



**Law Society of Kenya v Attorney General (Constitutional Petition 226 of 2018)
[2021] KEHC 436 (KLR) (Constitutional and Human Rights) (2 December 2021) (Judgment)**

Law Society of Kenya v Attorney General [2021] eKLR

Neutral citation: [2021] KEHC 436 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION 226 OF 2018

JA MAKAU, J

DECEMBER 2, 2021

**IN THE MATTER OF ARTICLE 2(4), 3, 10, 129 (1) & (2), 156, 248, 249(1)
& (2), 250, 251, 252, 253, 254 & 255 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION ARTICLES 2(4), 3, 10,
129(1) 7 (2), 156, 248, 249(1) & (2) & 255 OF THE CONSTITUTION OF KENYA**

AND

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

BETWEEN

LAW SOCIETY OF KENYA PETITIONER

AND

ATTORNEY GENERAL RESPONDENT

High Court directs the President to appoint, designate and assign a befitting cabinet secretary for the implementation and administration of the Law Reform Act, Legal Education Act, Kenya School of Law Act, Judicial Service Act, Kenya National Commission on Human Rights Act, and the Victim Protection Act.

Reported by Kakai Toili

Constitutional Law – Executive – President – powers of the President – appointing, designating or assigning a befitting cabinet secretary, for the lawful implementation and administration of the Law Reform Act (No.19 of 2013), the Legal Education Act, 2012, the Kenya School of Law Act, 2012, the Judicial Service Act (No.1 of 2011), the Kenya National Commission on Human Rights Act (No. 14 of 2011) and the Victim Protection Act (No. 17 of 2014) (the Acts) - whether failure by the President, in appointing, designating and or assigning a befitting cabinet



secretary, for the lawful implementation and administration of the Acts violated the Constitution - whether the President could task a particular member of the Cabinet with coordination of any of his functions – whether decisions of the President were subject to judicial review - Constitution of Kenya, 2010, article 132 (2), (3)(b) & (c), 152 and 165(3)(d).

Constitutional Law – *independent offices and commissions – Attorney General - whether the Attorney General was a cabinet secretary - Constitution of Kenya, 2010, articles 132(2) and (3)(c) and 135.*

Constitutional Law – *interpretation of the Constitution – proper way to interpret the Constitution - what was the proper way to interpret the Constitution of Kenya, 2010 - Constitution of Kenya, 2010, article 259.*

Brief facts

The petitioner, the Law Society of Kenya, filed the instant petition and prayed for among others an order of *mandamus* directed at the President of the Republic of Kenya (President) to appoint, designate and or assign a befitting cabinet secretary, not being the Attorney General for the implementation and administration of the following Acts of Parliament; the Law Reform Act (No.19 of 2013); the Legal Education Act, 2012; the Kenya School of Law Act, 2012; the Judicial Service Act (No.1 of 2011); the Kenya National Commission on Human Rights Act (No. 14 of 2011); and the Victim Protection Act (No. 17 of 2014).¹ (the Acts).

The petitioner stated that on or about June 2018, the President signed Executive Order No. 1 of 2018 on organization of Government. It was the petitioner's position that the decision of the President was unconstitutional; and that it purported to assign Executive authority to the Attorney General, who was not a cabinet secretary. It was further claimed that the decision also purported to subordinate independent constitutional offices and commissions to the office of the Attorney General, and cabinet secretaries contrary to the Constitution of Kenya, 2010 (Constitution).

Issues

- i. Whether failure by the President, in appointing, designating, and assigning a befitting cabinet secretary, for the lawful implementation and administration of the Acts violated the Constitution.
- ii. Whether the President could task a particular member of the Cabinet with coordination of any of his functions?
- iii. Whether the Attorney General was a cabinet secretary.
- iv. Whether decisions of the President were subject to judicial review.
- v. What was the proper way to interpret the Constitution of Kenya, 2010?

Held

1. From article 2 of the Constitution and on the basis of the supremacy of the Constitution, all persons and State organs at such levels of Government were bound by the Constitution at equal par and not less than the Executive, which was headed by the President, therefore the President was also mandated to respect, protect and uphold the Constitution.
2. Article 130 of the Constitution dealt with the National Executive. Article 130(1) provided that the National Executive of the Republic comprised of the President, the Deputy President and the rest of the Cabinet. The functions of the President were clearly provided for under article 132 of the Constitution. The President was required to nominate and with approval of the National Assembly; appoint and could dismiss.
3. Article 132(3)(b) and (c) of the Constitution donated to the President authorities to direct and co-ordinate the functions of ministries and Government departments; and by a decision published in the Kenya Gazette, assign responsibility for implementation and administration of any Act of Parliament to a cabinet secretary, to the extent not inconsistent with any Act of Parliament. It was perfectly constitutional for the President to task a particular member of the cabinet with coordination of any of his functions to the extent that it was not inconsistent with any Act of Parliament.



