreting statutes - what principles should the court consider in interpreting the Constitution and interpreting statutes*

***Constitutional Law** – Office of the President – powers of the president – powers to appoint members of the Cabinet – where the President appointed the Director-General of the Nairobi Metropolitan Services into the Cabinet - whether the President had the power to appoint persons not listed under article 152 of the Constitution into the Cabinet – whether such a decision was unconstitutional – Constitution of Kenya, 2010 articles 132 and 152*

Brief facts

The 3rd respondent was the Director-General of the Nairobi Metropolitan Services and he had taken an oath of secrecy that allowed him to attend Cabinet meetings and participate in Cabinet committee meetings. The



petitioner contended that the 3rd respondent was not a member of the Cabinet as established under article 152 of the Constitution and that his participation in Cabinet affairs was in breach of the Constitution.

The petitioner sought various judicial review remedies. She sought the writ of *mandamus* directing the 2nd respondent (the Secretary to the Cabinet) to exclude the 3rd respondent from Cabinet meetings, a writ of prohibition to prohibit the 3rd respondent from attending Cabinet meetings and the writ of *certiorari* to quash Executive Order No 3 of 2020 to the extent that it allowed the 3rd respondent to attend Cabinet meetings in breach of the Constitution. The petitioner also sought any other remedies that the court deemed fit to grant.

The respondents stated that the petitioner had not pleaded any specific violation of the Constitution. They further stated that the petition was not pleaded with precision as adequate particulars of violations of the Constitution had not been set out in the petition. Generally, the respondents contended that the petition did not raise any constitutional issues for consideration by the court. They added that the law and the Constitution did not preclude the 3rd respondent from being invited to attend Cabinet meetings and they cited article 132(3)(b) as a provision that allowed the President to invite any person to attend Cabinet meetings. Lastly, the respondents stated that the 3rd respondent was not a Cabinet member and the constitutional provisions relating to the appointment of Cabinet members including parliamentary approval were inapplicable.

Issues

- i. What considerations should be met when drafting a petition alleging constitutional violations?
- ii. What principles should the court consider when interpreting statutes?
- iii. Whether the President had the power to appoint persons not listed under article 152 of the Constitution into the Cabinet.
- iv. Whether the decision to include the 3rd respondent (the Director-General of Nairobi Metropolitan Services) into the Cabinet and its Committees was unconstitutional.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 152(1) and (2)

152. Cabinet

(1) *The Cabinet consists of—*

(a) *the President;*

(b) *the Deputy President;*

(c) *the Attorney-General; and*

(d) *not fewer than fourteen and not more than twenty-two Cabinet Secretaries.*

(2) *The President shall nominate and, with the approval of the National Assembly, appoint Cabinet Secretaries.*

Held

1. The petition was clear on the provisions of the Constitution alleged to have been violated. It also demonstrated the manner of the alleged violation. The petitioner had established a nexus between the factual issues which allegedly violated the Constitution, the provisions of the Constitution alleged to have been contravened and the manifestation of contravention. The petition was well pleaded. The petition raised at least one constitutional issue.
2. The national executive was comprised of only the President, the Deputy President, the Attorney-General and the Cabinet Secretaries. The offices of the Chief Administrative Secretaries were not created in consonance of the Constitution and the law, the offices were unconstitutional.
3. In upholding the principle of supremacy of the Constitution, courts had a duty and power to ensure that all the three arms of Government acted within the Constitution and the law. A court should not hesitate to point out any manner of contravention of the Constitution and the law and to accordingly remedy.



4. Article 10(2) of the Constitution that provided on the national values and principles, and article 3(2) of the Constitution provided that any attempt to establish a government otherwise than in compliance with the Constitution was unlawful, affirmed the need to abide by the rule of law.
5. The position that the President had a constitutional duty to direct and coordinate the functions of ministries and government departments and in doing so it could be necessary to invite persons other than members of the cabinet to attend Cabinet meetings was in contrast with the article 132 of the Constitution. The provision did not accord the President any powers to appoint any one into the Cabinet.
6. Article 132 of the Constitution did not leave any room for discretion in respect of the composition of the Cabinet. The composition of the Cabinet was purposely ring-fenced and insulated to consist of only the President, the Deputy President, the Attorney General and the Cabinet Secretaries. No manner of interpretation of the entire Constitution could infuse discretion into the composition of the Cabinet on the part of the President.
7. If Kenyans had wanted to credit the President with the discretion to appoint any other person or persons into the Cabinet, Kenyans would have expressly stated so in the Constitution. The Constitution and/or the law would have further provided for *inter alia* the criteria and procedures for such appointments, the mandate of such persons among other pertinent considerations.
8. There was no legal justification for the 3rd respondent's presence in the Cabinet. The basis on which the decision to include the 3rd respondent into the Cabinet was made was not clear. The position, mandate and role of the 3rd respondent in the Cabinet were unknown or at least the respondents chose not to disclose as much. The decision was masked in secrecy and, therefore, lacks transparency. The 3rd respondent was a stranger in the Cabinet. The appointment of the 3rd respondent into the Cabinet was not approved by the National Assembly. It was unclear as to by whom and how the 3rd respondent will be over-sighted. The term of office of the 3rd respondent in the Cabinet also remained an illusion.
9. The decision to appoint and include the 3rd respondent into the Cabinet contravened articles 3(2), 10(2), 129, 130(1) and 152(1) of the Constitution.

