



Katiba Institute v Attorney General & 2 others; Judicial Service Commission & 6 others (Interested Parties) (Petition 84 of 2018) [2018] KEHC 8889 (KLR) (Constitutional and Human Rights) (6 July 2018) (Judgment)

Katiba Institute v Attorney General & 6 others [2018] eKLR

Neutral citation: [2018] KEHC 8889 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 84 OF 2018

EC MWITA, J

JULY 6, 2018

BETWEEN

KATIBA INSTITUTE PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

PUBLIC SERVICE COMMISSION 2ND RESPONDENT

NATIONAL ASSEMBLY 3RD RESPONDENT

AND

JUDICIAL SERVICE COMMISSION INTERESTED PARTY

PATRICK GICHOHI INTERESTED PARTY

OLIVE MUGENDA INTERESTED PARTY

FELIX KOSKEI INTERESTED PARTY

GEORGE LUKOYE INTERESTED PARTY

KENYA HUMAN RIGHTS COMMISSION INTERESTED PARTY

AFRICA CENTRE FOR OPEN GOVERNANCE INTERESTED PARTY

Section 15(2) of the Judicial Service Act is not unconstitutional for failing to provide that nominations and appointment of members to the JSC would have to be done in an open, competitive and transparent process.

Reported by Beryl A Ikamari



Constitutional Law-interpretation of constitutional provisions-principles applicable to constitutional interpretation-the proper approach to constitutional interpretation-Constitution of Kenya 2010, article 259(1).

Constitutional Law-constitutional commission-Judicial Service Commission (JSC)-nomination and appointment of members to serve in the JSC-nomination of a person to represent the Public Service Commission in the JSC by the Public Service Commission and nomination of a woman and a man by the President to represent the public in the JSC-whether the process of undertaking such nominations and appointments would have to be competitive, open and transparent-Constitution of Kenya 2010, articles 171(2)(g), 171(2)(h), 250 & 248(1).

Statutes-constitutionality of statutory provisions-constitutionality of section 15(2)(a) of the Judicial Service Act-whether section 15(2)(a) of the Judicial Service Act was unconstitutional on grounds of not providing for the manner in which nominations and appointment of members to the JSC should be done and not providing that the nominations and appointments should be done in a competitive, open and transparent manner-Constitution of Kenya 2010, article 171(2); Judicial Service Act, No 1 of 2011, section 15(2)(a).

Brief facts

On February 13, 2018, the President nominated three persons as Commissioners to the Judicial Service Commission (JSC) and their names were forwarded to the National Assembly for approval. The 2nd Interested Party was nominated as a representative of the Public Service Commission pursuant to article 171(2)(g) of the Constitution. The 3rd and 4th Interested Parties were nominated to represent the public under article 171(2)(h) of the Constitution.

The Petitioner contended that the identification and nomination of the 2nd, 3rd and 4th Interested Parties was bereft of fair competition or merit contrary to article 232(1)(g) of the Constitution and was done without public participation. The Petitioner also stated that it was the role of the Public Service Commission and not the President to nominate the 2nd Interested Party.

The Petitioner challenged the constitutional validity section 15(2) of the Judicial Service Act, 2011, for failing to provide for the manner of identification and qualifications for appointment of the persons contemplated under article 171(2)(g) and 171(2)(h) of the Constitution. It argued that the impugned appointments negatively impacted on judicial independence and the proper functioning of the Judicial Service Commission.

Issues

- i. What were the principles applicable to constitutional interpretation?
- ii. Whether the 2nd, 3rd and 4th Interested Parties were appointed and approved in accordance with the Constitution and the law.
- iii. Whether section 15(2) of the Judicial Service Act, which dealt with the nomination of members to the JSC, was unconstitutional for failing to provide for the nominations to be done in an open, transparent and competitive process.

Held

1. Article 259(1) of the Constitution provided that the Constitution shall be interpreted in a manner that promoted its purposes, values and principles, advanced the rule of law, human rights and fundamental freedoms in the Bill of Rights, permitted the development of the law and contributed to good governance. The Constitution should not be given a narrow or simplistic interpretation.
2. The Constitution, as a living instrument should not be given a rigged or artificial interpretation to avoid distorting the spirit, ideals and aspirations of the people. A Constitution should also be interpreted in a broad and flexible manner in order to achieve its purposes and principles.
3. Although the Constitution had several provisions, it was one indivisible document that had to be given a holistic interpretation, reading one provision of the Constitution alongside others so that provisions would be read as supporting and not destroying one another.
4. Article 171(2)(g) required the Public Service Commission to nominate a representative to JSC. Although there were allegations that the 2nd Interested Party was nominated by the President and not the Public Service Commission, evidence from the Public Service Commission (PSC) showed that he



- was nominated through internal meetings and a resolution. They then forwarded the 2nd Interested Party's name to the President and thereafter the National Assembly for approval. Therefore, the 2nd Interested Party was nominated by the Public Service Commission.
5. Article 171(2)(g) of the Constitution did not require competition as suggested by the Petitioner. The article was self- executing and had to be understood as such.
 6. After the Public Service Commission nominated him, the 2nd Interested Party's name was forwarded to the office of the President as required under section 15(2)(a) of the Judicial Service Act. Under article 171(2) of the Constitution, there was no requirement for the nominee of the Public Service Commission to the JSC to be approved by the National Assembly. However the approval of the National Assembly was required for the one man and one woman, not being lawyers, appointed by the President to represent the public.
 7. Article 250(1) of the Constitution provided that each commission shall consist of at least three but not more than nine members, the Chairperson, members of the Commission and holders of independent offices shall be identified and recommended for appointment as prescribed by national legislation, approved by the National Assembly and appointed by the President. To be appointed, one had to have the qualifications specified in the Constitution and national legislation.
 8. Article 250 of the Constitution was a general provision dealing with Commissions and independent offices generally. It was applicable unless the Constitution provided otherwise. A reading of article 248(1) of the Constitution indicated that article 171 of the Constitution was an exception to article 250 and, therefore, the stated article 171 applied exclusively to the appointment of the 2nd Interested Party.
 9. Article 171(2)(h) of the Constitution gave the President discretion to nominate a woman and a man who were not lawyers, to represent the public subject to the approval of the National Assembly. The provision did not place conditions on how the appointment was to be done.
 10. The people, and by extension the framers of the Constitution, expected the President to act in good faith and in the best interest of the public when making appointments; to consider merit and national values and principles including integrity, national diversity and above all suitability to serve in JSC. Open and competitive nomination was not a requirement under article 171(2)(h) of the Constitution.
 11. The National Assembly had a constitutional obligation to ensure that there was public participation in the case of the appointment of the woman and the man who were to represent the public. The relevant Committee of the National Assembly invited public views on the two Presidential nominees. The National Assembly not only facilitated but also conducted public participation during the approval process of the 3rd and 4th Interested Parties.
 12. The integrity issue raised against the 4th Interested Party was that he was a politician who should not serve as a member of the JSC. There was evidence that the 4th Interested Party served as a Cabinet Secretary but there was no evidence that he was a politician. Without evidence, it was difficult for the Court to conclude that the 4th Interested Party was a politician who should not serve in the JSC.
 13. Against the appointment of the 3rd Interested Party three memoranda were received. Only one was accepted as the other two were rejected for failure to comply with procedural requirements. The accepted memorandum made allegations against the 3rd Interested Party relating to nepotism, tribalism, mismanagement of resources and the fact that there were a number of suits in court.
 14. In relation to her work and actions while working as Vice Chancellor of Kenyatta University, the 3rd Interested Party was investigated by the EACC and absolved from blame. It was not for the Court to consider the issue of the 3rd Interested Party's integrity; the National Assembly considered it and cleared her. The mandate of the Court was to check and be satisfied that the National Assembly acted in accordance with the Constitution and the law, but not to substitute the decision of the National Assembly with its own. The National Assembly did not fail to comply with the Constitution when approving the 3rd Interested Party.



15. Where a statute or statutory provision was challenged on grounds of being inconsistent with the Constitution, the statute or the statutory provision concerned would be laid alongside the article of the Constitution said to be violated and thereafter the Court would determine whether indeed there was inconsistency. The Court would also consider whether the purpose of enacting the statute or the effect of implementing the statute was unconstitutional. That could lead to a declaration of constitutional invalidity.
16. Section 15(2) of the Judicial Service Act had its constitutionality challenged on grounds that it failed to provide for open, transparent, and merit based nomination of members to the Judicial Service Commission. Article 171(2) (g) of the Constitution required the Public Service Commission to nominate its representative to JSC but it did not provide for how that should be done. Similarly, the Judicial Service Act was silent on the procedure for identifying the nominee. The nominating body was free to use its internal mechanism or process to arrive at its nominee.
17. Article 10 of the Constitution provided for transparency and accountability in public affairs as well as public participation in public appointments. However, not in every public appointment required open recruitment. In the case of the person contemplated under article 171(2)(g) of the Constitution, the Constitution gave the mandate to the Public Service Commission to nominate or designate a person to represent it in JSC. The Constitution left the discretion to the Public Service Commission to decide on whom to nominate. A reading of article 171(2)(g) and section 15(2) of the Judicial Service Act, did not show any inconsistency in so far as nomination of its representative to JSC was concerned.
18. Nominations by the President under article 171(2)(h) were discretionary and the Court could only interfere where the discretion was not exercised properly. There was no constitutional inconsistency based on the fact that section 15(2) of the Judicial Service Act failed to provide for an open and transparent manner of appointing members to represent the public in the JSC.

Petition partly allowed.

Orders

1. *A declaration was issued to the effect that there was no requirement for approval of the 2nd Interested Party, the nominee of Public Service Commission under article 171(2)(g) of the Constitution; and the approval by the National Assembly made in that regard was of no legal effect.*
2. *The rest of the petition was, however, dismissed with no order as to costs.*

Citations

East Africa

1. *British American Tobacco (k) Ltd v CS Ministry of Health & 4 others* Petition No 143 of 2015 – (Followed)
2. *Commission of Implementation of the Constitution v Parliament of Kenya & 5 others* Petition No 454 of 2012- (Mentioned)
3. *Commission of Implementation of the Constitution v Parliament of Kenya & 5 others* Petition No 263 of 2013 – (Cited)
4. *Community Advocacy Awareness Trust and 8 others v Attorney General* Petition No 243 of 2011 – (Mentioned)
5. *Consumer Federation of Kenya (COFEK) v Public Service Commission* Petition 263 of 2013 – (Followed)
6. *In the Matter of Interim Independent Electoral and Boundaries Commission* Constitutional Application No 2 of 2011 – (Explained)
7. *Institute of Social Accountability & another v National Assembly & 4 others* Petition 71 of 2013- (Mentioned)



8. *International Centre for Policy and Conflict v Uhuru Muigai Kenyatta & others* Petition No 552,554,573 & 579 of 2012 (Consolidated)– (Mentioned)
9. *Judicial Service Commission v Speaker of the National Assembly & 8 others* Petition No 518 of 2013- (Followed)
10. *Kamuru, Marilyn Muthomi & 2 others v Attorney General & another* Petition No 566 of 2012- (Mentioned)
11. *Kenya Youth Parliament & 2 others v Attorney General & another* Constitutional [2012] 1 KLR 677- (Followed)
12. *Mate, Justus Kariuki & another v Martin Nyaga Wambora* Petition No 32 of 2014– (Followed)
13. *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012 – (Followed)
14. *Nairobi Metropolitan PSV Sacco Union & 25 others v County Government of Nairobi & 3 others*-Petition No 486 of 2013 – (Mentioned)
15. *Njoya & 6 others v Attorney General & another* Miscellaneous Civil Application No 82 of 2004 (Os) – (Followed)
16. *Olum and another v Attorney General* [2002] 2 EA- (Followed)
17. *Paul Ssemogerere and others v The Attorney General* (Constitutional Appeal No 1 of 2002) [2004] 10 UGSC – (Followed)
18. *Raila Amolo Odinga & 2 others v Independent Electoral and Boundaries Commission & 3 others* Petition No 5, 4 & 3 of 2013(Consolidated) – (Mentioned)
19. *Re the Matter of Kenya National Human Rights Commission* Advisory Opinion Ref No1 of 2012 - (Followed)
20. *Republic v Attorney General & 3 others ex parte Tom Odoyo Oloo* Judicial Review Application No 196 of 2015– (Mentioned)
21. *Tinyefuze v Attorney General of Uganda* Constitutional Petition No 1 of 1996 [1997]3 UGCC – (Followed)
22. *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* Civil Application No 29 of 2014- (Mentioned)
23. *Waruathe, Samuel Thinguri & 2 others v Kiambu County Government & 2 others* Judicial Review Miscellaneous Application No122 of 2014– (Followed)