4. Article 132(2) of the Constitution created a clear distinction between the office of the Cabinet Secretary and the office of the Attorney General. Cabinet secretaries were appointed under article 152 of the Constitution. The Attorney General was an office created under article 156 of the Constitution.
5. In view of clear distinction of appointment between the office of a cabinet secretary and the Office of the Attorney-General, the Attorney-General was not a cabinet secretary and failure by the President, in appointing, designating and or assigning a befitting cabinet secretary, for the lawful implementation and administration of the Acts among many others, in accordance with article 132(3)(c) read with article 135 of the Constitution, was inconsistent with the Constitution and egregiously violated the Constitution, the rule of law and prejudiced public interest.
6. Articles 129 and 130 of the Constitution having vested executive authority in the National Executive headed by the President, the National Executive had a statutory duty to exercise the executive authority for the people of Kenya, in accordance with the law. In the Acts, the role of the cabinet secretary was critical and not a mere formality, as it started with appointments to the organs that Parliament designated as administrators of the statutes.
7. The petitioner had demonstrated that the President had failed to uphold his duty under article 132(3) (c) of the Constitution to assign and designate cabinet secretaries according to legislative intent. The legislative intent was likely to be defeated as a result of failure by the President to create and/or designate cabinet secretaries provided in the respective mentioned statutes.
8. The decisions of the President were subject to judicial review, and under article 165(3)(d) of the Constitution, the High Court had jurisdiction to issue interpretative declarations including consequential enforcement orders to ensure compliance with the Constitution.
9. Article 259 of the Constitution which dealt with construing the Constitution, introduced a new approach to the interpretation of the Constitution. The article obligated courts to adopt an approach to interpretation that promoted the spirit, purport, values and principles of the Constitution, advanced the rule of law, human rights and fundamental freedoms in the Bill of Rights and contributed to good governance. That approach had been described as a mandatory constitutional canon of statutory and constitutional interpretation. The duty to adopt an interpretation that conformed to article 259.
10. The constitutional provision had to be construed purposively and in a contextual manner and courts were simultaneously constrained by the language used. Courts could not impose a meaning that the text was not reasonably capable of bearing. In other words, the interpretation should not be unduly strained but should avoid excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene.
11. The national values under article 10 of the Constitution were binding and were not advisory. Violation of national values had led to the revising by the High Court of decisions made in disregard of values and the spirit of constitutionalism, as should be the fate of the decision of the President not to appoint, designate and or assign a befitting cabinet secretary, for the implementation and administration of the Acts, pertinently the Ministry for Justice and Constitutional Affairs.
12. The actions and/or inactions of the President were in effect an egregious affront to the Constitution, necessitating intervention as sought in the petition. It was unjustified and wrong that the public interest should be left to suffer as a consequence of the violation of the Constitution. The petitioner had demonstrated that the following Acts of Parliament were out of necessity being illegally administered, thus:-
 1. the Law Reform Act (No. 19 of 2013);
 2. the Legal Education Act, 2012;
 3. the Kenya School of Law Act, 2012;
 4. the Judicial Service Act (No. 1 of 2011);
 5. the Kenya National Commission on Human Rights Act (No. 14 of 2011); and



6. the Victim Protection Act (No. 17 of 2011).

Petition allowed. Each Party to bear its own costs.

Orders

- i. *A declaration was issued that under article 132(3)(c) of the Constitution, the President of the Republic of Kenya was under constitutional obligation to designate and assign cabinet secretaries as befitting to ensure administration and implementation of all Acts of Parliament.*
- ii. *An order of mandamus was issued directed at the President of the Republic of Kenya, to in deference to his oath of office taken as per the Third Schedule to the Constitution, and in accordance with article 132(3)(c) of the Constitution to appoint, designate and or assign a befitting cabinet secretary, not being the Attorney General for the implementation and administration of the following Acts of Parliament;*
 1. *the Law Reform Act (No.19 of 2013);*
 2. *the Legal Education Act, 2012;*
 3. *the Kenya School of Law Act, 2012;*
 4. *the Judicial Service Act (No.1 of 2011);*
 5. *the Kenya National Commission on Human Rights Act (No. 14 of 2011); and,*
 6. *the Victim Protection Act (No. 17 of 2014).*

Citations

Cases

1. Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another (Petition Nos 628 & 630 of 2014 (Consolidated) [2015] eKLR) — Explained
2. Council of County Governors v Inspector General of National Police Service & 3 others (Petition 298 of 2014 [2015] eKLR) — Explained
3. George Bala v Attorney General (Petition 238 of 2016 [2017] eKLR) — Explained
4. Katiba Institute & Another vs. Attorney General & Another ([2017] eKLR) — Mentioned
5. Republic v Chief Justice of Kenya & 6 others Ex-parte Moiyo Mataiya Ole Keiwua (Miscellaneous Civil Application 1298 of 2004 [2010] eKLR) — Explained
6. Speaker of National Assembly vs. Attorney General and 3 Others ([2013] eKLR) — Explained
7. Doctors for Life International vs. Speaker of the National Assembly and others ((CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006(6) SA 416 (CC)) — Explained

Statutes

1. Constitution of Kenya, 2010 — article 1, 3, 132 (3)(b),130, 130(1), 132, 132 (2), 132(3)(b) , 132 (3) (c), 152 (1), 135, 152, 154, 155, 156, 156(4)(c) , 255 — Interpreted
2. Judicial Service Act (No. 1 of 2011) — Cited
3. Kenya School of Law Act (Act No. 26 of 2012) — Cited
4. Law Reform Act (Cap. 26) — section 8 — Interpreted
5. Law Society Of Kenya Act — section 4 — Interpreted
6. Legal Education Act (Act No. 27 of 2012) — section 2, 4(5) — Interpreted
7. National Centre for International Arbitration Act (No. 26 of 2013) — section 2 — Interpreted
8. Registration of Business Names Act (Cap. 499) — section 2 — Interpreted
9. Victim Protection Act — Cited
10. Witness Protection Act — section 2 — Interpreted

Advocates

None mentioned



JUDGMENT

1. The Law Society of Kenya, through a Petition dated June 21, 2018 and filed on June 22, 2018 prayed for array of orders. However, arising out of new developments, particularly the promulgation of Executive Order No. 1 of 2020 superseding the substance of Executive Order No. 1 of 2018, affecting prayers (a) to (i) of the Petition as originally drafted, the petitioner abandons the said prayers as they now form the substance of Constitutional Petition No. 203 of 2020; Law Society of Kenya vs. The Attorney General. The Petitioner accordingly now only make submission in the residual prayer (j), (k) and (l):
 - a) Spent;
 - b) Spent;
 - c) Spent;
 - d) Spent;
 - e) Spent;
 - f) Spent;
 - g) Spent;
 - h) Spent;
 - i) Spent;
 - j) A Declaration that under article 132(3)(c) of the Constitution, the President of the Republic of Kenya is under Constitutional obligation to designate and assign Cabinet Secretaries as befitting to ensure administration and implementation of all Acts of Parliament;
 - k) An order of *mandamus* directed at the President of the Republic of Kenya, to in deference to his Oath of Office taken as per the Third Schedule of the Constitution of Kenya, and in accordance with article 132(3)(c) of the Constitution of Kenya to appoint, designate and or assign a befitting Cabinet Secretary, not being the Attorney General for the implementation and administration of the following Acts of Parliament:
 - i) The *Law Reform Act* (No.19 of 2013);
 - ii) The *Legal Education Act*, 2012;
 - iii) The *Kenya School of Law Act*, 2012;
 - iv) The *Judicial Service Act* (No.1 of 2011);
 - v) *Kenya National Commission on Human Rights Act* (No. 14 of 2011);
 - vi) *Victim Protection Act* (No. 17 of 2014).
 - l) Any other befitting relief under article 165(d) of the Constitution of Kenya.