Petition allowed.

Orders

- i. *Declaration issued that the decision to appoint and include the 3rd respondent into the business of the Cabinet with liberty to attend Cabinet meetings and Cabinet Committee meetings contravened articles 3(2), 10(2), 129, 130(1) and 152(1) of the Constitution and was illegal and void ab initio.*
- ii. *A writ of Certiorari was issued quashing the part of the Executive Order No 3 of 2020 which contained the decision to appoint and include the 3rd respondent into Cabinet meetings and Cabinet Committee meetings.*
- iii. *A writ of prohibition was issued prohibiting the 3rd respondent from attending any Cabinet meetings, Cabinet Committee meetings and/or discharging any functions of the Cabinet.*
- iv. *There was no order of costs as the petition was in public interest.*

Citations

Cases

Kenya

1. *Apollo Mboya v Attorney General & 2 others* Petition 472 of 2017; [2018] KEHC 6933 (KLR) - (Explained)
2. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 13 (KLR) - (Explained)
3. *Ibren, Nasra Ibrahim v Independent Electoral and Boundaries Commission & 2 others* Election Appeal 9 of 2018; [2018] KECA 500 (KLR) - (Explained)



4. *In the Matter of the Speaker of the Senate & another* Advisory Opinion Reference 2 of 2013; [2013] eKLR - (Explained)
5. *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others* Civil Appeal No. 224 of 2017; [2017] eKLR - (Explained)
6. *Khen Kharis Mburu v Inspector General Police Service & 3 others* Petition 7 of 2019; [2019] KEHC 3152 (KLR) - (Explained)
7. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)
8. *Okoiti & another v Public Service Commission & 73 others; Law Society of Kenya & another (Interested Parties)* Petition 33 & 42 of 2018 (Consolidated) [2021] KEHC 464 (KLR) - (Explained)
9. *Ramogi, William Odhiambo & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* Constitutional Petition 159 of 2018 & 201 of 2019; [2020] eKLR (Consolidated) - (Explained)
10. *RC v KKR* Petition E406 of 2020; [2021] eKLR - (Explained)

South Africa

Medicines Trust and Others v Minister of Health and Others [2005] ZACC 3; 2006 (3) SA 247 (CC) - (Explained)

Statutes

Kenya

1. Constitution of Kenya, 2010 articles 2, 3(2); 10(2); 95(5); 129; 130; 132(2)(3)(4);152(1); 153; 154; 259(1)- (Interpreted)
2. Ethics and Anti-Corruption Commission Act, 2011 (Act No 22 of 2011) In general- (Cited)

Advocates

1. Mr Gitonga for the petitioner
2. Mr Marwa for the respondents

JUDGMENT

Introduction

1. The exercise of executive authority has, once again, been put to test in these proceedings.
2. In this case, the petitioner, Hon Alice Muthoni Wahome, challenges the constitutionality of the decision to appoint and include Major General Mohammed Badi, the Director-General of Nairobi Metropolitan Services (hereinafter referred to as ‘the NMS’) sued as the 3rd respondent into the Cabinet and its Committees.
3. The petition is opposed.

The Petition:

4. The petitioner avers that on September 10, 2020, pursuant to Executive Order No 3 of 2020 the 3rd respondent took an oath of secrecy allowing him to attend Cabinet meetings.
5. The petitioner is aggrieved, and so contends that, the 3rd respondent is not a member of the Cabinet as established under article 152 of the [Constitution](#) and as such, the 3rd respondent’s participation in the Cabinet affairs is a continuing contravention of the Constitution.



