REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL PETITION NO. 7 OF 2018

IN THE MATTER OF: VIOLATION OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ARTICLES 2, 3, 10, 165, 232, 238, 239, 242, 248 AND 249 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTION 66 OF THE NATIONAL INTELLIGENCE SERVICE ACT, 2012

BETWEEN

KATIBA INSTITUTE……...……..PETITIONER

VERSUS

THE ATTORNEY GENERAL……..…..…….1ST RESPONDENT

CABINET SECRETARY, MINISTY INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT…….……..2ND RESPONDENT

PUBLIC SERVICE COMMISSION……..……3RD RESPONDENT

DIRECTOR GENERAL NATIONAL

INTELLIGENCE SERVICE KENYA.....4TH RESPONDENT

AND

KENYA NATIONAL COMMISSION

ON HUMAN RIGHTS……..……INTERESTED PARTY

Coram: Justice Reuben Nyakundi

Mr. Suyianka and Ms. Nyaberi for the Petitioner

Ms. Lutta for the Respondents

Mr. Nyanje for the Interested Party

JUDGEMENT

Introduction

In a nutshell, the Petitioner advances the argument that, by the Respondents failing in their respective mandates to constitute and operationalize the National Intelligence Service Complaints Board ("the Board") contemplated under **Section 66 of the National Intelligence Service Act, 2012, (NISA)** they have run afoul of multiple Articles of the **Constitution of Kenya, 2010.**

The Katiba Institute filed the instant petition dated 14th June 2018 on 21st June 2018 in the interest of the public as well as on its own behalf as a duly registered constitutional research, policy and litigation institute established to further the implementation of Kenya's 2010 Constitution and generally to seek the development of a culture of constitutionalism in Kenya. The petition was filed contemporaneously with an Application similarly dated and an affidavit sworn by Yash Pal Ghai on the 14th June 2018.

By way of response, on 16th October 2018, the Respondents- all represented by the Office of the Attorney General- filed an affidavit sworn on 9th October 2018 by the 4th Respondent, Patrick Kameru. The 1st Respondent has been sued in its capacity as the legal representative of the National Government in all Court proceedings and for the reason that it has a duty under Article 156(6) to not only promote and uphold the rule of law but also defend public interest. The case against the 2nd Respondent is based on the premise that the Cabinet Secretary in charge of the Ministry of Interior and Coordination of National Government (the CS), who is charged with the responsibility of inter alia public administration and ensuring civilian oversight, has failed to exercise his authority expressly given under the NISA. The Public Service Commission (PSC), is sued as the 3rd Respondent for its failure to uphold its statutory and administrative responsibilities which include in this instance, failing to exercise its mandate under Section 66 of the NISA to recommend members for appointment to the Board thus contributing to the cause of action. Finally, the Director General of the National Intelligence Service (NIS) is enjoined as the 4th Respondent for failing to exercise his statutory mandate under NISA to ensure effective mechanisms for civilian authority are in place.

The Kenya National Commission on Human Rights (KNCHR) is enjoined as an Interested Party in this Petition pursuant to its constitutional mandate that includes monitoring compliance of human rights by governmental institutions and specifically as it has an identifiable interest in the matter seeing as it has a slot in the Board envisaged under Section 66 of the NISA.

When the matter came up for hearing, the court issued directions to the effect that the application and petition be disposed of together and further directed all the parties to file and serve submissions as well as take a date for highlighting of submissions. Consequently, the Petitioner filed submissions dated 16th November 2018 on 20th November 2018. The Interested Party filed its submissions dated 20th November 2018 on 21st November 2018. Finally, the Respondents' filed their submissions dated 28th December 2018 on 7th January 2019.

When the Petitioner's and Respondent's advocates respectively highlighted their submissions on 21st January 2019, the Court further directed that the Interested Party's advocate be accorded an opportunity to be heard as they had filed their own submissions too. The Respondents' filed a preliminary objection opposing the Interested Party's participation which Objection was subsequently ventilated on and eventually dismissed.

Armed with this backstory, the Court will now address itself to the issues raised in the petition.

The Petition

The core constitutional underpinnings of this petition are Articles 1 and 2 which highlight the sovereignty of the people and the supremacy of the constitution; Article 3 that behoves every person to defend and uphold the constitution; Article 4 as it establishes Kenya as a republic founded on the national values and principles of governance expressed under Article 10 and Article 10 for the national values of the rule of law, democracy, participation of the people, equity, social justice, good governance, integrity, transparency and accountability. The Petitioner further relies on Article 29 which touches on the freedom and security of the person; Article 47 for the right to fair administrative action and Article 50(1) on the right to a fair hearing.

Article 73(1) is highlighted to the extent that it outlines the responsibilities of leadership expected of a state officer; Article 129 is alluded to for the principles of executive authority; Article 232 spells out the values and principles of public service whilst Article 238 provides for the principles of national security.

Also of direct consequence to this Petition is Article 239 which establishes national security organs including the National Intelligence Service which is provided for under Article 242(1). It is noteworthy that Article 239 further provides that these national security organs be subordinate to civilian authority.

As the Petitioner's case goes, a civilian complaints mechanism was for the first time statutorily provided for under Section 25 of the 1998 National Security Intelligence Service Act. The commission was supposed to deal with complaints from the public on any grievances against the Director General or any other staff member of the service while exercising their duties but ultimately this commission was never formed.

According to the Petitioner, the promulgation of the new constitution in 2010 brought critical changes in the security sector, including according the NIS constitutional status, authority and independence but also accountability. Thus, under Article 239(5), all security organs are subjected to civilian authority therefore civilian oversight and accountability of the NIS is a constitutional requirement and imperative.

Section 66 of the NISA establishes the Intelligence Service Complaints Board, envisioned as a civilian oversight mechanism, where anyone can lodge a complaint against the Director General and officials of the NIS. The Section provides:

> ***"There is established a Board to be known as the Intelligence Service Complaints Board which shall consist of the following members, appointed by the Cabinet Secretary on the recommendation of the Public Service Commission:***
>
> ***a) a chairperson who shall be a person who qualifies to be a judge of the High Court:***

b) four other members of whom:

i. one shall be a person nominated by the Kenya National Commission on Human Rights;

ii. one shall be an advocate of not less than seven years standing;

iii. one shall be a retired senior intelligence officer; and

iv. one shall be a person who has at least seven years' experience in public service.

