Okoiti v Judicial Service Commission & another; Mwilu & another (Interested Parties) (Constitutional Petition E408 of 2020) [2021] KEHC 421 (KLR) (Constitutional and Human Rights) (15 November 2021) (Judgment)

Okiya Omtatah Okoiti v Judicial Service Commission & another;Philomena Mbete Mwilu & another (Interested Parties) [2021] eKLR

Neutral citation: [2021] KEHC 421 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E408 OF 2020

AC MRIMA, J

NOVEMBER 15, 2021

BETWEEN

OKIYA OMTATAH OKOITI ..... PETITIONER

AND

JUDICIAL SERVICE COMMISSION ..... 1ST RESPONDENT

PARLIAMENT OF KENYA ..... 2ND RESPONDENT

AND

PHILOMENA MBETE MWILU ..... INTERESTED PARTY

ATTORNEY GENERAL ..... INTERESTED PARTY

A succeeding Chief Justice had to be appointed before the retirement of the serving Chief Justice.

Reported by Ribia John

Civil Practice and Procedure *– pleadings – constitutional petitions - requirement of reasonable precision - whether the instant petition as drafted satisfied the requirement of reasonable precision – the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) rule 10.*

Statutes *– interpretation of statutes – principles of statutory and constitutional interpretation - what principles did the court apply in interpreting the statute and in interpreting the Constitution.*

Statutes *– interpretation of statutes – interpretation of section 5(4) and 5(5) of the Judicial Service Act – whether the Chief Justice could rely on section 5(4) and 5(5) of the Judicial Service Act to authorize the DCJ to act as the acting Chief Justice either when he was retired or even when he was on leave - whether section 5(4) and 5(5) of the*

Judicial Service Act was unconstitutional for creating the position of an Acting Chief Justice which position was not created in the Constitution – whether the Chief Justice could rely on section 5(4) and 5(5) of the Judicial Service Act to authorize the DCJ to act as the acting Chief Justice either when he was retired or even when he was on leave -Constitution of Kenya, 2010 article 166(1); Judicial Service Act, Act No. 1 of 2011, section 5(4) and 5(5).

***Constitutional Law** – Judicial Officers – appointment of judicial officers - Chief Justice – Deputy Chief Justice (DCJ) – appointment of a succeeding Chief Justice after the retirement of a serving Chief Justice – position of 'Acting Chief Justice' - whether the Constitution anticipated or provided for both the title and the office of 'Acting Chief Justice' - whether the DCJ could perform the functions/duties of the Chief Justice when and where the functions/ duties were assigned by the Chief Justice while in office – whether a Chief Justice could only be appointed subject to the provisions of the Constitution - whether a succeeding Chief Justice had to be appointed before the retirement of a serving Chief Justice - Constitution of Kenya, 2010 article 166(1); Judicial Service Act, Act No. 1 of 2011, section 5(4) and 5(5).*

***Constitutional Law** – Judicial Officers – appointment of judicial officers - Chief Justice – Deputy Chief Justice (DCJ) – appointment of a succeeding Chief Justice after the retirement of a serving Chief Justice – Judicial Service Commission - where the DCJ had pending petitions before the Judicial Service Commission - whether the Deputy Chief Justice (DCJ) was eligible for appointment as a Chief Justice despite the pendency of the removal Petitions before the Judicial Service Commission (JSC) - whether the Judicial Service Commission failed in its constitutional mandate regarding the complaints against the Deputy Chief Justice - Constitution of Kenya, 2010 article 166(1) and 168(1), 168(2), 168(3) and 168(4); Judicial Service Act, Act No. 1 of 2011, section 5(4) and 5(5).*

***Constitutional Law** – Judicial Officers – appointment of judicial officers - Chief Justice – Deputy Chief Justice (DCJ) – appointment of a succeeding Chief Justice after the retirement of a serving Chief Justice – tenure of the Chief Justice vis-à-vis tenure of the Deputy Chief Justice - whether the tenure of the office of Deputy Chief Justice was tied to that of the Chief Justice - Constitution of Kenya, 2010 articles 166(1)(a) and 166(1)(b) and 167.*

Brief facts

Having reached the mandatory age for retirement, Chief Justice, Hon. David Maraga wrote a letter in which he appointed the Deputy Chief Justice Hon. Lady Justice Philomena Mbete Mwilu, to act as the Chief Justice for a period not exceeding 6 months. The appointment was to be undertaken *in lieu* of the retiring Chief Justice's leave and retirement.

Aggrieved by the procedure of appointment of the Deputy Chief Justice as Chief Justice, the petitioner filed the instant petition in which he challenged the suitability of the Deputy Chief Justice, Hon. Lady Justice Philomena Mbete Mwilu, to act as the Chief Justice in view of the several petitions seeking her removal from office at the Judicial Service Commission (JSC), in view of the fact that the position of Acting Chief Justice was not provided for in the Constitution, and in view of the fact the DCJ was appointed in acting capacity *via* appointment by the Chief Justice contrary to the provisions of article 166(1) of the Constitution. The petition also challenged the constitutionality of sections 5(4) and 5(5) of the Judicial Service Act, 2011.

Issues

i. Whether the instant petition satisfied the requirement of reasonable precision expected of constitutional petitions.
ii. What principles did the court apply in the interpreting statute and in interpreting the Constitution?
iii. Whether the Judicial Service Commission failed in its constitutional mandate regarding the complaints against the Deputy Chief Justice.
iv. Whether the Constitution anticipated or provided for both the title and the office of acting Chief Justice.
v. Whether sections 5(4) and 5(5) of the Judicial Service Act were unconstitutional for creating the position of an Acting Chief Justice which position was not created in the Constitution.
vi. Whether the Deputy Chief Justice (DCJ) was eligible for appointment as a Chief Justice despite the pendency of the removal petitions before the Judicial Service Commission (JSC).

vii. Whether the DCJ could perform the functions/duties of the Chief Justice when and where the functions/duties were assigned by the Chief Justice while in office.
viii. Whether the Chief Justice had any capacity in law to appoint anybody to be an acting Chief Justice.
ix. Whether the Chief Justice could rely on section 5(4) and (5) of the Judicial Service Act to authorize the DCJ to act as the acting Chief Justice either when he was retired or even when he was on leave.
x. Whether the Deputy Chief Justice should have taken an oath of office prior to acting as a Chief Justice.
xi. Whether the tenure of the office of Deputy Chief Justice was tied to that of the Chief Justice.
xii. Whether a succeeding Chief Justice had to be appointed before the retirement of a serving Chief Justice.
xiii. Whether in a circumstance where the Deputy Chief Justice acted as the Chief Justice in violation of the Constitution, the decisions made by the acting Chief Justice were unconstitutional, null and void.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 166 - Appointment of Chief Justice, Deputy Chief Justice and other judges

(1) The President shall appoint—

(a) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and

(b) all other judges, in accordance with the recommendation of the Judicial Service Commission.

Judicial Service Act, No 1 of 2011

Section 5 - Functions of the Chief Justice and the Deputy Chief Justice

(4) In the event of the removal, resignation or death of the Chief Justice, the Deputy Chief Justice shall act as the Chief Justice for a period not exceeding six months pending the appointment of a new Chief Justice in accordance with the Constitution.

(5) If a vacancy occurs in the office the Chief Justice and that of the Deputy Chief Justice, or if the Deputy Chief Justice is unable to act in the absence of Chief Justice, the senior most judge in the Supreme Court shall act as the Chief Justice and shall assume the administrative duties of the Chief Justice until the position of Chief Justice or Deputy Chief Justice is filled.

Held

1. If a person was seeking redress from the High Court on a matter which involved a reference to the Constitution, it was important (if only to ensure that justice was done to his case) that he should set out with a reasonable degree of precision that of which he complained, the provisions said to be infringed, and the manner in which they were alleged to be infringed.
2. The petition as laid before court was clear on the alleged violations and the manner in which those violations were allegedly inflicted. The petition was detailed and the constitutional issues in dispute easily came to the fore. The petition was in line with, and passed the threshold of reasonable precision. The petition was in consonance with rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules).
3. The Constitution was a document *sui generis*. It was the ultimate source of law in the land. It commanded superiority and dominance in every aspect and its interpretation as of necessity had to be in a manner that all other laws bowed to.

4. A court should consider the following principles that applied to the construction of statue and the constitution in interpreting the Constitution:
    1. presumption against an absurd result; meaning a court should avoid a construction that produces an absurd result;
    2. presumption against unworkable or impracticable result - meaning that a court should find against a construction which produced unworkable or impracticable result;
    3. presumption against anomalous or illogical result; meaning that a court should find against a construction that created an anomaly or otherwise produced an irrational or illogical result,
    4. presumption against artificial result – meaning that a court should find against a construction that produced artificial result and,
    5. the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which was in any way adverse to public interest, economic, social and political or otherwise.
5. Although the question of the election date of the first elections had evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, had minimal role to play. The court as an independent arbiter of the Constitution had fidelity to the Constitution and had to be guided by the letter and spirit of the Constitution.
6. While interpreting the impugned legislation alongside the Constitution, the court had to have a liberal approach that promoted the rule of law and had jurisprudential value that took into account the spirit of the Constitution.
7. The Judicial Service Commission (JSC) was one of the Commissions in the Constitution. It was established under article 171 of the Constitution. One of its functions related to the removal of judges of the superior Courts from office. The Constitution did not provide for the procedure in which the Commission was to discharge the above function. Be that as it may, the JSC just like any other constitutional Commission, had to strive to protect the sovereignty of the people, secure the observance of democratic values and principles and promote constitutionalism. In doing so, the JSC was subject only to the Constitution and the law, remained independent and was not subject to the direction or control by any person or authority.
8. The Judicial Service Act, No. 1 of 2011 (the JS Act) in a general way provided the manner in which the JSC and the Judiciary ought to function in section 3. For instance, it provided that the JSC and the Judiciary shall facilitate the conduct of a judicial process designed to render justice to all, and facilitate a judicial process that was committed to the expeditious determination of disputes and just resolution of disputes, among others.
9. On matters relating to procedure, the Judiciary Service Act in section 3 for instance provided that the JSC and the Judiciary were to promote and sustain fair procedures in their functioning and in the operations of the judicial process. In particular, the Judicial Service Act provided that the Commission had powers to protect and regulate its own processes in achieving its objects through the application of principles set out in the Constitution and other laws.
10. There was no black letter procedure that guided the JSC in the hearing of petitions against Judges. Notably, the Commission itself did not avail any settled procedure it adopted when processing complaints against judges. The Commission made and regulated its own processes as long as they were within the constitutional and statutory borders. The JSC was a quasi-judicial body.
11. The Commission, being a body that discharged quasi-judicial function ought to be reasonably guided by the processes akin to those that generally guided the courts. The overriding objective in civil cases aimed at facilitating the just, expeditious, proportionate and affordable resolution of civil disputes ought to permeate the JSC's undertakings.
12. There had been a deliberate purpose by the JSC to deal with the petitions fairly and expeditiously. Save for the suits that were filed by the DCJ, the conservatory orders of the High Court and the hardship,

delays and inefficiencies created by the Covid-19 pandemic, the manner in which the Commission had so far conducted the four Petitions ought not to be faulted. On the contrary, the petitioner had not provided any evidence to demonstrate the alleged bias, impropriety or inefficiency of the JSC that would culminate in the violation of the Constitution.

13. There was no evidence that the petitioners in the four petitions had lodged any complaints either before the JSC or elsewhere challenging the propriety of the processes. The most probable reason could be that the petitioners had all through been involved in the happenings at the Commission.

14. The court was not persuaded that the JSC had failed its constitutional mandate regarding the complaints against the DCJ. Unless the DCJ otherwise failed to meet the requisite constitutional and statutory requirements, the pendency of the removal petitions at the JSC did not *per se* constitute an adequate bar to the DCJ from seeking to be the Chief Justice of the Republic of Kenya.

15. Occupying an office in an acting capacity was not novel in Kenya. The challenge of the constitutionality of such position and exercise of power in acting capacity had also been the subject of litigation.

16. There was need to juxtapose the *ratio decedendi* in *Transparency International (TI Kenya) -vs- Attorney General & 2 others* [2018] eKLR with the instant case in *Transparency International (TI Kenya) -vs- Attorney General & 2 others* [2018] eKLR where the court held that the amendment of the law to create the position of Deputy Auditor General and appointing an Acting Auditor General was unconstitutional as those positions were not provided in the Constitution). The Constitution under article 248(3) recognized only two independent offices in Kenya. They were the offices of the Auditor General and the Controller of Budget. Article 229 of the Constitution provided for the office of the Auditor General. Unlike in article 166(1) of the Constitution which provided for the positions of Chief Justice and a Deputy Chief Justice, article 229 of the Constitution did not provide for a Deputy Auditor General.

17. The constitutional design in respect to the office of Auditor General was that there would always be one substantive holder of that office with no designated deputy. However, the position was different in the case of the Chief Justice. The Constitution openly created the substantive position of the Deputy Chief Justice with a clear mandate under article 161 of the Constitution. Article 161(2)(b) of the Constitution designated the Deputy Chief Justice as the Deputy Head of Judiciary and under article 163(1)(b) of the Constitution the Deputy Chief Justice was to deputize the Chief Justice and also serve as the Vice-President of the Supreme Court.

18. The constitutional matrix in the case of the Auditor General was different from that of the Chief Justice and the Deputy Chief Justice. What section 12 of the Public Audit Act, therefore, intended to do was to introduce and equate the most senior member to the Auditor General as the principal deputy to the Auditor General. In other words, the provision quietly intended to create the office of a deputy Auditor General who would then ascend to be an acting Auditor General.

19. Drawing from the tests of the objective, proportionality and the effect of a statutory provision, the effect of Section 12 of the Public Audit Act was to silently and, craftily so, create a substantive position of a Deputy Auditor General with the potential of ascending into the office of an acting Auditor General. That scheme of affairs out-rightly contravened the Constitution as it intended to create an office, otherwise not created by the Constitution. To that extent, the declaration of unconstitutionality of section 12 of the Public Audit Act was properly issued. On the converse, such could not be the position in the instant case as the Constitution expressly provided for the office of the Deputy Chief Justice. So far, the *Transparency International (TI Kenya) -vs- Attorney General & 2 others case (supra*) was distinguishable.

20. On the objective test, it was necessary, at a minimum, that an objective related to concerns which were pressing and substantial in a free and democratic society before it could be characterized as sufficiently important.

21. The impugned provisions were aimed at forestalling a crisis upon the removal, resignation or death of the Chief Justice. Such a provision aimed at fostering good governance and it passed the objective test.
22. On the effect of the impugned provisions, a court had to intently look at the nature of the violation, the extent of the violation and the degree to which the impugned provisions had upon the integral principles of a free and democratic society. The effect of the impugned provisions would be, not a creation of an unknown office, but instead it would yield a positive effect. The positive effect was that the impugned provisions would forestall any possible crisis that would be created by the vacancy in the seat of the Chief Justice. Further, such an intervention was time-bound to last for a period of only six months at most. The positive effect outweighed the alleged negative effect, if any.
23. The proportionality test juxtaposed the two tests, that was the objective test and the effects test. It ought to have been demonstrated that the means chosen were reasonable and justified. Whereas in each case courts would be required to balance the interests of society with those of individuals and groups, three important components of a proportionality test had to be ascertained. First, the measures adopted had to be carefully designed to achieve the objective in question. They ought not have been arbitrary, unfair or based on irrational considerations. In short, they had to be rationally connected to the objective. Second, the means, even if rationally connected to the objective in the first sense, should have the minimum possible effect. Third, there had to be a proportionality between the effects of the measures and the objective which had been identified as of sufficient importance.
24. The mode of attaining the desired objective was by use of offices which were already created within the Constitution. The contention that the impugned provisions were an attempt to otherwise create an office not provided within the Constitution was misplaced. Furthermore, article 74 of the Constitution provided for State officers in acting positions.
25. The impugned provisions applied in only three situations. They were on removal, resignation or death of a sitting Chief Justice. The provisions were, hence, intended to be applicable during the currency of the term of a substantive Chief Justice and not otherwise. They were, aimed at managing a transition from one substantive holder of the office of the Chief Justice to the next holder of office. Section(s) 5(4) and 5(5) of the Judicial Service Act were not unconstitutional.
26. The impugned letter gave authority to the DCJ to act as the Chief Justice in two instances. The first instance was when His Lordship was on leave between December 12, 2020 to January 11, 2021. The second instance was from January 12, 2021 when His Lordship was formally retired until the next Chief Justice took office. There was no issue that the impugned letter authorized the DCJ to act as the Chief Justice. Section 5(4) and 5(5) of the Judicial Service Act applied in instances where a sitting Chief Justice was either removed from office, resigned or died. The Constitution also made specific provisions for the tenure of office of the Chief Justice and other Judges of the superior courts. The retiring Chief Justice was, therefore, exiting the Judiciary on attaining the mandatory retirement age of 70 years old.
27. The Constitution demarcated retirement of judges from removal from office of the judges. Sections 5(4) and 5(5) of the Judicial Service Act were, therefore, centered on removal of the Chief Justice and not retirement. Had Parliament intended sections 5(4) and 5(5) of the Judicial Service Act to apply in instances of the retirement of the Chief Justice that would have been captured in black and white.
28. The operation of sections 5(4) and 5(5) of the Judicial Service Act was a self-executing process. The provision did not call for an appointing authority or affirmation by anyone for the Deputy Chief Justice or the most senior Judge in the Supreme Court, as the case may have been, to act as the Chief Justice. One assumed the office of the Chief Justice in an acting capacity purely on the basis of the operation of the law. Whenever a Chief Justice was removed, died or resigned before attaining the age of 70 or ten years in office, the Deputy Chief or the most senior judge in the Supreme Court, as the case may have been, automatically acted as the Chief Justice. The Chief Justice could not rely on sections 5(4)

and 5(5) of the Judicial Service Act to purport to authorize the DCJ to act as the acting Chief Justice either when he was retired or even when he was on leave.

29. The Chief Justice, as a State officer, did not cease to be the Chief Justice of the Republic of Kenya when on leave including leave pending retirement. Likewise, His Lordship could not rely on any provision of the Constitution or any other law in authorizing the DCJ to act as the Chief Justice either when he was retired or even when he was on leave. His Lordship purported to exercise powers which were non-existent. In short, His Lordship did not have the constitutional or legislative authority to authorize the DCJ to act as the Chief Justice as he did *vide* the impugned letter. The letter dated December 11, 2020, lacked legality and remained constitutionally infirm.

30. The Constitution demanded that whenever a state officer took office or acted in such an office, such had to take and subscribe the requisite oath or affirmation of office. Article 260 of the Constitution made it clear that judges were State officers. The DCJ ought to have first taken and subscribed the requisite oath or affirmation of the office of the Chief Justice in an acting capacity before assuming office.

31. The office of the Chief Justice had to be filled before the lapse of the tenure of the incumbent. In other words, Kenyans never anticipated a *lacuna* in the office of the Chief Justice on account of the retirement of the incumbent at the age of 70 years or at the expiry of the ten-year service as a Chief Justice. Parliament was of like thinking when it initiated an amendment to section 30 of the Judicial Service Act to take care of the *lacuna*. That was *vide* Judicial Service Amendment Bill, 2020.

32. The Bill sought to ensure that there was a seamless transition of power whenever the Chief Justice's ten-year term of office was about to come to an end or when retirement at the age of 70 years was imminent. What the intended amendment aimed to achieve was to align sections 5(4) and 5(5) of the Judicial Service Act to the constitutional edict that made no room for an acting Chief Justice in instances where JSC was aware that the incumbent Chief Justice's term was about to come to an end upon serving ten years or when the Chief Justice was about to attain the retirement age of 70 years.

33. There had to be legislation providing for the recruitment of a Chief Justice before the term of office of the incumbent expired either on attaining 70 years of age or upon serving ten years as a Chief Justice.

34. The Constitution comprehensively provided for the tenure of the Chief Justice in no uncertain terms. However, there was no specific provision for the Deputy Chief Justice. The effect of the lack of clarity on the tenure of the Deputy Chief Justice and in view of article 166(1) of the Constitution did not mean that the tenure of the Deputy Chief Justice was tied to that of the Chief Justice.

35. Had Kenyans wanted the tenure of the Deputy Chief Justice to be tied to that of the Chief Justice, then that would have been expressly stated in the Constitution. The Constitution would have also made it clear that when a Deputy Chief Justice retired after serving the ten years, but was yet to attain the mandatory retirement age of 70 years and opted to continue serving as a Judge of the Supreme Court, then that arrangement would also not impugn the composition of the Supreme Court even if the court would have more than the maximum permitted number of Supreme Court judges holding office. However, that was not the position.

36. The use of the word 'and' in article 166(1)(a) of the Constitution related to the unique manner in which the Chief Justice and the Deputy Chief Justice were appointed. Notably, Article 166 of the Constitution only dealt with the appointment of judges but not their tenure. It was article 167 of the Constitution which dealt with tenure of judges. It could not, therefore, be a proper mode of interpretation to stretch an appointive provision of the Constitution into the realm of another provision on the tenure of the holder of the office where the Constitution was silent. Since appointment and tenure of office were distinct, an interpretation imputing that they were similar certainly bred absurdity.

37. The Deputy Chief Justice while acting as the Chief Justice made many decisions. The decisions had to have been acted upon and that resulted to many other actions. For instance, the acting Chief Justice admitted Advocates to the bar during her brief tenure as the Acting Chief Justice. If such action was

to be nullified, then it meant those advocates would be deemed not to have been advocates of the High Court of Kenya at all. Several issues, therefore, arose including the fate of the legal briefs the advocates have had since their admission, the remuneration they had earned so far among many other pertinent issues. Nullifying all the decisions made by the Deputy Chief Justice when acting as such would generally have caused more detriment than the intended good. The instant case was one of such cases where declarations could serve as appropriate reliefs to meet the justice of the case.

38. There was pending legislation in Parliament on the recruitment of a succeeding Chief Justice before the reign of a sitting Chief Justice expired. Given that there was in office a Chief Justice whose retirement was not in the near future, there was really no need of issuing orders against Parliament to do what it was already doing. It was the court's hope that the legislation would be in place sooner. A copy of the instant judgment would be transmitted to the Speakers of the Parliament since Parliament did not take part in the instant matter.

Petition partly allowed.

Orders

i. *A declaration was issued that the Judicial Service Commission had not failed in its constitutional mandate regarding the complaints against the Deputy Chief Justice, Hon. Lady Justice Philomena Mbete Mwilu.*
ii. *A declaration was issued that sections 5(4) and 5(5) of Judicial Service Act were constitutional.*
iii. *A declaration was issued that the Deputy Chief Justice, the Hon. Lady Justice Philomena Mbete Mwilu, was eligible for appointment as a Chief Justice of the Republic of Kenya despite the pendency of the removal Petitions against her before the Judicial Service Commission.*
iv. *A declaration was issued that the letter dated December 11, 2020 by the then Chief Justice Hon. Justice David Kenani Maraga granting authority to the Deputy Chief Justice, the Hon. Lady Justice Philomena Mbete Mwilu, to act as the Chief Justice was unconstitutional, null and void. The letter was quashed.*
v. *A declaration was issued that an acting Chief Justice who assented to office by virtue of sections 5(4) and 5(5) of the Judicial Service Act had to take an oath of office as required under article 74 of the Constitution as read with article 259(3)(b) of the Constitution before assuming the office.*
vi. *A declaration was issued that the Deputy Chief Justice, the Hon. Lady Justice Philomena Mbete Mwilu, acted as the Chief Justice of the Republic of Kenya in contravention of the Constitution.*
vii. *A declaration hereby issued that a succeeding Chief Justice had to be appointed before the retirement of a serving Chief Justice.*
viii. *A declaration was issued that the tenure of the office of Deputy Chief Justice was not tied to that of the Chief Justice. Therefore, the Deputy Chief Justice, the Hon. Lady Justice Philomena Mbete Mwilu, was at liberty to remain in office until retirement or when she would otherwise cease to hold the office.*
ix. *Each party was to bear its costs since the petition was a public interest litigation.*

Citations

Cases

East Africa;

1. *Anarita Karimi Njeru v Republic* [1979] eKLR — (Explained)
2. *Center for Rights Education and Awareness & anothers v John Harun Mwau & 6 others* **C**ivil Appeal 74 & 82 of 2012; [2012] eKLR — (Explained)
3. *City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli v Orient Commercial Bank Limited* Civil Appeal No Nai 302 of 2008; [2008] eKLR — (Explained)
4. *Gitobu, Imanyara & 2 others v Attorney General* Civil Appeal 98 of 2014; [2016] eKLR — (Explained)
5. *In re Speaker, County Assembly of Embu* Reference 1 of 2015; 2018] eKLR — (Explained)

6. *Institute of Social Accountability & Another v National Assembly & 4 others* [2015] eKLR— (Explained)
7. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] eKLR — (Explained)
8. *John Harun Mwau & 3 ithers v Attorney General & 2 others* [2012] eKLR — (Explained)
9. *John Harun Mwau v Independent Electoral & Boundaries Commission & Attorney Genera*l [2019] eKLR —(Explained)
10. *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR — Explained
11. *Judicial Service Commission v Speaker of the National Assembly & 8 others* [2014] eKLR — (Explained)
12. *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR — Explained
13. *Law Society of Kenya v Attorney General & anothe*r [2021] eKLR — (Explained)
14. *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for StrategicLitigation in Africa (Amicus Curiae*) [2021] eKLR — (Explained)
15. *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] eKLR — (Explained)
16. *Salat, Nicholas Kiptoo arap Korir Independent Electoral and Boundaries Commission & 6 others* Civil Appeal (Application) 228 of 2013; [2013] eKLR — (Explained)
17. *Okiya Omtatah Okoiti vs. Public Service Commission & 73 others* Petition 33 & 42 of 2018 (Consolidated)2021] eKLR — (Explained)
18. *Mwilu, Philomena Mbete Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae)* Petition 295 of 2018; 2019] eKLR — (Explained)
19. *Republic ex parte Chudasama v Chief Magistrate's Court, Nairobi & another* [2008] 2 EA 311 — (Explained)
20. *Republic v Philomena Mbete Mwilu and Stanley Muluvi Kiima Chief Magistrate's Court* Criminal Case No 38 of 2018; [2018] eKLR — (Explained)
21. *In the Matter of the Interim Independent Electoral Commission* [2011] eKLR — (Explained)
22. *Macharia,Samuel Kamau & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR — (Explained)
23. *Kitheka, Simeon Kioko 18 others v County Government of Machakos & 2 others* [2018] eKLR — (Explained)
24. *Total Kenya Limited v Kenya Revenue Authority* [2013] eKLR — (Explained)
25. *Transparency International (TI Kenya) v Attorney General & 2 others* [2018] eKLR — (Explained)
26. *Were, Samuel & 14 others v Attorney General & 2 others* [2017] eKLR — (Explained)
27. *Olum & another v Attorney General* [2002] 2 EA 508 — (Explained)

United States of America;

1. Carr v State ((1890) 127 Ind. 204, 26 NE 778; 11 LRA 370) — (Explained)
2. *Indianapolis & Louisville Ry v Hackett* (1912) 227 US) — (Explained)

India;

Hambradda Wakhana v Union of India Air (1960) AIR 554 — (Explained)

South Africa;

Fose v Minister of Safety & Security [1977] ZACC 6 — (Explained)

Statutes

1. Anti-Corruption And Economic Crimes Act, 2003 (Act No 3 of 2003) section 62(1) — (Interpreted)
2. Constitution of Kenya, 2010 articles 10, 22, 27(1); 47(1); 48; 50(1); 73(1)(2)(a); 93; 139(1)(a)(3)(a); 166(1)(a)(2)(1)(3)(b)(ii); 167(5),(1)(2)(3)(4); 168(1); 184(4); 253; 258; 259(1)(8) — (Interpreted)
3. Judicial Service Act, 2011 (Act No 1 of 2011) sections 5(4)(5), 13 — (Interpreted)

4. Political Parties Act, 2011 (Act No 11 of 2011) section 10 — (Interpreted)
5. Public Audit Act, 2015 (Act No 24 of 2015) section 12 — (Interpreted)
6. Public Service Commission Act, 2012 (Act No 13 of 2012) section 2 — (Interpreted)

Advocates

1. Mr Kanjama for for the 1st respondent
2. Mr Havi & Miss Soweto for for the 1st interested party
3. Miss Chibole instructed by the Hon Attorney General for for the 2nd interested party

JUDGMENT

Introduction:

1. The petition subject of this judgment raises two cardinal issues. They raise the suitability of the current Deputy Chief Justice, Hon Lady Justice Philomena Mbete Mwilu, to act as the Chief Justice in view of the several petitions seeking her removal from office and the constitutionality of sections 5(4) and (5) of the *Judicial Service Act*, 2011. The petition also raises other issues including whether a retiring Chief Justice can appoint an Acting Chief Justice pending the recruitment and appointment of the next Chief Justice, among other issues.

2. The petition is opposed by the Judicial Service Commission, the 1st respondent, Hon Lady Justice Philomena Mbete Mwilu, the 1st interested party, and the Hon Attorney General, the 2nd interested party herein. The Parliament of Kenya sued as the 2nd respondent did not participate in this matter.

3. The petitioner, Okiya Omtatah Okoiti, describes himself as a law-abiding citizen, a public spirited individual and a human rights defender. He is the Executive Director of Kenyans for Justice and Development (KEJUDE) Trust, an incorporated legal entity with the objective of promoting democratic governance, economic development and prosperity.

4. The 1st respondent, The Judicial Service Commission, is a Commission established under article 171(1) of the *Constitution*. Its mandate is to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice. I shall hereinafter refer to the Judicial Service Commission as 'the 1st respondent' or 'the JSC' or 'the Commission').

5. The 2nd respondent, The Parliament of Kenya, is established under article 93 of the Constitution. It exercises legislative authority on behalf of the people of Kenya.

6. The 1st interested party, Hon Lady Justice Philomena Mbete Mwilu, is the current Deputy Chief Justice of the Republic of Kenya and Vice-President of the Supreme Court of Kenya. I shall hereinafter refer to her as 'the 1st interested party' or 'the DCJ').

7. The 2nd interested party, The Hon Attorney General, is the principal legal adviser and representative of the Government of Kenya. It has the constitutional mandate under article 156 of the Constitution to promote and protect the rule of law and defend public interest.

The Petitioner's Case:

8. The petitioner filed an amended petition dated 20th January, 2021. It was supported by the affidavit of Okiya Omtatah Okoiti sworn on an even date. The petitioner also filed written submissions dated 17th February 2021.

9. The petitioner detailed his case in the amended petition, the affidavit and submissions. He also made oral highlights before court.

10. The petition is founded on articles 1(1), 4(2), 10, 22, 27(1), 47(1), 48, 50(1), 73(1)(2)(a), 168(2)(3) and (4), 172(1), 249, 258 and 259(1) of the Constitution and sections 5 and 13 of The *Judicial Service Act*, 2011.

11. The petitioner's case is that the immediate former Chief Justice and the then President of the Supreme Court, Hon Justice David Kenani Maraga, was scheduled to proceed on terminal leave from 11th December, 2020 to 12th January, 2021. His retirement would subsequently commence on 12th January, 2021.

12. In view of the imminent retirement, the Chief Justice emeritus, through a letter referenced CJ/PERS of 11th December, 2020 gave the DCJ the authority to be the Acting Chief Justice.

13. It is the foregoing events that instigated the instant petition.

14. The petitioner was aggrieved that the former Chief Justice's actions were constitutionally impermissible and without any justification in law.

15. The petitioner contended that the actions of the Chief Justice created a constitutionally non-existent position of Acting Chief Justice and gave the DCJ authority to exercise the full powers of the Chief Justice, in an unconstitutional situation.

16. The petitioner impugned the Chief Justice's letter of appointment stating that it is only JSC under article 166(1)(a) of the Constitution, that could recommend to the President the appointment of a person as a Chief Justice.

17. Based on the foregoing, the petitioner posited that there was no constitutional requirement for the Chief Justice to appoint or recommend a person for appointment as Acting Chief Justice.

18. The petitioner posited that the Constitution expressly provided for instances where a deputy to a substantive office holder may act when a vacancy arises. To that end, he referred to article 139(1)(a) of the Constitution where the Deputy President can act as a President, article 139(3)(a) of the Constitution where the Speaker of the National Assembly shall act as President and at article 184(4) of the Constitution where a Speaker of a County Assembly can act as a Governor.

19. In reference to the foregoing, the petitioner stated that there was no provision in the Constitution for the DCJ or any other person to act in the office of the Chief Justice in the absence of the Chief Justice. It is his case that the DCJ can only be assigned duties of the office by the Chief Justice during the Chief Justice's tenure.

20. It was the petitioner's case that the position of Acting Chief Justice is unconstitutional because only one person is recognized by the Constitution as Chief Justice.

21. The petitioner claimed that the actions of the Chief Justice emeritus created of an unconstitutional office and was an unconstitutional exercise of functions and powers of the constitutional office of the Chief Justice.

22. On the constitutionality of section 5(4) and (5) of the *Judicial Service Act*, 2011, the petitioner argued that the same is also unconstitutional for providing that the Deputy Chief Justice (or the senior most Judge in the Supreme Court) can act as Chief Justice in the event of the removal, resignation or death of the Chief Justice.

23. The petitioner's contention was that since the Constitution did not provide for the position of an Acting Chief Justice, then a statute cannot attempt to create one.

24. To buttress the fact that legislation cannot confer jurisdiction beyond which what the Constitution provides, the petitioner referred to the Supreme Court in Application No 2 of 2011, *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, where the court struck out section 14 of the Supreme Court Act for purporting to confer special jurisdiction on the Supreme Court under article 163(9) of the Constitution, beyond what the Constitution vested in the court under article 163(3)(b)(ii).

25. Separately, the petitioner averred that the Constitution does not anticipate a vacancy in the Office of the Chief Justice following retirement of the incumbent. He stated that the appointment of the Chief Justice must be done such that no vacancy occurs as a result of retirement of the Chief Justice.

26. To lend credence to the foregoing, the petitioner invited the court to take judicial notice of The Judicial Service (Amendment) Bill, 2020, which intended to close the *lacuna* in the law regarding appointment of a successor Chief Justice when the serving one is due to retire due to effluxion of time.

27. In reference to articles 167(5) and 168(1) of the Constitution on removal, resignation or death of the Chief Justice, the Petitioner averred that there was absolutely no room for an Acting Chief Justice and the DCJ (or the senior most Judge in the Supreme Court) to perform the functions of the Chief Justice.

28. The petitioner also contended that even in any case, the DCJ could not act as a Chief Justice given the several disciplinary proceedings she is facing before the JSC.

29. To that end reference was made to *Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae)* [2019] eKLR and Nairobi Chief Magistrate's Court ACC Criminal Case No 38 of 2018 *Republic v Philomena Mbete Mwilu and Stanley Muluvi Kiima* where the DCJ faced charges related to credit transactions between herself and Imperial Bank Limited (now under receivership) and an alleged failure to pay stamp duty on four properties she purchased between 2014 and 2016.

30. It was further alluded that the DCJ faced four petitions before the JSC for her removal from office and that her integrity was so compromised that she could not be the face of the Judiciary.

31. The petitioner had another complaint. He was aggrieved that JSC had failed article 168(4) of the Constitution which mandates the JSC to consider a petition for the removal of a Judge of a superior court, to act expeditiously and resolve the matters. Instead, the DCJ had colluded with the JSC in abusing the protection accorded to Judges by blocking investigations into the accusations of abuse of office contained in the four petitions before the JSC.

32. He posited that the JSC had failed in its duty as the custodian and defender of the independence of the Judiciary despite the fact that, under article 253 of the Constitution and section 13(3) of the *Judicial Service Act*, 2011, the JSC has all the necessary powers for the execution of its functions.

33. In reference to article 259(8) of the Constitution, the petitioner stated that the JSC had deliberately failed to ensure that the disciplinary enquiry into the conduct of the DCJ was conducted speedily in violation of article 47(1) of the Constitution which entitles every person to administrative action that is expeditions, efficient, lawful reasonable and procedurally fair.

34. It was the petitioner's case that the delay to hear and determine the four petitions seeking the removal of the DCJ as a Judge, renders the JSC guilty of dereliction of duty and the fight against corruption within the Judiciary.

35. The petitioner posited that the slow pace at which the four petitions against the DCJ are being processed does not emphasize on the importance of fostering a culture of integrity within the Judiciary.

36. He stated that the foregoing state of affairs violates his legitimate expectation that would demonstrate a concrete commitment to enhance judicial integrity and it was both in the public interest and in the interests of justice that the DCJ is either cleared or condemned by the JSC.

37. In the end, the petitioner urged that the DCJ's continued participation in the affairs and deliberation of the JSC and Supreme Court were mockery of Chapter Six of the Constitution.

38. In the main, the petitioner prayed for the following declarations: -

    i. A declaration that the Judicial Service Commission has violated the Constitution by delaying to hear and determine the four petitions seeking the removal from office of the Hon Deputy Chief Justice Philomena Mbete Mwilu.

    ii. A declaration that the JSC has failed in its duty as the custodian and defender of the independence of the Judiciary by failing to adopt a policy on dealing with petitions for the removal of a judge of a superior court, including the time it would take between receiving such a petition and deciding whether or not the petition discloses a ground for the removal of a judge of a superior court.

    iii. A decaration that for as long as the four petitions seeking her removal from the office of Judge of the Supreme Court remain unresolved, the Deputy Chief Justice Philomena Mbete Mwilu is not suitable for appointment to the office of the Chief Justice.

    iv. A declaration that a Chief Justice has no capacity in law to appoint anybody to be an Acting Chief Justice.

    v. A declaration that the Hon David Kenani Maraga's letter Ref: CJ/Pers of 11th December 2020 is invalid null and void to the extent that it purports to create the position of Acting Chief Justice upon his retirement and to appoint the Deputy Chief Justice to be the Acting Chief Justice.

    vi. A declaration that the Constitution does not anticipate nor provide for both the title and the office of 'Acting Chief Justice'.

    vii. A declaration that subsections 5(4) and (5) of the *Judicial Service Act*, are unconstitutional and, therefore, invalid, null and void.

    viii. A declatarion that all decisions made by the Hon Deputy Justice Philomena Mbete Mwilu in her purported role of Acting Chief Justice are unconstitutional and, therefore, invalid, null and void.

    ix. A declaration that the office of the Chief Justice can only be occupied as provided under article 166(1)(a) of the Constitution of Kenya, 2020.

    x. A declaration that the Hon, Deputy Chief Justice Philomena Mbete Mwilu was never an Acting Chief Justice of the Republic of Kenya.

    xi. A declaration that the Deputy Chief Justice can only perform functions/ duties of the office of the Chief Justice when and where the functions/duties

are assigned by the Chief Justice during the tenure in office and not after he vacates office.

xii. A declaration that the tenure of a Deputy Chief Justice is tied to that of the Chief Justice and a new Deputy Chief Justice must be appointed whenever a new Chief Justice is appointed.

xiii. A declaration that to ensure continuity in office as anticipated under the Constitution of Kenya 2010, Parliament should enact a law to ensure that a new Chief Justice is recruited before the tenure of the incumbent expires.

39. The petitioner also prayed for the following orders: -

i. An order compelling the Parliament of Kenya to enact legislation providing for the recruitment of a new Chief Justice before an incumbent vacates office due to the expiry of his/her tenure.

ii. An order barring the Judicial Service Commission from considering the Hon Deputy Chief Justice Philomena Mbete Mwilu for appointment as the Chief Justice unless and until the Judicial Service Commission clears her of the accusations levelled against her in the four petitions in issue seeking her removal from the office of Judge of the Supreme Court.

iii. An order quashing subsections 5(4) and (5) of the *Judicial Service Act*, 2011.

iv. An order quashing the Hon David Kenani Maraga's letter Ref: CJ/Pers of 11th December 2020.

v. An order compelling the respondents to bear the costs of this suit.

vi. An order compeeling the respondents to bear the costs of this suit.

40. In his submissions, the petitioner identified many issues for determination which can be condensed into five, and as under: -

i. Whether the JSC violated the Constitution by delaying to adjudicate the four petitions against the DCJ;

ii. Whether the DCJ can only perform the functions/duties of the Chief Justice when and where the functions/duties are assigned by the Chief Justice while still in office;

iii. Whether the Constitution anticipates or provides for both the title and the office of 'Acting Chief Justice';

iv. Whether Parliament should enact a law to ensure that a new Chief Justice is recruited before the tenure of the incumbent expires.

v. Whether the office of the Chief Justice can only be occupied as provided under article 166(1)(a) of the Constitution.

vi. Whether the Chief Justice has any capacity in law to appoint anybody to be an Acting Chief Justice.

41. While submitting on the first issue on the delay in processing the four Petitions against the DCJ, the petitioner relied on *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR and the provisions of article 17(a) of the United Nations Basic Principles on the Independence of the Judiciary

where it is the position that a petition for the removal of a Judge must be dealt with expeditiously, efficiently, lawfully, reasonably, and in a manner that is procedurally fair.

42. It was submitted that the JSC had occasioned inordinate delay to the four Petitions since it has been more than two years since when complaints against the DCJ were filed. It was contended that the JSC had violated both article 47(1) and 259(8) of the Constitution.

43. In submitting that the JSC was accountable under the law, the petitioner found reliance on the Supreme Court in *In the Matter of the Interim Independent Electoral Commission* [2011] eKLR, where it was observed that independence is not a carte blanche for any entity to conduct themselves on whim; but that their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law.

44. In view of the administrative nature of the JSC and the finding of the Court of Appeal in *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR, the petitioner submitted that the there is need to establish a procedural/policy or regulatory framework applicable by the JSC that would regulate petitions seeking the removal of judges. He argued that the regulations would include timelines, and tests and standards that ought to be met at every stage of processing a petition before a recommendation to the President is made in order to avoid arbitrariness and open-ended process.

45. The petitioner further submitted that the delay had been occasioned by the JSC's bias in favour of the DCJ in view of the fact that she is a member of the entity.

46. On the second issue in respect to the contention that the DCJ can only perform functions of the Chief Justice when and where the functions/duties are assigned by the Chief Justice while in office, the petitioner in reference to article 163(1)(b)(i) of the Constitution submitted that the DCJ could only act on behalf of the Chief Justice during the Chief Justice's tenure and not otherwise.

47. To further buttress the foregoing, reliance was placed on section 5(2)(a) and 5(3) of the *Judicial Service Act* which provides that the Chief Justice shall "assign duties to the Deputy Chief Justice..." and as the Deputy Head of the Judiciary and the Vice President of the Supreme Court, the Deputy Chief Justice shall be responsible to the Chief Justice in the exercise of the functions and duties of the office respectively.

48. The petitioner submitted that the office of the Deputy Chief Justice does not have a life its own without the one of Chief Justice and as such the DCJ cannot perform any other functions under the law where there is no a Chief Justice in office to assign functions/duties to the DCJ. To this end, reliance was placed on article 259(11) of the Constitution.

49. On the issue of whether the Constitution anticipates for the title and office of Acting Chief Justice, the petitioner submitted that nowhere in the Constitution is the expression used.

50. It was his submission that even though the Constitution anticipated a vacancy in the office of the Chief Justice in emergency situations, where the incumbent is removed, resigns, or dies in office, the Constitution makes no provision for the appointment of an Acting Chief Justice.

51. He reiterated that the framers of the Constitution did not designate the Deputy Chief Justice to act in the office of the Chief Justice as they did with the Deputy President and the Deputy Governor and as such there was no room for an Acting Chief Justice. The office must remain vacant until a new Chief Justice is appointed.

52. The petitioner submitted further that in limiting the term of service of the Chief Justice to 10 years, the law did not envisage a vacancy flowing from that lapse of term of service. He claimed that the lapse of time was foreseeable unlike death, resignation or removal and as such, there ought to be a recruitment

process in anticipation of a vacancy where the prescribed term of ten years is to lapse and a successful candidate identified well in advance to avoid an acting appointment.

53. On the issue whether Parliament should enact legislation to ensure a new Chief Justice is recruited before the tenure of the incumbent expires, the petitioner submitted that since such lapsing of tenure is foreseeable, a procedure for timely identification, nomination, approval for appointment and appointment of the next holder of the office as at the time of the lapsing of the term of the incumbent must be provided for in legislation to ensure smooth transition.

54. While submitting that the Office of the Chief Justice can only be occupied in accordance with article 166(1) of the Constitution, the petitioner urged that the appointment of the Chief Justice is by the President and therefore the Constitution does not vest in Parliament the powers to establish any other mechanism for doing so. He stated that Parliament cannot provide in legislation a procedure for filling a vacancy in the office which derogates from the plain text of article 166(1)(a).

55. On the submission that the Constitution does not provide for an acting Chief Justice and that the Chief Justice must be recommended by the JSC and appointed by the President, the petitioner stated that there is absolutely no way that a Chief Justice can purport to appoint an acting Chief Justice.

56. Ultimately, the petitioner submitted that the letter Ref: CJ/Pers of 11th December, 2020 by the then Hon Chief Justice David Kenani Maraga that purported to appoint the Hon Lady Justice Philomena Mbete Mwilu, the Deputy Chief Justice (DCJ), to be the Acting Chief Justice while he proceeded on terminal leave was unconstitutional.

57. The petitioner argued that acting appointment can only be made where the office is vacant and not when the office holder is on leave. To that end, reliance was placed on section 2 of *Public Service Commission Act*.

58. In submitting on the unconstitutionality of section 5(4) and (5) of the *Judicial Service Act*, the petitioner stated that article 2(1) of the Constitution on supremacy of the Constitution and article 259(1) of the Constitution on construing the Constitution in a manner that promotes its values and purposes must be upheld.

59. It was his case that the framers of the Constitution never anticipated nor provided for an Acting Chief Justice. It was argued that only the Constitution itself can create acting constitutional offices, and provide for the appointment of acting holders of constitutional offices. Reliance was placed in *Transparency International (TI-Kenya) v Attorney General* [2018] eKLR where the court observed that: -

> Appointing an Acting Auditor General as proposed by section 12 violates article 229(1). For that reason, I find and hold that section 12 of the Act is inconsistent with article 229 of the Constitution and is invalid.

60. The petitioner urged the court to determine the constitutionality of section 5(4) and (5) of the *Judicial Service Act* by examining its purpose and effect. Reference was made to Court of Appeal of Uganda in *Olum & another v Attorney General* [2002] EA and the High Court in *Kenya Human Rights Commission v Attorney General* [2018] eKLR.

61. Flowing from the foregoing and in reference to article 1(1) and (2) of the Constitution on exercise of sovereign power, the petitioner stated that the there is absolutely no way the Hon Deputy Chief Justice Philomena Mbete Mwilu could have been an Acting Chief Justice of the Republic of Kenya.

62. It was his case that sections 5(4) and (5) of the *Judicial Service Act*, 2011, only provide, but unconstitutionally, for the Deputy Chief Justice (or the senior most Judge in the Supreme Court) to act as Chief Justice in the event of the removal, resignation or death of the Chief Justice, which is not the case herein with the retirement of the Hon Chief Justice Maraga.

63. On the foregoing basis, the petitioner submitted that all decisions made by the DCJ when acting as the Chief Justice were null and void. To buttress the position reliance was placed on the decision in *Carr v State*, (1890) 127 Ind 204, 26 NE 778; 11 LRA 370 where it was held that: -

> ... an act which violates the constitution has no power and of course, neither build up or tear down. It can neither create new rights nor destroy existing ones. It is an empty legislative declaration without force or vitality.

64. The petitioner further relied on the United States Supreme Court in Chicago, *Indianapolis & Louisville Ry v Hackett*, (1912) 227 US where it was observed thus: -

> That act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law.

65. In a separate argument, the petitioner submitted that the tenure of a Deputy Chief Justice is tied to that of the Chief Justice and a new Deputy Chief Justice must be appointed whenever a new Chief Justice is appointed. He referred to article 166(1)(a) of the Constitution and stated that the conjunction "and" in the provision the President shall appoint the Chief Justice and the Deputy Chief Justice indicates connection.

66. The petitioner further invited the court to make the finding that unless and until the DCJ is cleared by the JSC, the DCJ is not suitable for appointment to the office of the Chief Justice.

67. To buttress the need to suspend the DCJ pending the hearing and determination of her case, the petitioner found support in the Indian case of *R Ravichandran v Additional Commissioner of Police* where it was observed *inter-alia* that: -

> The order of suspension for a misconduct, involving moral turpitude, in the instant case, alleged act of corruption and the further order, refusing to revoke the order of suspension, both being discretionary and administrative in nature, should not ordinarily be interfered with by the High Court under article 226 of the Constitution of India. Allowing a person charged with serious acts of corruption or any other misconduct, involving moral turpitude, to discharge his duties and enjoy the fruits of the post, would be against a public policy and it would not be in public interest or to maintain a clean and effective administration.
>
> Cases involving serious charges of corruption and misappropriation of money, certainly involve moral turpitude, where there is implied depravity and villiness (*sic*) of character...[B]y allowing a government servant, facing serious charges of corruption or misappropriation or embezzlement, etc., to be retained in service, public interest would be affected.

68. To further buttress the impropriety of DCJ's continued stay in office, the petitioner submitted that section 62(1) of the *Anti-Corruption and Economic Crimes Act* provides that a public officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of

the charge until the conclusion of the case. Reference was also made on the decision in *Moses Kasaine Lenolkulal v Director of Public Prosecutions* [2019] eKLR where the court observed that: -

> It seems to me that the provisions of section 62(6), apart from obfuscating, indeed helping to obliterate the 'political hygiene' that Mr Nyamodi spoke of, are contrary to the constitutional requirements of integrity in governance, are against the national values and principles of governance and the principles of leadership and integrity in Chapter Six, and undermine the prosecution of officers in the position of the applicant in this case. In so doing, they entrench corruption and impunity in the land.

69. On costs, the petitioner submitted that it should be awarded costs to compensate for its input in this dispute. He cited J*John Harun Mwau & 3 others v Attorney-General & 2 others* [2012] eKLR, where the court held that it had discretion in awarding costs in instances of challenge to contraventions of the Constitution. The court stated as much: -

> ..... In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed....

70. He also submitted that in the event the petition is not successful, the petitioner ought not be condemned to pay costs.

71. In the end, the petitioner submitted that this court should consider the most appropriate relief it should give in the circumstances of the suit. Reliance was placed on the South African and Kenyan High Court decisions in Petition No 3 of 2018, *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] eKLR where it was observed thus: -

> We are however, in agreement with the submissions of the appellant and *Amicus Curiae*, to the effect that article 23(3) of the Constitution empowers the High Court to fashion appropriate reliefs, even of an interim nature, in specific cases, so as to redress the violation of a fundamental right.

72. The petitioner reiterated his call that all the prayers sought in the amended petition be allowed.

The 1st Respondent's Case:

73. The 1st respondent opposed the amended petition through the replying affidavit sworn by Mrs Anne Amadi, the Chief Registrar of the Judiciary and Secretary to the Commission. The affidavit was deponed to on 12th March, 2021.

74. In defending the proceedings and determination that take place before the JSC, Miss Amadi deposed that the membership of the JSC reflects the highest standards of constitutionalism and integrity.

75. She stated that under article 172 of the Constitution and the *Judicial Service Act*, the JSC is mandated to promote and facilitate the independence and accountability of the Judiciary in carrying out its functions of receiving and investigating complaints for the removal of Judges under article 168(2), (3) and (4) of the Constitution and complaints against any judicial officer under article 172(1c) of the Constitution and also disciplining judicial officers.

76. In distinguishing the process the Commission adopts in dealing with complaints against Judges and those of other judicial officers, she deponed that for Judges there is a process provided to facilitate

fair hearing of any complaint that meets a *prima facie* standard through a Tribunal appointed by the President. It was her case that JSC merely processes the petitions against Judges based on fair administrative action.

77. It was her disposition that in discharge of its duties, the Commission applies article 10 on national values and principles of governance, the Bill of Rights including fair administrative action, Chapter six on principle of leadership and integrity, Chapter 10 on Judiciary, Chapter 15 on the operational principles of Constitutional Commissions and Chapter 17 on the general provisions on interpretation of the Constitution.

78. Upon setting out the modus operandi of the 1st respondent, Mrs Amadi, in defending the manner in which the JSC had handled the complaints against the 1st interested party, gave a detailed chronology of events.

79. She deposed that on 28th August 2018, the 1st interested party was arrested and presented before court for plea taking. The taking of the lea was deferred to 29th August 2018. However, on the said date, plea was not taken because the 1st interested party instituted Constitutional Petition No 295 of 2019, *Hon Philomena Mbete Mwilu v DPP & others* and conservatory orders were issued. The matter was eventually heard and determined by a 5-judge bench.

80. In considering the question whether the 1st interested party's prosecution should await the decision of the JSC, the learned Judges made the finding that since the cases involved misconduct with criminal elements committed in the course of official functions, such must first be referred to the body responsible with the disciplinary or removal of Judges, that is the Commission. On that basis, the court quashed the decision by the Director of Public Prosecution (hereinafter referred to as 'the DPP") to prosecute the 1st interested party.

81. Mrs Amadi deponed that on 3rd July, 2019, the DPP appealed against the High Court decision in Nairobi Court of Appeal Civil Appeal No 324 of 2019. The DCJ also appealed the decision.

82. It was her further disposition that on 8th July, 2019, four petitions were received by the Commission namely; JSC Petition No 86 of 2019 filed by The DPP and DCI on the basis of the 1st interested party's lending transactions involving Imperial Bank Limited and in appropriate communication with Omar Ikimu Arafat, JSC Petition No 75 of 2019 filed by Alexander Mugane challenging the 1st interested party's continued participation in the affairs and deliberations of the JSC and the Supreme Court, JSC Petition No 74 of 2019 filed by Peter Kirika accusing the 1st interested party of gross misconduct and breach of Judicial Code of Conduct and Petition filed by Mogore Mogaka accusing the 1st interested party of corruption based on transactions with Imperial Bank.

83. She deponed that upon receipt of the petitions, JSC served the 1st interested party with the said petitions on 9th July, 2019 and in response, the 1st interested party filed preliminary objections on 26th July, 2019 and on 9th August, 2019 contending that the 4 petitions were *sub-judice* because they related to issues raised and pending before the Court of Appeal in Civil Appeal No 298 of 2019.

84. She also deponed that on 26th August, 2019, the Commission considered the preliminary objections and on 27th August, 2019 the objections were served upon the 4 petitioners. She further stated that it is only the DPP that responded on 9th September, 2019 stating that its petition was distinguishable from the pending appeal.

85. It was further deponed that on 12th November, 2019 the two cases before the Court of Appeal; Civil Appeal No 298 and Civil Appeal No 314 of 2019 came up for Case Management Conference but were deferred because of the scheduled hearing before the JSC for 16th December, 2019.

86. Mrs Amadi further deponed that on 13th December, 2019, the 1st interested party filed two applications seeking recusal of the Hon Attorney General and Commissioner Macharia Njeru on grounds of bias.

87. She deponed further that on 16th December, 2019, the day scheduled for hearing of the preliminary objections, hearing could not proceed firstly due to the two applications by the 1st interested party and secondly on the contest by one of the petitioners that they had been served late.

88. It was deponed that the JSC adjourned the hearing of the Preliminary Objection on the foregoing basis.

89. She also deponed further that on 18th March, 2020 a scheduled hearing could not proceed due to downscaling of various processes as a result of Covid -19 pandemic.

90. It was her case that on 29th and 30th June, 2020 JSC resolved to schedule a mention of the case on 10th July, 2020 in presence of all parties for purposes of taking a hearing date of the recusal applications. That on 10th July, 2020 the Petitions were mentioned before the Commission where the 1st interested party made several applications among them requesting the Petitions be stood over generally on the basis of Covid-19 pandemic.

91. It was stated that among the directions given that day were that the 1st interested party do file supplementary affidavit and the application for recusal was scheduled for 24th July, 2020.

92. Mrs Amadi further deponed that the 1st interested party filed an application on 24th July, 2020 for review of the directions of the JSC. However, in lieu of said applications, the Commission heard the recusal application on 27th July, 2020 where all parties submitted their respective positions. The JSC thereafter informed the parties that it would deliver the ruling on notice.

93. On 13th August, 2020 the ruling in respect of the recusal applications was delivered and adopted as the decision of the JSC. It was also resolved that the pending preliminary objection (on *sub-judice*) would be heard virtually on 31st August, 2020.

94. Mrs Amadi deponed that before the preliminary objections could be heard, the 1st interested party on 14th August 2020 filed Nairobi Constitutional Petition E245 of 2020; *Hon Lady Justice Philomena Mbete Mwilu v The JSC & others* where she obtained *ex-parte* conservatory orders.

95. From the foregoing dispositions, Mrs Amadi stated that the JSC had taken all necessary steps to expedite the hearing of the removal of the 1st interested party save for the interruptions caused by Covid-19 pandemic and the conservatory orders in Petition E245 of 2020; *Hon Lady Justice Philomena Mbete Mwilu v The JSC & others*.

96. It was her further disposition that the 1st interested party has never responded to the 4 Petitions for her removal despite the JSC's directions.

97. In responding to the claim that section 5(4) & (5) of the *Judicial Service Act* was unconstitutional, Mrs Amadi deponed that the contention was not merited because the existence of the office of Deputy Chief Justice and the holder thereof acting as Chief Justice for six months pending the appointment of a new Chief Justice was meant to forestall a crisis that would be created by the vacancy in the seat of the Chief Justice. It was her case that for purposes of good governance, the promotion of purposes and principles of the Constitution under article 259, it was proper for this court to find the said sections constitutional.

98. She further urged the court to interpret section 5(4) & (5) *vis-à-vis* articles 166 and 167 of the Constitution having due regard to the principle that constitutional interpretation must be done in a manner that advances its purposes, gives effect to its intents and illuminates its contents. Reference

was made to Supreme Court Advisory Opinion No 2 of 2013, *The Speaker of the Senate & another v Attorney General & 4 others*.

99. The 1st respondent filed submissions dated 12th March, 2021. It identified the two issues for determination. Firstly, whether the JSC failed in its mandate in respect of the four petitions seeking the removal of the DCJ and secondly, the constitutionality of section 5(4) of the *Judicial Service Act*.

100. The 1st respondent reiterated and expounded on its position as deponed to above.

101. As regards constitutionality of section 5(4) & (5) of the *Judicial Service Act*, the 1st respondent referred the court to the decision in *The Speaker of the Senate & another v Attorney General & 4 others* (2013) eKLR and stated that a court ought to apply the general rules of interpretation that requires interpretation to be done in a manner that advances its purposes and gives effects to its intents and illuminates its contents.

102. Reliance was also placed on the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services & 5 others* (2014) eKLR where the court stated that the Constitution must be interpreted in a holistic manner, within its context and in its spirit.

103. The 1st respondent reiterated the Court of Appeal in *Centre for Human Rights and Awareness v John Harun Mwau & 6 others* (2012) eKLR where it was observed that: -

> The Constitution should be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms and permits he development of law and contributes to good governance. That the spirit and tenor of the constitution must 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 legalise; that the entire Constitution has to be read as an integral whole and no one particular provisions destroying the other but each sustaining the other and no one particular provisions destroying the other but each sustaining the other as to effectuate the great purpose of the instrument.

104. From the foregoing, it was submitted that the import of section 5(4) & (5) of the *Judicial Service Act* was not unconstitutional because the existence of the office of Deputy Chief Justice and the holder thereof acting as Chief Justice for six months pending the appointment of a new chief Justice is meant to forestall a crisis in the Judiciary and the Republic in the event the office of the Chief Justice falls vacant.

105. It was submitted that for purposes of good governance and the promotion of the purposes values and principles of the Constitution, section 5(4) & (5) of the *Judicial Service Act* be found to be constitutional.

106. The 1st respondent prayed that the amended petition be dismissed with costs.

The 1st Interested Party's Case:

107. The 1st interested party, did not file a substantive response to either the petition or the amended petition. However, the 1st interested party responded to the petitioner's affidavits vide her replying affidavit sworn on 21st December, 2021 which was in respect of two interlocutory applications.

108. The 1st interested party also did not file any written submissions. Her counsel Mr Havi and Miss Soweto, made oral submissions on 28th June, 2021.

109. In her disposition, the DCJ stated that she was appointed Deputy Chief Justice and Judge of the Supreme Court having met the qualifications set out under article 166(3) of the Constitution and that she was the Deputy Head of the Judiciary as designated under article 161(2)(b) of the Constitution.

110. The DCJ reiterated that some charges had been laid against her relating to abuse of office, obtaining execution of a security by false pretences, unlawful failure to pay taxes and forgery levelled against her on 28th August, 2018, in AC Criminal Case No 38 of 2018, *Re v Philomena Mbete Mwilu & Stanley Muluvi Kiima*. That the charges were quashed by a judgement of the High Court made on 31st May, 2019, in HC Petition No 295 of 2018, *Philomena Mbete Mwilu v DPP & 4 others*.

111. The 1st interested party deponed that she was dissatisfied with part of the decision of the High Court and appealed against the same to the Court of Appeal. The Appeal in that regard, being Civil Appeal No 298 of 2019, *Honourable Philomena Mbete Mwilu v DPP & 6 others*, was filed before the Court of Appeal on 3rd July, 2019 and is yet to be heard and determined.

112. Similarly, the DCJ deponed that the Director of Public Prosecutions and the Director of Criminal Investigations being dissatisfied with the entire decision of the High Court, appealed against the same to the Court of Appeal. The Appeal in that regard, being Civil Appeal No 314 of 2019, *Director of Public Prosecutions & the Director of Criminal Investigations v Honourable Philomena Mbete Mwilu*, was filed before the Court of Appeal on 11th July, 2019 and is yet to be heard and determined.

113. She deponed further that after the making of the decision by the High Court on 31st May, 2019 three petitions for her removal from office were filed before the respondent as follows: -

    a. Petition dated 11th June, 2019, by Peter Kirika;

    b. Petition dated 7th June, 2019, by Alexander Mugane; and

    c. Petition dated 27th June, 2019 by the Director of Public Prosecutions and the Director of Criminal Investigations.

114. The DCJ also deponed that on 14th August, 2020 an order was made by the High Court in HC Petition No E245 of 2020, *Philomena Mbete Mwilu v JSC & 5 others* suspending the JSC's consideration of the three petitions aforesaid together with another one dated 4th October, 2018 by Mogire Mogaka.

115. It was further deponed that the Commission has since filed an appeal before the Court of Appeal, challenging the issuance of the order of 14th August, 2020 in HC Petition No E245 of 2020, being Civil Appeal No E242 of 2020, *JSC v Philomena Mbete Mwilu*.

116. The DCJ deponed that she has not been suspended from the office of Deputy Chief Justice and Judge of Supreme Court by the respondent or removed by a Tribunal in the manner contemplated by article 168(4) and (5) of the Constitution.

117. She reiterated that she had served as Deputy Chief Justice and Judge of the Supreme Court throughout the pendency of the litigation and petitions for her removal referred to hereinabove and continue serving as such to date. She further averred that complaints against Judges are received by the JSC all the time and the mere existence of any such complaints does not bar Judges from discharging their constitutional judicial or administrative functions. She decried that her case cannot be any different.

118. In her disposition, the DCJ further stated that a Judge's personal integrity does not diminish or end nor does the Judge cease being suitable to continue serving on account of pending complaints for removal.

119. It was her position that in the circumstances, articles 10 and 73(2)(b) of the Constitution do not and cannot be interpreted as precluding her from performing her duties and functions as Deputy Head of the Judiciary and to perform the duties of the Chief Justice in his absence.

120. The DCJ pointed out that as Deputy Head of the Judiciary, she had so far performed the very functions notified to her by the Chief Justice vide his letter of 11th December, 2020 whenever the Chief Justice was away.

121. The DCJ posited that the functions of the JSC in so far as Judges are concerned as stipulated in article 172 of the Constitution are limited to the recommendation for appointment and removal of a Judge. The functions do not include the appointment of an Acting Chief Justice or allocation of judicial or administrative duties and functions of the Chief Justice.

122. She further posited that the JSC does not appoint an Acting Chief Justice and cannot therefore, be prohibited from undertaking a function not given to it in the manner contemplated in the matter before Court.

123. Regarding the letter dated 11th December, 2020 from the Chief Justice, the DCJ stated that the same was a formal administrative notification of the matters set out therein and the challenge thereto, which was not merited, ought to have been addressed to the Chief Justice and not the JSC or the 1st Interested Party.

124. On section 5(4) of the *Judicial Service Act* No 1 of 2011, the DCJ posited that it designates an Acting Chief Justice in the event of absence of the Chief Justice and entitles the holder of office of Deputy Chief Justice to act as the Chief Justice for a period not exceeding six months pending the appointment of a new Chief Justice in accordance with the Constitution.

125. She further posited that the Acting Chief Justice is an intervention arising by express operation of the law and not a creation or the wish of an outgoing Chief Justice as implied by the petitioner herein. She affirmed her position that she verily believed that it was not lawful and/ or in the public interest for the Kenyan public to be denied the benefit of the administrative duties and functions of the Chief Justice which she was entitled to perform in an acting capacity on account of complaints before the JSC which had not culminated in her suspension or removal from office.

126. While submitting on the dismissal of the amended Petition, Mr Havi submitted that the entire amended petition had been overtaken by events on account of the appointment and assumption into office by the new Chief Justice.

127. As regards the prayer to compel Parliament to enact legislation for recruitment of the Chief Justice, Counsel submitted that it was not necessary for the reason that there is already an Amendment Bill in Parliament with similar amendment. It was the counsel's submission that the petitioner had not demonstrated to what extent section 5 of the *Judicial Service Act* is inconsistent with the Constitution.

128. He further submitted that the petition was tailor made and targeted at the 1st interested party. It was his case that the 1st interested party had fully discharged her duties as Acting Chief Justice to completion.

129. Miss Soweto sought to distinguish the decisions relied upon by the petitioner. It was her case that in the decision in *Transparency International v Attorney General* (2018) eKLR, the court struck down the provision in the legislation that purported to create the substantive office of the Auditor General on the basis that Parliament could not create an office like that. She submitted that the scenario anticipated by section 5(4) and (5) of *Judicial Service Act* were different from that of the Auditor General and that the said section has not created a position not within the law.

130. Counsel further urged the court to take cognisance of the fact that the alleged unconstitutionality of section 5(4) and (5) of the *Judicial Service Act* only arose as a secondary attack after the petitioner failed to succeed in his initial prayers. She stated that he who seeks equity must do equity.

131. In the end Counsel submitted that the petition is in bad faith and an abuse of court process. Counsel prayed that the petition be dismissed with costs.

The 2nd Interested Party's Case:

132. The 2nd interested party opposed the petition through Grounds of Opposition dated 19th April, 2021 and the written submissions dated 20th April, 2021.

133. In the Grounds of Opposition, the 2nd interested party stated that according to section 5(4) and (5) of the *Judicial Service Act*, the 1st interested party is in office constitutionally.

134. It was stated that every law enjoys presumption of constitutionality and it is the duty of the petitioner to demonstrate unconstitutionality and that there must be clear and unequivocal violation of the Constitution for any law to be invalidated.

135. In its written submissions, the 2nd interested party stated that the amended petition did not constitute violation and or contravention of the petitioner's fundamental rights and freedoms and/or the Constitution. In reference to the decision in *Anarita Karimi Njeru v Republic* on the need to state and identify the rights violated with precision, it was submitted that the petitioner had failed to satisfy that requirement.

136. With respect to the constitutionality of section 5(4) and (5) of the *Judicial Service Act*, the Hon Attorney General reiterated that every law enjoys presumption of constitutionality. Reliance was placed in *Were Samuel & 14 others v Attorney General & 2 others* (2017) eKLR and the Supreme Court of India in *Hambradda Wakhana v Union of India Air* (1960) AIR 554 where the following was stated: -

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

137. On costs, the 2nd interested party submitted that since the petition was a public interest one, the petitioner ought not be awarded any costs.

138. In the end, it was submitted that the petition lacked merit and was a waste of judicial time. The court was urged to dismiss it.

Issues for Determination:

139. From the reading of the documents filed, the parties' submissions and the decisions referred to, the following issues arise for determination: -

(a) Whether the petition satisfies the requirement of reasonable precision expected of constitutional disputes.

(b) Principles in constitutional and statutory interpretation.

(c) Whether the Judicial Service Commission failed in its constitutional mandate regarding the complaints against the Deputy Chief Justice, the Hon. Lady Justice Philomena Mbete Mwilu.

(d) Whether the Deputy Chief Justice, the Hon Lady Justice Philomena Mbete Mwilu, is eligible for appointment as a Chief Justice despite the pendency of the removal petitions.

(e) The constitutionality of section 5(4) and (5) of *Judicial Service Act*.

(f) The constitutionality of the letter dated 11th December, 2020 by the Chief Justice Hon Justice David Kenani Maraga.

(g) Whether a succeeding Chief Justice must be appointed before the retirement of a serving Chief Justice.

(h) Whether the Deputy Chief Justice should have taken an oath of office prior to acting as a Chief Justice.

(i) Whether the tenure of the office of Deputy Chief Justice is tied to that of the Chief Justice.

140. I will deal with each of the above issues hereunder.

Analysis and Determinations:

(a) Whether the petition satisfies the requirement of reasonable precision:

141. This issue was raised by the Hon Attorney General, the 2nd interested party. It was its case that the petition did not identify the rights violated with the precision necessary in constitutional petitions.

142. The issue was not responded to by any of the parties. Nevertheless, this court will deal with it.

143. The requirement upon a petitioner to identify a constitutional right violated and describe the manner in which it was violated reasonable with precision was conceived in the now famous case of *Anarita Karimi Njeru v Republic* [1979] eKLR, Miscellaneous Criminal Application 4 of 1979, where it was observed as follows: -

> ..... if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

144. In Civil Appeal No 290 of 2012, *Mumo Matemu v Trusted Society of Human Rights Alliance* the Court of Appeal resoundingly approved the finding in *Anarita Karimi Njeru's* case (*supra*). They observed as follows: -

> (41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole

> function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand *exactitude ex ante* is to miss the point.....
>
> The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.

145. The Learned Judges of Appeal emphasized the need for precision and identified the shortfalls in the petition that had been presented before the High Court. They further observed as follows: -

> (43) The petition before the High Court referred to articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.
>
> (44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (*supra*). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting," without requiring remedy by the 1st respondent.

146. Taking cue from the foregoing guidance, it is incumbent upon this court to make an assessment whether the contention by the 2nd interested party holds.

147. This court has carefully considered the amended petition. It is brought under articles 22(1) & (2)(c), 23, 48, 50(1), 165(3) and 258(1) & (2)(c) of the Constitution.

148. The petition alleges contravention and violation of articles 1(1), 2(1) & (2), 3(1), 10(1) & (2), 73(1) & (2)(a), 74, 168(2), (3) & (4), 172(1), 249(1) and 259(1) & (8) of the Constitution. It further alleges the contravention and violation of human rights and fundamental freedoms in the Bill of Rights under articles 27(1) & (2), 47(1), 48 and 50 (1) of the Constitution.

149. The petition further challenges the alleged contravention and violation of section 13(2) of the *Judicial Service Act*, No 1 of 2011. It also challenges the constitutional validity of subsections 5(4) and (5) of the *Judicial Service Act* and the capacity of an outgoing Chief Justice to appoint an acting Chief Justice

as well as the constitutionality of a person acting in the office of the Chief Justice without taking an oath of office.

150. The petition has 7 main parts. They are the description of parties, the petitioner's *locus standi* and the honourable court's jurisdiction, the detailed facts relied upon, the constitutional and legal basis of the petition, the constitutional provisions violated, the nature of the injury caused to the public and the reliefs sought.

151. On a balanced consideration of the petition at hand, it comes out that the contention by the Hon Attorney General that the petition is wanting in precision cannot be a serious one. A casual reading of the petition reveals otherwise.

152. The petition as laid before court is clear on the alleged violations and the manner in which those violations were alleged inflicted. The petition is detailed and the constitutional issues in dispute easily come to the fore.

153. Given the manner in which the petition is drafted, this court is satisfied that the petition is in line with, and passes the threshold of reasonable precision, as discussed above. Further, the petition is in consonance with rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly referred to as 'the Mutunga Rules').

154. I will now consider the merits or otherwise of the petition.

(b) Principles in constitutional and statutory interpretation:

155. The petition herein raises various constitutional issues. The issues border on the manner in which the Constitution and the law ought to be interpreted.

156. In such instance, a look at the settled principles in constitutional and statutory interpretation becomes imperative. That, needless to say, shall lay a firm basis for consideration of the rest of the issues with ease.

157. The Constitution is a document sui generis. It is the ultimate source of law in the land. It commands superiority and dominance in every aspect and its interpretation as of necessity must be in a manner that all other laws bow to.

158. In Nairobi High Court Constitutional Petitions No 33 and 42 of 2018 (Consolidated) *Okiya Omtatah Okoiti v Public Service Commission & 73 others* (2021) eKLR, this court discussed the principles of constitutional interpretation at length. It observed 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 21st December, 2011in *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 statues 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.

63. 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.

64. 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 v 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.

65. 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.'

66. 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.

67. 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: -

> 11.8. 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.

68. 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 Mwau & 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.

159. In discussing how constitutionality of impugned Acts of Parliament ought to be interpreted against the constitutional muster, the High Court in Petition No 71 of 2014, *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR remarked as follows: -

> [I]n determining whether a statute is constitutional, the court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see *Murang'a Bar Operators & another v Minister of State for Provincial Administration and Internal Security and others* Nairobi Petition No 3 of 2011 [2011]eKLR, *Samuel G Momanyi v Attorney General & another* (*supra*)). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. The Canadian Supreme Court in the *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 enunciated this principle as follows: -
>
> > Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.

[59] Fourth, the Constitution should be given a purposive, liberal interpretation. The Supreme Court in *In the Matter of the Interim Independent Electoral Commission Constitutional Application* (*supra*) at para. 51 adopted the words of Mohamed A J in the Namibian case of *State v Acheson* 1991(20 SA 805, 813) where he stated that;

> The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and..... aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.

Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see *Tinyefuza v Attorney General of Uganda* Constitutional Petition No 1 of 1997 (1997 UGCC 3)).

We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside the Constitution, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of the Constitution. "As this is a matter that concerns devolution, we recall what the Supreme Court stated in *The Speaker of the Senate & another v Attorney-General & another & 3 others* - Advisory Reference No 2 of 2013 [2013] eKLR.

160. Recently, in Nairobi High Court Constitutional Petition No E327 of 2020 *Law Society of Kenya v Attorney General & another* (2021) eKLR this court in furthering the discussion on the constitutionality of a statute expressed itself as follows: -

> 110. I will also look at the decision in *R v Oakes*. The brief facts are that the respondent, David Edwin Oakes, was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s 4(2) of the Narcotic Control Act, but was convicted only of unlawful possession. After the trial judge made a finding that it was beyond a reasonable doubt that the Respondent was in possession of a narcotic, the Respondent brought a motion challenging the constitutional validity of s 8 of the Narcotic Control Act. That section provides that if the court finds the accused in possession of a narcotic, the accused is presumed to be in possession for the purpose of trafficking and that, absent the accused's establishing the contrary, he or she must be convicted of trafficking. The Ontario Court of Appeal, on an appeal brought by the Crown, found that this provision constituted a "reverse onus" clause and held it to be unconstitutional because it violated the presumption of innocence now entrenched in s 11(d) of the Canadian Charter of Rights and Freedoms. The Crown appealed and a constitutional question was stated as to whether s 8 of the Narcotic Control Act violated s 11(d) of the Charter and was therefore of no force and effect. Inherent in this question, given a finding that s 11(d) of the Charter had been violated, was the issue of whether or not s 8 of the Narcotic Control Act was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society for the purpose of s 1 of the Charter.

111. The appeal was dismissed and the constitutional question answered in the affirmative. In so holding, the Supreme Court of Canada, then presided by the Chief Justice in a seven-judge bench discussed the criteria in ascertaining the manner in which a limitation to a right or fundamental freedom may be justified. The court came up with a three-pronged criteria. First, the objective which the limitation is designed to serve. Second, the means chosen to attain the objective must be reasonable and demonstrably justified. This is the proportionality test. Third, the effect of the limitation.

112. On the objective test, the Supreme Court stated as follows: -

> 67. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, ... the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R v Big M Drug Mart Ltd, supra*, at p 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

113. On the proportionality test, the Supreme Court stated that: -

> 70. Second, once a sufficiently significant objective is recognized, then the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R v Big M Drug Mart Ltd*, *supra*, at p 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R v Big M Drug Mart Ltd*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

114. On the third test, that is the effect of the limitation, the Supreme Court stated that: -

> 71. With respect to the third component, it is clear that the general effect of any measure impugned under s 1 will be the

> infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

161. Lastly, the Court of Appeal in *John Harun Mwau v Independent Electoral & Boundaries Commission & Attorney General* [2019] eKLR had the following to say on the constitutionality of statutes: -

> 27. Here the question we have to answer is whether the learned Judge erred by not declaring section 10 of the *Political Parties Act* unconstitutional? The cardinal rule in interpretation of statute is to check whether it complies with the constitutional mandate. This is a rule that has gained traction in several jurisdictions as stated in the case of, *US v Butler*, (*supra*) which was relied on by the appellant. It was held that a duty of a court in determining the constitutionality of a provision of a statute should take the following as a guidance: -
>
> > When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.
>
> Also in *The Queen v Big M Drug Mart Ltd 1986 LRC (Const) 332*, the Supreme Court of Canada stated that;
>
> > Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation

is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity.

28. Bearing in mind the above principles we are of the view that although the Constitution does not make any provisions for political mergers or coalitions, Parliament is mandated under article 92 to make Legislation to provide *inter alia* for the regulation of political parties, the roles and functions of political parties and other matters necessary for their management thereto. We are cognisant of the fact that enactment of legislation involves a lengthy process that involves people's representative as well as public participation. A party seeking to strike a provision of a statute must demonstrate how the particular enactment is unfair, irrational and patently against the values or the spirit of the Constitution.....

162. The foregoing general discussion on the manner in which courts ought to deal with the interpretation of the Constitution and the constitutionality of statutes, as said, suffices as a basis for the consideration of the rest of the issues.

(c) Whether The Judicial Service Commission has failed its constitutional mandate regarding the complaints against the Deputy Chief Justice the Hon. Lady Justice Philomena Mbete Mwilu:

163. This limb of the petition is an indictment on the JSC in respect of the manner it processes complaints against Judges. Its determination will depend on the constitutional and legislative principles guiding the hearing process generally.

164. The JSC is one of the Commissions in the Constitution. It is established under article 171 of the Constitution. Its functions are variously provided for in inter alia articles 166, 168 and 172 of the Constitution. One of its functions relates to the removal of Judges of the superior courts from office. That is under article 168 of the Constitution.

165. Article 168(1), (2), (3) and (4) of the Constitution deals with part of the mandate of the JSC as follows: -

168. Removal from office

(1) A judge of a superior court may be removed from office only on the grounds of—

(a) inability to perform the functions of office arising from mental or physical incapacity;

(b) a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament;

(c) bankruptcy;

(d) incompetence; or

(e) gross misconduct or misbehaviour.

(2) 2) The removal of a judge may be initiated only by the Judicial Service Commission acting on its own motion, or on the petition of any person to the Judicial Service Commission.

(3) A petition by a person to the Judicial Service Commission under clause (2) shall be in writing, setting out the alleged facts constituting the grounds for the Judges removal.

(4) The Judicial Service Commission shall consider the petition and, if it is satisfied that the petition discloses a ground for removal under clause (1), send the petition to the President. (emphasis added).

166. The Constitution does not provide for the procedure in which the Commission shall discharge the above function. Be that as it may, the JSC just like any other constitutional Commission, must strive to protect the sovereignty of the people, secure the observance of democratic values and principles and promote constitutionalism. In doing so, the JSC is subject only to the Constitution and the law, remains independent and is not subject to the direction or control by any person or authority. (See the Supreme Court *In the Matter of the Independent Electoral and Boundaries commission of Kenya* [2011] eKLR).

167. The *Judicial Service Act*, No 1 of 2011 (hereinafter referred to as 'the JS Act') in a general way provides the manner in which the JSC and the Judiciary ought to function in section 3 thereof. For instance, it provides that the JSC and the Judiciary shall facilitate the conduct of a judicial process designed to render justice to all, facilitate a judicial process that is committed to the expeditious determination of disputes and just resolution of disputes, among others.

168. On matters relating to procedures, the JS Act in section 3 for instance provides that the JSC and the Judiciary shall promote and sustain fair procedures in its functioning and in the operations of the judicial process. And, in particular, the JS Act provides that the Commission has powers to protect and regulate its own processes in achieving its objects through application of principles set out in the Constitution and other laws.

169. The Judicial Service (Code of Conduct and Ethics) Regulations, 2020 are also worth of mention. Regulation 3 thereof provides as follows:

3. The objects of this Code are to -

(a) give effect to articles 168(1)(b) and 172(1)(c) of the Constitution;

(b) give effect to article 10 of the Constitution on national values and principles of governance;

(c) give effect to the provisions of the Leadership and Integrity Act, 2012, the Public Service (Values and Principles) Act, 2015 and the Public Officer Ethics Act, 2003;

(d) provide for the Judicial Code of Conduct and Ethics, as a guide on ethical conduct for judges, judicial officers and judicial staff;

(e) state basic standards governing the conduct of judges, judicial officers and judicial staff;

(f) provide guidance to assist judges, judicial officers, and judicial staff in establishing and maintaining high standards of judicial and personal conduct; and

(g) provide a framework for the judiciary to regulate judicial conduct of judges, judicial officers and judicial staff.

170. Part V of the regulations provide for the enforcement, oversight and implementation of the Code. Regulation 81 states as follows: -

> The Commission may from time to time, issue guidelines on the oversight and implementation of the Code including the lodgement and resolution of complaints against Judges, judicial officers and judicial staff.

171. From the foregoing consideration of the Constitution, the JS Act and the Judicial Service (Code of Conduct and Ethics) Regulations, 2020, it is evident that the there is no black letter procedure that guides the JSC in the hearing of Petitions against Judges.

172. Notably, the Commission itself did not avail any settled procedure it adopts when processing complaints against Judges.

173. In that case, therefore, one reasonably concludes that the Commission makes and regulates its own processes as long as they are within the constitutional and statutory borders.

174. There is no doubt that the JSC is a quasi-judicial body.

175. A Five-Judge bench in Petition No 518 of 2013, *Judicial Service Commission v Speaker of the National Assembly & 8 others* [2014] eKLR discussed 'quasi-judicial function' as follows: -

> .... the *Black's Law Dictionary 9th Edition* defines a quasi-judicial process as a term applied to the action of bodies which are required to investigate, or ascertain the existence of facts, hold hearings, weigh evidence and draw conclusions from them as a basis for their official action, and to exercise discretion of a judicial nature. At page 34 of their text *Administrative Law, 10th Edition, HWR Wade and CF Forsyth* define a quasi-judicial function as:
>
> ...an administrative function which the law requires to be exercised in some aspects as if it were judicial. The procedure is subject to the principles of natural justice.

176. It can hence be deduced that, the Commission, being a body that discharges quasi-judicial function ought to be reasonably guided by the processes akin to those that generally guide the courts. For instance, the overriding objective in civil cases aimed at facilitating the just, expeditious, proportionate and affordable resolution of the civil disputes ought to permeate the JSC's undertakings.

177. In Nairobi Civil Appeal (Application) 228 of 2013, *Nicholas Kiptoo arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR, the Court of Appeal defined and gave the essence of overriding objective in civil litigation. The court observed as follows: -

> The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice.

178. The learned appellate judges made reference to Civil Application No Nai 302 of 2008 (UR 199/2008); *City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya*

Kasabuli v Orient Commercial Bank Limited where the aim of overriding objective was observed as under: -

> The aim of the overriding objective principle is to enable the court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it.

179. Returning back to the case at hand, the process against the DCJ at the Commission has been impugned by the petitioner on the basis of the pendency of four petitions filed by the DPP and the DCI, Mr Alexander Mugane, Mr Peter Kirika and Mr Mogire Mogaka.

180. The disposition by the Chief Registrar of the Judiciary and Secretary to the JSC detailed the chronology of events surrounding the four Petitions.

181. This court has carefully considered the proceedings before the JSC in respect to the four petitions.

182. On a fair and balanced assessment of the processes at the Commission in respect to the petitions against the DCJ, it can be easily discerned that there has been a deliberate purpose by the JSC to deal with the petitions fairly and expeditiously. Save for the suits that were filed by the DCJ, the conservatory orders of the High Court and the hardship, delays and inefficiencies created by the Covid-19 pandemic world over, the manner at which the Commission has so far conducted the four petitions ought not to be faulted.

183. To the contrary, the petitioner has not provided any evidence to demonstrate the alleged bias, impropriety or inefficiency of the JSC that would culminate in the violation of the Constitution.

184. In addition, there is no evidence that the petitioners in the four petitions have lodged any complaints either before the JSC or elsewhere challenging the propriety of the processes. The most probable reason may be that the petitioners have all through been involved in the happenings at the Commission.

185. From the foregoing, this court is not persuaded that the JSC has failed its constitutional mandate regarding the complaints against the DCJ.

186. In the end, the issue is answered in the negative.

(c) Whether the Deputy Chief Justice, the Hon Lady Justice Philomena Mbete Mwilu, is eligible for appointment as a Chief Justice despite the pendency of the removal petitions before the Judicial Service Commission:

187. This court dealt with this issue in its ruling No 1 in this petition.

188. After considering the parties' positions on the issue, this court stated as follows: -

> 54. At the moment, given the pendency of the various court cases and the Petitions before the JSC on whether the 1st interested party ought to be removed from office, this court finds it rather difficult to comprehend how the petitioner may aver to have established a case against the DCJ from acting as the Chief Justice. I say so because, to me, a similar issue was rightly settled by the High Court in a 5-Judge Bench in I*nternational Centre for Policy & Conflict & 5 others v Attorney General & 4 others* [2013] eKLR. The multi-bench considered whether a person facing prosecution for serious international crimes at the

International Criminal Court is disqualified from running for an elective office. The court, again rightly so, stated as follows: -

> 154. It has neither been alleged, nor has any evidence been placed before us that the 3rd and 4th respondents have been subjected to any trial by any local court or indeed the ICC that has led to imprisonment for more than 6 months. The confirmation of charges at the ICC may have formed the basis for commencement of the trial against the 3rd and 4th respondents. The end result however, cannot be presumed neither is there sufficient evidence that at the end of it all, a conviction may be arrived at.
>
> 155. We are alive to the serious nature of the charges the 3rd and 4th respondents are facing at the ICC. However, we can only say that much. This is because under article 50 of the Constitution, the 3rd and 4th respondents are to be presumed innocent until the contrary is proved. The entrenchment of this article is meant to ensure a fair trial in respect of every person before a court, tribunal or body. This right falls under the category of fundamental rights and freedoms that may not be limited as provided in article 25 of the Constitution.

55. The foregoing is the position in this matter. In as much as the petitioner may attempt to make a case out of the matters as they are, that case can only be dependent on the outcome of the court cases and the petitions before the JSC. The approach taken by the petitioner is, hence, premature.

189. This court still holds the above position. As such, unless the DCJ otherwise fails to meet the requisite constitutional and statutory requirements, the pendency of the removal petitions at the JSC do not per se constitute adequate bar to the DCJ from seeking to be the Chief Justice of the Republic of Kenya.

190. The issue is, hence, answered in the affirmative.

(d) The constitutionality of section 5(4) and (5) of the *Judicial Service Act*:

191. Having set out the principles of constitutional and statutory interpretation, I will now look at the constitutionality of section 5(4) and (5) of the JS Act.

192. For ease of this discussion, I will reproduce the entire Section 5 of the JS Act as under: -

> 5. Functions of the Chief Justice and the Deputy Chief Justice
>
> (1) The Chief Justice shall be the head of the Judiciary and the President of the Supreme Court and shall be the link between the Judiciary and the other arms of Government.

(2) Despite the generality of subsection (1), the Chief Justice shall—

(a) assign duties to the Deputy Chief Justice, the President of the Court of Appeal, the Principal Judge of the High Court and the Chief Registrar of the Judiciary;

(b) give an annual report to the nation on the state of the Judiciary and the administration of justice; and cause the report to be published in the Gazette, and a copy thereof sent, under the hand of the Chief Justice, to each of the two Clerks of the two Houses of Parliament for it to be placed before the respective Houses for debate and adoption;

(c) exercise general direction and control over the Judiciary.

(3) As the Deputy Head of the Judiciary and the Vice-President of the Supreme Court, the Deputy Chief Justice shall be responsible to the Chief Justice in the exercise of the functions and duties of the office.

(4) In the event of the removal, resignation or death of the Chief Justice, the Deputy Chief Justice shall act as the Chief Justice for a period not exceeding six months pending the appointment of a new Chief Justice in accordance with the Constitution.

(5) If a vacancy occurs in the office the Chief Justice and that of the Deputy Chief Justice, or if the Deputy Chief Justice is unable to act in the absence of Chief Justice, the senior most judge in the Supreme Court shall act as the Chief Justice.

193. As captured above, the petitioner's grievance stems from the interpretation of section 5(4) and (5) of the JS Act that the provision creates the position of an Acting Chief Justice which position is not created in the Constitution. To him, a statute cannot create a substantive position not created or intended by the Constitution.

194. In the words of the petitioner, the JS Act is a mere statute which cannot create an office that is not anticipated or expressly provided for by the Constitution.

195. Occupying an office in an acting capacity is not novel in Kenya. The challenge of constitutionality of such position and exercise of power in acting capacity has also been the subject of litigation.

196. In Reference No 1 of 2015, *In Re Speaker, County Assembly of Embu* [2018] eKLR the Supreme Court was confronted with the predicament revolving around the vacancy that arises in the constitutional office of Governor and Deputy Governor in the event of death, resignation, impeachment or incapacity.

197. In the case, the applicant, the Speaker of County Assembly of Embu, sought guidance from the Supreme Court since the Constitution does not provide for replacement of a Deputy Governor in

instances where the Governor is impeached and the Deputy Governor ascends to the position of Governor.

198. There were two rival positions. One faction posited that it would be unconstitutional to fill such a vacancy and that the County stands to be governed without a Deputy Governor for the remainder of the term of the original Governor. The other rival position was that the absence of a Deputy Governor would create an unconstitutional situation as per article 174 of the Constitution which provides for equitable sharing of national and local resources throughout". It was urged that where the Deputy Governor's seat is left vacant, there must be officers who have the charge of conducting the functions of that office.

199. In resolving the dispute, the Learned Judges of the Supreme Court first acknowledged the fact that the Constitution was silent and that there was a lacuna in law with regard to the filling of vacancy in the office of Deputy Governor. They however provided a solution. They observed as follows: -

> [48] The Constitution, of which it is the Supreme Court's first duty to give effect, is inadvertently reticent on the manner in which it is to be given effect, on a vital question of governance namely, the uninterrupted occupancy of the office of Deputy County Governor. Yet the Constitution is ever to bear intent, purpose and direction. The ultimate task of interpreting the Constitution falls to this court, which bears the mandate to do so in a manner that "promotes its purposes, values and principles" (article 259(1)(a)); that "advances the rule of law...." (article 259 (1) (b)); that "permits the development of the law" (article 259 (1) (c)); and that "contributes to good governance" (article 259 (1)(d)).
>
> [60] We would adopt the observations of this Court in earlier advisory opinions, regarding the requisite approach to constitutional interpretation, in view of the provisions of article 259 of the Constitution. Article 259 (3) provides that:
>
> > ... Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking...

200. The Supreme Court underscored the position that the Constitution is ever to bear intent, purpose and direction and that the law is always speaking.

201. I will have a look at another decision which dealt with the issue of an acting position. It is Petition 388 of 2016, Transparency International (*TI Kenya) v Attorney General & 2 others* [2018] eKLR. This decision was heavily relied upon by the petitioner.

202. In the case, the High Court declared unconstitutional section 12 of *Public Audit Act* 2015 for purporting to create the position of an Acting Auditor General.

203. For a clear understanding of the said decision, it is imperative to look at the said section 12 of the *Public Audit Act*. The provision states as follows: -

> 12. Acting Auditor-General
>
> (1) Where—
>
> (a) the office of the Auditor-General becomes vacant;
>
> (b) the Auditor-General has been suspended in accordance with the Constitution;

(c) the appointment of a person as Auditor-General is pending; or

(d) the Auditor-General is for any reason unable to perform the function of his or her office, then until a person is appointed to and has assumed the functions of that office in accordance with section 11, or until the Auditor-General has resumed the performance of those functions, the Public Service Commission shall recommend the most senior officer in the office of the Auditor-General to the President to designate such a person as the acting Auditor-General.

(2) A person designated under subsection (1) shall meet the minimum qualifications for appointment to the office of the Auditor-General and shall serve for a period not exceeding ninety days.

(3) When acting in terms of subsection (1), the acting Auditor-General shall have all the powers of the Auditor-General.

204. In making a finding that the above provision was unconstitutional, the Learned Judge traced the root cause of unconstitutionality of section 12. Accordingly, he faulted the substantive nature in the manner of appointing a person to the acting position and observed as follows: -

> 96. The petitioner argued that the position of Acting Auditor General is unconstitutional because only one person is recognized by the Constitution as Auditor General and I agree. The Constitution uses the word "an" Auditor General, meaning an individual and not individuals. The Constitution does not mention other substantive positions. Although the Constitution allows the Auditor General to recruit his own staff and in doing so, must develop staff organizational structure for the performance of his functions and exercise of powers. This is for purposes of functioning and the office must be ready for continuity as an independent office. However, the problem is whether there can be an Acting Auditor General and appointed in the manner suggested by section 12.
>
> 97. In my respectful view, there cannot be an Acting Auditor General because the Constitution only recognizes Auditor General appointed in accordance with article 229(1). Any attempt to create a substantive position of Acting Auditor General by statute, appoint a person otherwise than as contemplated by the Constitution and allow him/her to exercise constitutional functions and powers of the Auditor General, amounts an unconstitutional office and unconstitutional exercise of functions and powers of the constitutional independent office. Appointing an Acting Auditor General as proposed by section 12 violates article 229(1). For that reason, I find and hold that section 12 of the Act is inconsistent with articles 229 of the Constitution and is in valid.

205. Having stated as much, I will now juxtapose the ratio decidendi in *Transparency International (TI Kenya) v Attorney General & 2 others* case (*supra*) with the present case.

206. The Constitution under article 248(3) recognises only two independent offices in Kenya. They are the offices of the Auditor General and the Controller of Budget.

207. Article 229 of the Constitution provides for the office of the Auditor General. Unlike in article 166(1) of the Constitution which provides for the positions of Chief Justice and a Deputy Chief Justice, article 229 of the Constitution does not provide for a Deputy Auditor General.

208. The constitutional design, therefore, in respect to the office of Auditor General is that there shall always be one substantive holder of that office with no designated deputy. However, and as said, the position is different in the case of the Chief Justice. The Constitution openly creates the substantive position of the Deputy Chief Justice with a clear mandate under article 161 of the Constitution. Article 161(2)(b) of the Constitution designates the Deputy Chief Justice as the Deputy Head of Judiciary and under article 163(1)(b) of the Constitution the Deputy Chief Justice is to deputise the Chief Justice and also serve as the Vice-President of the Supreme Court.

209. To buttress the foregoing, it is imperative to note that the offices of the Chief Justice, the Deputy Chief Justice and the Chief Registrar of the Judiciary are constitutionally-entrenched in article 161(2) of the Constitution.

210. To that extent, the constitutional matrix in the case of the Auditor General is different from that of the Chief Justice and the Deputy Chief Justice. What section 12 of the *Public Audit Act*, therefore, intended to do was to introduce and equate the most senior member to the Auditor General as the principal deputy to the Auditor General. In other words, the provision quietly intended to create the office of a deputy Auditor General who would then ascend to be an acting Auditor General.

211. Drawing from the three tests of the objective, proportionality and the effect of a statutory provision as developed by the Supreme Court of Canada in *R vs Oakes* case (*supra*) which tests have been discussed hereinabove in *Law Society of Kenya v The Attorney General another* (2021) eKLR, it is clear that the effect of section 12 of the *Public Audit Act* was to silently and, craftly so, create a substantive position of a Deputy Auditor General with the potential of ascending into the office of an acting Auditor General. That scheme of affairs outrightly contravened the Constitution as it intended to create an office, otherwise not created by the Constitution.

212. To that extent, the declaration of unconstitutionality of section 12 of the *Public Audit Act* was properly issued. On the converse, such cannot be the position in the current case as the Constitution expressly provided for the office of the Deputy Chief Justice. That far, the *Transparency International (TI Kenya) v Attorney General & 2 others* case (*supra*) is distinguishable.

213. Section 5(4) and (5) of the JS Act makes provision for the Deputy Chief Justice or the senior most Judge in the Supreme Court to act as a Chief Justice in three instances being upon the removal, resignation or death of the Chief Justice. As said, the positions of the Deputy Chief Justice and that of a Judge of the Supreme Court are constitutionally provided.

214. I will now apply the three tests of the objective, proportionality and the effect of a statutory provision as developed by the Supreme Court of Canada in *R v Oakes* case (*supra*) to section 5(4) and (5) of the JS Act, being the impugned provisions.

215. On the objective test, the Supreme Court held that '... it is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

216. The disposition by Mrs Amadi, the Chief Registrar of the Judiciary and the Secretary to the JSC explained the rationale behind the impugned provisions. She explained that the provision was meant to

forestall a crisis that would be created by the vacancy in the seat of the Chief Justice. It was her case that for purposes of good governance and the promotion of purposes and principles of the Constitution under article 259, it was proper for this court to find the impugned provisions constitutional.

217. As the impugned provisions are aimed at forestalling a crisis upon the removal, resignation or death of the Chief Justice, then to me, such a provision aims at fostering good governance and it passes the objective test.

218. On the effect of the impugned provisions, a court must intently look at the nature of the violation, the extent of the violation and the degree to which the impugned provisions have upon the integral principles of a free and democratic society.

219. In this matter, the nature of the alleged violation is that the impugned provisions create a position not known in the Constitution. It is also alleged that the effect of the provisions in issue will be having an unconstitutional office contrary to the will of the people. However, it has been demonstrated above that there is already within the Constitution a substantive position of a deputy to the Chief Justice. To me, the effect of the impugned provisions will be, not a creation of an unknown office, but instead it will yield a positive effect. The positive effect is that the impugned provisions will forestall any possible crisis that would be created by the vacancy in the seat of the Chief Justice. Further, such an intervention is time-bound to last for a period of only six months at most. I, therefore, find that the positive effect outweighs the alleged negative effect, if any.

220. The proportionality test juxtaposes the two tests, that is the objective test and the effects test. It must be demonstrated that the means chosen are reasonable and justified. Whereas in each case courts will be required to balance the interests of society with those of individuals and groups, three important components of a proportionality test must be ascertained. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should have the minimum possible effect. Third, there must be a proportionality between the effects of the measures and the objective which has been identified as of "sufficient importance".

221. According to this court, the mode of attaining the desired objective is by use of offices which are already created within the Constitution. In that case, therefore, the contention that the impugned provisions are an attempt to otherwise create an office not provided within the Constitution is misplaced.

222. Furthermore, article 74 of the Constitution provides for State officers in acting positions.

223. Lastly, the impugned provisions apply in only three situations. They are on removal, resignation or death of a sitting Chief Justice. The provisions are, hence, intended to be applicable during the currency of the term of a substantive Chief Justice and not otherwise. They are, indeed, aimed at managing a transition from one substantive holder of the office of the Chef Justice to the next holder of office.

224. In sum, this court is not persuaded that section 5(4) and (5) of the JS Act are unconstitutional.

(e) The constitutionality of the letter dated 11th December, 2020 REF: CJ/PERS by the Chief Justice Emeritus Hon Justice David Kenani Maraga:

225. To aid the discussion under this head, I will hereunder reproduce verbatim the impugned letter. It reads as follows: -

Hon Lady Justice Philomena Mbete Mwilu,

.....

.....

Nairobi.

Dear DCJ,

REF: Autority to Act

As you are no doubt aware, I proceed on retirement leave from 12th December, 2020. As such, and pursuant to the provisions of articles 161(2)(b) and 163(1)(b)(i) of the Constitution of Kenya 2010, as well as section 5 of the *Judicial Service Act* and all other enabling provisions of the law, I hereby authorize you, Philomena Mbete Mwilu, the Deputy Chief Justice of the Republic of Kenya, to act as chief justice from 12th December 2020 until my retirement on 12th January 2020.

I shall return on 11th January 2021 to formally hand over to you to continue acting as Chief Justice of the Republic of Kenya for a period not exceeding six months or until a new Chief Justice is appointed in accordance with the Constitution of Kenya, 2010.

Yours Sincerely,

226. There is no dispute to the authorship of the impugned letter. It was written by Hon Justice David Kenani Maraga who was by then the Chief Justice of the Republic of Kenya. His Lordship retired on 12th January, 2021.

227. The impugned letter gave authority to the DCJ to act as the Chief Justice in two instances. The first instance was when His Lordship was on leave between 12th December, 2020 to 11th January, 2021. The second instance was from 12th January, 2021 when His Lordship was formally retired until the next Chief Justice took office.

228. The basis of the letter was indicated to be articles 161(2)(b) and 163(1)(b)(i) of the Constitution and section 5 of the JS Act.

229. As discussed elsewhere above, article 161(2)(b) of the Constitution establishes the office of the Deputy Chief Justice and article 163(10(b)(i) of the Constitution designates the Deputy Chief Justice to deputise the Chief Justice. I have already reproduced section 5 of the JS Act hereinabove.

230. There is again no issue that the impugned letter authorized the DCJ to act as the Chief Justice.

231. I have already taken the position that section 5(4) and (5) of the JS Act applies in instances where a sitting Chief Justice is either removed from office, resigns or dies.

232. I have, as well, reproduced article 168 of the Constitution which is on the removal from office of a Judge of a superior court.

233. The Constitution also makes specific provision for the tenure of office of the Chief Justice and other Judges of the superior courts. That is in article 167 of the Constitution. The article provides as follows: -

> (1) A judge shall retire from office on attaining the age of seventy years, but may elect to retire at any time after attaining the age of sixty-five years.
>
> (2) The Chief Justice shall hold office for a maximum of ten years or until retiring under clause (1), whichever is the earlier.
>
> (3) If the Chief Justice's term of office expires before the Chief Justice retires under clause (1), the Chief Justice may continue in office as a judge of the Supreme Court.

(4) If, on the expiry of the term of office of a Chief Justice, the Chief Justice opts to remain on the Supreme Court under clause (3), the next person appointed as Chief Justice may be selected in accordance with article 166(1), even though that appointment may result in there being more than the maximum permitted number of Supreme Court judges holding office.

(5) The Chief Justice and any other judge may resign from office by giving notice, in writing, to the President.

234. The Hon Justice David Kenani Maraga was, therefore, exiting the Judiciary on attaining the mandatory retirement age of 70 years old.

235. Looking at the constitutional and legislative designs of articles 161(2)(b), 163(1)(b)(i), 167 and 168 of the Constitution as well as section 5(4) and (5) of the JS Act, it is clear that the Constitution demarcated retirement of Judges from removal from office of the Judges.

236. Section 5(4) and (5) of the JS Act was, therefore, centred on removal of the Chief Justice and not retirement. I am certain that had Parliament intended section 5(4) and (5) of the JS Act to apply in instances of the retirement of the Chief Justice that would have been captured in black and white.

237. Further, the operation of section 5(4) and (5) of the JS Act is a self-executing process. The provision does not call for an appointing authority or affirmation by anyone for the Deputy Chief Justice or the most senior Judge in the Supreme Court, as the case may be, to act as the Chief Justice. One assumes the office of the Chief Justice in an acting capacity purely on the basis of the operation of the law.

238. In other words, whenever a Chief Justice is removed, dies or resigns before attaining the age of 70 or the ten years in office, the Deputy Chief or the most senior Judge in the Supreme Court, as the case may be, automatically acts as the Chief Justice.

239. The upshot is, hence, that His Lordship Hon. Justice David Kenani Maraga could not rely on section 5(4) and (5) of the JS Act to purport to authorize the DCJ to act as the acting Chief Justice either when he was retired or even when he was on leave.

240. The Hon Chief Justice, as a State officer, does not cease to be the Chief Justice of the Republic of Kenya when on leave including leave pending retirement. Likewise, His Lordship could not rely on any provision of the Constitution or any other law in authorizing the DCJ to act as the Chief Justice either when he was retired or even when he was on leave.

241. From the foregoing analysis, it turns out that His Lordship purported to exercise powers which were non-existent. In short, His Lordship did not have the constitutional or legislative authority to authorize the DCJ to act as the Chief Justice as he did vide the impugned letter.

242. The letter dated 11th December, 2020, therefore, lacked legality and remains constitutionally infirm.

(f) Whether the Deputy Chief Justice should have taken an oath of office:

243. This court has found that the Deputy Chief Justice or the most senior Judge in the Supreme Court, as the case may be, assumes the office of the Chief Justice in the instances contemplated under section 5(4) and (5) of the JS Act by operation of the law.

244. It now follows that there is need to ascertain whether when the Deputy Chief Justice or the most senior Judge in the Supreme Court acts as the Chief Justice, such must first take an oath of office.

245. Article 74 of the Constitution provides for oaths of office for State officers. It provides as follows: -

> 74. Oath of office of State officers
>
> Before assuming a State office, acting in a State office, or performing any functions of a State office, a person shall take and subscribe the oath or affirmation of office, in the manner and form prescribed by the Third Schedule or under an Act of Parliament.

246. In construing the Constitution, article 259(3)(b) provides that: -

> (b) any reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time;

247. This issue is, hence, fairly straight-forward. The Constitution demands that whenever a State officer takes office or acts in such an office, such must first take and subscribe the requisite oath or affirmation of office.

248. Article 260 of the Constitution makes it clear that Judges are State officers. It is on the foregoing basis that this court finds and hold that the DCJ ought to have first taken and subscribed the requisite oath or affirmation of the office of the Chief Justice in an acting capacity before assuming office.

249. The issue is answered in the affirmative.

> (g) Whether a succeeding Chief Justice must be appointed before the retirement of a serving Chief Justice:

250. This issue is closely linked to the preceding ones.

251. Having found that there is no constitutional and statutory basis for an acting Chief Justice during the tenure of a substantive Chief Justice or even when the Chief Justice retires, the question which now begs an answer is whether the office of the Chief Justice must be filled before the retirement of a Chief Justice.

252. Part of the discussion in this judgement has yielded that section 5(4) and (5) of the JS Act was intended to forestall a crisis upon the removal, resignation or death of the Chief Justice. As said, the provisions did not relate to the retirement of the Chief Justice.

253. It, therefore, turns out that the office of the Chief Justice must be filled before the lapse of the tenure of the incumbent. In other words, Kenyans never anticipated a lacuna in the office of the Chief Justice on account of retirement of the incumbent at the age of 70 years or at the expiry of the ten-year service as a Chief Justice.

254. I believe Parliament was of like thinking when it initiated an amendment to section 30 of the JS Act to take care of the said lacuna. That was vide Judicial Service Amendment Bill, 2020.

255. For that purpose, section 2 of the said Bill provided as follows: -

> 2. Section 30 of the *Judicial Service Act*, 2011, is amended by inserting the following new sub-section immediately after sub-section (5)—
>
> (6) Despite the provisions of paragraph 3 of the First Schedule, the Commission shall commence the process of filling a vacancy in the office of the Chief Justice

at least six months before the retirement date or expiry of the term of the Chief Justice under Article 167 of the Constitution.

256. The purpose of the amendment was enumerated in the memorandum of the Bill as follows: -

Memorandum of Objects and Reasons

Statement of objects and reasons for the Bill

The principal purpose of the Bill is to amend section 30 of the *Judicial Service Act*, No 1 of 2011 in order to insert a provision empowering the Judicial Service Commission to commence the process of recruitment of a new Chief Justice at least six months before the expected retirement date or expiry of the term of the Chief Justice under article 167 of the Constitution.

It is noted that article 167(1) of the Constitution provides that a judge shall retire from office on attaining the age of seventy years, but may elect to retire at any time after attaining the age of sixty-five years and article 167(2) provides that the Chief Justice shall hold office for a maximum period of ten years or until retiring under article 167(1), whichever is the earlier.

In light of the cited constitutional provisions, it is apparent that the Judicial Service Commission can foresee the arising of a vacancy in the office of the Chief justice and commence the recruitment process before the date of the actual occurrence of the vacancy. In this respect, the Bill seeks to codify the best practice in democratic jurisdictions where there is an understanding that critical constitutional offices like that of the Chief Justice or the Chairperson of the Independent Electoral and Boundaries Commission should not remain vacant for a long period.

257. Clearly, the Bill seeks to ensure there is a seamless transition of power whenever the Chief Justice's ten-year term of office is about to come to an end or when retirement at the age of 70 years is imminent.

258. Infact, what the intended amendment aims to achieve is to align section 5(4) and (5) of the JS Act to the constitutional edict that makes no room for an acting Chief Justice in instances where JSC is aware that the incumbent Chief Justice's term is about to come to an end upon serving ten years or when the Chief Justice is about to attain the retirement age of 70 years.

259. This court was not informed by any of the parties of the status of the Bill.

260. Having said so, this court finds and hold that there must be legislation providing for the recruitment of a Chief Justice before the term of office of the incumbent expires either on attaining 70 years of age or upon serving ten years as a Chief Justice.

(h) Whether the tenure of the office of Deputy Chief Justice is tied to that of the Chief Justice:

261. The Petitioner contended that the tenure of the office of Deputy Chief Justice ought to have lapsed upon retirement of the Chief Justice on the basis of article 166(1)(a) of the Constitution.

262. The Petitioner asserted that the silence in article 167 on the tenure of the Deputy Chief Justice raises three questions being: -

(i) Is one eligible to serve as a Deputy Chief Justice until they retire even where that means serving for more than the 10 years as for the Chief Justice? For example, where a person aged 50 years is appointed as the DCJ, is he/she eligible to serve in the position for 20 years?

(ii) Why did the framers of the Constitution provide that the President shall appoint the Chief Justice and the Deputy Chief Justice? Why did the framers use the conjunction 'and' (which is used as a function word to indicate connection) and not the conjunction 'or' (which is used as a function word to indicate an alternative)?

(iii) Why did the framers of the Constitution then drop any references to the DCJ in article 167?

263. In answer the above questions, the petitioner submitted that the framers of the Constitution resolved the issue through the provision in article 166(1) of the Constitution for joint appointment of the substantive office holder and his/her deputy. The expression that "the President shall appoint the Chief Justice and the Deputy Chief Justice...," ties the tenure of the Deputy Chief Justice to that of the Chief Justice, such that the contract of the DCJ ends where the Chief Justice with whom he/she was appointed ceases to hold office, be it due to the expiry of the maximum 10 years' tenure, retirement, removal, or death.

264. The petitioner posited that not only does the above interpretation, eliminate an untenable situation which would arise where the DCJ can serve for more than 10 years while the Chief Justice is limited to tenure of 10 years maximum; it ensures good governance to the extent that the new Chief Justice enters office without the baggage of the predecessor administration attached to a DCJ continuing in office.

265. Due to centrality of articles 166(1)(a) and (b) and 167 of the Constitution, I will reproduce the same verbatim. Article 166(1)(a) and (b) provides as follows: -

> 166. Appointment of Chief Justice, Deputy Chief Justice and other judges
>
> (1) The President shall appoint—
>
> (a) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and
>
> (b) all other judges, in accordance with the recommendation of the Judicial Service Commission

266. Article 167 states as follows: -

> 167. Tenure of office of the Chief Justice and other judges
>
> (1) A judge shall retire from office on attaining the age of seventy years, but may elect to retire at any time after attaining the age of sixty-five years.
>
> (2) The Chief Justice shall hold office for a maximum of ten years or until retiring under clause (1), whichever is the earlier.
>
> (3) If the Chief Justice's term of office expires before the Chief Justice retires under clause (1), the Chief Justice may continue in office as a judge of the Supreme Court.
>
> (4) If, on the expiry of the term of office of a Chief Justice, the Chief Justice opts to remain on the Supreme Court under clause (3), the next person appointed as Chief Justice may be selected in accordance with article 166(1), even though that appointment may result in there being more than the maximum permitted number of Supreme Court judges holding office.
>
> (5) The Chief Justice and any other judge may resign from office by giving notice, in writing, to the President.

267. Article 166 of the Constitution deals with the appointment of Judges by the President. The provision relates to the appointment of two sets of Judges. The first set relates to the Judges who are to be recommended by the JSC and then be approved by the National Assembly before being appointed by the President. Those Judges are only two. They are the Chief Justice and the Deputy Chief Justice.

268. The other set of Judges are those who are to be only recommended by the JSC and then appointed by the President. Such Judges do not require the approval of the National Assembly. This cluster refers to all other Judges of the superior court.

269. Article 167 of the Constitution deals with the tenure of the Judges. The title of the article makes a distinction between the tenure of the Chief Justice and the rest of the Judges.

270. The provision sets the retirement age of Judges at 70 years with an option of early retirement at 65 years.

271. The article further and specifically provides that the Chief Justice will hold office for a maximum of ten years or until one retires at 70 years or early as provided, whichever is earlier. It also makes provision whenever the Chief Justice retires after serving the ten years, but is yet to attain the mandatory retirement age of 70 years. In such a case, the retired Chief Justice may opt to continue serving as a Judge of the Supreme Court.

272. The Constitution went further and provided that in a case where the Chief Justice retires after serving the ten years, but is yet to attain the mandatory retirement age of 70 years and opts to continue serving as a Judge of the Supreme Court, that will not impugne the composition of the Supreme Court even if the court will have more than the maximum permitted number of Supreme Court judges holding office.

273. The Constitution, therefore, comprehensively provides for the tenure of the Chief Justice in no uncertain terms. There is, however, no specific provision for the Deputy Chief Justice.

274. Going back to the argument that the effect of the lack of clarity on the tenure of the Deputy Chief Justice and in view of article 166(1) of the Constitution means that the tenure of the Deputy Chief Justice is tied to that of the Chief Justice, this court begs to differ.

275. The court holds that position for three reasons. The first reason is that a close scrutiny of articles 166 and 167 of the Constitution reveals that had Kenyans wanted the tenure of the Deputy Chief Justice to be tied to that of the Chief Justice, then that would have been so expressly stated in the Constitution. Second, the Constitution would have also made it clear that when a Deputy Chief Justice retires after serving the ten years, but is yet to attain the mandatory retirement age of 70 years and opts to continue serving as a Judge of the Supreme Court, then that arrangement will also not impugne the composition of the Supreme court even if the court will have more than the maximum permitted number of Supreme Court judges holding office. However, that is not the position.

276. The third reason is that the use of the word 'and' in article 166(1)(a) of the Constitution relates to the unique manner in which the Chief Justice and the Deputy Chief Justice are appointed. Notably, article 166 of the Constitution only deals with the appointment of Judges but not their tenure. It is article 167 of the Constitution which deals with tenure of Judges. It cannot, therefore, be a proper mode of interpretation to stretch an appointive provision of the Constitution into the realm of another provision on the tenure of the holder of the office where the Constitution is silent. Since appointment and tenure of office are distinct, an interpretation imputing that they are similar certainly breeds absurdity. It is for those reasons that this court declines the petitioner's invitation.

277. In sum, the issue is answered in the negative.

(i) What remedies ought to issue, if any?

278. The foregoing discussion has resulted to the success and failure of the amended petition in equal measure. Whereas the petitioner failed to prove that the JSC failed in its constitutional mandate regarding the complaints against the DCJ, that section 5(4) and (5) of *Judicial Service Act* is unconstitutional and that the tenure of the office of Deputy Chief Justice is tied to that of the Chief Justice, he has, on the other side succeeded to prove various issues.

279. In the end, therefore, the conclusions and findings of the court are as follows: -

(i) The petition satisfies the requirement of reasonable precision expected of constitutional disputes.

(ii) The Constitution and statutes are to be interpreted on clear and settled principles.

(iii) The JSC has not failed in its constitutional mandate regarding the complaints against the DCJ.

(iv) Section 5(4) and (5) of *Judicial Service Act* is constitutional.

(v) The Deputy Chief Justice, the Hon Lady Justice Philomena Mbete Mwilu, is eligible for appointment as a Chief Justice of the Republic of Kenya despite the pendency of the removal Petitions against her before the Judicial Service Commission.

(vi) The letter dated 11th December, 2020 by the then Chief Justice Hon Justice David Kenani Maraga granting authority to the DCJ to act as the Chief Justice is unconstitutional.

(vii) A succeeding Chief Justice must be appointed before the retirement of a serving Chief Justice.

(viii) The Deputy Chief Justice, the Hon Lady Justice Philomena Mbete Mwilu, should have taken an oath of office prior to acting as a Chief Justice.

(ix) The tenure of the office of Deputy Chief Justice is not tied to that of the Chief Justice. Whereas a Chief Justice must retire after serving ten years with liberty to continue serving as a Judge of the Supreme Court if yet to attain the age of 70 years, the Deputy Chief Justice serves in the office of the Deputy Chief Justice until attaining the age of 70 years or otherwise ceases to hold that office.

280. This court has been asked to grant various orders given the now partial success of the petition. The orders sought include declarations and other orders. In deciding on the nature of the relief to issue, this court must consider the most appropriate relief. Even in instances where a party fails to ask for a specific relief, a court, depending on the nature of the matter ought to craft an appropriate relief.

281. Courts have severally rendered on reliefs. The Court of Appeal in *Total Kenya Limited v Kenya Revenue Authority* (2013) eKLR held that even in instances where there are express provisions on specific reliefs a court is not precluded from making any other orders under its inherent jurisdiction for ends of justice to be met to the parties. The High Court in *Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others* (2018) eKLR held that article 23 of the Constitution does not expressly bar the court from granting conservatory orders where a challenge is taken on the constitutionality of legislation.

282. In *Republic ex parte Chudasama v The Chief Magistrate's Court, Nairobi & another Nairobi HCCC No 473 of 2006*, [2008] 2 EA311, Rawal, J (as she then was) stated that:

> While protecting fundamental rights, the court has power to fashion new remedies as there is no limitation on what the court can do. Any limitation of its powers can only derive

> from the Constitution itself. Not only can the court enlarge old remedies, it can invent new ones as well if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal. See *Gaily v Attorney-General* [2001] 2 RC 671; *Ramanoop v Attorney General* [2004] Law Reports of Commonwealth (From High Court of Trinidad and Tobago); *Wanjuguna v Republic* [2004] KLR 520...The court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, especially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many facetted jurisdiction and discretionary powers of the High Court. See The *Judicial Review Handbook* (3rd Edn) by Michael Fordham at 361.

283. The Constitutional Court of South Africa in *Fose v Minister of Safety & Security* [1977] ZACC 6 emphasized the foregoing as follows: -

> Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.

284. One of the reliefs sought herein is that once the court finds that the Deputy Chief Justice acted as the Chief Justice in violation of the Constitution, then it should issue a declaration and orders that all decisions made by the then acting Chief Justice are unconstitutional and, therefore, invalid, null and void.

285. There is no doubt that the Deputy Chief Justice while acting as the Chief Justice made many decisions. The decisions must have been acted upon and that resulted to many other actions. For instance, the acting Chief Justice admitted Advocates to the bar during her bring tenure as the Acting Chief Justice. If such action is to be nullified, then it means those Advocates will be deemed not to have been Advocates of the High Court of Kenya at all. Several issues, therefore, arise including the fate of the legal briefs the Advocates have since their admission dealt with, the remuneration they have earned so far among many other pertinent issues.

286. The Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR while dealing with the issue of damages as a relief in constitutional violations emphasized the need for appropriate and just remedies. On the power of declarations, the Learned Judges stated as follows: -

> Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "appropriate and just "according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may

be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.

287. In this case, having found that the Deputy Chief Justice acted as a Chief Justice in contravention of the Constitution, it is the considered position of the court that nullifying all the decisions made by the Deputy Chief Justice when acting as such will generally cause more detriment than the intended good. This is, therefore, one of such cases where declarations may serve as appropriate reliefs to meet the justice of the case.

288. The court has also been informed that there is a pending legislation in Parliament on the recruitment of a succeeding Chief Justice before the reign of a sitting Chief Justice expires. Given that there is in office a Chief Justice whose retirement is not in the near future; this court holds the position that there is really no need of issuing orders against Parliament to do what it is already doing. It is the court's hope that the legislation will be in place sooner. To that end, a copy of this judgment will be transmitted to the Speakers of the Parliament since Parliament did not take part in this matter.

289. This court will, therefore, endeavour to grant the most appropriate reliefs in the unique circumstances raised in this Petition.

Disposition:

290. Before coming to the end of this judgment, this court wishes to apologize to the parties for the late delivery of this decision. The delay was mainly occasioned by the pressure of work within the Constitutional and Human Rights Division of the High Court.

291. The court, thereby, wishes to thank the parties and their counsel in the patience they extended to the court and their courteous participation in this matter.

292. In the end, the amended petition partly succeeds and the following final orders hereby issue: -

(a) A declaration hereby issues that the Judicial Service Commission has not failed in its constitutional mandate regarding the complaints against the Deputy Chief Justice, Hon Lady Justice Philomena Mbete Mwilu.

(b) A declaration hereby issues that section 5(4) and (5) of *Judicial Service Act* is constitutional.

(c) A declaration hereby issues that the Deputy Chief Justice, the Hon Lady Justice Philomena Mbete Mwilu, is eligible for appointment as a Chief Justice of the Republic of Kenya despite the pendency of the removal Petitions against her before the Judicial Service Commission.

(d) A declaration hereby issues that the letter dated 11th December, 2020 by the then Chief Justice Hon Justice David Kenani Maraga granting authority to the Deputy Chief Justice, the Hon. Lady Justice Philomena Mbete Mwilu, to act as the Chief Justice is unconstitutional, null and void. The letter is hereby quashed.

(e) A declaration hereby issues that an acting Chief Justice who assents to office by virtue of section 5(4) and (5) of the *Judicial Service Act* must take an oath of office as required under article 74 of the Constitution as read with article 259(3)(b) of the Constitution before assuming the office.

(f) A declaration hereby issues that the Deputy Chief Justice, the Hon Lady Justice Philomena Mbete Mwilu, acted as the Chief Justice of the Republic of Kenya in contravention of the Constitution.

(g) A declaration hereby issues that a succeeding Chief Justice must be appointed before the retirement of a serving Chief Justice.

(h) A declaration hereby issues that the tenure of the office of Deputy Chief Justice is not tied to that of the Chief Justice. Therefore, the Deputy Chief Justice, the Hon Lady Justice Philomena Mbete Mwilu, is at liberty to remain in office until retirement or otherwise ceases to hold the office.

(i) Each party shall bear its costs since the Petition is a public interest litigation.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF NOVEMBER, 2021

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Okiya Omtatah Okoiti, the Petitioner in person.

Mr. Kanjama, Counsel for the 1st Respondent.

No appearance for the 2nd Respondent.

Mr. Havi and Miss Soweto, Counsel for the 1st Interested Party.

Miss Chibole, Counsel instructed by the Hon. Attorney General for the 2nd Interested Party.

Elizabeth Wanjohi – Court Assistant.