6. It is further contended that the Petition raises very serious constitutional and governance issues surrounding the establishment of a Government and its organs in a manner other than as provided for in the Constitution.
7. In particular, the petitioner pleads the alleged violation of the Constitution as follows: -
 1. To the extent that the 3rd respondent has been introduced into Cabinet without following the process outlined in the Constitution, the said appointment is illegal, unconstitutional and void.
 2. To the extent that the 2nd respondent has allowed a "stranger" into the Cabinet meetings, the said actions offend the Constitution and are void.
 3. To the extent that the Cabinet is now constituted other than as provided for in the Constitution, the said Cabinet is illegally constituted and the appointment of the 3rd respondent is, therefore, unconstitutional and void.
 4. To the extent that the 3rd respondent's inclusion to the Cabinet is not backed by any law, it is unconstitutional and void.
 5. To the extent that the 3rd respondent's inclusion into Cabinet was done without approval of Parliament, the inclusion offends article 132(2) of the Constitution and is void.
 6. To the extent that the 3rd respondent's inclusion into Cabinet was done without the involvement of Parliament, it insulates him from oversight into his conduct as provided in article 95(5) of the Constitution, is illegal, unconstitutional and void.
 7. To the extent that there is now established an arm of Government in contravention of the Constitution, the Government is now established "in a manner other than as provided by the Constitution. The same offends article 3(2) and is void.
8. In the main, the petitioner prays for the following orders: -
 1. That there be a declaration that the 3rd respondent's inclusion in cabinet meetings is unconstitutional, illegal and void.
 2. That there be writs of mandamus directed at the 2nd respondent to exclude the 3rd respondent from cabinet meetings in keeping with his functions outlined in article 154 of the Constitution of Kenya.
 3. That there be writs of prohibition prohibiting the 3rd respondent from attending cabinet meetings.
 4. That there be writs of *certiorari* quashing Executive Order No 3 of 2020 to the extent that it included the 3rd respondent in Cabinet meetings in breach of the Constitution.
 5. Any other further orders, directions, declarations and remedies as this Honourable court may deem fit and just in the circumstances.
 6. An order on costs.
9. The petitioner expounded the foregoing in her filed written submissions.



10. She submitted that the court is entreated to intervene where the Executive is in breach of the Constitution, and in this case, in the formation of the Cabinet contrary to the Constitution. It is further submitted that Executive branch of Government cannot rely on the doctrine of comity as pleaded in the grounds of opposition. This court should not hesitate to intervene and interpret whether the Government as established meets the test of a Government established in a manner provided for in the Constitution.
11. The petitioner contends that the court has a constitutional obligation to intervene more so given that there is no defence to the allegations laid out in the petition. There is no suggestion or reference to any law that allows the Executive to include a stranger and exempt that person from the requirements of approval by Parliament.
12. The Supreme Court decision in *Communication Commission of Kenya & 5 others v Royal Media Services & 5 others* was referred to for the position that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit. Further, the petitioner referred to *Speaker of the Senate & another v. Attorney-General & 4 others* where the apex court held that: -
 - (156) ...Each matter that comes before the court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents...
13. It is further contended that an action as serious as the formation of an arm of Government cannot be left to “discretion” as pleaded in the Respondents’ Grounds of Opposition. It would then defeat the purpose of having participants in Cabinet proceedings vetted by Parliament. Parliament is the keeper of the sovereignty of the people with a function to oversight Government. The drafters did not intend for the requirement to be superfluous and subject to the Executive’s goodwill or otherwise in the matter of appointment of persons to attend Cabinet.
14. The petitioner retorts that the proposition that the President has unfettered power to invite anyone to Cabinet has no legal backing and ought to be rejected. The petitioner prays that the Petition be allowed as prayed.

The Response:

15. In opposition to the petitioner, the respondents filed Grounds of Opposition as well as written submissions. The respondents pleaded 12 grounds, and, as follows: -
 1. That the petitioner has not demonstrated how the respondents have breached any specific provision of the Constitution.
 2. That the petition has not been pleaded with precision; it does not provide adequate particulars of the claim relating to any alleged violation of the Constitution.
 3. That neither the provisions of the Constitution nor any law precludes the 3rd respondent from being invited and attending Cabinet meetings.
 4. That the petition, as filed herein, does not raise any Constitutional issues for deliberation as envisaged under the cited articles and as such should be dismissed with costs



5. That it is unequivocal that the petitioner has failed to demonstrate how his constitutional rights were violated and the harm he suffered.
6. That It is the law that the burden of proving allegations of violations of fundamental rights and freedom rests with the party so claiming. This was the position in the case of the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, the Court High Court held that;

It is our finding that the petition before the High Court was not pleaded with precision as required in constitutional petitions. Having reviewed the petition and supporting affidavit, we have concluded that they did not provide adequate particulars of the claims relating to the alleged violations of the Constitution of Kenya and the *Ethics and Anti-Corruption Commission Act, 2011*. Accordingly, the petition did not meet the standard enunciated in the *Anarita Karimi Njeru* case.
7. That the 3rd respondent has never been appointed as a cabinet secretary.
8. That article 132(2) of the *Constitution* is clear in the sense that after nomination of a candidate by the president, there has to be a process of approval by the National Assembly and thereafter one is appointed as a cabinet secretary. The 3rd respondent was never subjected to this process as such it cannot be said that he is a cabinet secretary.
9. That by dint of article 132(3)(b) of the *Constitution* the President may invite any person including the 3rd respondent to attend Cabinet Meetings in furtherance of his mandate of directing and co-ordinating functions of Ministries and government departments.
10. That article 95(5) of the *Constitution* was a never a subject of discussion for reasons that what the President did by inviting the 3rd respondent to the meeting did not require the approval of the National Assembly.
11. That in any event the President being the head of state and Government and with powers to exercise the executive authority of the Republic has the discretion of inviting the 3rd respondents to attend cabinet meetings.
12. That the petitioner has failed to meet the test for the grant of Orders sought and as such, the High Court should dismiss the Petition dated September 14, 2020.