The Petitioner avers that despite making overtures to the 2nd Respondent by its letter dated 15th May 2018 seeking to be furnished with relevant information as regards the establishment and operationalization of the of the National Intelligence Complaint Board pursuant to Article 35 of the Constitution of Kenya, to date no information has been forthcoming.

In the eyes of the Petitioner, their petition is grounded on the fact that whereas there is a sound legal framework geared towards ensuring oversight and accountability of the NIS, the law and provisions ensuring civilian authority is established and exercised over the NIS have not been properly and comprehensively implemented. Consequently, the argument goes, the citizens have limited recourse whenever their rights have been violated by the service members.

It is further the Petitioner's case that whereas Article 239(5) of the constitution expressly subjects the NIS as a security organ to civilian authority and whereas Section 66 of the National Intelligent Service Act establishes the Intelligence Service Complaints Board, the Respondents' have since 1998 to date failed to establish the Board. This, it is contended, offends the constitutional principle of the rule of law.

Per the Petitioner, the failure to operationalize the Board compromises the rights of citizens to fair administrative action against wrongful actions of the Director General and the members of the NIS.

Such omission, the argument goes, also runs the risk that the NIS could run without any oversight mechanism contrary to the dictates of the Constitution like its predecessor the Special Branch.

It is contended that whereas the Constitution traces transparency and accountability as national values, the Respondents' overt fettering of discretion by failure to operationalize a clear mechanism for lodging complaints against the NIS officers accorded to the public by the law, deliberately denies the public access to Justice. Further, that whilst the 2nd Respondent has a clear mandate to establish the Board on recommendation of the 3rd Respondent as prescribed by national legislation, he has failed to do so and hence is in violation of the requirements of Article 73 of the Constitution.

By the by, the Petitioner avers that it is upon this court to intervene and compel the Respondents' to perform their constitutional and statutory duty to constitute and operationalize the Board lest the public continues to suffer. That the absence of the Board impacts negatively on the ability of the public to seek redress from an autonomous institution whenever their rights have been violated or threatened by members of the National Intelligence Service.

As far as the Petitioner is concerned, the failure to establish the Board is a violation of the Article 10 principles on accountability and transparency since the activities and actions of the NIS are not subject to the oversight expected by the constitution and the law.

Reliefs Sought

It is on the basis of the averments articulated above that the Petitioner seeks from this Court the following orders and declarations:

a. A declaration be and is hereby issued that the Respondents failure, neglect or refusal to establish and operationalize the Intelligence Service Complaints Board under Section 66 of the National Intelligence Service Act is a violation of the rule of law and the constitution.

b. A declaration be and is hereby issued that the 1st, 2nd and 3rd Respondents' failure to constitute the Intelligence Service Complaints Board is unjustified, consequently denying the citizens a recourse for redress whenever their rights have been violated by the service members.

c. An Order of Mandamus do issue compelling and directing the Respondents to establish and operationalize the Intelligence Service Complaints Board within 6 months from the date of the Judgment of this Court.

d. An Order be and is hereby issued that in constituting the Intelligence Service Complaints Board, the Respondents adhere strictly to the principles of competition and merit provided for under Article 232 of the Constitution and Section 10 of the Public Service (Values and Principles) Act.

e. That the Respondents be directed to file an affidavit within 7 months of the court's order indicating the status of their compliance with orders (c) and (d) above.

f. The Respondents to bear the Petitioner's costs.

g. Any other relief that this honourable court may deem just and fair to order.

The Response

The 4th Respondent swore the affidavit in response to the Petition. In it, he avers that Section 66 of the National Intelligence Service Act outlines the mandate of the 2nd to 4th respondents herein to form the Intelligence Service Complaints Board. That under Section 66 (2) of the Act, the members of the Intelligence Service Complaints Board are appointed by the Cabinet Secretary responsible for Intelligence matters on the recommendation of the Public Service Commission. He contends that the Public Service Commission initiated formation of the Intelligence Service Complaints Board by advising the Cabinet Secretary Ministry of Interior and Co-ordination of National Government to commence the process of establishing the Board on 18th July 2018.

It is additionally contended that the 4th Respondent had also requested for the formation of the aforesaid Board through a letter dated 30th July, 2018 addressed to the Cabinet Secretary Ministry of Interior and Co-ordination of National Government. This request was further made on 27th August, 2018. Copies of letters marked "PWK 2" and "PWK 3" are evinced in attestation of this assertion.

According to the Respondents, the process of establishing the board is at an advanced stage and what is pending is the appointment of its members by the Cabinet Secretary, which is contended is expected to happen in due course.

From where they stand, the Respondents aver that they are keen to resolve the issue and are working on the process for compliance with the law and laid down procedures of Board Appointments.

In their view therefore, through the affidavit of the 4th Respondent, they have fully and duly demonstrated the steps taken to comply with the provisions of the Act and the issues raised by the Applicant through its letter seeking information dated 15th May, 2018.

According to the Respondents', they have acted in good faith and in accordance with the law and/or Constitution of Kenya and it is therefore not true as alleged by the Applicant that the respondents have blatantly refused to exercise their powers.

To them, since all the information requested by the Petitioner has been provided, both the Notice of Motion and the Petition have been overtaken by events, diluted and the cause of action no longer stands. While acceding to the jurisdiction of the Court, the Respondents'' nonetheless contend that there is an apparent inconvenience caused by the Petitioner for filing this matter in Malindi instead of Nairobi where all the Parties have ease to attend to this matter.

It is on the basis of the reasons laid out above that the Respondents' urge this Court to dismiss the Applicant's application with costs on grounds of equity and justice.

The Submissions by the Petitioner

The Petitioner, through its advocates, begins by giving an overview before setting out the brief facts of the instant petition, the alleged violations of the constitution and the applicable principles. The violations and applicable principles bear themselves out in detail in the issues articulated by the Petitioner for determination to wit:

a) Does the Respondents' failure to establish and operationalize the Intelligence Service Complaints Board violate the national values and principles under Article 10 of the constitution?

b) Does the Respondents' failure to establish and operationalize the Intelligence Service Complaints Board violate the right to fair administrative action under Article 47 as well as the right to a fair hearing under Article 50(1) of the Constitution?

c) Whether an Order of Mandamus is necessary to compel and direct the Respondents to establish and operationalize the Intelligence Service Complaints Board

d) Are the Respondents bound to adhere to merit and fair competition under Article 10, 27, and 232 of the Constitution as read with Section 10 of the Public Service (Values and Principles) Act, 2015 when constituting the Intelligence Service Complaints Board?

e) What are the appropriate reliefs in this case?