2. The Petition is supported by affidavit by Mercy Wambua sworn on June 22, 2018 and supported further by several annexures attached thereto.

The Respondent's Response

3. The respondent is opposed to the Petition and in its opposition relies on the Replying Affidavit by Kennedy Ogeto sworn on October 19, 2018.

Background

4. The petitioner filed the instant Petition seeking several reliefs as captured in the Petition. The petitioner position is that it has as its statutory mandate and objective, under Section 4 of the [Law Society of Kenya Act](#), No. 21 of 2014, the duty to protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law. Under this statutory mandate, as the professional body on matters of law, and on the general locus of article 3 of the Constitution, the petitioner drew and presented the Petition.
5. The petitioner urge that on or about June 2018, the President of the Republic of Kenya, his Excellency President Uhuru Muigai Kenyatta, signed Executive Order No. 1 of 2018, ostensibly done under provisions of Article 132 (3)(b) read with article 135 of the [Constitution of Kenya](#), on organization of Government. It is the petitioner's position that as far as it concerns this Petition, the President is directed and subordinated Government Departments, and also independent Constitutional Commissions and Offices as set out in various articles in the Constitution.
6. The petitioner contend that the said decision of the President of the Republic of Kenya, is highly unconstitutional; it purports to assign executive authority to the Attorney General, who is not a Cabinet Secretary. The decision also purports to subordinate independent Constitutional offices and Commissions to the office of the Attorney General, and Cabinet Secretaries contrary to the Constitution.
 7. The petitioner further urge the Executive Order by designating independent Constitutional Offices and Commissions to the Executive arm of government, purports to amend the Constitution of Kenya illegally contrary to article 255 of the Constitution.

Analysis And Determination

8. Upon consideration of the pleadings by the petitioner and the Respondent and further upon consideration of the rival submissions, I find that the following issues arise for consideration:-
 - a) Whether the President of the Republic of Kenya has failed to uphold his duty under article 132 (3) (c) to assign and designate Cabinet Secretaries according to legislative interest.
 - b) That as a consequence whether orders of judicial Review should issue to compel compliance with the Constitution and Statutes.

A. Whether the President of the Republic of Kenya has Failed To Uphold His Duty Under article 132 (3) (c) To Assign and Designate Cabinet Secretaries According To Legislative Interest.

9. In considering this issue it is important to start by considering the provision in article 2 of the Constitution of the Kenya, being the supremacy clause which provides:-

“2. Supremacy of this Constitution



- (1) This Constitution is the Supreme Law of the Republic and binds all persons and all State organs at both levels of government.
- (2) No person may claim or exercise State authority except as authorised under this Constitution.
- (3) The validity or legality of this Constitution is not subject to challenge by or before any Court or other State organ.
- (4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.
- (5) The general rules of international law shall form part of the law of Kenya.
- (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

10. It is clear from the said Article and on the basis of the Supremacy of the Constitution, that all state persons and all state organs at such levels of Government are bound by the Constitution at equal par and not less than the Executive, that is headed by His Excellency the President, it follows therefore the President is also mandated to respect, protect and uphold the Constitution.

11. Article 130 of the Constitution deals with the National Executive. Article 130(1) of the Constitution provides that the National Executive of the Republic comprise of the President, the Deputy President and the rest of the Cabinet. In addition thereto article 152(1) of the Constitution provides:-

Article 152 (1) further provides for the composition of the Cabinet as follows:

“The Cabinet consists of-

- a) The President
- b) The Deputy President
- c) The Attorney general; and
- d) Not fewer than fourteen and not more than twenty-two cabinet Secretaries.”

12. The functions of the President are clearly provided for under article 132 of the Constitution. The President is required to nominate and with approval of the National Assembly; appoint and may dismiss. The Article provides:-

“ 132 (2) The President shall nominate and, with the approval of the National Assembly, appoint, and may dismiss—

- (a) the Cabinet Secretaries, in accordance with article 152;
- (b) the Attorney-General, in accordance with article 156;
- (c) the Secretary to the Cabinet in accordance with article 154;
- (d) Principal Secretaries in accordance with article 155;
- (e) High Commissioners, ambassadors and diplomatic and consular representatives; and Constitution of Kenya, 2010