16. In their submissions, the respondents identified two issues for determination. They are: -

- I. Whether the attendance of the 3rd respondent in the Cabinet meetings is unconstitutional;
- II. Whether the High Court should quash Executive Order No 3 of 2020.

17. On the first issue, the respondents submitted that the petition has not been pleaded with precision; it does not particularize the exact provisions of the Constitution that are alleged to have been violated and the manner of such violation. They relied on *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR for that proposition that: -

It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional petitions. Having reviewed the petition and supporting affidavit, we have concluded that they did not provide adequate particulars of the claims relating



to the alleged violations of the Constitution of Kenya and *Ethics and Anti-Corruption Commission Act, 2011*. Accordingly, the petition did not meet the standard enunciated in the *Anarita Karimi Njeru* case...

18. The respondents further submitted that the law imposes both legal and evidentiary burden of proof upon the petitioner, which burden the petitioner has failed to discharge in the present petition. They argue that there is no law that precludes any person from attending Cabinet meetings and, therefore, the attendance of the 3rd respondent to Cabinet meetings is *prima facie* legal and constitutional.
19. It is the respondents' submission that it falls upon the petitioner to specifically state and prove which provision of the Constitution or statute has been violated by the 3rd respondent's attendance in Cabinet meetings. The respondents urged the court to be persuaded by the holdings of the High Court in the matter of *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR where it was held that; "A party is under a constitutional forensic duty to clearly set out the particulars of the constitutional transgressions that in his/her opinion the Court of Appeal committed in their interpretation and/or application. Those grounds must be pleaded with precision and the constitutional principle and/or provision alleged to have been violated clearly set out." and in *Khen Kharis Mburu v Inspector General Police Service & 3 others* [2019] eKLR, the High Court held that: -

One of the cardinal principles in constitutional litigation is that a party who claims that a right or fundamental freedom has been violated, is being violated or is threatened, must plead with accuracy and precision demonstrating the right violated, or infringed, the article of the Constitution violated and the jurisdictional basis for it. That is; it is now an established principle of law that anyone who wishes the court to grant a relief for violation of a right or fundamental freedom must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it.

20. It is the respondents contention that, other than the petitioner mentioning the provisions of article 132(2) of the *Constitution*, the petitioner failed to demonstrate how the said provision can be interpreted to bar the 3rd respondent or any other invitee from attending Cabinet meetings.
21. On the second issue, the respondents submitted that the petitioner did not make out a case for issuance of the orders seeking to quash the executive order in issue.
22. The respondents submitted that the petitioner has not explained how inviting the 3rd respondent to attend Cabinet meetings breaches the provisions of article 132(2) of the *Constitution* since the provision empowers the President to direct and coordinate the functions of ministries and government departments and in doing so it may be necessary to invite persons other than Members of the Cabinet to attend Cabinet meetings. Further, it was argued that the Constitution vests the discretion on the organization and coordination of the National Government upon the Presidency who in furtherance of the same may require and or permit any person to attend Cabinet Meetings. Article 132(4) of the *Constitution* which provides that the President may perform any other executive function provided for in the Constitution or national legislation, was argued to give the President the discretion to require the attendance of any person in Cabinet meetings.
23. The respondents urged this Court not to find fault in the decision to include the 3rd respondent to Cabinet meetings.



24. Responding to the petitioner's quest that this honourable court should issue orders against the 2nd respondent to the effect that the 3rd respondent should be precluded from attending Cabinet meetings, the respondents submit that the Office of the Secretary to the Cabinet lacks constitutional and statutory powers to effect any such orders since the 2nd respondents cannot invite and or assign any responsibility to the 3rd respondent.
25. It is the respondents' submission that the Secretary to the Cabinet has a clear and distinct role as provided under article 154(3) of the *Constitution*.
26. The respondents further submitted that the orders sought if granted would constitute a usurpation of the Executives' constitutional roles and prerogatives contrary to the principle of separation of powers. The decision by the Supreme Court in *In the Matter of the Speaker of the Senate & another* [2013] eKLR Advisory Opinion No 2 of 2013, was referred to, thus: -
- This court, I humbly submit, may not go further than to suggest this, as to delve into further details would border dangerously on giving direction to a different arm of Government on its internal processes.
- This would fly in the face of the doctrine of separation of powers.
27. The respondents prayed that the petition fails and that none of the orders sought should be granted.