On the first issue, it is submitted that under Article 10 of the Constitution, the national values and principles of governance include rule of law, human dignity, human rights, discrimination, good governance, integrity, transparency and accountability. The Petitioner further submits that the rule of law contains two main components: the predictability of the law, which enables people to rely on it in ordering their affairs, and to plan their conduct with some confidence and security; and the coherence of the legal system as a whole which implies that one standard of law will not contradict another. This argument was pegged on the case of **Law Society of Kenya v Kenya Revenue Authority [2017] eKLR.** Further reliance was placed on **Muslims for Human Rights (MUHURI) & another v Inspector- General of Police & 5 Others, Petition No 19 of 2015.**

The petitioner submits that the powers of the NIS and the Respondents are determined by the Constitution and laws which ought to be observed strictly. It is submitted that the failure of the Respondents to constitute the Board limits the ability of citizens to rely on the law to file any complaints whatsoever regarding the actions of the National Intelligence Service as provided for in Section 66 of the NISA.

Furthermore, it is submitted, the Board once established would act as a watchdog to ensure that the National Intelligence Service acts in accordance with the law. Counsel submits that the Board is explicitly provided for under the Act. It is supposed to receive and investigate complaints against the NIS, for oversight and accountability purposes. Per the Petitioner, both individual and institutional accountability measures are necessary as Kenya aspires to be a modern, democratic country.

Turning to the second issue, on the violation of the right to fair administrative action under Article 47, the Petitioner submits that Article 47 of the Constitution as read with section 4(1) of the Fair Administrative Act guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. This right encompasses the duty to act expeditiously, fairly and reasonably. Aiding this line of argument is **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR, Civil Appeal 52 of 2014**.

The Petitioner submits that delay increases costs of administrative action and imposes additional burdens on the persons affected by administrative actions. On the other hand, expedition in administrative action is one of the requirements of fair administrative action under Article 47 as read with Section 4(1) of the Fair Administrative Action Act, 2015. Similarly, an administrative action is reviewable under section 7(2) of the FAA if there was abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law. Under Articles 232(1) (b) and (c), the values and principles of public include efficiency, responsiveness, promptness and effectiveness.

It is urged by the Petitioner that the Constitution provides that where no particular time is prescribed by the Constitution for performing an administrative action, that action must be taken without unreasonable delay and as often as occasion arises. Drawing inference from **Republic v Cabinet Secretary for Ministry of Interior & Coordination of National Government ex parte Patricia Olga Howson [2013] eKLR** it is submitted that the long running delay of 6 years in implementing the Act by the Cabinet Minister of Interior and Coordination of National Government amounts to an abdication of duty by the C.S, a violation of rights through inaction, abuse of discretion and a frustration of the purpose of the Act.

Citing **Republic v Cabinet Secretary for Internal Security ex parte Gragory Oriaro Nyauchi & 4 others [2017] eKLR**, it is submitted that this Court is empowered to interfere with the exercise of discretion where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power.

Submitting on the alleged violation of the right to fair hearing under Article 50 (1), Counsel for the Petitioner firstly submits that Article 47(3) requires Parliament to enact legislation to provide for review of administrative action by a court or if appropriate, an independent and impartial tribunal and promote efficient administration. To implement Article 47(3), Counsel contends, Parliament enacted the Fair Administrative Action Act, 2015 whose section 7(1) provides that any person aggrieved by an administrative decision may apply for review of the decision inter alia to a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

Secondly, Counsel submits, Article 50 (1) provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before an independent and impartial court, tribunal or body. Similarly, the Universal Declaration of Human Rights under its Article 10 further proclaims that everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The Petitioner submits that by dint of Article 2(5) and (6), international law forms part and parcel of the sources of law in Kenya. He goes further to quote Article 8 of the Universal Declaration of Human Rights which states that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. This Right, it is submitted, is also provided for under other various international and regional instruments such as the International Covenant on Civil and Political Rights (ICCPR) under Article 2(3); the Convention Against Torture (CAT) under Article 14 (1); the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa Charter under Article 25 as well as the General Comment No. 31 on Nature of the General Legal Obligation Imposed on States Parties to the Covenant by the Human Rights Committee where paragraph 15 explains that all States must ensure that individuals also have accessible and effective remedies to vindicate those rights.

Along the same line of argument, it is submitted that Section 66 of the Act establishes the Intelligence Service Complaints Board, whose function is primarily to hear complaints against members of the Service by anyone who is aggrieved. It therefore provides a remedy to those who are aggrieved by any action(s) of the members of the National Intelligence Service, including but not limited to persons whose rights have been violated. Submitting that a remedy must be available, effective and sufficient, Counsel directs the court to **Council of County Governors v Lake Basin Development Authority & 6 others, Petition No 280 of 2017 [2017] eKLR.**

Reiterating that the Board is a remedy that has been provided for statutorily, the Petitioner submits that it has not been implemented accordingly in contravention of Article 21 (1), Article 47 as well as Article 50. The Petitioner submits that for the wrong to be granted appropriate relief, there must be an avenue for one who is aggrieved to be heard.

The Petitioner submits that it is the responsibility of the State to ensure that all persons who have been aggrieved, through violation, have the mechanisms to seek justice and obtain redress. In support of this, Counsel cites **W .J & another v Astarikoh Henry Amkoah & 9 others, Petition No 331 of 2011 [2015] eKLR.**

The Petitioner contends that the lack of an operational Complaints Board is a violation of Articles 48 and 50 since the aggrieved do not have access to the Complaints Board and neither do they get a recourse to trial.

Referring to **Commission for the Implementation of the Constitution v The Speaker of the National Assembly, Petition 403 of 2015 [2016] eKLR** the Petitioner submits that Article 50 (1) can be invoked because the Board can be used to deliberate on issues arising from the actions of the Director General or any other member of the NIS in the exercise of their powers, including legal issues such as persons acting ultra vires or violating human rights and fundamental freedoms of a person.