South Africa

1. *Doctors for Life International v Speaker of the National Assembly & others* (CCT/12/05) [2006] ZACC 1; 2006(12) BCLR 1399 (CC)- (Followed)
2. *Land Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of Provinces and others* [20016] ZAACC22 – (Followed)
3. *Minister for Health for Health v New Clicks (PTY) Ltd* (CCT 59/2004) [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 - (Mentioned)
4. *State v Acheson* 1991 20 SA SOS – (Followed)
5. *The Government of Republic of Namibia v Cultura 2000 & another* (SA 2/92) [1993] NASC 1; 1994 (1)SA 407 (NASC) (15 October 1993) – (Followed)

Hong Kong

1. *Ng Ka Ling & another v The Director of Immigration* (1999) 1 HKLRD 315 – (Followed)

India

1. *Centre for IPL & another v Union of India & another* Petition (c) No 348 of 2010 – (Explained)



Canada

1. *Schachter v Canada* [1992] 2 SCR 679 – (Explained)
2. *Delwin Vrend v Alberta* [1985] ISCR 493 – (Explained)

United States of America

1. *Grayned v City of Rockford*, 408 U.S 104 (1972) – (Explained)
2. *US v Butler*, 297 US I [1936]-(Followed)

United Kingdom

1. *Lovell Romain v The Police Service Commission* [2014] UKPC 32 – (Explained)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 1,2, 10(2)(a); 47, 94(6); 73(2); 118;124(4);131; 156; 159;160(1);161 171(1) (2) (b) (c) (d) (f) (h) (g); 232(1) (g); 234(2) (c); 248- 254; 249(1); 250(2) (a)(b) (c); 251;259(1) 165(3) (d) (ii);Chapter 6; Chapter 15 – (Interpreted)
2. Access to Information Act,2016 (Act No 31 of 2016) section 9(1) – (Interpreted)
3. Fair Administrative Action Act, 2015 (Act No 4 of 2015) section 7(2) (b) –(Interpreted)
4. Judicial Service Act, 2011 (Act No 1 of 2011) sections 15(2); 17 – (Interpreted)
5. Public Appointments (Parliamentary Approval) Act 2011 (Act No 33 of 2011) sections 3, 5, 6(1) (3); 7 – (Interpreted)
6. Public Service Commission Act 2017 (Act No 10 of 2017) sections 14(1); 46
7. Public Service Commission Regulations, 2005 Repealed (Public Service Commission Act ,cap 185 Sub Leg) regulation 3 – (Interpreted)

Texts & Journals

1. Angus Stevenson, A., Waite, M., (Eds) (2011) *Concise Oxford English Dictionary* London: Oxford University Press; 12th Edn
2. Bondansky., D et al (Eds) (2008) *The Oxford Hand book of International Environmental Law* London: Oxford University Press
3. Garner , BA., (Ed) (2009) *Black’s Law Dictionary* St Paul Minnesota: West Group 9th Edn
4. Mark., E (Ed) (1994) “*A bridge to where*” *Introducing the Interim Bill of Rights*” AHRLJ Volume 13 No 1 2013

JUDGMENT

Introduction

1. In 2010, the people of Kenya adopted a Constitution that significantly changed governance structure of the country. The 2010 Constitution established constitutional commissions and in some instances, provided for the manner of identification and appointment of commissioners while in others, it left identification and qualification to national legislations. One of the constitutional commissions established by the Constitution is the Judicial Service Commission, JSC, established under Article 171(1) of the Constitution.
2. On 13th February 2018, the President nominated Patrick Gichohi, Olive Mugenda and Felix Koskei, the 2nd, 3rd and 4th interested parties, Commissioners to JSC. The 1st interested party herein was appointed pursuant to Article 171(2) (g) of the Constitution to represent the Public service Commission while the 3rd and 4th interested parties were appointed pursuant to Article 171(2) (h) to represent the public.



Their names were forwarded to the National Assembly, the 3rd respondent, for approval before formal appointment. The petitioner thought the manner of these appointments was flawed and moved to Court to challenge it through this action.

The petition

3. In a petition dated 8th March 2018, the petitioner, a litigation, research and policy institute, sued the Attorney General, the principal legal advisor to the national government with the mandate to represent the national government in civil case and defender of public interest under Article 156 of the Constitution, the Public Service Commission, a constitutional commission established under Article 233(1) of the Constitution, and the National Assembly, the legislative branch of the government of Kenya with the mandate to enact laws of the National government, the 1st, 2nd, and 3rd respondents respectively.
4. Also joined in the petition are the JSC, the 1st interested Party, an independent constitutional commission established under Article 171 (1) of the Constitution, with functions and mandate under Article 172, the 2nd, 3rd, and 4th interested parties respectively the persons nominated as Commissioners to the 1st interested party, while the 5th, 6th and 7th interested parties are a citizen and human rights organisations respectively.
5. It was averred and deposed that the nomination of the 2nd, 3rd, and 4th interested parties as members of JSC is ultra vires Article 171(2) (g) and (h) of the Constitution in that the same is bereft of fair competition or merit contrary to Article 232(1)(g) of the Constitution. The petitioner contended that identification and nomination of the 2nd, 3rd and 4th interested parties was not preceded by public participation and therefore, the same is null and void.
6. According to the petitioner, the President forwarded the names of the 2nd, 3rd and 4th interested parties to the National Assembly on the basis that he had nominated them under Article 171(2) (g) and (h) of the Constitution. The petitioner averred that the nomination of the 2nd interested party is ultra vires Article 171(2) (g) as it was made by the President instead of the Public Service Commission.
7. The petitioner accused the 2nd and 3rd Respondents for failing to uphold their constitutional, statutory and administrative responsibilities. It contended that the 2nd interested party was nominated outside the strictures of Article 232 and 234(2) (c) and section 46 of the Public Service Commission Act 2017 which underpin among others, the constitutional requirement of fair competition and merit as the basis of appointment, in all cases where the commission is required by the Constitution or legislation to nominate or recommend a person for appointment, hence the action is invalid and of no legal effect.
8. The petitioner further averred that the National Assembly failed to interrogate the mandatory considerations under sections 7 of the Public Appointments (Parliamentary Approval) Act 2011 while vetting the 3rd interested party that her vetting did not meet the standard of strict scrutiny set out by case law. It was contended that the 3rd respondent also failed to take into account that the 2nd interested party had already retired from public service thus his appointment denied other citizens an equal opportunity for appointment, training and advancement in the public service.
9. It was deposed that on the 5th of March 2018 the petitioner sought information from the 2nd respondent regarding the circumstances surrounding the 2nd interested party's nomination by the President but no response was given. The petitioner argued that the appointment of the 2nd, 3rd and 4th interested parties amounted to unconstitutional exercise of state authority and violated national values and principles of governance, that the same is invalid and of no legal effect, and is a direct threat to judicial independence secured under Articles 160(1) and 172(1) through JSC. The petitioner



maintained the view, that the interested parties' nominations as conceived and executed, is meant to interfere and indeed interferes with the 1st interested party's status, function and public perception as an independent constitutional Commission; that the nomination of the 2nd interested party by the President as opposed to the Public Service Commission is a dereliction of the Commission's duty under Article 249(1) to protect the sovereignty of the people; secure observance by all state organs of democratic values and principles; and to promote constitutionalism, hence is invalid.

10. The petitioner also queried the constitutional validity section 15(2) of the Judicial Service Act, 2011, the Act, for failing to provide for the manner of identification and qualifications for appointment of the persons contemplated under Article 171(2)(g) and (h) of the Constitution. It was contended that the section is null and void in so far as it purports to give the President and the 3rd respondent a role in the appointment and approval of members of JSC elected and nominated under Article 171(2)(b) (c)(d)(f) and (g) of the Constitution; that it does not provide for diversity, merit or fair competition in the appointments under Article 171(2) (g) and (h); and that it is inconsistent with Articles 10 and 232(1)(g) and is therefore unconstitutional.
11. The petitioner also contended that any process decreed by section 15(2) of the Act, must meet the standards set in Article 232, the Public Service Commission Act and values and principles in the public service on diversity and fair competition. The petitioner averred that section 15 (2) is arbitrary, threatens the right to fair Administrative action under Article 47, the rule of law, transparency, accountability and good governance under Article 10 and is therefore invalid.
12. It is the petitioner's case that absence of appointment criterion under section 15(2) and the attendant vetting and approvals by the National Assembly, are devoid of constitutional meaning hence unconstitutional and invalid. The petitioner further averred that section 15(2) amounts to uncalled for tyranny of delegation of legislative authority and discretion which violates the rule against excessive delegation thus offends Article 94(6) of the Constitution
13. It is the petitioner's case therefore, that the substantive defects in the procedure as well as fundamental omissions in the nomination of the 2nd, 3rd and 4th interested parties as members of JSC, renders their nomination and approval unconstitutional. The petitioner sought the following reliefs;
 - a. A declaration be and is hereby issued that the nomination, vetting, approval and appointment of the 2nd, 3rd and 4th interested parties as members of the Judicial Service Commission is unconstitutional and invalid
 - b. A permanent injunction does issue prohibiting; the President, sued through the 1st respondent and his agents or assignees from appointing or gazetting, and the 1st interested party and its agents or assignees from swearing in, the 2nd, 3rd, and 4th interested parties as members of the Judicial Service Commission. By extension, the 2nd, 3rd and 4th interested parties be and are hereby prohibited from taking oath as members of the Judicial Service Commission arising from the impugned nomination, vetting, approval and appointment.
 - c. A declaration be and is hereby issued in that in so far as section 15 of the Judicial Service Act, 2011 does not provide for diversity, merit or fair competition as the basis for appointment of the one man and one woman under Article 171(2)(h) the same is unconstitutional and invalid.
 - d. In the alternative to prayer (c) above an Order issue reading into section 15 of the Judicial Service Act the requirement that any nomination/appointment under Article 171(2)(h) be preceded by an open, transparent process that takes into account diversity, merit and fair competition.