Issues for Determination:

28. Having considered the respective parties' pleadings, arguments and counter arguments and the decisions variously referred to by the parties, I discern the following issues for discussion: -
- i. Whether the petition raises any constitutional issues.
 - ii. If the answer to (i) above is in the affirmative, the applicable principles in constitutional interpretation.
 - iii. Whether the decision to include the 3rd respondent into the Cabinet and its Committees is unconstitutional.
 - iv. Conclusion and Disposition.
29. I will deal with the issues in seriatim.

i. Whether the Petition raises any constitutional issues:

30. In Nairobi High Court Constitutional Petition No E406 of 2020 *Renita Choda vs Kirit Kapur Rajput* [2021] eKLR, this court considered the above issue. This is what was stated: -
33. Long before the downing of the new constitutional dispensation under the Constitution of Kenya 2010, Courts have variously emphasized the need for clarity of pleadings. I echo the position.
34. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly referred to as 'the *Mutunga* Rules') also provide for the contents of Petitions. Rule 10 thereof provides seven key contents of a Petition as follows: -

Form of petition.



- 10 An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.
- (1) The petition shall disclose the following—
- (a) the petitioner’s name and address;
 - (b) the facts relied upon;
 - (c) the constitutional provision violated;
 - (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
 - (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
 - (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
 - (g) the relief sought by the petitioner.
35. Rule 10(3) and (4) of the *Mutunga* Rules also have a bearing on the form of petitions. They provide as follows: -
- (3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
 - (4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.
36. Rules 9 and 10 are on the place of filing and the Notice of institution of the petition respectively.
37. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others case (supra)* had the following on Constitutional Petitions: -

Although article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru vs Republic* [1979] KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.



38. Both parties are in agreement with what a constitutional issue is. They both referred to *Fredricks & Other v MEC for Education and Training, Eastern Cape & Others* case (*supra*) where the Court, rightly so, delimited what a constitutional issue entails and the jurisdiction of a Constitutional Court as follows: -
- The Constitution provides no definition of ‘constitutional matter’. What is a constitutional matter must be gleaned from a reading of the Constitution itself: if regard is had to the provisions of... Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State the interpretation, application and upholding of the Constitution are also constitutional issues. So too is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...
39. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.
40. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or the Constitution itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of the Constitution alleged to have been contravened or threatened and the manifestation of contravention or infringement. In the words of Langa, J in *Minister of Safety & Security v Luiters*, (2007) 28 ILJ 133 (CC): -
- ... When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the Court to consider constitutional rights and values...
41. Whereas it is largely agreed that the Constitution of Kenya, 2010 is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as Lenaola, J (as he then was) firmly stated in *Rapinder Kaur Atal v Manjit Singh Amrit* case (*supra*) ‘... Courts must interpret it with all liberation they can marshal...’
42. Resulting from the above discussion and the definition of a constitutional issue, this Court is in agreement with the position in *Turkana County Government & 20 Others v Attorney General & Others* case (*supra*) where a Multi-Judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.
31. The Petition in this matter has 5 parts. They are the description of parties, the legal foundations of the Petition, the facts, the violations of the Constitution and the prayers. Under the limb of legal foundations, the Petitioner stated the various constitutional provisions forming the basis of the Petition. They include articles 2, 3, 10, 129, 130, 132, 152, 153 and 154.



32. Under the limb of violation of the Constitution, the Petitioner superimposes the facts of the case with the provisions of the Constitution and states how the Constitution is allegedly violated. Thereafter, the Petitioner seeks the reliefs.
33. The petitioner is clear on the provisions of the Constitution which she alleges to have been violated. She also demonstrated the manner of the alleged violation. The Petitioner, hence, established a nexus between the factual issues which, according to her, violated the Constitution, the provisions of the Constitution alleged to have been contravened and the manifestation of contravention.
34. The petition is well pleaded. What remains is the ascertainment of whether the petition is legally holding.
35. This court is, hence, satisfied that the petition raises at least one constitutional issue. The first issue for consideration is now answered in the affirmative thereby paving way to the second issue.

ii. The applicable principles in constitutional interpretation:

36. The manner in which the Constitution is to be interpreted is a well-beaten path.
37. This court dealt with this subject recently in Nairobi High Court Constitutional Petitions No 33 and 42 of 2018 (Consolidated) *Okiya Omtatah Okiiti v Public Service Commission & 73 Others* [2021] eKLR. The court rendered itself as follows: -
 54. As regards the interpretation of the Constitution, suffice to say that the Constitution itself gives guidelines on how it ought to be interpreted. That is in articles 20(4) and 259(1).
 55. Article 20(4) requires courts while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights. Article 259(1) command courts to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.
 56. Courts have also rendered how the Constitution ought to be interpreted. The Supreme Court in a ruling rendered on December 21, 2011 in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR discussed the need for courts, while interpreting the Constitution, to favour a purposive approach as opposed to formalism. The court stated as under: -
 - (86) The rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles 20(4) and 259(1)).The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.
 - (87) In Article 259(1) the Constitution lays down the rule of interpretation as follows: “This 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.” Article 20 requires the Courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.