In closing on this issue, it is submitted that that passing of law is not an end in itself. It must be matched by a greater effort in implementing

those laws. Operationalization of the Intelligence Service Complaints Board is one sure way of strengthening civilian accountability of NIS. The body will provide for a genuine inclusion and appreciation of civilian views in shaping security and not merely using them as a conduit for gathering information on fighting crime. The appearance to the citizens that complaints, misconduct or policy matters are addressed in a transparent and fair way is also very important in lending legitimacy to the Service.

As for the necessity of a Mandamus Order, it is submitted that Article 23 (3) of the Constitution provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including an order for judicial review under which a court in its discretion may grant an order of Mandamus. It is submitted that this order is sought to compel the 1st Respondent to rectify the procedural impropriety that is the 1st Respondent's failure to adhere to its statutory mandate to establish the Board, which is a clear violation of citizens' rights under Article 47. This failure and refusal to abide by the NISA amounts to action that is unlawful, unreasonable and unfair. There is no satisfactory reason why the Respondents' have failed to comply with the mandatory provisions of **Section 66 of the NISA**. Counsel buttresses this argument by citing **Republic v. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996.**

It is the Petitioner's submission that denying the citizens a recourse for redress whenever their rights are violated or threatened with violation by the Service members amounts to a continued violation occasioned by the Respondents' inaction in the intervening period. It is on this basis that the Petitioner implores the Court to issue the orders for mandamus sought, compelling the Respondent to establish the Complaints Board within such time as the court may define and that the Court should retain jurisdiction to ensure compliance.

As for whether the Respondents are bound to adhere to merit and fair competition under Articles 10, 27, 73(2)(a) and 232 of the Constitution as read with Section 10 of the Public Service (Values and Principles) Act, 2015 when constituting the Board, the Petitioner submits that the Respondents' are bound to comply with the aforementioned Articles as well as section 66(2) of the NIS Act. It is therefore submitted that the recruitment process alleged to be ongoing is unconstitutional and must not expend further public funds.

Citing the Respondents' assertion that the process of establishing the Board is at an advanced stage and what is pending is the appointment of its members by the Cabinet Secretary, it is submitted that no evidence has been placed before the Court either of ongoing appointments or of the Respondents' intention to comply with Section 66(2) of the Act which requires the Cabinet Secretary in the appointment of members of the Board, to comply with Articles 73(2) (a) and 232(1) (i) of the Constitution and ensure that not more than two-thirds of the members of the Board are of the same gender.

It is further submitted that contrary to Section 66(1) of the NISA that requires the members of the Board to be appointed by the 2nd Respondent on recommendation by the 3rd Respondent, no evidence has been led to show that any recommendations were ever made. Reference is made to Article 259(11) of the Constitution which provides that if a function or power conferred on a person is exercisable by the person only on the advice or recommendation of another person, the function may be performed or the power exercised only on that recommendation.

Winding up on this issue, it is submitted that as members of the Board are public officers and members of the public service within the meaning of Article 260 the Constitution, their appointment must be in line with the provisions of Article 73(2) (a) which mandates the selection of state officers to be made on the basis of personal integrity, competence and suitability. Per the Petitioner, since the Board falls within the ambit of Public Service, Section 66(2) of the NIS Act requires the Cabinet Secretary in the appointment of members of the Board, to comply with Articles 73(2) (a) and 232(1) (i) of the Constitution and ensure that not more than two-thirds of the members of the Board are of the same gender. Further, it is submitted, Section 10 of the Public Service (Values and Principles) Act, 2015 reinforces merit and fair competition in public appointments.

On the final issue of the reliefs which the Court ought to grant, Counsel cited Article 23 of the Constitution and Section 11(1) of the Fair Administrative Action Act, 2015 in support of the reliefs sought and enumerated in the Petition and expressed earlier in this judgement.

The Respondents' Submissions

On behalf of the Respondents' Ms Lutta gave a brief overview of the case from the Petitioner's and Respondents' point of view and formulated two issues for the Court's adjudication:

a) Can the Court at this stage grant the orders sought for in the Petition?

b) Who pays the costs?

Submitting on the first issue, the Respondents' position is that at this point in time it is evident that the Respondents' whose mandate is outlined under Section 66 of the NISA are not in violation of the rule of law and the constitution. According to them, the Replying Affidavit sworn by the 4th Respondent has clearly demonstrated that they have commenced the process of formation of Intelligence Service Complaints Board as laid in the Act with all the intentions to follow the procedure laid down in the Act and within provisions of the Constitution. They submit that the process has commenced and is pending completion and that at completion the names of the successful applicants/appointees will be made public. Any aggrieved person will be free to challenge.

It is further submitted that the Petitioner, though having made reference to several Articles in the Constitution, has not provided court with cogent evidence of the allegations of breach. In this regard, reliance is placed on **Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others [2014] eKLR.**

It is submitted that while the Petitioner urges the Court to take judicial notice of long history of Kenya before the 1990, this is the only fact relied upon and there is no link of these allegations to the Respondents and there are no facts forming the basis of the petition.

It is the Respondents' submission that their mandate is contained in Section 66 of the Act, the commencement date of the Act was in October, 2012 and since then there has been no evidence of any complaint by a member of the public. They further submit that the Act provides for several forums of civilian authority which the Respondents have been progressively affecting.

The Respondents' argue that while the Petitioner alleges that the Respondents are in breach of the Constitutional rights under Articles 27 and 50 of the Constitution, no evidence that the public have lacked a forum to address their complaints has been forthcoming. Indeed, they submit, the Petitioner has not provided a specific case of the complaints raised against the Respondents. It is submitted that the fundamental tenet of the rule of law is that evidence, should be the basis of any judicial decision. In this regard, reliance is placed on **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR.**

It is submitted that Section 66 of the Act does not provide for a specific timeline for the establishment of the Board. That Section 66 (2) only provides for the procedure to be followed and the Act states that in the appointment of members of the Board, the Cabinet Secretary shall comply with Articles 73 (2) (a) and 232(1)(i) of the Constitution and ensure that not more than two-thirds of the members of the Board are of the same gender.

It is also submitted that the actions of the respondents flow from statute and the intention of the legislature must first be considered. Reliance is placed on **Malindi Law Society vs. Attorney General & 4 others (2016) eKLR** for this point.