- e. An order do issue invalidating the nomination, approval and appointment of the 2nd, 3rd and 4th interested parties, as the case may be, as members of the Judicial Service Commission.
- f. The 1st, 2nd and 3rd respondents bears the Petitioner's costs while the interested Parties can each bear their own costs

1st and 2nd respondent's response

- 14. The 1st and 2nd respondents filed grounds of opposition dated 9th April 2018 opposing the petition. They contended that the petition is unmeritorious and premature; that it was filed contrary to section 9(1) of the Access to Information Act in that the petitioner did not allow the respondents time to provide the information requested; that the 2nd, 3rd and 4th interested parties are by dint of Article 171(2) (g) and 171(2)(h) of the Constitution as read with section 15(2) of the Judicial Service Act deemed to have been appointed and can only be removed under Article 251 of the Constitution; and to that extent, the petition contravenes of Article 251 of the Constitution.
- 15. The respondents further contended that the nomination of the 2nd interested party was lawful and was made in accordance with the provisions of section 14(1) of the Public Service Act (No 10 of 2017) and regulation 3 of the Public Service Regulations 2005; that the nomination of the 3rd and 4th interested parties under Article 171(2)(h) of the Constitution is at the discretion of the President but only subject to approval by the National Assembly; that the nomination does not require competition and or merit; and that timelines under section 15(2)(b) of the Judicial Service Act cannot reasonably be achieved by imputing the requirement for fair competition and merit based nomination process.
- 16. The respondents went on to contended that Article 232(1)(g) makes fair competition and merit based appointments or nominations subject to the requirement for the representation of Kenya's diverse communities (Article 232(1)(h) and affording adequate and equal opportunities for appointment in the public service; which is different from Article 171; and that the President exercised discretion in nominating the 3rd and 4th interested parties in accordance with the authority vested in him under Article 131 of the Constitution as the symbol of national unity.
- 17. The respondents further argued that the process for nominating the 2nd interested party under Article 171(2) (g) does not require public participation and that the appointment of the 3rd and 4th interested parties does not required to be preceded by public participation except that the requirement for public participation is to be adhered to during the approval process in the National Assembly. In that regard, the respondents contended that and the National Assembly adhered to the requirement for public participation during the approval hearings.
- 18. According to the respondents, the President's discretion to nominate the 3rd and 4th interested parties is anchored in Article 171(2) (h) of the Constitution and as such, section 15 (2) of the Act is constitutional and is within the ambit of Article 171(2)(h) of the Constitution. The respondents opposed the prayer for reading words into section 15 to require that any nomination or appointment under the Article be preceded by an open, transparent process taking into account diversity, merit and fair competition arguing that such a requirement will be unconstitutional and an attempt by the court arrogate itself powers conferred upon Parliament.
- 19. The respondents contended therefore, that the Court lacks jurisdiction to review the merits or demerits of the approval process of the 2nd, 3rd and 4th interested parties by the National Assembly; and further that the petition and the orders sought are contrary to public interest in the proper composition and functioning of JSC. It was averred that the petition is frivolous, vexatious, lacking in merit and an abuse of the Court process.



Replying Affidavit

20. The 2nd respondent (Public Service Commission) also filed a detailed affidavit by Alice A Otwala, its secretary, who deposed that on 30th January 2018, the 2nd respondent received a letter from the Secretary, JSC notifying it of the vacancy of its representative to JSC and requested it to nominate a representative; that after consultations among commissioners, the 2nd interested party was nominated as the 2nd respondent's representative to JSC and the same communicated to the office of the President
21. Ms Otwala deposed that the procedure used was in conformity with regulation 3 of the Public Service Commission Regulations 2005 which allows the Commission to make decisions through consultations. She deposed that the 2nd respondent held a special board meeting on Monday 12th February 2018 and ratified the decision arrived at during the consultations. She stated that the procedure followed in nominating the 2nd interested party was also in conformity with the provisions of section 17 of the Judicial Service Act and Article 250(2) of the Constitution.
22. According to Ms Otwala, the role of the 2nd respondent's representative in JSC is to add value on human resource management in the public service and to keep JSC updated on the modern human resource best practices which is part of the core mandate of the 2nd respondent. She deposed that the nomination envisaged in Article 171(2) (g) is confined within the Public Service Commission especially to provide the required human resource management expertise, and therefore, an internal nomination process is within the constitutional expectation.

2nd Interested party's response

23. Patrick Gichohi, the 2nd interested party, opposed the petition through a replying affidavit sworn on 9th April 2018, contending that he was validly nominated by the 2nd respondent to JSC. He deposed that after his nomination, he was successfully vetted by the National Assembly's Committee on Justice and Legal Affairs and the recommendation for his appointment was approved by the National assembly. He stated that after approval he was appointed by the President as a member of JSC through Gazette Notice No 2091 of 2nd March 2018. He contended that the procedure followed in his appointment is in conformity with Section 17 of the Judicial Service Act and Articles 250(2) of the Constitution. He also contended that before his vetting, the National Assembly called for views from members of the public on his suitability but no objection was raised against his appointment.

3rd respondent's response

24. The National Assembly, the 3rd respondent, filed a replying affidavit by Jeremiah Ndombi, Senior Deputy Clerk of the National Assembly, who deposed that the National Assembly's approval of the nominees was carried out in conformity with the Constitution and the law; that after the names of the 2nd, 3rd, and 4th interested parties were received for approval as Commissioners to JSC, they were submitted to the Departmental Committee on Justice and Legal Affairs for consideration on behalf of the National Assembly; that the Committee held approval hearings as required by section 6(1) of the Public Appointment (Parliamentary Approval) Act; that the nominees and the public were notified of the vetting hearings as required by Article 118 of the Constitution and section 6 (3) and member of the public opposed to the nominations were asked to submit memoranda by way of affidavits.
25. Mr. Ndombi deposed that the Committee conducted its sittings in the presence of all the nominees after which it considered its report and unanimously adopted it on 24th February 2018. He deposed that among the issues the Committee looked into was the procedure used to arrive at the nominations including statutory procedural requirements, their abilities, experience and qualities in light of the



functions of JSC; that information sought by the Committee regarding the nominees from the EACC, KRA, HELB, DCI and the Registrar of Political Parties was received and the nominees were therefore properly cleared.

26. With regard to the 2nd and 4th interested parties, he stated that no memorandum was received opposing their appointment. It was stated that the Committee received three memoranda contesting the suitability of the 3rd interested party, the 5th interested party submitting one of the memoranda. Of the three memoranda, two were disqualified for failure to comply with the procedure while that by the 5th interested party was considered and the 3rd interested party satisfactorily responded to the issues raised against her, including the fact that Petition number 128 of 2016 *okiya omtatah okoiti v Kenyatta university council and others* which alleged that she illegality occupied the office as Vice Chancellor at Kenyatta University for 10 years; petition Number 78 of 2016 *Okiya Omtatah v Kenyatta University & 4 others*; and case number 2010 of 2016, *Olive Mugenda v Kenyatta University and another* (over her exit package) are pending in Court. He stated that the 3rd interested party provided oral and affidavit responses to the allegations made against her.
27. Mr. Ndombi deposed that the Committee considered the allegations against the 3rd interested party and concluded that the petitions are still pending in Court and that all the allegations made by the 5th interested party had been substantively responded to, and therefore, recommended approval of the appointment of all three nominees. He deposed that that the Committee's report was tabled and adopted by the National Assembly.

3rd Interested Party's response

28. The 3rd interested party filed a replying affidavit sworn on 22nd February, 2018 and filed on the 19th of March opposing the petition. She deposed that she had worked at Kenyatta University from 1982 rising to become the of Vice Chancellor, a position she held for ten years; that on the 13th February 2018 the President nominated her as a Commissioner to JSC under Article 171(2) (h) of the Constitution being a woman and not a lawyer, to represent the public and that she met all the criteria set under Article 171(2) (h) hence she is suitable to serve in JSC owing to her academic background.
29. She deposed that she filed a response to all questions raised against her and appeared before the National Assembly Committee on Justice and Legal Affairs and responded to objections raised by the 5th interested party against her nomination. She stated that the 5th interested party's presence in this petition was a continuation of his failed attempt to stop her nomination at the National Assembly and that the National Assembly was satisfied that the objections had no merit and approved her appointment.
30. The 3rd Interested Party was of the view that having exhaustively answered the allegations raised against her in the National Assembly; the petition is prejudicial to her and is an abuse of the Court process to rely on the same allegations to challenge her appointment. She deposed that the power to appoint under Article 171 (2) (h) is vested in the President and no prior interviews or other processes are contemplated hence section 15(2) of the Judicial Service Act cannot be unconstitutional for failure to specify requirements and or qualifications for appointment under that Article. She maintained that that she is qualified and suitable for the appointed hence the petition is brought in bad faith.
31. She further contended that it is in the public knowledge that she turned down an exit package of Kshs. 100,000,000; that the National Assembly paid due regard to the fact that the cases are live in Court which is the right forum to decide on the matters and that she had fully addressed the allegations raised by the 5th interested party regarding her suitability to serve in JSC,.



4th interested party's response

32. The 4th interested party filed a replying affidavit sworn on 26th March 2018 opposing this petition. He deposed that he was properly nominated to by the President under Article 171(2) (h) of the Constitution; that he appeared before the Departmental Committee on Justice and Legal Affairs for vetting; and that his nomination was approved pursuant to Articles 171(2) (h) and 250(2) of the Constitution.
33. Felix Koskei further deposed that he believed on the advice by counsel that under Article 171(2) (h), the President has power to appoint a man, and woman not being a lawyers, with approval of the National Assembly, to represent the public in the JSC; that under section 15(2) of the Judicial Service Act, the procedure for appointment of a member to JSC is well laid down and was adhered to. He stated that prior to his vetting, the Committee called for views from members of the public on his suitability for appointment but there was no objection, hence the National Assembly cannot be faulted for approving his appointment since no member of the public opposed it.
34. He therefore deposed that public participation was duly complied with and was of the view that his appointment JSC was done in compliance with the Constitution and the law, values and principles of public service and was above board.

5th interested party's response

35. The 5th Interested party, the Secretary of the University Academic Staff Union, Kenyatta University Chapter, filed an affidavit sworn on 3rd March 2018 in support of the Petition. His contended that Article 47 of the Constitution on administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair was violated; that section 7(2) (b) of the Fair Administrative Action Act, 2015 permits judicial review of a vetting decision where mandatory procedure was not followed; and that the Court can review a vetting decision where the 3rd respondent failed to take into account relevant considerations in vetting the 2nd, 3rd, and 4th interested parties.
36. Dr. Lukoye deposed that the 3rd Respondent's decision to approve the 3rd interested party's was vitiated with failure by the 3rd respondent to take into considerations relevant matters including information and facts placed before it regarding the 3rd interested party's suitability. He deposed that under instructions from UASU-KU Chapter, he sent a memorandum to the National Assembly questioning the suitability of the 3rd interested party and gave reasons.
37. He deposed that the reasons for objecting to the appointment included the fact that the 3rd interested party's occupation of the office of Vice Chancellor was unlawful; that she influenced the University to reward her with an astronomical, fraudulent and fictitious exit package of one hundred million shillings; that she engaged in nepotism and tribalism when employing university staff; and that she was involved in financial misappropriation at the university among others grounds.
38. The 5th interested party was of the view, the National Assembly failed to seriously interrogate the questions of integrity and suitability raised against the 3rd interested party and, instead, approved her appointment. He contended that the Constitution has set minimum standards public servants .must meet and that the 3rd interested party having been a public servant at Kenyatta University, her conduct in that office was a relevant consideration which the National Assembly failed to consider.
39. He contended that authority assigned to a public officer is a public trust to be exercised in a manner consistent with the objects of the Constitution including demonstration of respect for the people, bringing honour and respect to the office and promoting public confidence in the integrity of the office,



which in his view, the 3rd interested party does not meet. Dr. Lukoye pointed to the 3rd respondent's report by its Committee on Education Research and Technology of the 10th Parliament during its 3rd session inquiring on the students' disturbance at the University, which recommended that the 3rd interested party and other university officials be investigated, which was however ignored by the National Assembly.

40. He lamented that the 3rd respondent disregarded evidence placed before it regarding the 3rd interested party suitability, including the fact that she was facing suits in Court which had to do with her personal integrity, competence, objectivity and impartiality. It was his case that the Constitution gives members of JSC a noble mandate to appoint judicial officers including the Chief Justice of the Republic of Kenya and President of the Supreme Court and other Judges hence it is unimaginable that a person of questionable integrity would be tasked with such a noble task.