(88) Article 10 states clearly the values and principles of the Constitution, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.

(89) It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation.

57. On the principle of holistic interpretation of the Constitution, the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2015] eKLR affirmed the holistic interpretation principle by stating that:

This court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit.

58. The meaning of holistic interpretation of the Constitution was addressed by the Supreme Court in *In the Matter of the Kenya National Human Rights Commission*, Sup Ct Advisory Opinion Reference No 1 of 2012; [2014] eKLR. The court at paragraph 26 stated as follows: -

...But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.

59. In a Ugandan case in *Tinyefuza v Attorney General*, [1997] UGCC 3 (25 April 1997) the court was of the firm position that the Constitution should be read as an integrated whole. The court observed as follows: -

the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.....

60. In *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR, the Court of Appeal summarized the various principles of constitutional interpretation as follows:-



- (21) Before the High Court embarked on the interpretation of the contentious provisions of the Constitution, it restated the relevant principles of interpretation of the Constitution as extracted from case law thus: -that as provided by article 259 the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.that the Constitution must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism.that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).

These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statutes which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.

61. In Advisory Opinion Application No 2 of 2012, *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR, the Supreme Court spoke to purposive interpretation of the Constitution. It had the following to say: -

...The approach is to be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of the Constitution.

62. The court went ahead and gave further meaning of the term purposive by making reference to the decision in the Supreme Court of Canada in *R -vs- Drug Mart* (1985) when it made the following remarks: -

The proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect...to recall the Charter was not enacted in a vacuum, and must therefore... be placed in its proper linguistic, philosophic and historical contexts.



63. The Supreme Court, while referring to the South African Constitutional decision in *Minister of Home Affairs (Bermuda) v Fisher*[1980] AC 319 (PC), went further and stated that a purposive approach is ‘a generous interpretation... suitable to give individuals the full measure of the fundamental rights and freedoms referred to.’
64. The Learned Judges of the Supreme Court further agreed with the South African Constitutional Court in *S v Zuma* (CCT5/94) 1995 when it stated that in taking a purposive approach in interpretation, regard must be paid to the legal history, traditions and usages of the country concerned.
65. The Supreme Court embellished the need to pay attention to legal history while interpreting not only the Constitution but also statutes. It observed as follows: -
- 8.11 This background is, in my opinion, a sufficient statement on the approach to be taken in interpreting the Constitution, so as to breathe life into all its provisions. It is an approach that should be adopted in interpreting statutes and all decided cases that are to be followed, distinguished and for the purposes of the Supreme Court when it reverses itself.
66. The Court of Appeal while dealing with holistic interpretation of the Constitution in Civil Appeal 74 & 82 of 2012, *Centre for Rights Education and Awareness & Another v John Harun Mwanu & 6 others* [2012] eKLR stated that the entire Constitution must be read as an integrated whole and no one particular provision destroying the other so as to effectuate harmonization principle.
38. Having looked at the manner in which the Constitution ought to be interpreted, I now turn to the next issue.
- iii. Whether the decision to include the 3rd respondent into the Cabinet and its Committees is unconstitutional:**
39. This court had an occasion to, and interrogated the, creation of the offices of Chief Administrative Secretaries in *Okiya Omtatah Okoiti and Another versus The Public Service Commission & 73 others* case (*supra*).
40. In that matter, I briefly traced the rationale behind the creation of a leaner National executive in the Constitution of Kenya, 2010. This is what I stated: -
66. On the place of the office of the CAS as created, it is not lost to this Court that the composition of the national executive was one of the hotly contested matters during the constitutional-making process. The people’s cry was that the national executive was too bloated with unnecessary offices including the office of an Assistant Minister.
67. At the promulgation of the current Constitution, Kenyans adopted the Executive structure which is in Chapter Nine. Article 130 of the [Constitution](#) provides for the National Executive as follows: -
- (1) The national executive of the Republic comprises the President, the Deputy President and the rest of the Cabinet.
 - (2) The composition of the national executive shall reflect the regional and ethnic diversity of the people of Kenya.