- (f) in accordance with this Constitution, any other State or public officer whom this Constitution requires or empowers the President to appoint or dismiss.
13. Considering article 132(3)(b) and (c) of the Constitution, it donates to the President authorities to direct and co-ordinate the functions of Ministries and Government Departments; and by a decision publish in the Kenya Gazette, assign responsibility for implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any Act of Parliament. It therefore follows that it is perfectly constitutional for the President to task a particular member of the Cabinet with coordination of any of his functions to the extent that its not inconsistent with any Act of Parliament.
14. It should at the same time be appreciated that article 132 of the Constitution is better appreciated under the context of article 129 of the Constitution that offer parameters for exercise of Executive Power in the following terms:-
- “Principles of executive authority
- (1) Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution.
- (2) Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well – being and benefit.
15. It is at the same time important to keenly consider the provisions of article 132(3) (c) of the Constitution that provides as follows:-
- “(3) The President shall-
- (a)
- (b); and
- (c) by a decision published in the Gazette, assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any Act of Parliament.”
16. It is urged on behalf of the respondent that the Constitution does not specifically define the functions of the Cabinet Secretaries. That the role and function of individual Cabinet Secretary is defined by the President upon whom the executive authority at the national level is ultimately vested.
17. Further it is the respondents contention that the Constitution recognises the doctrine of separation of powers wherein executive authority at the National Level is vested in the President, the Deputy President and the rest of the Cabinet as provided by the provisions of article 130(1) of the Constitution. The respondent argument is therefore that article 132(3)(b) of the Constitution empowers the President to direct and co-ordinate the functions of ministries and government departments, it is therefore according to the Respondent clear that it is the President who has the Constitutional mandate to assign Cabinet Secretaries responsibilities.
18. The petitioner in support of the Petition contend that in the premises, the President of the Republic of Kenya as far as it concerns this Petition, has, in view of his Oath of Office taken as per the Third Schedule of the Constitution of Kenya, and in accordance with article 132(c) of the Constitution of



Kenya, failed and or neglected to appoint, designate and or assign a befitting Cabinet Secretary, for the implementation and administration of the following Acts of Parliament;

- i) The Law Reform Act, (No. 19 of 2013);
- ii) The Legal Education Act, 2012;
- iii) The Kenya School of law Act, 2012;
- iv) The Judicial Service Act (no. 1 of 2011);
- v) Kenya National Commission on Human Rights Act (No.14 of 2011);
- vi) Victim Protection Act (No. 17of 2014).

19. The petitioner contend that violations by the President of the Republic of Kenya goes against the provisions of article 129 and 132(3)(c) of the Constitution as this is no doubt a clear-cut violation and/or enactment of the provisions of the Constitution, a violation that is urged to have prejudiced and continues to prejudice public interest.

20. Reliance in support of the above is placed in the decision of Doctors for Life International vs Speaker of the National Assembly and others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006(6) SA 416 (CC); wherein the Court rendered itself as follows:

“But under our constitutional democracy, the Constitution is the Supreme Law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament ‘must act in accordance with, and within the limits of, the Constitution’, and the supremacy of the Constitution requires that ‘the obligations imposed by it must be fulfilled.’” (Emphasis added)

21. In considering the above-precedent and applying it mutatis mutandis to the present suit, I find that the Constitution is Supreme and binding on all persons and state organs of the Government and no less on the Executive and that the Constitution; “edict and obligations imposed by it must be fulfilled.”

22. Further it is clear, in my mind, that by dint of provisions of article 132 (3) (c) of the Constitution, even though His Excellency the President, has the prerogative to assign responsibilities for implementation and administration of any Act of Parliament as contended by the respondent herein, to a Cabinet Secretary, it is clearly provided that the some must not be inconsistent with the Constitution and any Act of Parliament. I find and hold that the prerogative must be exercised in accordance with and within the limits of the Constitution, else, it risks being involved or invalidated for such violation.

23. It is clear and has clearly been provided, that any inconsistency with the Constitution and any Act of Parliament is a matter, that is now well settled by wealth of jurisprudence of this Court, the Court of Appeal and Supreme Court.

24. To buttress this point reliance is placed in the case of Katiba Institute & Another vs. Attorney General & Another [2017] eKLR, where the Supreme Court faced with a situation as the present one, rendered itself *in tandem* with the decision in Coalition for Reform and Democracy (CORD) & Another vs. The Republic of Kenya & Another (2015) eKLR where the Court stated *inter-alia*; at paragraph 125 that:-

“Under article 1 of the Constitution sovereign power belongs to the people and it is to be exercised in accordance with the Constitution. That sovereign power is delegated to Parliament and the Legislative Assemblies in the County Governments; the National Executive and the Executive structures in the County Governments; and the Judiciary and



Independent Tribunals. There is however a rider that the said organs must perform their functions in accordance with the Constitution. Our Constitution having been enacted by way of a referendum, is the direct expression of the people’s will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the Constitution...Article 2 of the Constitution provides for the binding effect of the Constitution on State Organs and proceeds to decree that any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.....” (Emphasis mine)

25. In dealing with this issue, I find that it is of great importance to consider, what it is that the petitioner impugn the actions and / or inactions of the President as being inconsistent with the Constitution.
26. The respondent places reliance in article 132 (3)(b) of the Constitution in Supporting the Presidents action. It is contended the article empowers the President to direct and co-ordinate the functions of Ministers and Government Departments and as such the President has constitutional mandate to assign Cabinet Secretaries responsibilities.
27. The respondent proceeds to place reliance in article 156 of the Constitution and urges it sets out the functions of Attorney-General. Article 156(4)(c) of the Constitution provides that the Hon. Attorney General shall perform any other function conferred on the office by an Act of Parliament or by the President. Further it is urged that the Constitution provides that Parliament can confer functions upon the office of the Attorney-General by dint of the provision of article 156(4) (c) of the Constitution. The Constitution it is urged doesn’t specifically state what kind of functions, the Parliament can confer upon the Attorney General. As regards Cabinet Secretaries there is no similar express provision to that effect, the nearest would be the provisions of article 132(3)(c) which provides as follows:-

“By decision published in the Gazette, assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any Act of Parliament.” (Emphasis mine)

28. The respondent proceeded on to contend that Parliament unlike the case of Attorney-General, where it can assign him/her specific roles in respect to any legislation, cannot specifically assign responsibility for implementation and administration of any Act of Parliament to a particular Cabinet Secretary. It is the President who subject to consistency with the enabling Act who can assign a specific Cabinet Secretary such roles. In view of the above constitutional provisions, it is urged by the respondent that the President can assign responsibilities to both the Attorney-General and Cabinet Secretary.
29. Reliance is placed in support of the above proposition is placed in the case of Council of County Governors vs. Inspector General of National Police Service & 3 others [2015] eKLR, where Lenaola J, (as he then was) stated as follows as regards the Court’s power to question the wisdom of the legislature;

“Having so found, I must at this state, point out, as Courts have always done that in interpreting a legislation, there is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on any person who alleges otherwise – See Ndyanabo vs. Attorney – General of Tanzania (supra). I therefore reiterate that it is not the role of this Court to interrogate the wisdom or otherwise of enacted laws and as the Indian Supreme Court stated in Re Application by Bahadur [1986] LRC 545 (Const.).”