Petitioner's submissions

41. Mr. Waikwa Wanyoike, appearing with Mr. Ochiel for the petitioner, submitted highlighting their written submissions dated 27th April 2018 in support of the petition. Mr. Waikwa, who was first off the blocks, submitted first; that the appointment and approval of the 2nd, 3rd and 4th interested parties was not done accordance with the Constitution, and second; that section 15(2) of the Judicial Service Act, 2011 is unconstitutional.

Appointment and approval of the 2nd, 3rd, and 4th interested parties

42. On the appointment of the 2nd, 3rd and 4th interested parties, learned counsel submitted that none of them was subjected to an open, competitive and merit based process of appointment. According to learned counsel, the Court in determining this issue must also consider process of appointment to public offices. He contended that the appointments must not only be competitive but also open and transparent. He referred to the case of Community Advocacy Awareness Trust and 8 others v Attorney General [2012] eKLR to submit that the new Constitution has ushered in a new regime on the appointments to public office devoid of corruption, tribalism, nepotism, favoritism and political patronage to that of the values and principles under Article 10 of the Constitution.
43. Learned counsel went on to submit that like in any appointments to Public Office, appointment to JSC must observe the values and principles of open, transparent and accountable to aid in guaranteeing judicial independence. "Where independence of the JSC is encroached, the independence of the judiciary will equally be affected". Counsel submitted.
44. Turning to section 15 of the JSC Act, Mr. Waikwa submitted that section 15(2) provides that nominees to JSC should be appointed by the President within 3 days of receiving the names. The grounds for impugning section 15(2), learned counsel argued, were limited to persons appointed under Article 171(2)(g) and (h). This, counsel argued, was because the section did not provide for an objective criteria for appointment of the persons under Article 171(2)(g) and (h). He submitted, therefore, that section 15(2) is to that extent inconsistent with Article 171(2)(b)(c)(d) and (f) of the Constitution.
45. Mr. Waikwa contended that Article 73(2) of the Constitution provides that state officers have to be picked in a free and fair election or selected competitively, including consideration of competency and integrity. Learned counsel argued that positions in JSC are offices in the public service hence Article 232(1)(i) requires competition and merit as the basis of appointment and that the same spirit is in Articles 232 and 234 - values and principles of public service. He referred to the judgment in the case of Republic v Attorney General & 3 others Ex parte Tom Odoyo Oloo [2015] eKLR contending that whenever public officer appointments should go to those who are competent to undertake tasks



entrusted to them because values and principles of public service under Article 232 of the Constitution include high standards of professional ethics, efficient and economic use of public resources.

46. Learned counsel relied on an article titled “A bridge to where? Introducing the Bill of Rights” by Etienne Mark reported in the South African Journal on Human Rights at page 32, for the submission that if the new constitution is a bridge away from a culture of authority, it is clear what it must a bridge be to. - must lead to a culture of justification where every exercise of power is expected to be justified. Counsel further relied to the case of Lovell Romain v The Police Service Commission [2014] UKPC 32 (para 28) for the submission that there is a public interest for the appointment of public officers hence it is important to adopt an open criteria for appointment to public office; and the case of Grayned v City of Rockford, 408 U.S 104 (1972) for the submission that there is need for explicit standards in the law as opposed to a vague law.
47. Submitting on the inconsistency between section 15(2) and Article 171(2) (b) (c) (d) (f) and (g) on election of members of JSC, learned counsel contended that the election of those members does not require any action on the part of the President. He contended that once elected those persons become members of JSC. He also argued that there is no requirement for the President to nominate a person under Article 171(2) (g) which is a mandate for the Public Service Commission. In learned counsel’s view, the President overreached his mandate and authority in nominating the 2nd interested party.
48. Mr. Waikwa faulted the respondents’ contention that the President could nominate the 2nd Interested Party under the authority of Article 250(2) of the Constitution. He contended that Article 250 is a general provision which is qualified by Article 248(1). He argued that unless section 15(2) is interpreted as requiring that the process of nominating the 2nd, 3rd and 4th Interested Parties be competitive in terms of Article 232, the section is unconstitutional. Counsel asked the Court to read words into section 15(2) to make it constitutionally compliant and relied on the case of Schachter v Canada [1992] 2 SCR 679- page 682) for the submission that the purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the legislature; and the case of Delwin Vrend v Alberta [1985] ISCR 493 for similar proposition.
49. Mr. Waikwa submitted that when the petitioner learnt of the 2nd Interested Party’s nomination, it sought information by letter of 1st March 2018; and although a response was received on 5th March 2018, he submitted that the nomination was done in contravention of the law including regulation 3 of the Public Service Regulations. He contended that there was no evidence that the 2nd Interested Party’s nomination was done openly and competitively.
50. Mr. Waikwa handed over to Mr. Ochiel who submitted that vetting and approval is a constitutional edict under Article 124(4) of the Constitution and section 7 of the Public Appointments (Parliamentary Approval) Act. Learned counsel contended that proper procedure was not followed in vetting the Interested Parties. He also argued that both the 3rd and 4th Interested Parties did not meet integrity requirements.
51. Learned counsel contended that the 4th interested party had been a member of the executive as a cabinet Secretary between 2013 and 2015 when he stepped aside, and referred to the 3rd respondent’s replying affidavit which admitted as much. He also argued that the 4th interested party had no institutional competence. He referred to the Supreme Court of India’s decision of Centre for IPL & another v Union of India & another Petition (c) No. 348 of 2010 where it was observed that appointment of members of the executive is forbidden if the selection adversely affects institutional competence and that it is the duty of the vetting body not to recommend such an appointment.



52. Counsel referred to the 3rd respondent's replying affidavit more so the minutes of Kenyatta University council meeting to show that the 3rd Interested Party awarded herself an exit package leading to a case being filed in Court -ELRC Petition No 128 of 2016 which touched on her integrity. He therefore contended that the 3rd interested party is not suitable for appointment to JSC.

6th and 7th Interested Parties' Submissions

57. Dr. Khaminwa, learned Senior counsel for the 6th and 7th Interested Parties, submitted highlighting their written submissions dated 20th April 2018 in support of the petition, that Articles 1, 2, 10, Chapter 6, Articles 159 and 160 of the Constitution are critical in the governance of the Country. Alluding to the retired Constitution, Senior Counsel submitted that the President then had absolute power to appoint whoever he wanted which is no longer the case under the current constitutional dispensation in that whoever is appointed has to be vetted. Learned Senior Counsel relied on The Oxford Hand book of International Environmental Law by Jonas Ebbesson, to submit that during such vetting there should be proper public participation. He however submitted that in the case of the interested parties, there was no effective public participation.
58. Dr. Khaminwa argued that if proper persons are not appointed to JSC, people will lose confidence in the Judiciary. He contended that although JSC must have legitimacy, the people who were nominated to join it lack that legitimacy. He referred to Article 249 of the Constitution on the purpose of establishing constitutional Commissions and submitted that the persons appointed to JSC lack legitimacy. On perception, senior counsel submitted that perception is important since the people nominated may give wrong perception that they represent the executive, and will advance the executive's interests in JSC.
59. Senior Counsel, while referring to paragraph 2.1 in the same book, contended that the President never speaks for people any more but the Constitution does. He also submitted that information about the 2nd, 3rd, and 4th interested parties nominated to JSC was not given to the public and that their nomination had come from nowhere. Dr. Khaminwa submitted that JSC is a very important Commission, and therefore, people who sit in it, including their full particulars, must be known to the public.

5th Interested Party's submissions

60. Miss Ngesa, learned counsel for the 5th Interested Party, submitted highlighting their written submissions dated 9th May 2018 in support of the petition, that the 3rd Interested Party who was Vice Chancellor of Kenyatta University for 10 years was unsuitable for appointment to JSC. Learned counsel relied on the case of Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR (paragraph 54) to submit that there must be compliance with the objectives of appointments to public office.
61. Learned counsel submitted that Article 94 of the Constitution obligates the National Assembly to promote democratic governance since its powers derive from the people. She contended that the 5th interested party submitted a memorandum to the 3rd respondent detailing reasons for opposing the 3rd Interested party's nomination including lack of integrity. Miss Ngesa pointed out that there are cases by and against the 3rd interested party still pending in Court and in one of the cases; the 3rd interested party was accused of short comings such as nepotism, tribalism and conflict of interest which, though serious, were ignored by the 3rd respondent.



62. Counsel further contended that the 3rd respondent's Committee on Education Research and Technology had conducted an investigation on the affairs of Kenyatta University in 2009 regarding students' disturbances and recommended that the 3rd, interested party be investigated on the students' unrest and other failures. Learned counsel submitted that it was clear from the recommendations for investigations that the 3rd interested party had issues on institutional principles including integrity, transparency and accountability hence her appointment should not have been approved. She argued that with the above short comings, the 3rd interested party cannot uphold the tenets in Article 172 of the Constitution.

1st interested party's submissions

63. Mr. Wamaasa, learned counsel for the 1st interested party did not wish to take a position on behalf of the 1st interested party and therefore, left the matter to Court.

1st And 2nd Respondent's Submissions

64. Mr. Mutinda, appearing with Mr. Ogosso for the 1st respondent and 2nd interested party submitted highlighting their written submissions, that the petition is bad in law; that it was filed contrary to Article 251 of the Constitution and that the orders sought cannot be granted. Learned counsel submitted, referring to the Gazette Notice No 209 of 2nd March 2018 attached to the 2nd interested parties affidavit, that the President exercised his powers under Article 250(2)(c) as read with Article 171(2) (g) and (h) of the Constitution in making the impugned appointments.

65. According to learned counsel, Article 250 governs appointment of commissioners to commissions and independent offices including JSC. He contended that the impugned appointments complied with Article 171(2) (g) and (h) and section 15(2) (b) of the Judicial Service Act. Learned counsel argued that the appointment of the 2nd, 3rd, and 4th interested parties by the President was proceeded by approval which made the appointments complete as it happened before the filing of this petition and, therefore, the 2nd, 3rd and 4th interested parties' removal can only be done in accordance with Article 251 of the Constitution.

66. Regarding nomination of the 2nd interested party, Mr. Mutinda submitted that Article 171(2) (g) of the Constitution requires that a person be nominated by the Public Service Commission. He contended that the replying affidavit of the 2nd interested party demonstrates that Public Service Commission had settled on the 2nd interested party as its nominee to JSC following consultative meetings. Counsel submitted that under section 14 of the Public Service Commission Act, the Commission could regulate its own proceedings in making decisions. He therefore contended that Public Service Commission followed the law in nominating the 2nd interested party. In counsel's view, no evidence was presented by the petitioner to show that Public Service Commission violated the Constitution or the law.

67. Mr. Mutinda went on to contend that a nominee of the Public Service Commission is not a representative of the public whose representative is appointed under Article 171(2)(h) of the Constitution. He submitted that Article 171(2) (g) and (h) of the Constitution do not require competition as contended by the petitioner but competence. He submitted that the 2nd interested party's nomination did not violate section 46 of the Public Service Commission Act either which in any case, he contended, does not apply to state officers but applies only to public service officers. In learned counsel's view, Commissioners are state officers and not public service officers.