The Respondents' urge that in considering the issue of timeline, the Court ought to consider the facts of a specific case or situation as facts forming basis of an action vary. The Respondents' draw a distinction between the instant case and **Republic v Cabinet Secretary for Ministry of Interior Coordination of National Government & 2 others Ex parte Patricia Olga Howson [2013] eKLR** cited by the Petitioner, submitting that the circumstances and the nature of compliance between that case and the present case differ and the period of compliance would be distinct in each specific case. For this, reliance is placed on **Kenya Pharmaceutical Association & another v Nairobi City County and the 46 other County Governments & another [2017] eKLR**.

The Respondents further submit that due to the regular reshuffle in the Government, at the time of filing the Petition, the office holders in the named respondents were hardly 6 months in office especially cabinet Secretary. In the circumstances therefore, it is submitted that the actions of the Respondents were expedient.

It is the Respondent's submission that the Court lacks the functional and operational competence to determine the content merit of the process embarked by the Respondents at this stage. According to them, one of the core attributes of functional and operational independence is the ability of independent and competent bodies, in this case the 2nd to 4th Respondents, to have a measure of reasonable discretion to decide on governance process especially when the legislature has bestowed them with discretion in executing its constitutional and statutory mandate. Pursuing this line of defence, reliance was placed on **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [20131 eKLR; In Re the Matter of the Interim Independent Electoral Commission Sup. Ct. Application No. 2 of 2011; [2011] eKLR; Communications Commission of Kenya and 5 Others vs Royal Media Services and 5 others; Supreme Court Petitions No. 14, 14A, 14B and 14C of 2014 [2014] eKLR** and I**n the Matter of the National Land Commission 2015 eKLR.**

Counsel for the Respondents' submits that the order of mandamus cannot issue since the Court cannot compel an action that has already been commenced. Reliance is placed on **Republic vs Attorney General & another Ex-Parte Ongata Works Limited [20161 eKLR where the Odunga J cited Newton Gikaru Githiomi & Anor vs AG/Public Trustee Nairobi HCJR 472 of 2014; Charles Omanga & 8 others v Attorney General & another [2014] eKLR.**

Concluding on the issue, it was submitted that the instant Petition and Application be dismissed with no orders as to costs as the case was one made in public interest. For this, reliance was placed on **Samuel Kimuchu Gichuru another v Attorney General & 3 others [2015] eKLR and Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 others [2014] eKLR.**

The Interested Party's Submissions

KNHCR, through its advocate, was of the view that two issues required the Court's interpretation. These are:

> ***a. Whether the Respondents have a duty to establish the Intelligence Service Complaints Board;***
>
> ***b. Whether the failure to operationalize the Board compromises the rights of citizens to fair administrative action against wrongful actions of the Director General and the members of NIS;***

Mr. Nyanje submits on the first issue that the NIS is a security organ subject to civilian authority under Articles 239(1) (b) and 239(5). The Interested Party submits that the Constitution of Kenya 2010 accords the National Intelligence Service constitutional status, authority and independence but also accountability.

According to the Interested Party, Section 66 of the Act establishes the Intelligence Service Complaints Board and failure by the Respondents to establish the Board offends the constitutional principle of the rule of law. That the Respondents are clearly obligated under the Constitution of Kenya, 2010 and the Act to establish and operationalize the Intelligence Service Complaints Board failure to which they compromise the right of citizens to fair administrative action.

Addressing the second issue, it is submitted that despite the constitutional requirement of transparency and accountability, the public has been denied a mechanism for lodging complaints against the Intelligence Service officers. It is further submitted that the Respondents, as public officers, have administrative powers to set up the Board and therefore amenable to the constitution and the related laws of which they have failed in their obligation. Reference is made to Article 232 on the values and principles of public service and Article 259(1) for the principles upon which the Constitution ought to be interpreted. This point is supported by reference to **Apollo Mboya vs Attorney General**

and 2 Others [2018] eKLR.

Further reference is made by Counsel for the Interested Party to Article 73 on the responsibilities of leadership, Article 47 for the right to fair administrative action and Article 50 for the right to have any dispute that can be decided by the application of the law decided in a fair and public hearing before the appropriate forum. The National values and principles articulated under Article 10 is also cited and Counsel submits that the Court is duty bound to infuse the cited values when interpreting the constitution.

Based on the foregoing, the Interested Party draws the conclusion that the Respondents' omission to constitute the Board is unjustified, fails the constitutional test and renders the instant petition meritorious and the orders sought worthy of being allowed.

Analysis and Determination

Having fastidiously adverted to the respective positions taken by the parties herein, the evidence adduced in support of their cases and the submissions of the advocates on record- Mr. Suyianka and Ms. Nyaberi for the Petitioner, Ms. Lutta for the Respondents' and Mr. Nyanje for the Interested Party-I find the following issues fall for determination:

a. What are the principles of constitutional interpretation relevant to the instant petition?

b. Is the failure by the 2nd to 4th Respondents to institute and operationalize the National Intelligence Service Board contemplated under Article 239(5) and Section 66 of the NISA justifiable under the Constitution?

c. What reliefs, if any, should the Court grant in the circumstances

In outlining the principles of statutory interpretation, my first port of call is **Article 10** as it establishes that the national values and principles are binding to all and ought to be considered when enacting, applying and interpreting any law. These principles, especially as they relate to the instant Petition include the rule of law, human dignity, human rights, non-discrimination, good governance, integrity, transparency and accountability.

Article 165(3)(d) makes it clear that that power extends well beyond the Bill of Rights when it provides that the High Court has jurisdiction to hear any matter relating to any question with respect to interpretation of the Constitution:

> ***"including the determination of (i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention, of this Constitution; (iii) any matter relating . . . to the constitutional relationship between the levels of government."***

These provisions make clear that Kenyan courts have a far-reaching constitutional mandate to ensure the rule of law in the governance of the country.