“I would only emphasize that one should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown.”



Further at page 304 it was stated that:

“It is not the function of the Court to form its own judgment as to what is fair and then to “amend or supplement it with new provisions so as to make it conform to that judgment.”

30. The Petitioner contend on its part that the President by the actions and or inactions has failed and /or neglected to appoint, designate and or assign a befitting Cabinet Secretary under article 132 (3)(c) of the Constitution, for the implementation and administration of the following Acts of Parliament:-

a) The Kenya Law Reform Commission (Established under provision of the Kenya [Law Reform Act](#), No. 2 of 1982);

i) The Law Reform Commission Act, defines ‘Cabinet Secretary’ as follows:

“Cabinet Secretary” means the Cabinet Secretary for the time being responsible for matters relating to law reform”.

ii) By section 8 of the Act, the Commission is comprised as follows:-

‘Composition of the Commission

(1) The Commission shall consist of-

a) A chairperson appointed by the President through an open and competitive process;

b) Two members appointed by the Cabinet Secretary through an open and competitive process;

c) Two members appointed by the attorney-General one of whom shall be a member of the Law Society of Kenya;

d) A representative of the Director of Public prosecution appointed in writings; and

e) A representative of the Chief Justice appointed in writings.’

iii) Legally therefore the Kenya law Reform Commission cannot be operationalized, as the appointments by the envisaged Cabinet Secretary cannot be undertaken. The President has failed to appoint and designate a Cabinet Secretary responsible for matters relating to Law Reform, and its thereby frustrating legislative intent and public interest.

b) Council of Legal Education (Established under provision of the [Legal Education Act](#), 2012);

i) By section 2 of the [Legal Education Act](#), Cabinet Secretary is defined as follows:

“Cabinet Secretary” means the Cabinet Secretary for the time being responsible for matters relating to legal education.”



- ii) By section 4(5) of the [Legal Education Act](#), the Council of Legal Education is comprised as follows:

“The Council shall consist of the following persons-

- a) The chairperson, who shall be a person with at least fifteen years experience in matters relating to legal education and training, appointed by President.
 - b) The principal Secretary of the ministry for the time being responsible for legal education;
 - c) The Principal Secretary of the Ministry for the time being responsible for finance;
 - d) The attorney General
 - e) The Chief Justice;
 - f) Two advocates, nominated by the Council of the Law Society of Kenya;
 - g) One person who teaches law in a public university, nominated by public Universities; and
 - h) The Secretary to the Council
 - i) One person who teaches law in a private university nominated by private universities.
- iv) Legally, the operations of the Council of Legal Education cannot be operationalized. There is no Ministry and no Cabinet Secretary responsible for legal education. There accordingly cannot exist a Permanent Secretary of the Ministry responsible for Legal education if there is no Ministry of Legal Education. The failure by the President to appoint and designate a Cabinet Secretary responsible for matter relating to Legal Education frustrating legislative intent and public interest.
- c) Kenya School of Law (Under the [Kenya School of Law Act](#), 2012);
 - i) Section 2 of the Act defines Cabinet Secretary as follows:

“Cabinet Secretary” means the Cabinet Secretary for the time being responsible for matters relating to legal education.’
 - ii) By section 6(2) of the Act, the Kenya School of Law Board is comprised as follows:

‘The Board shall consist of-

 - a) The Principal Secretary of the Ministry for the time being responsible for legal education;
 - b) The Principal Secretary of the Ministry for the time being responsible for finance;
 - c) The Attorney General;
 - d) The Chief Justice;



- e) Deleted by Act No 18 of 2014, Sch;
- f) A representative of the Law Society of Kenya nominated by its Council;
- g) Two others persons appointed by the Cabinet Secretary of whom –
 - (i) One shall be a person who teaches law in Kenya, nominated by the Universities; and
 - (ii) One shall be a curriculum expert who teaches education in a university in Kenya; and
- h) The Director.’
- iii) The Statute clearly contemplates the existence of a Ministry being responsible for matters relating to legal education.
- iv) The statue further envisages a board that exists of a Principal Secretary of the Ministry for the time being responsible for legal education and two appointees of the Cabinet Secretary responsible for legal education.
- v) Legally, the operations of the School cannot be operationalised. There is no Ministry and no Cabinet Secretary responsible for legal education. There accordingly cannot exist a Permeant Secretary of the Ministry responsible for Legal Education if there is no Ministry of Legal Education. There failure by the President to appoint and designate a Cabinet Secretary responsible for matters relating to legal Education frustrating legislative intent and public interest.
- d) Victims Protection Board (*Victim Protection Act* (No.17 of 2014);
 - i. Section 2 of the Act defines Cabinet Secretary as follows:-

“Cabinet Secretary” means the Cabinet Secretary for the time being responsible for matters relating to justice’.
 - ii. The Statute clearly contemplates the existence of a Ministry being responsible for matters relating to justice, wherefore the absence of the said Ministry and or a Cabinet Secretary responsible of matters relating to Justice has during the President’s tenure has inhibited the proper and lawful implementation and administration of the statue, thereby frustrating legislative intent and public interest.
- e) Kenya National Commission on Human Rights article 249 (2) (a) of the Constitution:
 - i. Section 2 of the *Kenya National Commission on Human Rights Act* (No. 14 of 2011) defines Cabinet Secretary as follows:-

“Cabinet Secretary” means the Cabinet Secretary for the time being responsible for matters relating to human rights.’
 - ii. The Statute clearly contemplates the existence of a Ministry being responsible for matters relating to Human Rights, wherefore the absence of the said Ministry and or a Cabinet Secretary responsible of matters relating to Human Rights has during the President’s tenure has inhibited the lawful and



proper implementation and administration of the statute, thereby frustrating legislative intent and public interest.