68. Mr. Ogosso took over and added that under Article 171(2) (g), Public Service Commission is required to produce a nominee but the Article does not provide for the mode of such nomination. Learned counsel contended that the procedure adopted by the Public Service Commission in arriving at its nominee is determined by the Commission itself. He argued that the commission can pick a nominee from within since Article 171(2) (g) only provides that the Commission is to produce a nominee.
69. Submitting on the President's power to appoint the 3rd and 4th interested parties, Mr. Ogosso argued the President acts on behalf of the people exercising their sovereign power; that the President's actions under Article 129 are derived from the people; that under Article 260, Commissioners are state officers; and that under Article 132 (2) (f) the President has to act in accordance with the Constitution being head of state and government. He therefore argued that when the President acts under Article 171(2) (h) he exercises his powers as head of state. He submitted that the President acted in accordance with Article 250(2) (b) (c) of the Constitution with parliamentary approval when making the impugned appointments.
70. Mr. Ogosso sought to draw a distinction between JSC and the Judiciary, submitting that JSC is not part of the Judiciary. He contended that judicial authority is vested in the people and exercised on their behalf by courts and tribunals under Article 159(1) comprised of Judges and magistrates as provided for under Article 161 of the Constitution.
71. On the constitutionality of section 15(2) of the Judicial Service Act, Mr. Ogosso submitted that the section does not contravene Article 171(2) (b) (c) (d) (f) or (g) of the Constitution. He also contended that absence of merit or competitiveness in the appointment under Article 171(2) (h) does not contravene the Constitution either. In learned counsel's view, Article 171(2) (h) gives the President latitude to make appointments without consultation.
72. Regarding public participation, counsel argued that public participation was conducted by the Committee of the National Assembly during the vetting; that public views were sought including submission of memoranda and thereafter the Committee of the National Assembly considered the issues raised and made a report on the nominees recommending their approval. Counsel contended, therefore, that there was effective public participation in the appointment of the 2nd, 3rd and 4th interested parties.

3rd respondent's submissions

73. Mr. Mbaraka, learned counsel for the 3rd respondent, associated himself with submissions made on behalf of the 1st and 2nd respondents in opposing the petition. He added, highlighting their written submissions dated 10th May 2018, that the National Assembly carried out approval hearings in accordance with the Constitution. According to learned counsel, the Speaker of the National Assembly received notification from the President as required by sections 3 and 5 of the Public Appointments (Parliamentary Approval) Act and Articles 171 (2) (g) and (h), 250 and 135 of the Constitution with the 2nd, 3rd and 4th interested parties' names for approval.
74. He submitted that the 3rd respondent carried out approval hearings in accordance with Article 118 of the Constitution and standing orders and facilitated public participation. Learned counsel contended that members of the public submitted 3 memoranda two of which were ruled out for not being supported by affidavits. However, the 5th interested party's memorandum which only challenged the 3rd interested party's appointment was accepted and considered. Mr. Mbaraka submitted that no objection was received contesting the nomination of the 2nd and 4th interested parties. Learned counsel



further submitted that after consideration of the memorandum, the Committee tabled its report which was adopted by the National Assembly approving all the nominations.

75. Regarding the suitability of the 2nd interested party, counsel contended that the committee noted that there was not a single contestation received against him and further that the 2nd interested party was already a commissioner with the Public Service Commission and had no integrity issues. He submitted with regard to the 4th interested party, that there was also no objection against his appointment.
76. With regard to the 3rd interested party, Mr. Mbaraka conceded that there was a memorandum against her appointment. Learned counsel submitted, however, that the issues raised in the memorandum were brought to the 3rd interested person's attention who made a deposition in an affidavit responding to those issues and that after consideration, the Committee made a recommendation to approve her appointment which the National Assembly agreed with and therefore cleared her.
77. Learned counsel argued that the role of the Court in a petition like the one before it is to look at the process and the manner in which the process was conducted and determine whether it was in accordance with the Constitution and the law. He relied on the case of *Justus Kariuki Mate & another v Martin Nyaga Wambora* [2017] eKLR for the submission that the Court should not conduct a merit review of the entire process or act on appeal over the decision of an independent body. In counsel's view, the Court can only act where there was clear violation of the Constitution and applicable law. He contended that the 3rd respondent did not ignore the 3rd interested party's issues of integrity.
78. On the constitutionality of section 15(2) of Judicial Service Act, Mr. Mbaraka submitted that whereas it is true that the section has no specific criteria for nomination based on competition, Article 171 (2)(h) is clear that the President appoints two persons, a woman and a man not being lawyers. He contended that there are no other requirements in the Constitution hence the impugned provision is constitutional.
79. Learned counsel went on to contend that the Constitution creates checks and balance between arms of government, and the President as head of one arm, his actions under Articles 171 and 250 of the Constitution are subject to Parliamentary approval. He argued that the National Assembly as peoples' representative has been given mandate to approve nominees to JSC regardless of the nominating body. Counsel relied on several authorities to buttress his submissions including; *Marilyn Muthomi Kamuru & 2 others v Attorney General & another* [2016] eKLR, *Justice Kariuki Mate & another v Martin Nyaga Wambora* [2017] eKLR and *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR

3rd Interested Party's submission

80. Mr. Regeru, appearing with Mr. Nyiha for the 3rd Interested party, submitted highlighting their written submissions dated 10th May 2018, that the petitioner though a public spirited litigant in defence of the Constitution is conflicted, biased and partisan; that the petitioner is a dishonest broker said to be acting in public interest but a self-serving party designed to serve partisan interests.
81. Learned counsel referred to decisions from Superior Courts to show that the petitioner had been shut out from appearing in those Courts as amicus Curiae because of bias. These included *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* [2015] eKLR, *Judicial Service Commission v Speaker of the National Assembly & 8 others* [2014] eKLR, *Katiba Institute v Judicial Service Commission* [2017] eKLR and *Raila Amolo Odinga & 2 others v Independent Electoral and Boundaries Commission & 3 others* [2013] eKLR He contended that even in the present petition, the petitioner is biased, subjective and should be viewed in that context. I must say with a lot of respect to



- counsel, that this submission has no merit in so far this petition is concerned. No evidence was placed before Court to show that the petitioner is biased towards any of the parties in Court. Furthermore, in the decisions referred to above, the petitioner was not allowed to participate in those cases as amicus curiae and not as a petitioner after it was shown to the satisfaction of the courts in those cases that the petitioner had taken a position in one way or the other and could not therefore be impartial as amicus curiae.
82. Regarding the 5th interested party, learned counsel submitted that the 5th interested party is connected with the current Vice Chair of UASU one Itolondo, who had on several occasions waged a vindictive wars against the 3rd interested party while she was the Vice Chancellor of Kenyatta University through institution of several suits in various courts impeaching the 3rd interested party's integrity and challenging her appointments as Vice Chancellor. In counsel's view, the same Itolondo is now re-litigating the same issues using the 5th interested party and has reached out to the petitioner to file the present petition for the same purpose.
 83. Mr. Regeru contended that the 3rd interested party submitted an affidavit to the National Assembly and fully answered the allegations made against her; that the petition is misconceived and incompetent; and that the burden of proof that the impugned section 15(2) of the Judicial Service Act is unconstitutional lies with the petitioner. Counsel argued that the petitioner had failed to show how the section violates the Constitution. He contended that the section is in consonant with Article 171(2) (h) of the Constitution. In Mr. Regeru's view, the 3rd interested party was appointed by the President; that she is a woman; she is not a lawyer; was approved by the National Assembly and that she is competent and qualified.
 84. Learned counsel further contended that the petition seeks to re-litigate matters that were dealt with by the National Assembly Committee, and associated himself with the submissions of Mr. Mbaraka to that effect. Mr. Regeru contended that the petition is an affront to Article 171(h) of the Constitution in that it seeks to introduce matters such as interviews that are not in the Constitution.
 85. Learned counsel also argued that the petition raises a question of jurisdiction, contending that once the process under Article 171(2) (h) is finalized, the Court lacks jurisdiction to entertain a challenge that would be the constitutional function of the National Assembly under the principle of separation of powers. According to counsel, the petition seeks to have the Court substitute the decision of the National Assembly with its own,
 86. Mr. Regeru went on to contend that there is discrimination against the 3rd interested party thus the petition is a contravention of Article 27 of the Constitution. In counsel's view, the petitioner, though holding herself out as a defender of the Constitution, has come out to challenge the 3rd interested party's appointment which is discriminatory.
 87. On the question of integrity, learned counsel submitted that the Court is not the right forum to undertake an assessment of the integrity of persons presenting themselves for public appointments, a role that falls on Parliament. Counsel relied on the case of *International Centre for Policy and Conflict v Uhuru Muigai Kenyatta & Others* [2013] eKLR arguing that the issues of integrity raised by the petitioner and 5th interested party were dealt with by the national Assembly.
 88. On the proper interpretation of Article 171(2) (h), learned counsel contended that Article 259(1) of the Constitution gives the manner of interpretation and urged the Court to avoid an interpretation that would effectively amend the Constitution. He also argued that the Court cannot read into a statute wards that would amount to legislating.



89. Submitting on judicial independence, learned counsel contended that there is no evidence to show that the appointments will compromise judicial independence. He argued that Judicial Service Commission is not part of the judiciary and submitted that granting the petition would itself undermine that independence.
90. Mr. Regeeru contended that the President has been given powers by the Constitution which he exercised and argued that amendments to law even if made, do not act retrospectively. He was of the view that the 3rd interested party having been nominated in accordance with the Constitution and the law, a subsequent amendment to law would not annul such an appointment. He relied on the case of *Commission of Implementation of the Constitution v Parliament of Kenya & 5 others* [2013] eKLR on separation of powers. He also relied on a number of authorities to support their case.

4th Interested Party's Submissions

91. Mr. Dullo, learned counsel for the 4th interested party associate himself with the submissions made on behalf of the respondents and the 2nd and 3rd interested parties. He submitted highlighting their written submissions dated 10th May 2018, that a proper interpretation of Article 171(2)(h) of the Constitution shows that there is no requirement for competition. In learned counsel's view, the words of Articles 171(2)(h) and 250(2) of the Constitution are clear on the presidential powers to appoint persons to serve in JSC and no more is required.
92. Learned counsel submitted that Article 171(2)(h) talks of one man and one woman not being lawyers, to represent the public, appointed by the President and approved by the National Assembly. He added that Article 250(2)(a) talks of persons being identified and recommended in a manner prescribed in a statute such as Judicial Service Act, approved by the National Assembly and appointed by the President.
93. On whether there was public participation, learned counsel answered in the affirmative and relied on the decisions in the case of *British American Tobacco (k) Ltd v CS Ministry of Health & 4 Others* [2016]eKLR; *Nairobi Metropolitan PSV Sacco Union & 25 others v County Government of Nairobi & 3 Others-Petition No 486 of 2013*; *Consumer Federation of Kenya (COFEK) v Public Service Commission* [2013] eKLR and *Minister for Health for Health v New Clicks (PTY) Ltd* (2006) (2) SA 311, for the submission that the public must be accorded a reasonable level of opportunity for participation which he contended was the case here
94. Mr. Dullo argued that the Public was accorded an opportunity to present memoranda or appear in person during the vetting of the 4th interested party but no one objected to his appointment. Counsel also submitted that proper procedure was followed and the 4th interested party was appointment as required by both the Constitution and the law. He contended that the requirement for the appointment under section 15(2) is in line with Articles 171(2)(h) and 250(2)(a)(b)(c) of the Constitution hence, section 15(2) of the Judicial Service Act is constitutional and mirrors the two Articles of the Constitution. In counsel's view, holding section 15(2) unconstitutional would be tantamount to holding that Articles 171(2)(h) and 250(a)(b)(c) of the Constitution are also unconstitutional which is an absurdity.
95. Counsel relied on the decision in *British American Tobacco Limited v Cabinet Secretary for Health & 4 others* (supra) on the interpretation of the Constitution and the decision of the Supreme Court in *Re The Matter of Interim Independent Electoral and Boundaries Commission* [2011] eKLR, to submit that provisions of the Constitution should be read as an integrated whole, each sustaining the other.