Article 259 lays the foundation for interpretation of the constitution by providing that:

> ***"(1) This Constitution shall be interpreted in a manner that—***
>
> ***(a) Promotes its purposes, values and principles;***
>
> ***(b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;***
>
> ***(c) Permits the development of the law; and***
>
> ***(d) Contributes to good governance."***

The Supreme Court, addressing the issue of constitutional interpretation **In the Matter of Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 [2011] eKLR** had this to say:

> ***"…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."***

In the case of **Ndyanabo vs. Attorney General [2001] 2 EA 485** the Tanzania Court of Appeal held:-

> ***"We propose to allude to general provisions governing constitutional interpretation. These principles may, in the interest of brevity, be stated as follows; first, the Constitution of the Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must, therefore, endevour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. As Mr. Justice E.O Ayoola, former Chief Justice of Gambia stated….. "A timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the Constitution a stale and sterile document." Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our democracy not only functions but grows, and the will and dominant aspirations of the people prevail. Restrictions of fundamental rights must strictly be construed."***

Drawing inspiration from a retinue of authorities, Honourable Mativo J. in **Apollo v Attorney General & 2 others Petition No. 472 of 2017 [2018] eKLR,** described the principles on interpretation in the following manner:

> ***"34. It is useful to restate the well-known general principles relating to constitutional interpretation, which are, in any event, incontrovertible. The first principle is that the Constitution of a nation is not to be interpreted like an ordinary statute. In his characteristic eloquence, the late Mahomed AJ described the Constitution as "a mirror reflecting the national soul, the identification of the ideals 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. In keeping with the requirement to allow the constitutional spirit and tenor to permeate, the Constitution must not be interpreted in 'a narrow, mechanistic, rigid and artificial' manner. Instead, constitutional provisions are to be 'broadly, liberally and purposively' interpreted so as to avoid what has been described as the 'austerity of tabulated legalism.' It is also true to say that situations may arise where the generous and purposive interpretations do not coincide. In such instances, it was held that it may be necessary for the generous to yield to the purposive. Secondly, in interpreting constitutional rights, close scrutiny should be given to the language of the Constitution itself in ascertaining the underlying meaning and purpose of the provision in question." (See National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24, Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (Ferreira v Levin) at para 26., S v Acheson 1991 NR 1(HC) at 10A-B, Government of the Republic of Namibia v Cultura 2000 1993 NR328 (SC) at 340A-C., The South African Constitutional Court cases of S v Makwanyane 1995 (3) SA 391 (CC) at Para [9] footnote 8; Soobramoney v Minister of Health (KwaZulu-Natal) 1998 (1) SA 765 (CC) at para 17., Kauesa v Minister of Home Affairs and Others 1995 NR 175 (SC) at 183J-184B; S v Zemburuka (2) 2003 NR 200 (HC) at 20E-H; Tlhoro v Minister of Home Affairs 2008 (1) NR 97 (HC) at116H-I; Schroeder and Another v Solomon and 48 Others 2009 (1) NR 1 (SC) at 6J-7A; Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia 2009 (2) NR 596 (SC) at 269B-C. and Minister of Defence v Mwandinghi 1993 NR 63 (SC); S v Heidenreich 1998 NR 229 (HC) at 234.")***

As far as the interpretation of statutes go, the Court ought to guard itself against an interpretation that would result in an absurdity or unworkable result. It must also take care not to give an irrational interpretation nor should it acquiesce to an interpretation that goes against the public interest. In **Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others [2017] eKLR** it is stated:

> ***"There are important principles which apply to the construction of statues such as:- (a) presumption against "absurdity" – meaning that a court should avoid a construction that produces an absurd result;(b) the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces "unworkable or impracticable" result; (c) 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 (d) the presumption against artificial result – meaning that a court should find against a construction that produces "artificial" result and, lastly,(e) 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."***

Having recited the guiding principles, I am comfortable enough to proceed to the Petitioner's gravamen. The Court has been tasked with addressing whether the failure by the 2nd to 4th Respondents to institute and operationalize the National Intelligence Service Board as contemplated under Article 239(5) and Section 66 of the NISA is justifiable under the Constitution. To get to the bottom of this I must appreciate, as a springboard into the discussion, the import of **Article 239 (1)** which provides for the national security organs including for the purposes of this petition, sub article which creates the National Intelligence Service. The Service has, according to the Constitution, the primary objective of promoting and guaranteeing national security in accordance with the principles articulated in Article 238(2); of note among them being that national security is subject to the authority of this Constitution and Parliament; and that it shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms.

Getting to the heart of things, the Petitioner's issue is a rather straightforward one. The question is asked, why, in spite of the clear provisions of Article 239(5) as effectuated through Section 66 of the NISA, there isn't established and operationalized an Intelligence Service Complaints Board. The buck, it is charged by the Petitioner, stops at the doorstep of the Respondents. From where the Petitioner sits, their failure to constitute the Board is tantamount to a violation of the Constitution on a number of levels. The gist of it all being that by the dereliction of their unique roles in the creation of the Board, the 2nd, 3rd and 4th Respondents have violated, not least the legitimate expectation of the general public to a functional civilian authority to oversee the operations of a key national security organ; but also the rights to fair administrative action, access to justice and the fair trial rights elaborated under Articles 47, 48 and 50 respectively.

In their retort, the Respondents' collectively aver that as evinced by the correspondence between the 2nd, 3rd and 4th Respondents on the diverse dates of 18th July 2018, 30th July 2018 and 27th August 2018, the process of establishing the board is at an advanced stage and what

is pending is the appointment of its members by the Cabinet Secretary, which is contended is expected to happen in due course. The Respondents maintain their keenness for a resolution to this issue and aver that they are working on the process for compliance with the law and laid down procedures of Board Appointments. They are confident that in the circumstances they have fully and duly demonstrated the steps taken to comply with the provisions of the Act and the issues raised by the Applicant through its letter seeking information dated 15th May, 2018. It is insisted that the Respondents' actions exhibit their good faith and it is therefore not true as alleged by the Petitioner that the Respondents have blatantly refused to exercise their powers.

Article 239(5) of the Constitution could not have been more explicit in its subordination of all the national security organs to civilian authority. In pursuit of the noble objective of allowing the public to have a hand in overseeing the operations of a powerful national security organ as intended by Article 239(5), Section 66 of NISA, the basis of this petition, provides:

"There is established a Board to be known as the Intelligence Service Complaints Board which shall consist of the following members, appointed by the Cabinet Secretary on the recommendation of the Public Service Commission:

a. a chairperson who shall be a person who qualifies to be a judge of the High Court:

b. four other members of whom:

i. one shall be a person nominated by the Kenya National Commission on Human Rights;

ii. one shall be an advocate of not less than seven years standing;

iii. one shall be a retired senior intelligence officer; and

iv. one shall be a person who has at least seven years' experience in public service.