68. Article 152(1) of the Constitution creates the Cabinet as follows: -
The Cabinet consists of—
- (a) the President;
 - (b) the Deputy President;
 - (c) the Attorney-General; and
 - (d) not fewer than fourteen and not more than twenty-two Cabinet Secretaries.
69. In Kenya, therefore, the national executive is comprised of only the President, the Deputy President, the Attorney-General and the CSs.(emphasis added).
41. In the end, I found that the offices of the Chief Administrative Secretaries were not created in consonance of the Constitution and the law. I then declared them unconstitutional.
42. Returning to the matter at hand, on September 10, 2020 the State House Spokesperson, Kanze Dena Mararo, issued a Press Release as follows: -
- Taking of the Oath of Secrecy by the Director General of Nairobi Metropolitan Services**
- His Excellency the President this morning witnessed the taking and sub-scription to the Oath of Secrecy by Major General Mohammed Abdalla Badi, the Director-General of the Nairobi Metropolitan Services (NMS), a requirement of all persons who attend Cabinet Meetings or participate in the conduct of Cabinet Business. The Director-General shall henceforth attend all meetings of Cabinet and its Committees, pursuant to Executive Order No. 3 of 2020.
- The Ceremony conducted by the Head of the Public Service was a precursor to the Cabinet Meeting held at State House, Nairobi on this Tenth Day of September the Year of our Lord Two Thousand and Twenty.
43. As a result of taking of the oath of secrecy, the 3rd respondent effectively became a member of the Cabinet.
44. I have, over time, asserted the position that, in upholding the principle of supremacy of the Constitution, courts have a duty and power to ensure that all the three arms of Government act, but within the Constitution and the law. A court should not hesitate to point out any manner of contravention of the Constitution and the law and to accordingly remedy the situation. By doing so, that is the only way Kenyans will reap the fruits of their hard-earned Constitution of Kenya, 2010.
45. The High Court in a 5-Judge Bench in the High Court in Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with Constitutional Petition No 201 of 2019 *William Odhiambo Ramogi & 3 Others v The Attorney General & Others* reiterated the supremacy of the Constitution as follows: -
115. The starting point is the Constitution. Article 2 inter alia declares the Constitution as the supreme law of the land which binds all persons and all State organs at both levels of government. It also provides that the validity or legality of the Constitution is not subject to any kind of challenge and that any law that is inconsistent with it is void to the extent of that inconsistency. Further, any act or omission in contravention of the Constitution is



invalid. Article 3 places an obligation upon every person to respect, uphold and defend the Constitution. (emphasis added).

46. Further, in *Apollo Mboya v Attorney General & 2 others* [2018] eKLR, the High Court held that:

86. In our constitutional dispensation, it is not Parliament, or the executive or the Judiciary that are Supreme, but the Constitution.

47. 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 dealt with the issue of exercise of public power and 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.

48. The Court of Appeal in *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others*, Civil Appeal No 224 of 2017; [2017] eKLR while buttressing the position that article 10 of the Constitution, which is on national values and principles of governance, must apply to all and with immediate effect, had the following to say: -

In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that article 10(2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in article 10(2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforced gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by article 259(1)(a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.

Consequently, in this appeal, we make a firm determination that article 10(2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional articles or Statutes as appropriate.

49. The national values and principles of governance in article 10(2) of the Constitution include patriotism, patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised, good governance, integrity, transparency and accountability and sustainable development.



50. Article 3(2) of the Constitution provides that any attempt to establish a government otherwise than in compliance with the Constitution is unlawful.
51. The foregoing variously affirms the need to abide by the rule of law. In this case, the contention is that in appointing the 3rd respondent into the Cabinet the President is in conflict with the rule of law.
52. The respondents while relying on articles 132(2) and (4) of the Constitution vehemently argued that the President has a constitutional duty to direct and coordinate the functions of ministries and government departments and in doing so it may be necessary to invite persons other than Members of the Cabinet to attend Cabinet meetings. Further, it was argued that article 132(4) of the Constitution which provides that the President may perform any other executive function provided for in the Constitution or national legislation, yielded the President the discretion to require the attendance of any person in Cabinet meetings.
53. Due to the gravity of the above submission, I will first reproduce the entire article 132 of the Constitution. The Article is on the functions of the President. It provides as follows: -
- (1) The President shall—
 - (a) address the opening of each newly elected Parliament;
 - (b) address a special sitting of Parliament once every year and may address Parliament at any other time; and
 - (c) once every year—
 - (i) report, in an address to the nation, on all the measures taken and the progress achieved in the realisation of the national values, referred to in article 10;
 - (ii) publish in the Gazette the details of the measures and progress under subparagraph (i); and
 - (iii) submit a report for debate to the National Assembly on the progress made in fulfilling the international obligations of the Republic.
 - (2) The President shall nominate and, with the approval of the National Assembly, appoint, and may dismiss—
 - (a) the Cabinet Secretaries, in accordance with article 152;
 - (b) the Attorney-General, in accordance with article 156;
 - (c) the Secretary to the Cabinet in accordance with article 154;
 - (d) Principal Secretaries in accordance with article 155;
 - (e) high commissioners, ambassadors and diplomatic and consular representatives; and
 - (f) in accordance with this Constitution, any other State or public officer whom this Constitution requires or empowers the President to appoint or dismiss.
 - (3) The President shall—
 - (a) chair Cabinet meetings;
 - (b) direct and co-ordinate the functions of ministries and government departments; and