96. In that regard, counsel submitted that section 15(2) of the Judicial Service Act does not violate values and principles of the Constitution espoused under Articles 10, 73(2), and 232(1) (g) of the Constitution. He contended that whereas Articles 171(2) and 250 deal with appointment to constitutional commissions, Article 132(1) (g) has no application to this case because it deals with the Public Service. Mr. Dullo was of the view that the petition deals with appointment of state officers and not public officers, who would fall under Article 232 of the Constitution.
97. Regarding the contention that the 4th interested party is a politician, Mr. Dullo submitted that the contention is not factual and that neither did the 4th interested party resign on account of integrity issues. He contended that the 4th interested party will not jeopardize the independence of JSC

Analysis and determination

98. I have considered this petition, responses thereto; submissions by counsel for the parties and the authorities relied on. Two issues arise for determination, namely; whether the appointment of the 2nd, 3rd and 4th interested parties as members of JSC was done in accordance with the Constitution and the law, and whether section 15(2) of the Judicial Service Act is inconsistent with the Constitution.
99. The 2nd, 3rd and 4th interested parties were nominated as members of JSC, the 2nd interested party under Article 171(2) (g) and the 3rd and 4th interested parties under Article 171(2) (h) of the Constitution. Their names were then sent to the National Assembly for approval which the National Assembly did. The petitioner then filed the present petition challenging the manner of appointment and eventual approval of the 2nd interested party by the National Assembly arguing that proper procedure for his appointment was not followed and further that the suitability of the 3rd and 4th interested parties as members of JSC was in doubt and sought to block their appointment to JSC. The petitioner also contended that section 15 (2) of the Judicial Service Act is unconstitutional for failure to provide for the manner of identification and qualifications for persons to be appointed under Article 171 (2) (g) and (h) of the Constitution.
100. The respondents on their part contended that the nomination and eventual approval of the 2nd, 3rd, and 4th interested parties was done in accordance with Articles 171(2)(g) and (h) as read with Article 250(2) of the Constitution and section 15(2) of the Judicial Service Act. They also contended that the interested parties are suitably qualified and that section 15(2) of the Judicial Service Act is constitutional.
101. The contestation between the two sides seems to strike at the heart of the meaning and import of Articles 171 and 250 of the Constitution. This therefore, calls for interpretation the two Articles in order to resolve the dispute. In that regard, it is important to revisit the principles underlying constitutional interpretation before delving into the issues raised in the petition.
102. Article 259(1) of the Constitution decrees how the Constitution should be interpreted. On this, the Supreme Court had the following to say in *Re The Matter of Interim Independent Electoral and Boundaries Commission* [2011] eKLR;

“(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.”



103. The Constitution being the basic law should not be given a narrow or simplistic interpretation. The Court must strive to interpret the Constitution in a manner that gives effect to the values and principles that the people it is intended to serve desired. In that regard, Mahomed J observed in the case of *State v Acheson* 1991 20 SA SOS that:

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

104. It is also a principle of constitutional interpretation that the Constitution as a living instrument should not be given a rigged or artificial interpretation to avoid distorting the spirit, ideals and aspirations of the people. In the case of *The Government of Republic of Namibia v Cultura* 2000, 1994 (1) SA 407 at 418, Mahomed CJ again stated that;

“A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation.”

105. A constitution should also be interpreted in a broad and flexible manner in order to achieve its purposes and principles. This was observed in the case of *Njoya & 6 Others v Attorney General & another* [2004]eKLR where the Court put the position thus;

“Constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the constitution, of necessity, has principles and values embodied in it, that a constitution is a living piece of legislation. It is a living document.”

106. It is also important to bear in mind that although a Constitution has several provisions, it is one indivisible document that must be given a holistic interpretation, reading one provision of the Constitution alongside others so that provisions are read as supporting and not destroying one another. In the case of *Tinyefuze v Attorney General of Uganda Constitutional Petition No 1 of 1996* [1997]3 UGCC, the Constitutional Court of Uganda observed that “The entire Constitution has to be read together as an integrated whole, not one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness. And exhaustiveness.”

107. The Constitution should, above all, be given a holistic interpretation in context. The Supreme Court advocated for this approach in *Re The Matter of Kenya National Human Rights Commission*, (Supreme Court Advisory Opinion Ref. No.1 of 2012) stating;

“But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does



not mean an unbridled extrapolation of discrete constitutional provisions in each other, so as to arrive at a desired result.”

Whether the 2nd, 3rd and 4th interested parties were appointed and approved in accordance with the Constitution and the law.

108. The petitioner, the 5th, 6th and 7th interested parties have contended that the 2nd, 3rd and 4th interested parties’ appointment and subsequent approval by the National Assembly was not done procedurally. According to them, there was no competition, merit and openness in the process and that the 3rd and 4th interested parties do not meet the integrity test required under Chapter Six of the Constitution. They also argued that the 2nd interested party was not supposed to be approved by the National Assembly since Article 171(2) (g) does not require such approval.
109. The respondents as well as the 2nd, 3rd and 4th interested parties all argued that the 2nd, 3rd and 4th interested parties were properly appointed and approved and that they have integrity to serve in JSC. They also contended that it is a requirement of Article 250(2) of the Constitution that all Commissioners to independent Constitutional Commissions be approved by the National Assembly.
110. Judicial Service Commission is an independent constitutional commission established under Article 171(1) of the Constitution and composed in terms of Article 171(2). Article 171 provides as follows:-
- “(1) there is established the Judicial Service Commission.
 - (2) The Commission shall consist of—
 - (a) the Chief Justice, who shall be the chairperson of the Commission;
 - (b) one Supreme Court judge elected by the judges of the Supreme Court;
 - (c) one Court of Appeal judge elected by the judges of the Court of Appeal;
 - (d) one High Court judge and one magistrate, one a woman and one a man, elected by the members of the association of judges and magistrates;
 - (e) the Attorney-General;
 - (f) two advocates, one a woman and one a man, each of whom has at least fifteen years’ experience, elected by the members of the statutory body responsible for the professional regulation of advocates;
 - (g) one person nominated by the Public Service Commission; and
 - (h) one woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly.
 - (3) The Chief Registrar of the Judiciary shall be the Secretary to the Commission.



- (4) Members of the Commission, apart from the Chief Justice and the Attorney-General, shall hold office, provided that they remain qualified, for a term of five years and shall be eligible to be nominated for one further term of five years.
111. Article 171(2) provides for three categories of Commissioners – (i) those who become members by virtue of their positions, that is; The Chief Justice and Attorney General;(ii) those elected or nominated by named bodies, that is a Judge of the Supreme Court; Court of Appeal and High Court as well as representative of the Magistrates-elected as representatives of Judges of the Superior Courts and Magistrates; two advocates -representing the Law Society elected by members of the Law Society, and a representative of Public Service Commission. (iii)The third category is that of lay persons who are not lawyers, appointed by the President to represent Public interest in the Commission.
112. The dispute in this petition relates to the representative of the Public Service Commission appointed under Article 171(2) (g) and persons appointed under Article 171(2) (h). For convenience, I will deal with the appointment of the 2nd and 4th interested parties first.
113. Article 171(2) (g) requires the Public Service Commission to nominate a representative to JSC. According the petitioner and those supporting it, the 2nd interested party was nominated by the President and not the Public Service Commission. However, according to the Public Service Commission, it nominated the 2nd interested party to represent it in JSC. This, it deposed through its secretary Alice A Otwala, was done through consultative meetings of the Commission and his name sent to the President for formal nomination and appointment. The President then forwarded the 2nd interested party’s name to the National Assembly for approval in terms of Article 250(2) of the Constitution. The National Assembly through its Committee of Justice and Legal Affairs, conducted approval hearings and recommended his approval which the National Assembly accepted approved his appointment.
114. According to the evidence on record from the Public Service Commission, the 2nd interested party, one of its Commissioners, was nominated following internal meetings and a resolution of the Commission. The Public Service Commission contended, therefore, that proper procedure was followed before the 2nd interested party’s name was picked and forwarded to the President and, thereafter, to the National Assembly for approval. The petitioner, 5th, 6th and 7th interested parties have not only impugned the manner the 2nd interested party’s nomination but also contended that he should have not been approved by the National Assembly because Article 171 (g) does not require such approval. In their view, the Public Service Commission should have conducted an open and competitive nomination process so that the best suitable and merited person would have been picked and nominated.
115. Article 171(2) of the Constitution states that the Commission shall consist of among others; (g) one person nominated by the Public Service Commission. The Article does not give any criteria for arriving at the nominee which leaves the nomination at the discretion of the Commission. The word “nomination” is defined by Black’s Law dictionary 9th Edition to mean; “to propose(a person) for election or appointment; to name or designate (a person) for a position”. The Public Service Commission was given mandate by the Constitution to propose or designate a person as its representative for appointment to JSC. In that context, the Constitution granted mandate and discretion to the Public Service Commission to designate its representative to JSC without any conditions.
116. The Article must be read as a whole so that Article 171(2) (g) just like 171(2) (b) (c) (d) and (f), left the issue of nomination to the nominating body. Where Article 171(2) requires, anything else done or done in a particular manner such as election, nomination or appointment of Commissioners to JSC,



it states clearly what is required. In the case of the 2nd interested party, the Public Service Commission was thus left with the discretion to nominate its representative for appointment to JSC.

117. From the Public Service Commission's response which is also supported by that of the 2nd interested party, the Commission nominated the 2nd interested party through an internal process and picked its own Commissioner to represent it in JSC. I do not think from the reading of Article 171(2) (g), there could have been any other way of picking that nominee and where the Commission picked its own Commissioner as its representative to JSC. I therefore find and hold that it was the Public Service Commission and not the President that nominated the 2nd interested party. I also see no fault in the manner the Commission arrived at the choice of the 2nd interested party as its nominee to JSC because Article 171(2) (g) of the Constitution does not, in my view, require competition as suggested by the petitioner. The Article is self-executing and must be understood as such.
118. The petitioner, the 5th, 6th and 7th interested parties also complained that the process of picking the 2nd interested party was not open and transparent thus violated the values and principles of public service in Article 232 of the Constitution. The position the 2nd interested party was nominated to, was that of a state officer as opposed to public service. The nomination was done in accordance with express provisions of the Constitution. The Constitution having reserved the vacancy for the Public Service Commission which exercised its discretion and nominated the 2nd interested party, I see no violation of Article 171(2)(g) or any other, including Article 10 of the of the Constitution. The rationale for giving the Commission discretion must have been that since it is the constitutional Commission responsible for the public service, it would nominate a person that meets the criteria for appointment to such a constitutional Commission, to represent the entire public service in JSC and ensure observance of objects of commissions in Article 249(1)
119. What I see, however, to be the fundamental question here is whether the 2nd interested party was subject to approval by the National Assembly as it was purportedly done. As stated earlier, after the 2nd interested party's nomination by the Public Service Commission, his name was sent to the President's office as required by section 15(2)(a). The name was however sent to the National Assembly for approval under Article 250(2) of the Constitution. He was vetted and approved. The petitioner has contended that this was not required by the Constitution while the respondents have maintained that it was. The petitioner, the 5th, 6th, and 7th interested parties have relied on Article 171(2), while the respondents, the 2nd, 3rd, and 4th interested parties have relied on Article 250(2) of the Constitution for their contrary views.
120. The Article 171(2) states clearly that JSC consists of— (a) the Chief Justice, as the chairperson of the Commission; a Judge of Supreme Court, a Judge of the Court of Appeal, one High Court Judge and one magistrate, one a woman and one a man, the Attorney-General, two advocates, one a woman and one a man, each with at least fifteen years' experience, one person nominated by the Public Service Commission; and, one woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly. The Article read as a whole is clear that there is no requirement for the nominee of the public Service Commission to be approved by the National Assembly.
121. The respondents have relied on Article 250(2) of the Constitution to argue that the 2nd interested party is subject to such approval. Article 250(1) provides that each commission shall consist of at least three, but not more than nine members; that (2) the chairperson and each member of a commission, and holder of an independent office, shall be— (a) identified and recommended for appointment in a manner prescribed by national legislation; (b) approved by the National Assembly; and (c) appointed by the President. To be appointed, a person shall have the specific qualifications required by this