The Board is envisioned as a crucial oversight organ with quasi-judicial powers and is meant to keep the NIS accountable in line with the expectations of Article 10. Its functions are outlined under Section 67 of the Act and for completeness replicated below:

"67. Powers and functions of the Board

(1) The functions of the Board shall be—

(a) to receive and inquire into complaints against the Service made by any person aggrieved by anything done by the Director-General or any member of the Service in the exercise of the powers or the performance of the functions of the Service under this Act;

(b) to inquire into any other matter referred to it by the President or the Cabinet Secretary under this Act; and

(c) to make its recommendation thereon to the President or the Cabinet Secretary.

(2) Subject to the provisions of subsection (4) and for the purpose of investigating any complaint under this Act, the Board shall have the powers of the High Court—

(a) to summon any witness;

(b) to administer oaths or affirmations; and

(c) to order the production of any records or documents relevant to the investigation.

(3) No person shall be compellable under any such summons to produce any document which he or she could not be compelled to produce at the trial of a suit.

(4) In the discharge of its functions under this Act, the Board shall have regard to the requirements of national security and for that purpose shall—

(a) subject to subsection (1)(b), consult the Director-General and the Council; and (b) take all the necessary precautions to prevent the disclosure of—

(i) any information which in its opinion may not be disclosed in the course of, or in relation to any inquiry; and

(ii) the source of such information.

(5) The Board may hear separately and in private, such evidence as may be tendered by a complainant and the Director-General or any other member of the Service in relation to a complaint.

(6) If during the inquiry, the Board receives evidence of a breach of duty or misconduct against any member of the Service, it shall notify the Cabinet Secretary and the Council or the Director-General, as the case may be, and subject to the provisions of this Act, recommend appropriate disciplinary action against such member.

(7) At the end of the inquiry, the Board shall inform the complainant, in writing, of its findings and shall make a report of its findings and recommendations to the Cabinet secretary and the Council.

(8) The Cabinet Secretary shall make regulations, prescribing the manner in which the Board shall discharge its functions under this Part including the procedure for proceedings of the Board, but subject thereto, the Board shall regulate its own procedure."

As is evident from the Section above, the Board ought to play the key role of receiving and inquiring into complaints against the Service made by any person aggrieved by anything done by the Director-General or any member of the Service in the exercise of the powers or the performance of the functions of the Service under the Act. This is a key role that ensures the NIS is kept accountable and transparent.

The absence of the Board, it is contended, is an affront to the right to fair administrative action guaranteed under Article 47. I am inclined to agree with this position. The Article provides:

"Article 47

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights"

The Fair Administrative Action Act at Section **2** defines an **"administrative action"** to include—the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

Article 23 (3) provides the remedies the Court can grant in cases for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. It also provides that in proceedings brought under Article 22, the court can grant appropriate relief including a declaration of rights, an injunction, a conservatory order, invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the bill of rights, an order of compensation and an order of Judicial Review.

In **Joseph Mbalu Mutava v Attorney General & another [2014] eKLR** reference is made to **Judicial Review of Administrative Action, Third Edition** by S.A De Smith, where at page 60 it is stated that the term administrative refers to broad areas of governmental activity in which the repositories of power may exercise every class of statutory function, and that an administrative act cannot be exactly defined but includes the adoption of a policy, the making and issue of a specific direction and the application of a general rule to a particular case in accordance with the requirements of policy, expediency or administrative practice.

Fair administrative action has a complimentary appearance at **Section 33 of the South African Constitution** hence when tasked with rendering a definition on what entails just administrative action, the Constitutional Court of South Africa in its decision in **President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1,** at paragraphs **135 -136** held as follows:

"Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades…"

In the **Joseph Mbalu Mutava case,** the court makes further reference to **President of the Republic of South Africa and Others [supra] where** the test for determining whether conduct constitutes "administrative action" is described as not the question whether the action concerned is performed by a member of the executive arm of government but rather the nature of the power he or she is exercising. In the present case the constitutional powers of the empower them to constitute the Board for civilian oversight on the NIS. An action they have failed to undertake. As a result, the situation that prevails is one where the public has no recourse to tackle the excesses of the members of the NIS in their performance of administrative action. I agree with the Petitioner and therefore hold, that the inaction of the 2nd, 3rd and 4th Respondents is a violation of Article 47 of the Constitution.

The Petitioner contends, in furtherance of the argument that Article 47 has been violated, that the lack of an operational Complaints Board is a violation of Articles 48 and 50(1) since the aggrieved do not have access to the Complaints Board and neither do they get a recourse to trial. The Court is referred to **Commission for the Implementation of the Constitution v The Speaker of the National Assembly, Petition 403 of 2015 [2016] eKLR** for the submission that Article 50 (1) can be invoked because the Board can be used to deliberate on issues arising from the actions of the Director General or any other member of the NIS in the exercise of their powers, including legal issues such as persons acting ultra vires or violating human rights and fundamental freedoms of a person. The Court of Appeal in ***Judicial Service***

Commission vs Mbalu Mutava[supra] and ***Judicial Service Commission vs Gladys Boss Shollei & Another [2014] eKLR*** held that article 50 (1) of the constitution relates to proceedings in courts and other judicial tribunals. As such the failure to constitute the Board, which would function as a quasi-judicial tribunal, is in violation of Article 50(1).

Turning to access to justice as contemplated under the Constitution, the totality of the Respondents' defence has so far been that the process of constituting the board has not been given a specific timeline within which it ought to have been completed. It is contended that never the less, the process has commenced, is at an advanced stage and ought not to be stopped by the court. The Respondents charge that the CS in charge of the Ministry tasked with the constitution of the Board has not been long in office, that the delay in setting up the board is not inordinate and even that the Respondents ought to be given a wide berth to exercise their discretion in the execution of their mandates hence the Court ought not to intervene in the manner they do this.

These explanations, respectfully, amount to mere excuses my view. It cannot be said that a delay of six years since the commencement of the NISA is not inordinate. That the Constitution is not explicit is its timelines for the requirement that there be established a civilian authority to oversee the workings of the NIS is not far from being a compelling excuse for the Respondents to be resting on their laurels. As per Article 259 (8), where the Constitution has not prescribed a particular time for performing a required act, the act shall be done without unreasonable delay. Six years down the line since the Act came into being, the Board has still not been operationalized. It took the filing of the instant petition to stir some movement in the right direction. This cannot by any stretch of imagination be construed to be keeping in tandem with the constitutional dictates as regards timelines. I find that this turn of events is an outright denial of the general public's right to access to justice.