- (c) by a decision published in the Gazette, assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any Act of Parliament.
- (4) The President may—
- (a) perform any other executive function provided for in this Constitution or in national legislation and, except as otherwise provided for in this Constitution, may establish an office in the public service in accordance with the recommendation of the Public Service Commission;
 - (b) receive foreign diplomatic and consular representatives;
 - (c) confer honours in the name of the people and the Republic;
 - (d) subject to article 58, declare a state of emergency; and
 - (e) with the approval of Parliament, declare war.
- (5) The President shall ensure that the international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries
54. A careful reading of the above article turns to be in contrast with the arguments put forth by the respondents. The provision does not accord the President any powers to appoint any one into the Cabinet.
55. Article 152(1) of the *Constitution* gives the composition of the Cabinet as follows: -
The Cabinet consists of—
- (a) the President;
 - (b) the Deputy President;
 - (c) the Attorney-General; and
 - (d) not fewer than fourteen and not more than twenty-two Cabinet Secretaries.
56. The provision did not leave any room for discretion in respect of the composition of the Cabinet. In fact, the composition of the Cabinet is purposely ring-fenced and insulated to consist of only the President, the Deputy President, the Attorney General and the Cabinet Secretaries. I cannot imagine of any manner of interpretation of the entire Constitution that will infuse discretion into the composition of the Cabinet on the part of the President.
57. I find the interpretation by the respondents legally untenable, too far-fetched and not in tandem with the aspirations of Kenyans. If Kenyans had wanted to credit the President with the discretion to appoint any other person or persons into the Cabinet, I believe the Kenyans would have expressly stated so in the Constitution. The Constitution and/or the law would have further provided for inter alia the criteria and procedures for such appointments, the mandate of such persons among other pertinent considerations.
58. The respondents readily admit that the 3rd respondent is not President, the Deputy President, the Attorney General or one of the Cabinet Secretaries. Further, apart from the constrained interpretation of article 132 of the *Constitution*, the respondents have not made any reference to any law or decisional authority on the inclusion of the 3rd respondent into the Cabinet. In short, there is no legal justification for the 3rd respondent's presence in the Cabinet.



59. Currently, the basis on which the decision to include the 3rd respondent into the Cabinet was made is not clear. The position, mandate and role of the 3rd respondent in the Cabinet is also unknown or at least the respondents chose not to disclose as much. It seems like the decision is masked in secrecy and, therefore, lacks transparency. The 3rd respondent is, hence, a ‘stranger’ in the Cabinet.
60. There is also no doubt that the appointment of the 3rd respondent into the Cabinet was not approved by the National Assembly. As such, it is unclear as to by whom and how the 3rd respondent will be oversighted. The term of office of the 3rd respondent in the Cabinet also remain an illusion.
61. The retention of the 3rd respondent into the Cabinet no doubt raises far too many unanswered questions. For instance, one may ask why the 3rd respondent and yet there are so many other Director-Generals or heads of public institutions in the country. Such question and many others would have easily been answered had the process towards the inclusion of the 3rd respondent into the Cabinet been transparent and based on clear provisions of the Constitution and the law.
62. On the basis of the foregoing, this court does not find any justification in the decision to include the 3rd respondent into the Cabinet.
63. Having said so, suffice to hold that the decision to appoint and include the 3rd respondent into the Cabinet contravenes articles 3(2), 10(2), 129, 130(1) and 152(1) of the *Constitution*.
64. I will now consider the last issue.

Conclusion and Disposition:

65. The foregoing analysis, therefore, settles the two main issue raised in the petition. It is the finding of this Court the petition raises constitutional issues and that the appointment and inclusion of the 3rd respondent into the Cabinet contravenes articles 3(2), 10(2), 129, 130(1) and 152(1) of the *Constitution*.
66. Flowing from the above findings, the petition dated September 14, 2020 succeeds and the following orders hereby issue: -
 - (a) A declaration hereby issues that the decision to appoint and include Major General Badi, the 3rd respondent herein, into the business of the Cabinet with liberty to attend Cabinet meetings and Cabinet Committee meetings contravenes articles 3(2), 10(2), 129, 130(1) and 152(1) of the *Constitution* and is illegal and void *ab initio*.
 - (b) A writ of *certiorari* hereby issues quashing the part of the Executive Order No 3 of 2020 which contain the decision to appoint and include Major General Badi, the 3rd respondent herein, into Cabinet meetings and Cabinet Committee meetings.
 - (c) A writ of Prohibition hereby issues prohibiting Major General Badi, the 3rd respondent herein, from attending any Cabinet meetings, Cabinet Committee meetings and/or discharging any functions of the Cabinet.
 - (d) There shall be no order as to costs as the petition is in public interest.
67. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RD SEPTEMBER, 2021

A. C. MRIMA

JUDGE



Judgment virtually delivered in the presence of:

Mr. Gitonga, Counsel for the Petitioner.

Mr. Marwa, Counsel for the Respondents.

Elizabeth Wanjohi – Court Assistant.