- Constitution or national legislation. The Article further states that appointments to commissions and independent offices shall take into account the national values referred to in Article 10, and the principle that the composition of the commissions and offices, taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya.
122. Article 250 is a general provision dealing with Commissions and independent offices generally. This is gathered from the tenor of Article 248 (1) of the Constitution which states that Chapter 15 (Articles 248- 254), applies to the commissions specified in clause (2) and the independent offices specified in clause (3), except to the extent that this Constitution provides otherwise. There are ten Commissions listed in clause 2 of Article 248 including Judicial Service Commission, and two independent offices in clause 3- the Auditor General and Controller of Budget.
123. In that regard, it is clear to me that Article 250 applies to constitutional commissions and independent offices- the Auditor General and the Controller of Budget, except where the Constitution provides otherwise. From the reading of Article 248(1), Article 171 is an exception to Article 250 and, therefore, applies exclusively to the appointment of the 2nd interested party and not the general provision of Article 250. This view is supported by the principle of constitutional construction that requires provisions of the Constitution to be read harmoniously. Parties cannot choose one provision and disregard the other. The two Articles must be read together in order to give effect to the spirit, values and principles of the Constitution because it is one living document.
124. The Constitution must therefore be given a holistic and purposive interpretation to achieve its values and purposes. In this regard, it was observed In *Ng Ka Ling & Another v The Director of Immigration* (1999) 1 HKLRD 315 that;
- “It is generally accepted that in the interpretation of a Constitution such as the Basic Law, a purposive approach is to be applied. The adoption of a purposive approach is necessary because the Constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the Constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument.”
125. And In *Paul Semogerere and Others vs. The Attorney General* (Constitutional Appeal No 1 of 2002) [2004] 10 UGSC, it was stated that “it is a cardinal rule in constitutional interpretation that provisions of a constitution concerned with the same subject should, as much as possible, be construed as complementing, and not contradicting one another. The constitution must be read as an integrated and cohesive whole.”
126. The purpose of including Article 171(2) in our Constitution despite the general provision in Article 250 was to make the process of appointing members of JSC separate and distinct from that of other Commissions and independent offices given the peculiar functions and mandate of JSC. Article 171(2) is a special constitutional provision that applies exclusively to JSC. In giving both Articles 171 and 250 a purposive interpretation, I find and hold, that the 2nd interested is not subject to approval by the National Assembly and any such approval is unconstitutional and a nullity. I must also point out that even if approval was required the 2nd interested party is a Commissioner with the Public Service Commission duly appointed in accordance with Article 233(2) which required approval by the



National Assembly. Subsequent approval would not serve any useful purpose but a waste of public resources.

Appointment of the 3rd and 4th Interested Parties

127. The petitioner, the 5th 6th and 7th interested parties raised questions on the suitability of the 3rd and 4th interested parties to serve as members of JSC. Their argument against the appointment was that just like that of the 2nd interested party, their appointment was neither competitive nor merit based. According to them, the process should have been open, competitive, transparent, and merit based. They expressed the view, that it was erroneous for the President to pick people and send their names to the National Assembly for approval. They contended that the Constitution, and in particular Article 10, requires public participation in public appointments. The respondents, the 3rd and 4th interested parties saw nothing wrong in the appointments, arguing that the Constitution gives discretionary powers to the President to appoint two lay persons, a woman and a man, to represent the public in JSC. According to them, the only caveat the Constitution places is that they be non- lawyers.
128. Article 171(2) (h) confers discretion on the Presidents to nominate persons under that paragraph, a woman and a man, who are not lawyers, to represent the public and, approved by the National Assembly. The Article does not place any conditions on how this appointment should be done.
129. As already adverted to in this judgment, Article 171 is self-executing. It provides for the mode of identification, qualifications and the manner of appointment. Where the Constitution itself makes clear how membership should be identified and appointments made, including conferring discretion in certain instances, the Court may not question that discretion as long as it is exercised in accordance with the Constitution and the law. In my respectful view, if the Constitution as the supreme law, gives power or authority for the performance of certain duties and functions, and determines how they are to be executed, there would be no need for a legislation to provide for a different way of discharging those duties and functions unless the Constitution so requires.
130. The people of Kenya wanted to be represented in JSC and conferred discretionary mandate on the President to make the appointments on their behalf. In doing so, the people, and by extension the framers of our Constitution, expected the President to act in good faith and in the best interest of the public when making such appointments; consider merit and national values and principles including integrity, national diversity and above all suitability to serve in JSC.
131. The drafters of our Constitution did not end there. They made appointments under Article 171(2)(h) subject to approval by the National Assembly. In that regard, the National Assembly is also required to ascertain whether in making the appointments, the President took into account national values and principle of governance in Article 10, including integrity, suitability and regional balance. In discharging that mandate, the National Assembly acting as the representative of the people has to subject the appointments to public participation and ensure that the President acted in accordance with the Constitution and the law. The National Assembly too has to act in accordance with the Constitution and the law while exercising that mandate.
132. It is my view, therefore, that the choice of the 3rd and 4th interested parties by the President cannot be faulted for lack of open and competitive nomination as the petitioner has tried to do because that is not a requirement under Article 171(2)(h). I have no doubt, and I so hold, that the choice of the 3rd and 4th interested parties by the President was done in accordance with the Constitution.
133. With regard to public participation, the National Assembly has a constitutional obligation to ensure that the public have an input in the case of the two lay persons appointed to JSC. The public has a



right to participate in determining the suitability of their representatives to JSC and that is why Article 171(2) (h) requires approval by the National Assembly as the peoples' representative. For that reason, Article 118 of the Constitution provides that (1) Parliament shall— (a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and (b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees.

134. There is no denial that the Committee of the National Assembly invited public views on the two nominees. In that regard, there are enough authorities on public participation. It is not mandatory that every person should present views or directly participate in the approval process. What is important, however, is that the public be accorded adequate opportunity to participate in the approval exercise. In the case of *Doctors for Life International v Speaker of the National Assembly & Others (CCT/12/05) [2006] ZACC 1; 2006(12) BCLR 1399 (CC)*, the court stated that:

“The measure and degree of public participation that is reasonable in a given case will depend on a number of factors. These include; the nature and the importance of the legislation and the intensity of its impact on the public. The more discreet and identifiable the potentially affected section of the population, and the more intense the possible effect on their interest, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.”

135. In *Samuel Thinguri Waruathe and 2 Others v Kiambu County Government & 2 Others [2015] eKLR*, the Court observed that “public views ought to be considered in the decision process and as far as possible the product to the legislative process ought to be a true reflection of the public participation so that the end product bears the seal of approval by the public. In other word the end product ought to be owned by the public.”

136. In *British American Tobacco Limited v Cabinet Secretary for Health & 5 others [2017] eKLR* the Court of Appeal stated;

“From these decisions and others that were cited before us by the parties' advocates, it is clear that public participation is a mandatory requirement in the process of making legislation including subsidiary legislation. The threshold of such participation is dependent on the particular legislation and the circumstances surrounding the legislation. Suffice to note that the concerned State Agency or officer should provide reasonable opportunity for public participation and any person concerned or affected by the intended legislation should be given an opportunity to be heard. Public participation does not necessarily mean that the views given must prevail. It is sufficient that the views are taken into consideration together with any other factors in deciding on the legislation to be enacted”.

137. And in the case of *Land Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of Provinces and others [20016] ZAACC22* the Court stated thus;

“The standard to be applied in determining whether Parliament has met its obligation of facilitating public participation is one of reasonableness. The reasonableness of Parliament's conduct depends on the peculiar circumstances and facts at issue. When determining the question whether Parliament's conduct was reasonable, some deference should be paid to what Parliament considered appropriate in the circumstances, as the power to determine how participation in the legislative process will be facilitated rests upon Parliament. The



Court must have regard to issues like time constraints and potential expense. It must also be alive to the importance of the legislation in question, and its impact on the public.”

138. Based on the above stated principles, and considering the record herein, I am satisfied that the National Assembly not only facilitated but also conducted public participation during the approval process of the 3rd and 4th interested parties.
139. The main question however, as I perceive it, is on the suitability of the 3rd and 4th interested parties to serve in JSC. The petitioner, the 5th, 6th and 7th interested parties contended that they are not suitable. They argued that the two have integrity issues and, in addition, that the 4th interested party is a politician. In their view, the appointment of the two interested parties will affect the independence of JSC and the judiciary. They contended that the independence of the Judiciary is to a large extent depended on the independence of JSC, and urged the Court to find that the two interested parties would be perceived to be on the side of the executive which will give a wrong perception that they represent the executive interest in JSC. The respondents, the 3rd and 4th interested parties dismissed this contention arguing that the two interested parties are suitable to serve in JSC.
140. In the case of the 4th interested party, it is true that he was at one time a member of the executive serving as a Cabinet Secretary between 2013 and 2015. Our constitutional architecture does not allow persons holding political positions to serve as cabinet secretaries. The 4th interested party had therefore been picked from the private sector and there is no evidence that he had been a politician before then. Even at the time of his appointment as a member of JSC, he was not a Member of Parliament. Other than having served in the cabinet, there is no evidence that he is a politician. In that regard, therefore, it would be difficult for this Court to conclude, without concrete evidence, that the 4th interested party is a politician who should not serve as a member of JSC. It was stated in *Centre for IPL & another v Union of India & another* (supra) that appointment of members of the executive should not be made to such institutions if the selection would adversely affect institutional competence. There must be evidence that indeed this will be the case otherwise the Court cannot act on speculation or suspicion.
141. Regarding the 4th interested party’s integrity, I must state that nothing was placed before Court to justify the contention that he lacks integrity. Moreover, the 4th interested party’s name was forwarded to the National Assembly for approval; the public were invited to submit information and or views on his suitability but no one came out to challenge his appointment. In such a case, even where there would be strong suspicion or perception of lack of integrity, it would be difficult for the Court to come to a conclusion, as the petitioner has urged, that the 4th interested party lacks integrity and should not serve as a member of JSC. The National Assembly cannot be faulted for approving his appointment either.
142. What about the 3rd interested party? In the case of the 3rd interested party, three memoranda were received challenging her appointment. Two were rejected for failure to comply with the procedure, while the third was accepted and considered. It made a number of allegations against the 3rd interested party such as nepotism, tribalism, mismanagement resources and the fact that there are a number of suits in Court. These are Petition Nos. 78 of 2016; 128 of 2016, and 2010 of 2016 which are pending before the Employment and Labour Relations Court. Also brought to the attention of the National Assembly’s Committee was the existence of a Parliamentary report which had recommended that the 3rd interested party be investigated over issues of students’ disturbances at the University during her watch.
143. The petitioner, the 5th, 6th, and 7th interested parties blamed the National Assembly for ignoring these issues and approved the 3rd interested party’s appointment. In their view, the National Assembly failed to discharge its constitutional mandate, including ignoring its own recommendations for the 3rd