The Court would not have been inclined to intervene had the Respondents simply done what the law needs them to, they cannot now turn around and claim interference with their mandate. Whatever processes the Respondents have intimated to have been ongoing in as far as the constitution of the Board goes have so far amounted to naught.

Finally, aside from being in violation of the Constitution, the failure to constitute the Board goes against the principle of legitimate expectation. It was developed in ***re Westminster City Council,*** [1986] A.C. 668 at 692(Lord Bridge) as:

> *"…the courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation".*

The principle sees backing in the Kenyan context in the Supreme Court decision in **Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others [2014] eKLR** where it is purported to arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation. The Court further recites its emergent principles to be that *there must be an express, clear and unambiguous promise given by a public authority; the expectation itself must be reasonable; the representation must be one which it was competent and lawful for the decision-maker to make; and there cannot be a legitimate expectation against clear provisions of the law or the Constitution.*

The public has a legitimate expectation that as the Constitution ordains, it would be able to superintend the powers of the National Intelligence Service which see it at the centre of our country's security intelligence and counter intelligence and ought to work to enhance national security in accordance with the Constitution. Acting in accordance with the Constitution and Section 66 of the NISA behoves the Respondents to take all the necessary actions to ensure that transparency and accountability of an organisation of the magnitude of the NIS is put on the forefront. Demonstrably, this has not been the case, accountability seems to come as an afterthought to the Respondents. this failure to meet the expectation must be remedied. It matters not, as the Respondents have purported, that there has not been a single complainant who has come forward alleging a lack of an opportunity for redress because of the non-existence of the Board. All that matters, is that it is a constitutional requirement that the NIS be subject to civilian authority, the public has a legitimate expectation of this, yet as of yet, the constitution of the Board is as far as the evidence herein suggests, in limbo.

As I conclude therefore, I take the stern but well informed view that on the whole, the instant Petition is unnecessary. What is clear to me is that this is yet another instance where a public bodies, though properly seized of their mandate, have without any tangible evidence or plausible explanation, shirked in the performance of their duties to the extent that they have to be dragged to Court and compelled to act as they ordinarily ought to have.

I am of this persuasion because in a matter as cut and dry as this, nothing could have been easier that for the Respondents to demonstrate, through their conduct, of their willingness to establish the Board. Surely, if they claim to be eager to have the Board constituted, approaching the Court with a proposal to be allowed for a certain time within which they would have complied with the law should not have been so hard. While I in no way seek to usurp their mandate by directing how they ought to operate, I find that for a Respondent that has insisted on being in the advanced stages of operationalizing the Board, from the time the Petition was filed up, through the length and breadth of the proceedings culminating in this judgement, little by way of evidence has been adduced in support of their assertions.

What I have instead in a set of events that paint a different picture. While the Respondents' would have the Court believe that they are desirous of having a functional complaints board at the NIS, they readily admit that the process commenced on 18th July 2018 with further deliberations being made through the correspondence dated 30th July 2018 as well as 27th August, 2018. It is not lost on this court that all these dates fall after the date of the filing of the instant Petition. In the letter dated 18th July 2018, addressed to the 2nd Respondent by the 3rd Respondent, it is explicitly admitted that the CS ought to commence the constitution of the Board to avoid the costs of the instant Petition. While the letters dated 30th July 2018 and 27th August, 2018 purport to show that indeed the process has commenced, my deduction is that they are merely but a thin veneer put up by the Respondents, after being compelled no less, in an attempt to put on a show that there is indeed an ongoing process for constituting the Board. This Court is not convinced in the least. Save for these letters, the Respondents' have nothing else to show for their apparent efforts to constitute the Board.

In light of the foregoing, the inescapable conclusion is that the 2nd, 3rd and 4th Respondents have very clearly abdicated their duty to the public to have a functional forum that can handle complaints against the NIS. They have failed the constitutional tests of integrity, transparency and accountability that Article 10 boldly speaks of and guarantees and have by their inaction run roughshod over the right to fair administrative action, access to justice as well as the guarantee of a fair trial. It is my finding therefore that this Court must intervene and assist the Respondents' to realign their priorities in conformity with Article 239(5) and Section 66 of the NISA.

As to what reliefs the Court ought to grant, apart from the declarations sought by the Petitioner, they have also asked that the Respondents be compelled to perform their respective duties. To this end, they pray for a Mandamus Order to remove from this Court to direct the Respondents to establish the Board. Article 23(3)(f) provides judicial review as one of the remedies available in an instance such as this one. The position of judicial review under the Constitution of Kenya, 2010 is now settled. When previously prerogative writs flowed from common law principles, they now emanate directly from the Constitution itself as the common law principles have now been subsumed by the Constitution and entrenched through Article 47. In **Ernst & Young LLP v Capital Markets Authority & another [2017] eKLR** it is confirmed that indeed:

> *"Presently, Article 165(6) gives the High Court the powers of judicial review over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. Judicial review is no longer a common law prerogative directed purely at public bodies to enforce the will of Parliament, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The judicial review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution."*

The Court of Appeal in **Kenya National Examinations Council vs. Republic** *Ex parte* **Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** speaks on Mandamus orders as below:

> ***"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way… These principles mean that an order of mandamus compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done".***

Flowing from the above, it is this Court's determination that the Petition dated 14th June 2018 succeeds and the following Orders commend themselves:

> **a. A declaration be and is hereby issued that the Respondents failure, neglect or refusal to establish and operationalize the Intelligence Service Complaints Board under Section 66 of the National Intelligence Service Act is a violation of Article 10 (2), Article 47, Article 48 and Article 50(1) of the Constitution of Kenya, 2010**
>
> **b. A declaration be and is hereby issued that the 1st, 2nd and 3rd Respondents' failure to constitute the Intelligence Service Complaints Board is unjustified, consequently denying the citizens a recourse for redress whenever their rights have been violated by the service members.**
>
> **c. An Order of Mandamus does hereby remove from this court to compel and direct the 2nd, 3rd and 4th Respondents to establish and operationalize the Intelligence Service Complaints Board, in strict adherence with the principles provided for under Article 232 of the Constitution and Section 10 of the Public Service (Values and Principles) Act within 180 days from the date of the Judgment of this Court and consequently file an affidavit indicating the status of their compliance.**
>
> **d. The Respondents' shall bear the Petitioner's costs.**

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF DECEMBER 2019

……

R NYAKUNDI

JUDGE

In the presence of:

1. Atiang for the interested party