- f) Judicial Service Commission:-
 - i. Section 2 of the Judicial Service Act (No. 1 of 2011) defines Cabinet Secretary as follows:-

“Cabinet Secretary” means the Cabinet Secretary for the time being responsible for matters relating to the Judiciary.’
 - ii. The Statute clearly contemplates the existence of a Ministry being responsible for matters relating to justice, wherefore the absence of the said Ministry and or a Cabinet Secretary responsible of matters relating to Justice has during the President’s tenure has inhibited the lawful and proper implementation and administration of the statute frustrating legislative intent and public interest.

31. It is contended by the Petitioner that in an attempt to try and operationalise these statutes the Attorney-General has been deployed and deputized as the “Cabinet Secretary”.

32. The petitioner acknowledge that whilst by dint of section 3 of the Interpretation of General Provisions Act (Chapter 2 of the Laws of Kenya), for the administration of laws in the legal sector, the Attorney General is deemed to be a Cabinet Secretary for purposes of article 132(3)(c) of the Constitution, such consideration and designation is subject to the particular Statute. Section 3 of the Interpretation of General provisions Act legislates as follows:-

“the Cabinet Secretary” means the Cabinet Secretary for the time being responsible for the matter in question, or the President where executive authority is retained by him;

Provided that for the purposes of the administration of laws relating to the Legal Sector, the expression shall, subject to any assignment under article 132 (3)(c) of the Constitution, include the Attorney-General.’

33. I find that the assignment under article 132(3)(c) of the Constitution is subject to designation contemplated by a particular statute. In Kenya, where parliament intended to designate the Attorney-General as Cabinet Secretary, Parliament has been very express, an example is clearly provided for in the following legislations:-

“

a) [Business Registration Service Act](#) No. 15 of 2015):

At Section 2:

“Cabinet Secretary” means the Attorney-General;’

b) [Witness Protection Act](#), No. 16 of 2006’

At Section 2:

“Minister” means the Attorney-General;’

c) [Nairobi Centre for International Arbitration Act](#), (No. 26 of 2013);

At Section 2:

“Cabinet Secretary” means the Attorney-General;’



34. In the instant Petition the statutes where operationalization is sought, the Cabinet Secretary has expressly excluded the Attorney-General. These are as follows:-

“ a) The Kenya Law Reform (Established under provisions of the Kenya [Law Reform Act](#), No. 2 of 1982);

i. The Law Reform Commission Act, defines ‘Cabinet Secretary’ as follows;
“Cabinet Secretary” means the Cabinet Secretary for the time being responsible for matters relating to law reform’.

ii. By section 8 of the Act, the Commission is comprised as follows:

‘Composition of the Commission

(1) The Commission shall consist of-

a) A chairperson appointed by the President through an open and competitive process;

b) Two members appointed by the Cabinet Secretary through an open and competitive process;

c) Two members appointed by the Attorney-General one of whom shall be a member of the Law Society of Kenya;

d) A representative of the Director of Public Prosecution appointed in writing; and

e) A representative of the Chief Justice appointed in writing.’

iii. The Statute clearly contemplates and delineates two distinct offices, one by the Cabinet Secretary and the Attorney General.

iv. For the purposes of article 132(3) of the Constitution, and section 3 of Interpretation of General Provisions Act, the Attorney General is not the Cabinet Secretary, and accordingly cannot be so designated for purposes of administration of the Act.

v. Besides, there shall be a conflict, in performance of functions of the Commission, if the Commission is made subordinate to the Attorney General, who is a member of the Commission by two representatives.

b. Council of Legal Education (Established under provisions of the [Legal Education Act](#), 2012);

a. By Section 2 of the [Legal Education Act](#), Cabinet Secretary is defined as follows:

“Cabinet secretary” means the cabinet secretary for the time being responsible for matters relating to legal education;’

b. By section 4(5) of the [Legal Education Act](#), the Council of Legal Education is comprised as follows:

‘The Council shall consist of the following persons —



- (a) the chairperson who shall be a person with at least fifteen years experience in matters relating to legal education and training, appointed by President.
 - (b) the Principal Secretary of the Ministry for the time being responsible for legal education;
 - (c) the Principal Secretary of the Ministry for the time being responsible for finance;
 - (d) the Attorney-General;
 - (e) the Chief Justice;
 - (f) two advocates, nominated by the Council of the Law Society of Kenya;
 - (g) one person who teaches law in a public university, nominated by public Universities; and
 - (h) the Secretary to the Council.
 - (i) one person who teaches law in a private university nominated by private universities.
- vi. The Statute clearly contemplates and delineates two distinct offices, one by the Cabinet Secretary and the Attorney General.
 - vii. For the purposes of article 132(3) of the Constitution, and section 3 of Interpretation of General Provisions Act, the Attorney General is not the Cabinet Secretary, and accordingly cannot be so designated for purposes of administration of the Act.
 - viii. Besides, there shall be a conflict, in performance of functions of the Commission, if the Council is made subordinate to the Attorney General, who is a member of the Council.
 - ix. The High Court has decide so in *George Bala v Attorney General* [2017] eKLR.
- c. Office of Registrar of Political Parties (Political Parties Act, No. 11 of 2011):
 - i. Section 2 of the *Political Parties Act* defines Cabinet Secretary as follows: "Cabinet Secretary" means the Cabinet Secretary for the time being responsible for matters relating to elections'.
 - i. For the purposes of Article 132(3) of the Constitution, and section 3 of Interpretation of General Provisions Act, the Attorney General is not the Cabinet Secretary, and accordingly cannot be so designated for purposes of administration of the Act.
 - d. Kenya School of Law (Under the *Kenya School of Law Act*, 2012);
 - v. Section 2 of the Act defines Cabinet Secretary as follows: "'Cabinet Secretary" means the Cabinet Secretary for the time being responsible for matters relating to legal education'.
 - vi. By section 6(2) of the Act, the Kenya School of Law Board is comprised as follows: 'The Board shall consist of —
 - a) the Principal Secretary of the Ministry for the time being responsible for legal education;
 - b) the Principal Secretary of the Ministry for the time being responsible for finance;
 - c) the Attorney-General
 - d) the Chief Justice;
 - e) deleted by Act No. 18 of 2014, Sch;