- interested party's further investigation. The respondents and the 3rd interested party argued that the issues were adequately responded to by the 3rd interested party both orally and through depositions.
144. I have perused the pleadings and submissions by both sides. It is admitted that indeed the 5th interested party raised issues of integrity against the 3rd interested party which were placed before the Committee. It is also true that the 3rd interested party swore an affidavit in response to those allegations which was placed before the Committee. She also appeared before the Committee and gave an oral response. After considering the issues, the Committee recommended approval of her appointment and the National Assembly went ahead and approved it.
145. The question raised here, as it ought to be, is whether the National Assembly acted within the Constitution and the law in approving the 3rd interested party's appointment in the face of the issues raised against her integrity and suitability to serve in JSC. The 3rd interested party was nominated as a member of JSC, a constitutional Commission whose functions and mandate under Article 172 of the Constitution include; to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice; recommend persons for appointment as judges and receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary.
146. With this mandate, there is no doubt that a member of JSC must be one with unquestionable integrity given that the Commission is to recruit Judges, Judicial officers and staff of integrity to serve in the Judiciary. One of the greatest attributes necessary for one to join JSC is unquestionable integrity. Commissioners are the nerve Centre of the Judiciary and carry the highest level of responsibility in the management of the institution and, therefore, their integrity and conduct should be beyond reproach.
147. Kenyans decided dedicated the whole of chapter six on leadership and integrity, and made it clear that those whose conduct will not bring honour, public confidence and integrity to public office, have no room in the management of public affairs. And because JSC quite often seeks to recruit people of highest integrity to serve in the Judiciary, they must themselves be of unquestionable integrity. This is because without integrity, one cannot inspire confidence in an institution and to those he/she leads. Integrity is a fundamental virtue that is cherished by the Constitution.
148. Concise Oxford English Dictionary, Twelfth Edition defines the word "integrity" as "the quality of having strong moral principles." According to Black's Law Dictionary, 9th Edition, the word "Integrity" is defined to mean "soundness of moral principle and character, as shown by one person dealing with others in the making and performance of contracts, and fidelity and honesty in the discharge of trusts; it is synonymous with "probity," "honesty," and "uprightness." In that context, integrity is the attribute of one's adherence to moral and ethical principles, having the soundness of moral character and being honest in undertakings with others. When one's integrity is challenged it does not mean s/he is guilty but is an expression of doubts about his/her suitability to serve in a public office.
149. The 5th interested party placed before the National Assembly facts that brought the 3rd interested party's integrity to question. They included the fact that she is actively litigating in Court and that the National Assembly had previously recommended her investigation over issues that had to do with her leadership as Vice Chancellor of Kenyatta University. There was also submission by the 5th interested party that a complaint arising from the litigation has found its way to JSC where it is pending, which called on the National Assembly to consider the issues and determine whether the 3rd interested party met the integrity threshold prescribed by the Constitution and ultimately whether she was suitable for appointment.



150. There is no doubt as seen from the pleading and submissions, that there are a number of suits by and against the 3rd interested party pending in Court relating to her work and actions while working as Vice Chancellor of Kenyatta University. That, however, is a matter that the court hearing the cases will decide based on the evidence and the law. On the allegations that there was a recommendation for further investigation of the 3rd interested party, the 3rd interested party deposed that she was investigated by EACC and absolved from blame. She attached to her supplementary affidavit two letters dated 1st and 15th October 2013 (“OMM2” and “OMM3” respectively) one from EACC and the other from the Secretary to the Cabinet, to confirm this fact. The letters state that due to insufficient facts, further investigations were no possible. This seems to have laid that issue to rest.
151. There was further contention and indeed the 5th interested deposed in his memorandum to the Committee of the National Assembly, which is also attached to the 3rd interested party’s supplementary affidavit, that there is a matter pending before JSC stemming from the 3rd interested party’s litigations thus raising the question of suitability of the 3rd interested party to sit in JSC. The Committee however considered the matter and, concluded that the 3rd interested party had integrity and that there was no likelihood of conflict of interest.
152. Looking at the material on record, the National Assembly dealt with the issues and determined them. The respondents and the 3rd interested party contend and rightly so, in my view, that it is not for the Court to determine the integrity of the 3rd interested party at this stage since the National Assembly had considered the issue and cleared her. The Court recognizes the doctrine of separation of powers and the fact that it is not sitting on appeal over the decision of the National Assembly. The mandate of the Court at this stage is to check and be satisfied that the National Assembly acted in accordance with the Constitution and the law, but not to substitute the decision of the National Assembly with its own. However, where the National Assembly fails, and the court determines so, the Court has jurisdiction under Article 165(3) (d) (ii) to determine whether anything said to be done under the authority of the Constitution or of any law is inconsistent with or in contravention of the Constitution and may annul the appointment.
153. This issue has been dealt with in a number of cases including *Kenya Youth Parliament & 2 Others v AG & Another*, Constitutional Petition No. 101 of 2011, where the court observed; “We state here with certain affirmation, that in an appropriate case, each case depending on its own peculiar circumstances, facts and evidence, this court clothed with jurisdiction as earlier stated, would not hesitate to nullify and revoke an appointment that violates the spirit and letter of the Constitution but the Court will hesitate to enter into the arena of merit review of a constitutionally mandated function by another organ of State that has proceeded with due regard to procedure. The Court’s intervention would of necessity be pursuant to a high threshold.”
154. In the case of *Judicial Service Commission v. Speaker of the National Assembly & 8 Others* [2014] eKLR the Supreme Court stated that “The Constitution disperses powers among various constitutional organs. Where it is alleged that any of these organs has failed to act in accordance with the Constitution, then the Courts are empowered by Article 165 (3)(d)(ii) to determine whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution.”
155. In *Mumo Matemu v Trusted Society of Human Rights Alliance & 2 Others*, [2013] eKLR the Court of Appeal stated that [Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent. Yet, as the



respondents also concede, the Courts have an interpretive role – including the last word in determining the constitutionality of all governmental actions...”

156. And in *Justus Kariuki Mate & another v Martin Nyaaga Wambora & another* [2017] eKLR the Supreme Court, after analyzing various decisions on the subject, stated at paragraph[62] that”A clear inference to be drawn is that, it was the Supreme Court’s stand that no arm of Government is above the law. This being a constitutional democracy, the Constitution is the guiding light for the operations of all State Organs. The Court’s mandate, where it applies, is for the purpose of averting any real danger of constitutional violation.”*(emphasis)
157. The jurisprudence flowing from the above decisions is that the duty of the Court, when considering a challenge to decisions other constitutional organs, is to ensure that state organs comply with the Constitution, its values and principles and the law, with the aim of averting a real danger of constitutional violation but not to venture into the arena of other constitutional organs without justifiable or constitutional compulsion. With that in mind and considering the facts of this petition and the materials placed before me, I am unable to hold that the National Assembly failed to comply with the Constitution and the principles it espouses when it approved the appointment of the 3rd interested party.

Constitutionality of Section 15(2) of the Judicial Service Act

158. The other issue raised in the petition is on the constitutionality of section 15(2) of the Judicial Service Act. JSC is an independent constitutional commission. The Judicial Service Act was enacted in 2011 to complement Article 171 of the Constitution. The petitioner, the 5th, 6th, and 7th interested parties have, however, argued that the section is unconstitutional to the extent that it does not require appointment of the Public Service Commission representative and those under Article 171(2)(h) to be subjected to an open, transparent and competitive processes. They therefore contended that this failure violates Article 10 of the Constitution. The respondents, the 2nd, 3rd, and 4th interested parties rejected this contention arguing that the section is in line with Article 171(2) (g) and (h) of the Constitution.
159. It is a principle of law that where a statute or statutory provision is challenged on grounds that it is inconsistent with the Constitution, the statute or the statutory provision concerned is to be laid alongside the Article of the Constitution said to be violated and thereafter the Court will determine whether indeed there is inconsistency. In *US v Butler*, 297 US I [1936], it was stated that where an act of Congress is appropriately challenged as being unconstitutional, the judicial branch has only one duty; to lay the article of the constitution involved beside the statute challenged and decide whether the latter squares with the former.
160. The Court must also consider whether the purpose of enacting the legislation so challenged or the effect of implementing it has an unconstitutional purpose or effect which may lead a declaration of constitutional invalidity. In *Olum and another v Attorney General* [2002] 2 EA 508, the Court stated;
- “To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the constitution, the court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the constitution, the impugned statute or section thereof shall be declared unconstitutional...”
161. Section 15 (2) provides that where the nominations are to be made by bodies specified under Article 171(2) (b), (c), (d), (f) and (g) of the Constitution—(a) the respective nominating body shall submit



the name of its nominee to the President; and (b), the President shall, within three days of receipt of the names, appoint the nominees as members of the Commission.

162. The petitioner has argued that this section violates values and principles in Article 10(2) and 73(2) for failing to provide for fair competition in the nomination and appointment of the persons contemplated under Article 171(2)(g) and (h) of the Constitution. National values and principles of governance in Article 10(2) include; (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development.
163. The national values and principles of governance espoused in Article 10(2) are not exhaustive. The Article contains only some, which means they are more than those mentioned therein. Article 259(1) of the Constitution emphasizes the need to interpret the Constitution so as to take into account not only national values and principles, but also to promote the Constitution, its purposes, values and principles; advances the rule of law and the human rights and fundamental freedom in the Bill of rights as well as permit development of the law and contribute to good governance.
164. The Judicial Service Act was enacted to augment Article 171 of the Constitution. The challenge in so far as I can see it, only relates to the nominee by Public Service Commission nominated under Article 171(2) (g) and the persons appointed under Article 171(2) (h). The petitioner, the 5th, 6th and 7th interested parties contend that the section should have provided for open, transparent, and merit based nomination of the persons contemplated in those paragraphs. In their view, the Public Service Commission should not just hand pick anyone and send him/her to represent it in JSC but should do an open nomination in which all those who qualify are given an equal opportunity to apply. They too argued that the President should also not be allowed to hand pick anyone without any criteria and appoint them as representatives of the public in JSC.
165. As I have already stated elsewhere in this judgment, Article 171(2) (g) requires the Public Service Commission to nominate its representative to JSC but does not say how this should be done. Similarly, the Act is silent on the procedure for identifying the nominee. The word “nominate”, as seen earlier means to designate or appoint someone to a position. To designate would mean that the nominating body would be free to use its internal mechanism or process to arrive at its nominee.
166. It is true that Article 10 provides for transparency and accountability in public affairs as well as public participation in public appointments. However, it is not in every public appointment that there must be open recruitment. In the case of the Person contemplated under Article 171(2) (g), the Constitution gave the mandate to the Public Service Commission to nominate or designate a person to represent it in JSC. The Constitution leaves the discretion to the Public Service Commission to decide who to nominate. In my respectful view, the reading of Article 171(2) (g) and section 15 (2) of the Judicial Service Act, does not show any inconsistency in so far as nomination of its representative to JSC is concerned.
167. With regard to the persons under Article 171(2) (h), that is purely at the discretion of the President. Where the Constitution has conferred discretion, the Court will only interfere if the discretion is not exercised properly. From a purposive approach, this construction, in my view, resonates well with the broader objectives of the Constitution as supported by the Judicial Service Act which was enacted to give effect to the imperatives of Article 171(2) on the revamped JSC. Consequently, I see no Constitutional inconsistency merely because the section fails to provide for an open and transparent manner of appointing members to represent the public in JSC.



Conclusion

168. Having given due consideration to this petition, the constitution, the law and precedent I agree with the petitioner to the extent only that the 2nd interested party did not require approval by the National Assembly and that the National Assembly was wrong in vetting and approving him. Regarding the appointment of the 3rd and 4th interested parties, there was no violation of the constitution. I am also unable to find constitutional invalidity in section 15(2) of the Judicial Service Act.
169. The upshot is that the petition partially succeeds and I make the following orders.
- a. A declaration is hereby issued that there is no requirement for approval of the 2nd interested party, the nominee of Public Service Commission under Article 171(2)(g) of the Constitution; and the approval by the National Assembly made in this regard is of no legal effect.
 - b. The rest of the petition is, however, dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JULY 2018

E C MWITA

JUDGE