- f) a representative of the Law Society of Kenya nominated by its Council;
- g) two others persons appointed by the Cabinet Secretary of whom—
 - (i) one shall be a person who teaches law in Kenya, nominated by the universities; and
 - (ii) one shall be a curriculum expert who teaches education in a university in Kenya; and
- g) the Director.'
- vii. The Statute clearly contemplates and delineates two distinct offices, one by the Cabinet Secretary and the Attorney General.
- viii. For the purposes of article 132(3) of the Constitution, and section 3 of *Interpretation of General Provisions Act*, the Attorney General is not the Cabinet Secretary, and accordingly cannot be so designated for purposes of administration of the Act.
- ix. Besides, there shall be a conflict, in performance of functions of the Board, if the Board is made subordinate to the Attorney General, who is a member of the Board.
- e. Kenya Copyright Board (*Copyright Act*, 2001):
 - i. Section 2 of the Act defines Cabinet Secretary as follows:

"Cabinet Secretary" means the Cabinet Secretary for the time being responsible for matters relating to copyright and related rights'
 - ii. Section 6(1) of the Act constitutes the Copyright Board as follows:

'The Board shall consist of—

 - a) deleted by Act No. 7 of 2007, Sch.
 - b) one member nominate by registered software associations;
 - c) one member nominated by registered musicians' associations;
 - d) one member nominated by registered filming associations;
 - e) two members nominated by publishers, authors and writers associations;
 - f) one member nominated by performing artistes associations;
 - g) one member nominated by public universities;
 - h) one member nominated by registered associations of producers of sound recordings;
 - i) one member nominated by registered associations of broadcasting stations;
 - j) one member nominated by producers and distributors of audio-visual works;
 - k) the Permanent Secretary in the Ministry for the time being responsible for matters relating to broadcasting or his representative;
 - l) the Attorney-General or his representative;
 - m) the Commissioner of Police or his representative;
 - n) the Permanent Secretary in the Ministry for the time being responsible for matters relating to home affairs, heritage and Sports or his representative;



- o) the Permanent Secretary to the Treasury or his representative;
 - p) the Executive Director appointed under section 11; and
 - q) not more than four other members appointed by the Minister by virtue of their knowledge and expertise in matters relating to copyright and other related rights.'
- iii. The Statute clearly contemplates and delineates two distinct offices, one by the Cabinet Secretary and the Attorney General.
 - iv. For the purposes of article 132(3) of the Constitution, and section 3 of Interpretation of General Provisions Act, the Attorney General is not the Cabinet Secretary, and accordingly cannot be so designated for purposes of administration of the Act.
 - v. Besides, there shall be a conflict, in performance of functions of the Board, if the Board is made subordinate to the Attorney General, who is a member of the Board.
 - f. Victims Protection Board (*Victim Protection Act* (No. 17 of 2014):
 - g. Section 2 of the Act defines Cabinet Secretary as follows:
"Cabinet Secretary" means the Cabinet Secretary for the time being responsible for matters relating to justice'.
 - h. For the purposes of article 132(3) of the Constitution, and section 3 of Interpretation of General Provisions Act, the Attorney General is not the Cabinet Secretary, and accordingly cannot be so designated for purposes of administration of the Act.
35. The issue arising is whether for the purposes and intentions of this Petition, whether the Attorney-General is a Cabinet Secretary. Article 132 (2) of the Constitution creates a clear distinction between the office of the Cabinet Secretary and office of the Attorney General. Cabinet Secretaries are appointed under article 152 of the Constitution. The Attorney General is an office created under article 156 of the Constitution.
 36. In view of clear distinction of appointment between the office of a Cabinet Secretary and Office of the Attorney-General, I am satisfied that the Attorney-General is not a Cabinet Secretary and failure by the President of the Republic of Kenya, in appointing, designating and or assigning a befitting Cabinet Secretary, for the lawful implementation and administration of the aforesaid Acts of Parliament among many others, in accordance with article 132(3)(c) read with article 135 of the Constitution, is inconsistent with the Constitution and egregiously violates the Constitution of Kenya, the Rule of Law and prejudices public interest.
 37. Further to the aforesaid article 129 and 130 of the Constitution having vested Executive authority in the National Executive headed by the President, the national executive has a statutory duty to exercise the Executive Authority for the People of Kenya, in accordance with the Constitution of Kenya and law. It is important to note in the statutes aforesaid herein-above the role of the Cabinet Secretary is critical and not a mere formality, as it starts with appointments to the organs that Parliament designated as administrators of the Statutes.
 38. In view of the above, I find that the Petitioner has demonstrated that the President of the Republic of Kenya has failed to uphold his duty under article 132(3)(c) to assign and designate Cabinet Secretaries according to Legislative intent. I find that legislative intent as enumerated herein above is likely to be defeated as a result of failure by the President to create and/or designate Cabinet Secretaries provided in the respective mentioned statutes.



B. That as a consequence whether orders of Judicial Review should issue to compel compliance with the Constitution and Statutes.

39. The Law is clear that the decisions of the President of the Republic of Kenya are subject to judicial review, and by jurisdiction of the High Court of Kenya under article 165 (d) of the Constitution, the High Court has jurisdiction to issue interpretative declarations including consequential enforcement orders to ensure compliance with the Constitution.
40. The assertion herein above has been afforded Judicial affirmation in the case of *Republic vs. The Honourable the Chief Justice of Kenya & Others Ex Parte Moio Mataiqa Ole Keiwua Nairobi HCMCA No. 1298 of 2004* where the Court expressed itself as follows:-
- “It is the court’s view that when the law proceeds to impose on the executive legally prescribed duties and responsibilities, the performance of which depends upon the enhancing or handling of public interest, the political officers of the executive must act consistent and according to the laws of the land....In the court’s view the performance of certain duties and responsibilities is dependent upon individual rights and responsibilities hence the duty to act consistently with and according to the law. If public officers including the President fail to act and their failure harms the interests of the public and rights of individual citizens, their actions and omissions are subject to judicial review.” (Emphasis added)
41. Similarly the Supreme Court on similar point, addressed itself in the decision of *Speaker of National Assembly vs. Attorney General and 3 Others [2013] eKLR* wherein it stated as follows:
- “Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of a resolution in plebiscite, is only the Courts.”
42. Article 259 of the Constitution dealing with Construing the Constitution, introduced a new approach to the interpretation of the Constitution. The Article obligates Courts to promote the spirit, purport, values and principles of the Constitution, advance the rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance. This approach has been described as ‘a mandatory constitutional canon of statutory and Constitutional interpretation’. The duty to adopt an interpretation that conforms to article 259 of the Constitution is mandatory.
43. The Constitutional provision must be construed purposively and in a contextual manner and that Courts are simultaneously constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, the interpretation should not be “unduly strained” but should avoid “excessive peering at the language to the interpreted without sufficient attention to the historical contextual scene.” Which includes the political and constitutional history leading up to the enactment of a particular provision.
44. The petitioner in the instant Petition have sought to invoke the Courts Constitutional jurisdiction as the superintendent of the Constitution, and custodian of the aspirations of the Republic, to issue the necessary interpretative declarations as sought in the Petition and to issue the writ of Mandamus, to compel the compliance with the Constitution.



45. It is contended by the petitioner that, by reason of the matters stated herein above, the President of the Republic of Kenya has violated his constitutional duty and oath to heed the National values of the Constitution of Kenya, as posited by article 10 of the Constitution. It should be noted that the National values under article 10 of the Constitution are binding, and are not advisory. The significance of National Values of article 10 of the Constitution is best captured judicially in *George Bala v Attorney General [2017] eKLR*: where it was stated:-

“...70. By employing the use of the term “include” the framers of the Constitution were alive to the fact that there are other values and principles which may advance the spirit of the Constitution and hence all State organs, State officers, public officers and all persons may be enjoined to apply them. This is where the limit of executive power by the High Court, in my view ought to be invoked. What this means is that the national values and principles of governance in article 10 of the Constitution are not exclusive but merely inclusive. The Constitution set out to plant the seed of the national values and principles of national governance but left it open to all State organs, State officers, public officers and all persons when applying or interpreting the Constitution, enacting, applying or interpreting any law, or applying or implementing any public policy decision to water and nature the seedling to ensure that the plant develops all its parts such as the stem, the leaves, the branches and the flowers etc. In other words, the national values and principles of governance must grow as the society develops in order to reflect the true state of the society at any given point in time.”

46. It is noted that violation of National values has led to the revising by the High Court of decision made in disregard of values and the spirit of the Constitutionalism, as should be the fate of the decision of the President not to appoint, designate and or assign a befitting Cabinet Secretary, for the implementation and administration of the aforesaid Acts of Parliament, pertinently the Ministry for Justice and Constitutional Affairs. I find that the actions and / or inactions of the President are in effect an egregious affront to the Constitution, necessitating intervention as sought in the Petition. I think its unjustified and wrong that public interest should be left to suffer as consequence of violation of the Constitution as demonstrated in this Petition.

47. The petitioner has clearly demonstrated in the instant Petition that the following Acts of Parliament are out of necessity being illegally administered, thus:-

- i. The *Law Reform Act (No. 19 of 2013)*;
- ii. The *Legal Education Act, 2012*;
- iii. The *Kenya School of Law Act, 2012*;
- iv. The *Judicial Service Act (No. 1 of 2011)*;
- v. *Kenya National Commission on Human Rights Act (No. 14 of 2011)*;
- vi. *Victim Protection Act (No. 17 of 2011)*.

48. Considering the nature of the Petition and reliefs sought in the Petition I have no doubt the reliefs are not only extremely urgent, but are appropriate and necessary for protection of the Constitution, administration of justice, enforcement of the Rule of Law and protection of public interest as clearly provided in the Constitution and various statutes referred to in this Petition.



49. The upshot is that the Petition is meritorious and the same is allowed as follows:

- a) Spent;
- b) Spent;
- c) Spent;
- d) Spent;
- e) Spent;
- f) Spent;
- g) Spent;
- h) Spent;
- i) Spent;
- j) A Declaration be and is hereby issued that under article 132(3)(c) of the Constitution, the President of the Republic of Kenya is under Constitutional obligation to designate and assign Cabinet Secretaries as befitting to ensure administration and implementation of all Acts of Parliament;
- k) An Order of *mandamus* be and is hereby issued directed at the President of the Republic of Kenya, to in deference to his Oath of Office taken as per the Third Schedule of the Constitution of Kenya, and in accordance with article 132(3) (c) of the Constitution of Kenya to appoint, designate and or assign a befitting Cabinet Secretary, not being the Attorney General for the implementation and administration of the following Acts of Parliament:
 - i) The *Law Reform Act* (No.19 of 2013);
 - ii) The *Legal Education Act*, 2012;
 - iii) The *Kenya School of Law Act*, 2012;
 - iv) The *Judicial Service Act* (No.1 of 2011);
 - v) *Kenya National Commission on Human Rights Act* (No. 14 of 2011);
 - vi) *Victim Protection Act* (No. 17 of 2014).
- l) Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF DECEMBER, 2021.

.....

J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA

