



**Law Society of Kenya & another v National Assembly of the Republic of Kenya & 3 others;
Warsame & 2 others (Interested Parties) (Petition 106 & 119 of 2018 (Consolidated))
[2018] KEHC 8892 (KLR) (Constitutional and Human Rights) (6 July 2018) (Judgment)**

Law Society of Kenya & another v National Assembly of the Republic of Kenya & 3 others [2018] eKLR

Neutral citation: [2018] KEHC 8892 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 106 & 119 OF 2018 (CONSOLIDATED)**

**EC MWITA, J
JULY 6, 2018**

BETWEEN

THE LAW SOCIETY OF KENYA PETITIONER

AND

NATIONAL ASSEMBLY OF THE REPUBLIC OF KENYA 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

AND

JUSTICE MOHAMED ABDULLAHI WARSAME INTERESTED PARTY

JUDICIAL SERVICE COMMISSION INTERESTED PARTY

**AS CONSOLIDATED WITH
PETITION 119 OF 2018**

BETWEEN

SAMUEL NJUGUNA PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

JUDICIAL SERVICE COMMISSION 2ND RESPONDENT

AND



LAW SOCIETY OF KENYA INTERESTED PARTY
JUSTICE MOHAMMED WARSAME INTERESTED PARTY

With the exception of the two lay persons appointed by the President, elected members of the Judicial Service Commission are not subject to approval by the National Assembly before appointment

Reported by Ian Kiptoo and Diana Mutunga

Constitutional Law-interpretation of the Constitution-interpretation of articles 171 and 250 of the Constitution of Kenya, 2010-principles applicable in interpreting the Constitution-claim that article 250 on composition, appointment and terms of office applied to the Judicial Service Commission-whether a commissioner elected to the Judicial Service Commission (JSC) as a representative of the justices of the Court of Appeal was subject to national assembly approval before being appointed by the President-Constitution of Kenya, 2010, articles 171(2); (b), (c), (d), (f), § (h); 248(1) § (2); and 250(6) (a); Judicial Service Act, sections 15(2) and 16

Constitutional Law-separation of powers-functions and powers of the organs of government-extent to which parliament can interfere in the judiciary-claim that elected commissioners of the JSC were subject to parliamentary approval-whether subjecting an elected commissioner of the JSC, excluding the two lay persons appointed by the President, to an approval process by the National Assembly was a breach of separation of powers-Constitution of Kenya, 2010, articles 132(4), 171 and 250; Final Report of Committee of Experts (COE's Final Report), paragraph 8.11.5

Constitutional Law-constitutionality of statutes-constitutionality of section 15(2) of the Judicial service Act-principles applicable in determining the constitutionality of statutes-whether section 15(2) of the Judicial Service Act was unconstitutional for not providing for mandatory approval of an elected commissioner to the JSC by the National Assembly-Constitution of Kenya, 2010, articles 171 and 250; Judicial Service Act, section 15(2)

Brief facts

The consolidated Petitions involved the relationship between articles 171(2) and 250(2) of the Constitution of Kenya, 2010 (Constitution) in as far as the appointment of commissioners to the Judicial Service Commission (JSC). The second Petition was, as a matter of fact, a response to the first Petition because issues it raised were answers to the first petition.

The 1st Petitioner averred that the President's act of nominating the 1st Interested Party was *ultra vires* article 171(2) (c) of the Constitution and similarly, that the National Assembly had no constitutional mandate to approve elected members of JSC. On the other hand, the 2nd Petitioner contended that approval by the National Assembly was mandatory for all commissioners irrespective of the Commission.

Issues

1. Whether a commissioner elected to the Judicial Service Commission (JSC) as a representative of the justices of the Court of Appeal was subject to national assembly approval before being appointed by the President.
2. Whether subjecting an elected commissioner of the JSC, excluding the two lay persons appointed by the President, to an approval process by the National Assembly was a breach of separation of powers.
3. Whether section 15(2) of the Judicial Service Act was unconstitutional for not providing for mandatory approval of an elected commissioner to the JSC by the National Assembly.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 171

- 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 15 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."

Article 250

Composition, appointment and terms of office

- 1. each commission shall consist of at least three, but not more than nine commissioners; that
- 2. the Chairperson and each member of a commission and holder of an independent office
 - 1. shall be Identified and recommended for appointment in a manner prescribed by national legislation;
 - 2. approved by the National Assembly; and
 - 3. appointed by the President

Held

- 1. Article 259(1) of the Constitution of Kenya, 2010 (Constitution) enjoined the Court to interpret the Constitution in a manner that promoted its purpose and principles; advanced the rule of law and the human rights and fundamental freedoms in the Bill of Rights; permitted the development of the law and contributed to good governance. Furthermore, the Constitution should be given a purposive, liberal and flexible interpretation. A Constitution was a living instrument with several provisions that should be read as an integrated whole, reading one provision alongside others so that they were seen as supporting one another and not contradicting or destroying each other.
- 2. Article 171(2) had four categories of commissioners.
 - a. persons who were Commissioners by virtue of the offices they held- the Chief Justice who was Chairperson of the Commission by virtue of being Chief Justice and the Attorney General who was a member of Judicial Service Commission (JSC) by virtue of being the Attorney General;
 - b. members elected by their peers- a justice of the Supreme Court, a justice of the Court of Appeal and a judge of the High Court and a representative of the Magistrates, male and female, elected by the association of Judges and Magistrates. In the same category were two advocates, a woman and a man of 15 years' standing, to represent the Law Society of Kenya;
 - c. the nominee by the Public Service Commission; and
 - d. two lay persons, a man and a woman, appointed by the President with approval by the National Assembly, to represent public interest.

In the case of second class of Commissioners, the Constitution was clear that they were elected by their peers. The Supreme Court, Court of Appeal, Judges of the High Court and Magistrates elected representatives of their choice.

- 1. The Law Society of Kenya and section 16 of the Judicial Service Act provided that elections had to be by secret ballot and were ordinarily overseen by the Independent Electoral and Boundaries Commission. Therefore, there was no doubt that article 171(2) of the Constitution provided for identification, qualification and appointment of JSC Commissioners. In the case of the 1st Interested Party, he was



- elected by the Justices of his Court in accordance with article 171(2) (c) of the Constitution, and by secret ballot as required by section 16 of the Judicial Service Act.
2. Section 15(2) of the Judicial Service Act required the President to formally appoint those elected and the one nominated within three days after receiving the names. After the 1st Interested Party's election, instead of being appointed as required by law, his name was sent to the National Assembly for approval leading to litigation.
 3. Article 250 was a general provision relating to commissions and independent office holders including the Auditor General and Controller of Budget. Furthermore, article 250 of the Constitution left identification, recommendation for appointment and qualifications of chairpersons and members of commission and independent offices a matter for national legislation. Sub-article 6(a) gave commissioners a single term of six years with no eligibility for reappointment. At the same time, article 248(1) of the Constitution provided that Chapter 15 applied to the Commissions specified in clause 2 and the independent offices specified in clause (3) except to the extent that the Constitution provided otherwise. JSC was one of the commissions specified in article 248(2). It was however clear that although Chapter 15, including article 250, applied to all the commissions listed there under, the article contemplated situations where the Constitution may exclude chapter 15 (article 250) from applying to some commissions.
 4. JSC was excluded from the general provisions of article 250 of the Constitution. Whereas article 250(2) left identification, qualification and recommendation for appointment of commissioners to legislation, that was not the case with regard to membership of JSC. In contrast, article 171(2) identified who the Chairperson was; who the members should be; provided for modes of their identification as election, nomination and those to be appointed and in some instances gave qualifications and gender. Moreover, unlike the Commissions contemplated under article 250, JSC had eleven commissioners, way above the maximum number of nine prescribed by article 250.
 5. A reading of the language in articles 171 and 250 of the Constitution, taking into account article 248(1), was that articles 171 and 250 applied to different commissions. Therefore, article 250 of the Constitution did not apply to JSC whether in terms of composition or manner of identification of its commissioners. In that regard, the requirement and processes of approval by the National Assembly in article 250 did not apply to JSC commissioners except those appointed under article 171(2) (h) of the Constitution.
 6. Even though article 250(6) limited the term of office for commissioners and holders of independent office to a single non-renewable term of six years, article 171(4) gave JSC commissioners, other than the Chief Justice and Attorney General, a renewable term of five years provided they remained qualified. That was; the status of the commissioners must not have changed since their first appointment. Where a statute (read a Constitution) contained both a general provision as well as a specific one, the latter had to prevail.
 7. Articles 171 and 250 were articles in the same Constitution. None of them was superior to the other, and the principles of constitutional construction required that the Constitution be read as an integrated whole with various articles supporting one another. They should never be seen as contradicting each other or one subordinating the others. They had to be read harmoniously because they were mutually consistent with no internal logical contradictions. The Court therefore had to adopt an interpretation that brought a harmonious relationship between the two articles and resist an interpretation that created tension between them or encouraged one provision of the same Constitution to be hoist above the other. They were equal like branches of the same tree.
 8. It was a rule in constitutional interpretation that provisions of a constitution concerned with the same subject should be as far as possible, be construed as complementing and not contradicting one another. Furthermore, the history of the Country including the legislative history of the Constitution was also relevant and a useful guide in constitutional interpretation. The Court had to pay proper attention to



- the words actually used in context; avoid doing so literally or rigidly; look at the whole Constitution; and consider further the background circumstances when the Constitution was granted because in interpreting the Constitution the whole document had to be looked at, both provisions were impliedly subject to any exceptions made in other parts of the Constitution.
9. Articles 171 and 250 of the Constitution were not at war with each other but complemented one another. They had to be understood from the historical context that they were a product of change from the past when JSC was composed of unknown people. As a result, the country wanted a break from the past, thus the adoption of article 171 on the establishment, composition and appointment of JSC commissioners. Article 171(2) reflected the wishes of the people of Kenya and the Court's duty was to give effect to those wishes. In that regard, the language of article 171(2) (b), (c), (d), and (f) had to be respected and given effect to, rather than ignoring it in favour of a strict and technical interpretation which deviated from the spirit of the Constitution.
 10. Flowing from the language of article 171 (2) (b), (c), (d), and (f) of the Constitution, there was no doubt that results from elections conducted under the authority of the Constitution and the law by constituencies identified in article 171(2)(b), (c), (d), and (f) were final and conclusive and did not require approval by any other state organ, not even the National Assembly under the guise of article 250(2) of the Constitution. Any attempt to subject those elected to any form of approval was against the letter and spirit of the Constitution and was unconstitutional. So was any action so far taken by the National Assembly respecting the election of the 1st Interested Party as a member of JSC.
 11. If a rigid interpretation of article 171(2) (h), that implied that all JSC commissioners had to be approved by the National Assembly, were to be taken to be correct. It would then mean that even the Chief Justice and the Attorney General who were members of JSC by virtue of the offices they held, would be subjected to approval which would obviously be absurd, because those two were appointed after a process that included approval by the National Assembly. They could not be subjected to another approval.
 12. Secondly, such an interpretation would defeat the meaning and essence of elections conducted by peers through secret ballot. Members who had been subjected to elections were, in essence, vetted by their colleagues on their suitability to serve as representatives. The Constitution did not use the word elected just for the sake of it. It wanted elected representatives subjected to scrutiny and competition among peers before being picked through such elections because only the person who stood out best was elected. It had to be clear that the member was elected as a representative and, therefore, only those who had been given the constitutional mandate to elect had a final say on who their best representative was and not the National Assembly.
 13. The people of Kenya made a deliberate decision on how they wanted JSC constituted and its members appointed. That was intended to guarantee independence to JSC and by extension to the Judiciary. Independence of the Judiciary could not be delinked from that of JSC because article 172(1) of the Constitution mandated JSC to promote and facilitate independence of the Judiciary. JSC could not do so if it was not independent. Subjecting persons duly elected by peers as required by the Constitution to approval by the National Assembly would not only expose them to ridicule, possible political patronage and horse trading, but would also defeat the spirit of the Constitution, thus interfere with independence of JSC and ultimately, that of the Judiciary. In fact, the final Report of Committee of Experts (COE's Final Report) paragraph 8.11.5 bore the fact that only the two lay members of the JSC appointed by the President should be subject to approval by the National Assembly.
 14. It may well be true that approval by the National Assembly provided checks on those elected to JSC with some scope of public scrutiny of the appointment process. However, the Constitution limited that to the persons appointed under article 171(2) (h) in so far as membership to JSC was concerned. That was the constitutional reality the Court had to be prepared to live with, uphold and



- defend. Article 250 could not be emphasized while down playing the import of article 171 of the same Constitution. They were equal, complementary and deserved equal consideration.
15. There was no constitutional requirement that JSC commissioners contemplated in article 171(2) (b), (c), (d), and (f) of the Constitution be approved by the National Assembly. In addition, article 250(2) did not also apply to JSC Commissioners. Therefore, section 15(2) could not be constitutionally invalid for failure to provide for mandatory approval of JSC Commissioners by the National Assembly.
 16. It was the first time the National Assembly and the Attorney General argued that a legislation enacted by the National Assembly was constitutionally invalid, a serious indictment on the National Assembly's ability to act in accordance with the Constitution. If not for anything else, that admission betrayed any good intentions the National Assembly and the Attorney General may have had in supporting the second petition.
 17. The principles upon which a statute or statutory provision may be declared constitutionally invalid were clear. The provision had to violate or contradict a clear provision of the Constitution to the extent that it could not be reconciled with the offended article; and second, the purpose of enacting the statute or statutory provision had to be unconstitutional or the implementation of the impugned statute or statutory provision had to have an unconstitutional effect. In other words, the statute or statutory provision had to have an unconstitutional purpose or effect.
 18. Section 15(2) provided that where nominations were to be made by bodies specified under article 171(2) (b), (c), (d), (f), and (g) of the Constitution-
 - a. the respective nominating body would submit the name of its nominee to the President; and
 - b. The President would, within three days of receipt of the names, appoint the nominees as members of the Commission.
1. The section simply directed that names be sent to the President for formal appointment. It did not confer any discretion on the President once he received the names. He was under legal obligation to appoint the nominee(s) within three days of receipt of the name(s). Once the President received names of commissioners determined in accordance with provisions of article 171(2) (b), (c), (d), (f), and (g), his mandate was to formally appoint them and nothing more.
 1. The National Assembly, fully cognizant of and appreciating the unique functions and mandate of JSC, assigned a period of three days within which the President had to sign the instrument(s) formally appointing the nominee(s) as commissioner(s). Article 132(4) of the Constitution mandated the President to perform any other executive function provided for in the Constitution and in national legislation. In that regard, appointment of nominees as JSC commissioners was an executive function conferred on the President by section 15(2) of the Judicial Service Act. Therefore there was no constitutional invalidity in the impugned section 15(2).

First Petition allowed and second Petition dismissed.

Orders

1. *A declaration was issued that the 1st Interested Party, having been elected by Judges of the Court of Appeal as a member of the Judicial Service Commission in accordance with article 171(2) (c) as read with section 16 of the Judicial Service Act, was not subject to approval by the National Assembly under article 250(2) of the Constitution.*
2. *An order was issued invalidating the purported nomination by the President of the 1st Interested Party as a member of the judicial Service Commission and forwarding his name to the National Assembly for approval and any subsequent decision by the National Assembly in that regard.*
3. *A permanent injunction was issued prohibiting the National Assembly, the 1st Respondent, from vetting or approving the 1st Interested Party as a member of Judicial Service Commission.*



4. *The 1st and 2nd Respondents in the first Petition would bear the Petitioner's costs; while the Interested Parties bore their own costs.*
5. *The second Petition was dismissed with no order as to costs.*

Citations

Statutes

None referred to

Advocates

None mentioned

JUDGMENT

1. This is the second time the relationship between Articles 171 (2) and 250(2) of the Constitution in so far as the appointment of commissioners to the Judicial Service Commission, a constitutional commission established under Article 171(1), is concerned has been questioned. The questions raised herein are whether a commissioner elected under Article 171(2) (c) and by extension, those elected under (2) (b), (d) and (f) of the Constitution, are subject to approval by the National Assembly in terms of Article 250(2) of the same Constitution; and also whether section 15(2) of the Judicial Service Act is unconstitutional for either requiring the President to formally appoint the elected commissioners or for failing to provide that the commissioners be approved by the National Assembly.
2. Raising the above questions are two consolidated petitions Numbers 106 of 2018, herein the first petition, and 119 of 2018, herein the second petition. The second Petition is, as a matter of fact, a response to the first petition because the issues it raises are, in a manner of speaking, answers to the first petition. For convenience, I will set out facts of the two petitions separately.

The first Petition

3. Law Society of Kenya, the first petitioner, is established under section 4 of the Law Society of Kenya Act, No 21 of 2014 whose mandate under section 4 include to assist the Government and the courts in matters relating to legislation, the administration of justice and the practice of law in Kenya; and uphold the Constitution of Kenya and advance the rule of law and the administration of justice among others. The 1st respondent is the National Assembly of Kenya while the 2nd respondent is the Attorney General of the Republic, the principal legal advisor to the National government; represents the national government in civil proceedings and is the defender of public interest under Article 156 of the Constitution.
4. The 1st interested party is a Judge of the Court of Appeal, the elected representative of the Justices of the Court of Appeal to the Judicial Service Commission for a second term. The 2nd interested party is the Judicial Service Commission, a constitutional commission established under Article 171(1) of the Constitution with mandate specified in Article 172.
5. According to the first petitioner, the 1st interested party was elected on 9th March 2018 by Justices of the Court of Appeal and his name forwarded to the President for formal appointment as a Commissioner in accordance with section 15(2) of the Judicial Service Act 2011. The first petitioner contends that, instead of appointing him, the President forwarded the 1st interested party's name to the National Assembly approval. It is averred that although the 2nd interested party wrote to the 1st respondent pointing out that the approval is unconstitutional and, therefore, the 1st interested party would not attend, the 1st respondent insisted on proceeding with approval hearings.



6. The first petitioner averred that the President's act of nominating the 1st interested party is ultra vires Article 171(2)(c) of the Constitution, that intended approval of the 1st interested party is a violation of Article 171(2)(c); that the procedure adopted by the respondents is ultra vires section 15(2) of the Judicial Service Act; and that the constitutionality of section 15(2) of the Act is contested in so far as it purports to give the President a role in the appointment of members of JSC elected and or nominated by bodies specified under Article 171(2)(b)(c),(d)(f) and (g) of the Constitution.
7. It was contended that under Article 94(1) of the Constitution, the legislative authority at the national level is vested in and exercised by Parliament and that Article 94(4) of the Constitution obligates Parliament to protect the Constitution and promote democratic governance.
8. The first petitioner further contended that under Article 95(2) of the Constitution, the National Assembly apart from exercising oversight on state organs is to deliberate on and resolve issues of concern to the people and review conduct of the President, Deputy President and other state officers and initiate processes of removing them from office. It was averred that under Article 129 of the Constitution, executive authority derives from the people and must be exercised in a manner compatible with the principle of service to the people of Kenya and for their wellbeing and benefit.
9. The first petitioner went on to contend that under Article 131 of the Constitution, the President is required to among others, respect, uphold and safeguard the Constitution; that under Article 159 Judicial authority is derived from the people and vests in courts and tribunals which they exercise guided by the principles enunciated in that Article; further that Article 160 of the Constitution guarantees the independence of the judiciary and in exercising its authority, the judiciary is subject only to the Constitution and the law.
10. It was averred that when it comes to election and appointment of JCS Commissioners, the President's role is provided for under Article 171(2)(h) of the Constitution and further that Article 248 (1) is clear that chapter 15 of the Constitution applies to constitutional commissions except to the extent that the Constitution provides otherwise. In that context, the first petitioner averred, Article 171(2) is a special provision on the composition of JSC and its membership. It was similarly contended, that the Constitution sets out composition of other commissions, including Commission on Revenue Allocation, Salaries and Remuneration Commission, Public Service Commission, National Police Service, Controller of the Budget and Auditor General, some of which do not fall under chapter 15 in terms of composition and appointment of commissioners. It was averred that on that basis, Article 250(2) is a general provision and does not necessarily apply to all commissions for identification and appointment of chairpersons and commissioners.
11. The first petitioner also contended that section 15(2) of Judicial Service Act contradicts Article 171 regarding the 1st interested party's mode of appointment. According to the first petitioner, Section 15(2) (a) provides that the respective nominating bodies should submit names of their representatives and the President should, within three days of receipt of the names, appoint the nominees as members of the commission.
12. The petitioner averred that despite the 1st interested party having been elected on 9th March 2018, the President has purported to nominate him as a member of JSC; and the 1st respondent called for submission for memoranda for purposes of vetting and considering his suitability for appointment as a member of JSC, an act the first petitioner contends is unconstitutional. The first petitioner's position is that the nomination of the 1st interested party and subsequent intention of National Assembly to vet and approve him are unconstitutional and that the President's failure to appoint the 1st interested party within 3 days is a violation of the law.



13. It further contended that section 15(2) is unconstitutional for purporting to give the President a role the Constitution has not assigned him regarding persons elected pursuant to Article 171(2) (b) (c) (d) (f) and (g) of the Constitution and amounts to a wrong exercise of state authority contrary to the Constitution and is a threat to the independence of the judiciary. Based on the above averments, the first petitioner sought the following reliefs:
- (a) A declaration be and is hereby issued that the purported nomination and vetting of the 1st interested party by the President and the 1st respondent respectively as a member of the judicial service commission is unconstitutional and invalid.
 - (b) A declaration that the 1st interested party automatically became a member of the Judicial Service Commission by operation Article 171(2) (c) upon his election by the judges of the Court of appeal.
 - (c) A declaration that to the extent that in purpose and effect section 15(2) of the JSC Act, 2011 purports to give the President any role in the nomination and appointment of a person elected under article 171(2)(b)(c)(d) and (f) and in effect allows the 3rd respondent a role in the approval of members of the judicial service commission elected under article 171(2)(b)(c) (d)and (f) of the constitution the same is null and void and of no effect in law.
 - (d) A permanent injunction do issue prohibiting the 1st respondent from purporting to vet the 1st interested party.
 - (e) An order do issue invalidating the purported nomination by the president of the 1st interested party as a member of the judicial service commission.
 - (f) The 1st and 2nd respondents bear the petitioner's costs while the interested parties bear their own costs.

Response by the Attorney General

14. The 2nd respondent filed grounds of opposition dated 10th may 2018 in opposition to the first petition. It contended that the petition neither discloses violation of fundamental freedoms nor raises constitutional issues; that the first petition lacks merit as there is no legitimate expectation by the omission on the part of the 1st respondent to comply with the law in the vetting of the 1st interested party or any other commissioner; that the first petitioner has selectively alluded to Article 171(2) while disregarding Article 250(2) and 171(2)(h) of the Constitution; that the appointment of the 1st interested party to represent the Court of Appeal in JSC was in accordance with the law and due process and that the first petition is misconceived and based on wrong principles applicable to JSC by dint of Article 248(2) of the Constitution whose membership should be subject to Article 250(2) as well as sections 3 and 5 of the Public Appointments (Parliamentary Approval) Act, 2011.. It was contended that the 1st interested party is bound to uphold the principles espoused Article 10 of the Constitution; and that the first petition lack merit, is an abuse of the Court process, and should be dismissed.

Response by Justice Warsame

15. In a replying affidavit sworn on 19th April 2018, the 1st interested party deposed that he was duly elected the representative of the Court of Appeal to the JSC, that Article 171(1) establishes JSC which is composed as provided for under Article 171(2), while Article 171(4) provides for the term of office of the commissioners. He stated that according to section 16 of the JSC Act, election to identify a nominee to JSC is by secret ballot.



16. Hon. Mr. Justice Warsame went on to depose that he was first elected to represent the Court of Appeal in JSC in March 2013 and following that election, he was duly appointed by the President after his name had been forwarded to the President without being subjected to approval by the National Assembly. He stated that he was once again re-elected on 9th March 2018 to serve a second term in JSC pursuant to Article 171(2) (c) as read with Article 171(4) of the Constitution; that pursuant to section 15(2) of Judicial Service Act, his name was forwarded to the President for formal Appointment as a member of JSC but was surprised when the President forwarded the name to the National Assembly for approval under Article 250(2) of the Constitution.
17. Justice Warsame further deposed that the National Assembly purported to call for submission of memoranda and public views on his suitability to serve as a commissioner of JSC but according to him, the National Assembly has no mandate to approve his nomination and the intended approval would be in violation of the Constitution. He contended that given the clear provisions of Articles 171(2) (c) and 248(1), Article 250(2) of the Constitution is inapplicable to his election and appointment. He contended that Article 171 (2) does not provide for approval by the National Assembly.
18. Regarding section 15(2)(c) of the Judicial Service Act, he stated that the power of appointment is reserved for the President as head of State once a nominating body has elected and nominated persons to be appointed as members of JSC. According to him, section 15(2) of the Act mirrors the Constitution and makes a distinction between members nominated under Article 171(2)(b)(c)(d)(f) and (g) and members appointed by the President under Article 171(2)(h) of the Constitution. He contended that there is no provision either in the Constitution or the Act for his approval by the National Assembly and therefore, the decision to subject his appointment to approval by the national Assembly is erroneous.

Response by JSC

19. The 2nd interested party filed a replying affidavit by Anne Amadi, the Secretary to JSC sworn on 17th April 2018 and filed in Court on the same day. She deposed that the 1st interested party was elected on 9th March 2018 in compliance with Article 171(2) (c) of the Constitution and issued with a certificate of election. And His name forwarded to the President for formal appointment as a member of JSC in accordance with section 15(2) of Judicial Service Act.
20. It was deposed that upon receiving the name, however, instead of appointing the 1st interested party as a commissioner, the name was forwarded to the National Assembly for approval under Article 250(2) of the Constitution a provision she contended does not apply to the appointment of the 1st interested party. Ms. Amadi deposed that approval by the National Assembly is only applicable in the case of persons appointed under Article 171(2) (h) of the Constitution. According to her, the Constitution provides for election as opposed to nomination of a representative of the Court of Appeal. It was contended that Article 171(2) (c) of the Constitution has not vested power to the President to nominate a member to JSC on behalf of the Court of Appeal and therefore the President's act to nominate the 1st interested party for approval by the National Assembly is unconstitutional, null and void.
21. M.s Amadi stated that the position of the respondents that the National Assembly is mandated to approve suitability of all persons to serve in JSC has no constitutional or legal foundation; that JSC is a special commission under Article 171 of the Constitution and does not therefore fall under Article 250 of the Constitution. She contended that when it comes to identification and appointment of its commissions, approval by the National Assembly is only reserved for the two commissioners appointed



under Article 171(2) (h). She relied on Article 148(1) to contend that it exempts Chapter 15 from applies to JSC. In that regard, she contended that Article 171 is an exception to Article 250.

The second Petition

22. Samuel Njuguna, the petitioner, is a citizen, who brought this petition as a matter of public interest. He sued the Attorney General, the 1st respondent, Judicial Service Commission, the 2nd respondent and the National Assembly as the 3rd respondent. Also joined in the petition are the Law Society of Kenya and Hon Mr. Justice Mohammed Warsame as the 1st and 2nd interested parties, respectively.
23. The petitioner averred that the 2nd interested party was identified through an election by Justices of the Court of Appeal and thereafter, his name was forwarded to the National Assembly for approval in terms of Articles 250(2) of the Constitution. He averred that the National Assembly called for views and memoranda from the Public on the 1st interested party's suitability to serve in JSC but this was opposed by the 2nd interested party. According to the second petitioner, when the National Assembly insisted on proceeding with the approval process, the first petitioner moved to Court and obtained conservatory orders on the basis that the 1st interested party as an elected Commissioner to JSC under Article 171(2) (c) of the Constitution is not subject to approval by the National Assembly.
24. The second petitioner averred that he seeks the Court's interpretation of the Constitution in relation to the establishment and composition of constitutional commissions, appointment of members of these commissions and the import of Article 248 as read with Article 250 of the Constitution. It is the second petitioner's case that all Commissioners to constitutional Commissions including those to JSC must be approved by the National Assembly.
25. He contended that the view that only some members of JSC should undergo approval by the National Assembly is an affront to Article 27 of the Constitution since it creates both inters class and intra class discrimination between members of JSC identified in accordance with Article 171(2) (h) of the Constitution. The second petitioner stated that Article 250(2) provides for the manner of appointment of members of all constitutional commissions.
26. He contended that although Article 171(2) provides for the composition of JSC and manner of identification of Commissioners, section 15(2) of Judicial Service Act provides that in the case of nominations made in accordance with Article 171 (b) (c) (d) (f) and (g), the nominating bodies should submit names of their nominees to the President who should within three days of receipt of the names, appoint the nominees as members of the Commission. According to the second petitioner, the section implies that they need not undergo approval even through Article 250(2) is clear that all those identified for appointment to commissions are subject to approval by the National Assembly. He contended that section 15(2) of the Judicial Service Act contravenes Article 250(2) of the Constitution and is therefore unconstitutional. He sought the following reliefs:-
 - a. A declaration that all members of constitutional commissions and independent officers created under Article 248(2) other than Ex-officio members thereof, are subject to approval by the National Assembly in accordance Article 250(2)(b).
 - b. A declaration that members appointed to the Judicial Service Commission are subject to approval by the National Assembly before appointment by the President.
 - c. A declaration that section 15 of the Judicial service commission is inconsistent with the constitution to the extent that it provides that nominees for appointment for the Judicial Service Commission are not subject to approval of the National Assembly except nominees provided for under Article 171(2) (h) of the constitution.



- d. Costs of the petition

Response by Judicial Service Commission

27. The second respondent filed a replying affidavit by Anne Amadi sworn on 14th May 2018. She deposed that the petition raises no issues for consideration by the Court; that there is no ambiguity in the Constitution pertaining composition and appointment of commissioners to JSC; that composition and appointment of JSC members is governed by Article 171(2) and that Article 250(2) of the Constitution does not apply to composition, identification and appointment of JSC commissioners. It was also stated that Article 248(1) of the Constitution is clear that JSC is exempted from the application of Article 250 of the Constitution. The deponent was of the view, that Article 250 applies commissions that have no specific provisions in the Constitution on the appointment of their commissioners.
28. Ms. Amadi stated that in the case of JSC Article 171 has specifically and exhaustively provided for its establishment, composition and appointment of commissioners and therefore, the Article cannot be subsumed in Article 250 which makes general provisions regarding commissioners and independent offices. She drew another distinction between Article 171(4) and 250(6) to the effect that whereas Article 171(4) gives commissioners a renewable term of 5 years, Article 250(6) gives a fixed non-renewable term of 6 years. It was contended that in so far as appointments under Article 171(2)(b) (c)(d)(f) and (g) are concerned, there is no requirement for approval by the National Assembly hence there was no need for subject the 2nd interested party to such approval.

Response by the National Assembly

29. The 3rd respondent filed a replying affidavit by Michael Sialai, clerk to the National Assembly sworn on 22nd May 2018 and filed in Court on the same day in support of the second petition. He deposed that the National Assembly has mandate to approve public appointments on behalf of the people of Kenya in accordance with the Constitution and Public Appointments (Parliamentary Approvals) Act 2011; that the 3rd respondent received the name of the 2nd interested party purposes of approval and the name was sent to the departmental committee concerned for approval.
30. It was deposed that the committee arranged for public participation and even extended time for purposes of concluding the approval process but the sittings were postponed due to conservatory orders granted by the court. It was stated that an objection was also received from JSC regarding the approval of the 2nd interested party. Mr. Sialai contended that the National Assembly exercises its approval mandate under Article 250(2) of the Constitution and maintained that approval under Article 250(2) serves to enhance public participation in the appointment of commissioners of constitutional commissions and acts as one of the checks and balances envisaged by the Constitution.
31. He deposed that due to the important role JSC plays, it is important that its membership be subjected to public participation to enhance accountability, transparency, the rule of law and democracy through National Assembly approval. He denied that the approval of the 2nd interested party is an affront to the independence of the Judiciary, contending that it is a constitutional process bestowed upon the National Assembly by the people of Kenya as one of the oversight and control mechanisms by the national Assembly over JSC as an organ of state.
32. On the constitutionality of section 15(2) of the Judicial Service Act, Mr. Sialai deposed that the section is unconstitutional to the extent that it requires the President to appoint the nominees as commissioners within 3 days after receipt of the names from nominating bodies under Article 171(2) (b)(c)(d)(f) and (g) of the Constitution. He agreed with the second petitioner that the section is inconsistent with Article 250(2) of the Constitution.



Response by the Law Society of Kenya

33. The 1st interested party, the Law Society of Kenya, filed a response dated 7th May 2018 contending that JSC is a constitutional commission established under Article 171(1) of the Constitution; that unlike other constitutional commissions governed by Articles 248 and 250, JSC is a special and unique commission as highlighted in Article 171; that the 2nd interested party was elected by Justices of the Court of Appeal in accordance with Article 171(2)(c) to represent them in JSC; and that the provisions establishing JSC ensure that there is no overlap or conflict with other provisions in the Constitution by being clear, precise and concise.
34. It was contended that Article 248(1) acknowledges that there are situations where Article 250 is inapplicable to certain commissions and, therefore, a proper interpretation of the Constitution is that Article 250 does not apply to JSC. The 1st interested party contended therefore that the second petitioner's concerns are baseless and a misapprehension of the law. The 1st interested party took the view that the Court ought to adopt a purposive interpretation and give meaning to the values and principles of the Constitution.

Response by Justice Warsame

35. The 2nd interested party filed a reply for affidavit sworn on 18th May 2018 opposing the second petition. He deposed that he was elected by Justices of the Court of Appeal to represent them in JSC as required by the Constitution; that his name was not forwarded to the national Assembly for approval by JSC; and that Article 250 of the Constitution does not apply to JSC Commissioners except those appointed under Article 171(2) (h).
36. Justice Warsame went on to depose that composition of JSC is provided for in Article 171(2) while Article 171(4) provides for the term of office of the commissioners and that section 16 of the Judicial Service Act provides that election of Commissioners is by secret ballot. He further deposed that this was his second term having been re-elected on 9th March 2018 and that under section 15(2) of the Judicial Service Act, the President has to appoint commissioners specified under Article 171(2)(b)(c) (d)(f) and (g) of the Constitution within three days on receiving the names.
37. He deposed that he was surprised to learn that his name had been forwarded to the National Assembly for approval under Article 250(2) of the Constitution yet Article 250 is exempted by Article 248(1) from applying to JSC. He stated that Article 250(2) contemplates approval of only those persons appointed under Article 171(2) (h). He further stated that to the extent that Article 171(2) provides for different modes of appointment, is not discriminatory.
38. His was of the view, that section 15(2) of the Judicial Service Act is consistent with the Constitution for making a distinction between commissioners appointed under Article 171(2)(b)(c)(d)(f)and (g) and those under (h). He contended that there is no provision either in the Constitution or statute requiring approval of his election by the National Assembly.

First Petitioner's submissions

39. Mr. Ochiel, learned counsel for the petitioner in the first petition, submitted highlighting their written submissions, that the President has no constructional mandate to nominate or appoint members of JSC and similarly, that the National Assembly has no constitutional mandate to approve elected members of JSC. In learned counsel's view, this submission is informed by Articles 171(2), 248(1) and 250(2) of the Constitution. Learned counsel urged the court to interpret these Articles in a manner that makes constitutional sense. Counsel relied on the case of *South Dakota v North Carolina* (192



U.S. 286 (24 S.Ct. 269, 48 L.Ed. 448) to submit that all constitutional provisions must be brought into play. He submitted that a construction where one provision neutralizes the other is an erroneous construction.

40. Mr. Ochiel submitted that Article 171(2) (h) gives the President the role in the appointment of two lay persons into JSC who are the only members of JSC he appoints with approval of the National Assembly. He contended that there is an exception in Article 248(1) of the Constitution to the effect that provisions in chapter 15 will apply to all constitutional commissions and Independent offices except where the Constitution provides otherwise. According to learned counsel, the Constitution provides otherwise with regard to JSC.
41. Learned counsel argued that although under Article 250(2) members of constitutional commissions are to be approved by the National Assembly and appointed by the President, only Article 171(2) (h) allows the President and National Assembly some room for appointment and approval respecting JSC members. He submitted that under Article 250(1), commissions have between 3 and 9 members while JSC is made up of 11 members making it different from the other commissions contemplated under Article 250 of the constitution. Mr. Ochiel pointed out to some commissions with more than 9 members such as Parliamentary Service Commission, Article 127(2) with more than 9 members, Salaries and Remuneration Commission (Article 230) as some of the commissions not covered by Article 250. He urged the Court to interpret the Constitution holistically and relied on the case of *Re the matter of Kenya National Human Rights Commission* [2014] eKLR.
42. Pointing out why the Constitution exempted members of JSC from appointment by the President, Mr. Ochiel argued that the Judiciary was not independent prior to the 2010 constitution since its members were appointed by the President. Counsel relied on the supreme Court decision in the case of *Judges and Magistrates Vetting Board & 2 others v Centre for Human rights and Democracy & 11 others*[2014]eKLR (para 212). Learned counsel argued that the Court should interpret the Constitution so as to promote judicial independence as the people of Kenya intended. He relied on the decisions in *Re The Matter of National Land Commission* [2015] eKLR, *Communication Commission of Kenya v Royal Media Services & 5 others* [2014] eKLR, *Independent Policing Oversight Authority v Attorney General* [2014] eKLR and *Bar Association of Belize v Attorney General of Belize -claim No. 666 of 2010*, on judicial independence. He therefore urged the Court to shield JSC's independence and allow the president no more than the Constitution gives him.
43. With regard to section 15(2), learned counsel contended that the section gives the President more than the Constitution does, and therefore, the section violates Article 171(2) of the Constitution. Counsel maintained that once member of JSC is elected, the President cannot appoint them.

Submissions on behalf of Justice Warsame

44. Mr. Issa, learned counsel for the 1st interested party in the first petition, and 2nd interested party in the second petition ,associate himself with Mr. Ochiel's submissions to the extent only that that there is no constitutional or legal requirement that the 1st interested party should be approved by the National Assembly.
45. On the appointment of the 1st interested party, Mr. Issa urged the Court to consider Article 171(2) of the Constitution which he contended gives the procedure for appointment. He cited as examples, Parliamentary Service Commission – Article 127(2) and Commission of Revenue Allocation where commissioners are appointed other than in accordance with Article 250 .Article 230 – where only the Chairperson of the Salaries and Remuneration Commission is approved by the President and Article



- 233(2) which establishes the Public Service Commission, provides for composition, appointment and approval by the National Assembly.
46. Counsel also referred to Article 246(1) which establishes the National Police Service in which Sub Article 2 providing for composition and appointment by the President but with no requirement for approval, among others. Learned counsel contended that where the Constitution requires appointment with approval by the National Assembly, it makes that position clear. He submitted that the only commission that compares with JSC is Parliamentary Service Commission.
 47. Mr. Issa argued that that of majority members of JSC are elected by their peers, a choice that was made by the people of Kenya and which must be respected. Learned counsel contended that there are commissions whose members' appointments are left to national legislation including Kenya National commission on Human rights. Under Article 59(4) Parliament was to enact a legislation on the appointment; National Land Commission, Ethics and Anti- Corruption Commission, Independent Electoral and Boundaries Commission and Teachers Service Commission. He submitted that appointment of members of those Commissions is left to legislation although they are constitutional Commissions.
 48. Learned counsel submitted that where the Constitution is clear the Court has no choice but to uphold it and give effect to the values espoused in it. In his view such a clear provision does not require any other interpretation save to give effect to the provision.
 49. Responding to Mr. Mwangi's submissions with regard to the second petition, Mr. Issa submitted that Article 10 contains national values and principles but was of the view that not all values come into play whenever there is an opportunity. He argued that some of the values in Article 10 have nothing to do with appointment of Commissioners to JSC. His contention was that there is no role of Public Participation in the case of commissioners elected by their colleagues as provided for by the Constitution. On the allegations that there is discrimination with regard to appointment of some commissioners to JSC, learned counsel argued that there cannot be discrimination when it is the Constitution itself that has dictated the manner of appointment. In his view, if that be discrimination, then it is the people themselves who wanted it, a constitutional discrimination. He relied on a number of decisions including *Law Society of Kenya v Attorney General* [2016] eKLR to buttress their submissions.
 50. Regarding section 15(2) of the Judicial Service Act, Mr. Issa contended that the appointment required by that section 15 is formalistic to formalize the appointment and, in his view, that does not violate the Constitution. He argued that while acting under section 15(2), the President acts as head of state under Article 131(a) of the Constitution hence there is nothing unconstitutional about section 15(2) of the Judicial Service Act.

Submissions on behalf of JSC

51. Senator Omogeni, Senior Counsel, submitted on behalf of the 2nd interested party also highlighting their written submissions, that Article 171(2) is specific, exclusive and conclusively determines the mode of establishment of JSC, composition and appointment of its members. According to senior counsel, one need not refer to any other Article of the Constitution on the issue. With regard to the 1st interested party as representative of the Court of Appeal to JSC, he submitted that Article 171(2) (c) of the Constitution is clear that the representative be elected by Justices of that Court.
52. Learned senior counsel argued that in view of that clear constitutional dictate, the Article is sufficient and does not require supplemental assistance from Article 250. In senior counsel's view, Article 248 has an exception on the application of Article 250, in that Article 250 will apply to all constitutional



commissions and independent offices except where the Constitution provides otherwise. In that regard, he submitted, Article 171(2) provides otherwise thus exempts Article 250 from applying to appointment of commissioners to JSC.

53. Senior counsel relied on the cases of *Law Society of Kenya v Kenya Revenue Authority* [2017] eKLR to argue that where the law is clear and precise, the Court cannot start looking for what is missing and that where Parliament has made it clear, the Court cannot go on a speculation. In that regard he submitted that Article 171 is clear and requires no interpretation. Further reliance was placed on the case of *Mugambi Imanyara & Another v Attorney General & 2 Others* [2017]eKLR for the submissions that when the language clear, it is not necessary to be labour other grounds on statutory interpretation.
54. He pointed out the fact that the President has previously applied Article 171(2)(b)(c)(d)(f) and (g) without the approval by the National Assembly and contended that since the 1st interested party was re-elected in the same manner as he was previously, he should be appointed without approval given that there is no constitutional imperative. He contended that had the people of Kenya intended that other commissioners to JSC be subjected to approval, they would have said so as they did in the case of those appointed under Article 171(2) (h). He relied on the case of *Republic v Speaker of National Assembly Expiate Edward Ouko* [2017] to buttress his submissions.
55. Regarding the second Petition, learned Senior Counsel argued pointing at Article 132(2) that where the President is to appoint persons to office, he will appoint persons to offices where the Constitution requires him to do so. He submitted that comparing Article 132 with Article 171(2) (b) (c) (d) (f) and (g), the President has no mandate to appoint these commissioners. His powers are limited to those appointed under Article 171(2)(h)

Submissions on behalf of the National Assembly

56. Mr. Mbaraka, Learned counsel for 1st respondent submitted opposing the first petition, that the President forwarded the 1st interested party's name for approval by the National Assembly pursuant to Article 250(2)(b) of the Constitution as read with sections 3 and 5 of Public Appointments (Parliamentary Approval) Act, 2011, which was however, objected to by the 2nd interested party. In learned Counsel's view, the petition was not initiated in accordance with the Law Society Act, 2014 and General Regulations 1962. In this regard counsel urged that the petition be dismissed.
57. On whether the National Assembly has the mandate to approve the 1st interested party's election, learned counsel submitted in the affirmative arguing that the mandate is donated to the National Assembly by the Constitution. Mr. Mbaraka contended that the concept of parliamentary approval did not exist in the old Constitution but was introduced in the 2010 Constitution. He argued that the requirement for approval of appointments is to ensure that there are checks and balances between various arms of government.
58. Learned counsel submitted that appointment under Article 171(2) (c) and 250(2) (c) of the Constitution are appointments to be made by the President. Referring to the Supreme Court decision in *Re The Matter of National Land Commission* [2014]eKLR , (para 191-199 of decision, he submitted that the Court held that transparency and accountability are some forms of the principles of checks and balances in that the more the checks and balances the better for good governance. He contended that the Supreme Court noted that when it comes to the Judiciary after its members are appointed, their discipline is self-regulatory.
59. Learned counsel argued that given the important role the judiciary plays with respect to judicial independence, checks and balances such as approval by the National Assembly is an important



safeguard against the possibility of judicial tyranny. .On holistic interpretation of the Constitution, counsel submitted that the two Articles mean that there should be approval. He also referred to Article 259(1) for purposive interpretation. Regarding the election of the 1st interested party, learned counsel contended that Article 171(2) (c) of the Constitution does not state that he should be appointed without approval.

60. With regard to section 15(2), learned counsel submitted that the section is inconsistent with Article 250(2) to the extent that it requires the President to appoint the 1st interested party without approval by the National Assembly. On the second petition, Mr. Mbaraka submitted in support of the petition and asked the Court to allow it.

Submissions on behalf of the Attorney General

61. Mr. Kuria, learned counsel for the 2nd respondent submitted in support of their grounds of opposition, which were however not traced in the file, that the first petition is not well founded. He however supported the second petition. He associated himself with submissions by Mr. Mbaraka and urged the Court to interpret the Constitution in a holistic manner. He was of the view that the National Assembly has constitutional mandate pursuant to Article 250(2) to approve the 1st interested party's appointment. He contended that the first petitioner had selectively applied Article 171 by ignoring Article 250(2) of the Constitution.
62. In learned counsel's view, under Article 259(1), the Court is to give effect to constitutional principles such that the provisions should be interpreted in a harmonious manner. He therefore submitted that the President has a role in appointing the nominees and, according to him; election of members of JSC is a mode of identification as contemplated by Article 250(2) of the Constitution.
63. Counsel went on to contend that the President is head of state and government under Article 131(1) (a) and has mandate under Article 132 to appoint persons to public offices in accordance with the Constitution. He therefore argued that under Article 250(2) the President has mandate to appoint chairpersons and members of commissions with the approval of the National Assembly. In his view, JSC is not the same as the judiciary but the two are separate. He maintained that under Article 250(2), the National Assembly has mandate to approve appointment of commissioners. He argued that the 1st interested party was not being appointed as a Judge but a commissioner hence he is subject to approval by the National Assembly. Regarding the constitutionality of section 15(2) of the Judicial Service Act, Mr. Kuria agreed with Mr. Mbaraka that it is unconstitutional.

2nd petitioner's submissions

64. Mr. Mwangi, learned counsel for the second petitioner, submitted highlighting their written submissions, that the President has powers and mandate to appoint members of JSC with approval of the national assembly except the Chief Justice and the Attorney General. He also submitted that section 15(2) of the Judicial Service Act is inconsistent with the Constitution to the extent that it exempts members of JSC nominated in accordance with Article 171(2)(b)(c)(d)(f) from approval by the National Assembly. He relied on the principle of harmonious interpretation, values and principles of the Constitution in this regard. He also submitted that a general provision of a law cannot be derogated from in favour of a specific provision.
65. In Mr. Mwangi's view, there was a notorious past when members of the judiciary were appointed by the President but that was followed by the radical shift with the new Constitution on the appointment of members of JSC as engraved in Article 171(2). He contended that a reading of Article 171(2) (h) shows that all JSC members must be approved by the National Assembly in terms of Article 250(2)



of the Constitution. In learned counsel's view, Article 250 is the procedural Article since it contains modes of identification and approval. He argued that the purpose of election under Article 171(2) (b) (c) (d) and (f) is to nominate or identify members. He contended that this view is reinforced by section 16 of the Judicial Service Act which requires that election be by secret ballot. On constitutionality of section 15(2), learned counsel submitted that it violates the Constitution for not providing that there must be approval by the National Assembly.

Analysis and Determination

66. I have considered the consolidated petitions, responses thereto; submissions by counsel for the Parties and authorities relied on. Two issues arise for determination. First; whether Justice Mohammed Warsame, the elected representative of Justices of the Court of Appeal, was subject to approval by the National Assembly before assuming his position as a JSC commissioner; and second; whether, Section 15(2) of the Judicial Service Act is unconstitutional for failure to require that all persons elected and nominated as JSC Commissioners be subject to approval by the National Assembly.
67. The issues raised in the twin petitions rest on the interpretation the provisions of Articles 171 and 250 of the Constitution. Before doing so it is proper to consider the principles underlying interpretation of the Constitution. Article 259(1) of the Constitution enjoins the Court to interpret the Constitution in a manner that promotes its purpose and principles; advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law and contributes to good governance.
68. Further, the Constitution should be given a purposive, liberal and flexible interpretation. The Supreme Court in *Re The Matter of the Interim Independent Electoral Commission Constitutional* [2011] eKLR, adopted the words of Mahomed J in the Namibian case of *State v Acheson* 1991(20 SA 805, 813) where he stated that;
- The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship government and the governed. It is a mirror reflecting the “national soul” the identification of ideas and ...aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion”.
69. In the case of *The Government of Republic of Namibia v Cultura* 2000, 1994 (1) SA 407 at 418, Mahomed CJ again stated;
- “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.”
70. While in the case of *Njoya & 6 Others v Attorney General & another* [2004] eKLR the Court observed that “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.”
71. A Constitution is a living instrument with several provisions that should be read as an integrated whole, reading one provision alongside others so that they are seen as supporting one another and not contradicting or destroying each other.(see *Tinyefuze v Attorney General of Uganda Constitutional*



Petition No 1 of 1996 [1997]3 UGCC). In Re The Matter of Kenya National Human Rights Commission, (Supreme Court Advisory Opinion Ref. No.1 of 2012), the Supreme Court advocated a holistic interpretation of the Constitution 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.”

72. And in *Minister of Home Affairs v Fisher* [1980] AC 319 the Privy Council stated at 329;

“A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the requirement that rules of interpretation may apply, to take as a point of departure for the process of interpretation, a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.”

73. These consolidated petitions are pegged on two constitutional provisions, namely; Article 171 and 250. The first petitioner has relied on Article 171 to contend that there is no requirement that the elected representative of Justices of the Court of Appeal be approved by the National Assembly. The respondents as well as the second petitioner rely on Article 250 to argue that all Commissioners to constitutional commissions must be approved by the National Assembly.

74. Article 171 provides;

- 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 15 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.”



75. Article 171 (2) has four categories of commissioners. First; persons who are Commissioners by virtue of the offices they hold- the Chief Justice who is Chairperson of the Commission by virtue of being Chief Justice and the Attorney General who is a member of JSC by virtue of being the Attorney General.
76. The second category is that of members elected by their peers- a Justice of the Supreme Court, a justice of the Court of Appeal and a Judge of the High Court and a representative of the magistrates, male and female, elected by the association of Judges and Magistrates. In the same category are two advocates, a woman and a man of 15 years' standing, to represent the Law Society of Kenya. The third category is the nominee by the Public Service Commission, while the fourth and last category is that of two lay persons, a man and a woman, appointed by the President with approval by the National Assembly, to represent public interest.
77. In the case of second class of Commissioners, the Constitution is clear that they are elected by their peers. The Supreme Court, Court of Appeal, Judges of the High Court and Magistrates elect representatives of their choice. So does the Law Society of Kenya. Section 16 of the Judicial Service Act provides that elections must be by secret ballot and are ordinarily overseen by the Independent Electoral and Boundaries Commission. There is no doubt, therefore, that Article 171 (2) of the Constitution provides for identification, qualification and appointment of JSC Commissioners. In the case of the 1st interested party, he was elected by the Justices of his Court in accordance with Article 171 (2)(c) of the Constitution, and by secret ballot as required by section 16 of the Judicial Service Act.
78. Section 15(2) of the Judicial Service Act requires the President to formally appoint those elected and the one nominated within three days after receiving the names. After Justice Warsame's election, instead of being appointed as required by law, his name was sent to the National Assembly for approval leading to this litigation. The first petitioner contended that the National Assembly has no mandate to approve elected members of the commission but the respondents and the second petitioner maintained that all commissioners to constitutional commissions are subject to approved by the National Assembly as contemplated by Article 250(2) of the Constitution.
79. The stand-off brings into focus Articles 171 and 250 of the Constitution as both relate to appointment of commissioners to constitutional commissions. The respondents in the first petition and Mr. Mwangi counsel for the second petitioner have held a firm position that approval by the National Assembly is mandatory for all commissioners irrespective of the commission. Mr. Mwangi went as far as interpreting Article 171(2) (h) as requiring approval of all JSC Commissioners, being a requirement in Article 250(2) of the Constitution.
80. Article 250 provides that (1)-each commission shall consist of at least three, but not more than nine commissioners; that (2) the Chairperson and each member of a commission and holder of an independent office (a) shall be Identified and recommended for appointment in a manner prescribed by national legislation; (b) approved by the National Assembly; and (c) appointed by the President. Article 250 is a general provision relating to commissions and independent office holders including the Auditor General and Controller of Budget
81. The Article, however, leaves identification, recommendation for appointment and qualifications of chairpersons and members of commission and independent offices a matter for national legislation. Sub -Article 6 (a) thereof gives commissioners a single term of six years with no legibility for reappointment. At the same time, Article 248(1) of the Constitution provides that Chapter 15 applies to the Commissions specified in clause 2 and the independent offices specified in clause (3) except to the extent that the Constitution provides otherwise. JSC is one of the commissions specified in Article 248(2). It is however clear that although Chapter 15, including Article 250, applies to all



the commissions listed there under, the Article contemplates situations where the Constitution may exclude chapter 15 (Article 250) from applying to some commissions.

82. It was submitted by counsel for the first petitioner and interested parties, and I agree with them, that JSC is excluded from the general provisions of Article 250 of the Constitution. Whereas Article 250(2) leaves identification, qualification and recommendation for appointment of commissioners to legislation, that is not the case with regard to membership of JSC. In contrast, Article 171 (2) identifies who the Chairperson is; who the members should be; provides for modes of their identification as election, nomination and those to be appointed and in some instances gives qualifications and gender. Moreover, unlike the Commissions contemplated under Article 250, JSC has eleven commissioners, way above the maximum number of nine prescribed by Article 250
83. My reading of the language in Articles 171 and 250 and taking into account Article 248(1) is that Articles 171 and 250 apply to different commissions. It is therefore my finding and I so hold, that Article 250 of the Constitution does not apply to JSC whether in terms of composition or manner of identification of its commissioners. In that regard, the requirement and processes of approval by the National Assembly in Article 250 do not apply to JSC commissioners except those appointed under Article 171(2) (h) of the Constitution.
84. This view is buttressed by the fact that even though Article 250(6) limits the term of office for commissioners and holders of independent office to a single non- renewable term of six years, Article 171(4) gives JSC commissioners, other than the Chief Justice and Attorney General, a renewable term of five years “provided they remain qualified”. That is; the status of the commissioners must have not changed since their first appointment. I also take guidance from the observation by the Supreme Court of India in *Commercial Tax Officer, Rajasthan v M/s Binani Cements Limited & another* Civil Appeal No. 332 of 2003, that “where a statute (read a Constitution) contains both a general provision as well as a specific one, the latter must prevail. “
85. Articles 171 and 250 are Articles in the same Constitution. None of them is superior to the other, and the principles of constitutional construction require that the Constitution be read as an integrated whole with various articles supporting one another. They should never be seen as contradicting each other or one subordinating the others. They must be read harmoniously because they are mutually consistent with no internal logical contradictions. The Court must therefore adopt an interpretation that brings a harmonious relationship between the two Articles and resist an interpretation that creates tension between them or encourages one provision of the same Constitution to be hoist above the other. They are equal like branches of the same tree.
86. As the Court stated in *Paul Semogerrere & others v Attorney General* (Constitutional Appeal No of 2000) {2004} 10 UGSC), it is a rule in constitutional interpretation that provisions of a constitution concerned with the same subject should be as far as possible, be construed as complementing and not contradicting one another. In *Okello John Livingstone and 6 others v the Attorney General and Another*. Constitutional Petition No.4 of 2005 (CA), the Court did observe that the history of the Country including the legislative history of the Constitution is also relevant and a useful guide in constitutional interpretation.
87. And as Lord Wilberforce stated in the case of *Minister of Home Affairs v Fisher* (supra), the Court must pay proper attention to the words actually used in context; avoid doing so literally or rigidly; look at the whole Constitution; and consider further the background circumstances when the Constitution was granted. It was the view of the Judge, that because in interpreting the Constitution the whole document has to be looked at, both provisions are impliedly subject to any exceptions made in other parts of the Constitutions.



88. It is also worth bearing in mind the words of the Supreme Court of Ireland in *Philip Tormey vs. Ireland and the Attorney General* (1985) 1 I.R. 289) that;

“The rule of literal interpretation, which is generally applied in the absence of ambiguity or absurdity in the text, must here give way to the more fundamental rule of constitutional interpretation that the Constitution must be read as a whole and that its several provisions must not be looked at in isolation, but be treated as interlocking parts of the general constitutional scheme. This means that where two constructions of the provision are open in the light of the Constitution as a whole, despite the apparent unambiguity of the provision itself, the court should adopt the construction which will achieve the smooth and harmonious operation of the Constitution. A judicial attitude of strict construction should be avoided when it would allow the imperfection or inadequacy of the words used to defeat or pervert any of the fundamental purposes of the Constitution. It follows from such global approach that, save where the Constitution itself otherwise provides, all its provisions should be given due weight and effect and not be subordinated one to another. Thus, where there are two provisions in apparent conflict with one another, there should be adopted, if possible, an interpretation which will give due and harmonious effect to both provisions. The true purpose and range of a Constitution would not be achieved if it were treated as no more than the sum of its parts.”

89. Applying the above principles to these petitions, Articles 171 and 250 of the Constitution are not at war with each other but complement one another. They must be understood from our historical context that they are a product of change from the past when JSC was composed of unknown people. As a result, the country wanted a break from the past, thus the adoption of Article 171 on the establishment, composition and appointment of JSC commissioners. Article 171(2) reflects the wishes of the people of Kenya and the Court’s duty is to give effect to those wishes. In that regard, the language of Article 171(2) (b) (c)(d) and (f) must be respected and given effect to, rather than ignoring it in favour of a strict and technical interpretation which deviates from the spirit of the Constitution.

90. In that case, therefore, flowing from the language of Article 171 (2) (b) (c) (d) (f), there is no doubt, and I state without hesitation, that results from elections conducted under the authority of the Constitution and the law by constituencies identified in Article 171(2)(b)(c)(d)and (f), are final and conclusive and do not require approval by any other state organ, not even the National Assembly under the guise of Article 250(2) of the Constitution. Any attempt to subject those elected to any form of approval is against the letter and spirit of the Constitution and is unconstitutional. So is any action so far taken by the National Assembly respecting the election of Justice Mohammed Warsame as a member of JSC.

91. Mr. Mwangi, learned counsel for the second petitioner, urged on by Mr. Mbaraka for the National Assembly and Mr. Kuria for the Attorney General, sought to argue that the reading of Article 171 (2) (h) implies that all JSC commissioners must be approved by the National Assembly. If such a rigid interpretation were to be taken to be correct, it would then mean that even the Chief Justice and the Attorney General who are members of JSC by virtue of the offices they hold, would be subjected to approval which would obviously be absurd, because these two are appointed after a process that includes approval by the National Assembly. They cannot be subjected to another approval.

92. Secondly, such an interpretation would defeat the meaning and essence of elections conducted by peers through secret ballot. Members who have been subjected to elections are, in essence, vetted by their colleagues on their suitability to serve as representatives. The Constitution did not use the word “elected” just for the sake of it. It wanted elected representatives subjected to scrutiny and competition



among peers before being picked through such elections because only the person who stands out best is elected. It must be clear that the member is elected as a representative and, therefore, only those who have been given the constitutional mandate to elect have a final say on who their best representative is and not the National Assembly.

93. The people of Kenya made a deliberate decision on how they wanted JSC constituted and its members appointed. This was intended to guarantee independence to JSC and by extension to the Judiciary. Independence of the Judiciary cannot be delinked from that of JSC because Article 172(1) of the Constitution mandates JSC to promote and facilitate independence of the Judiciary. JSC cannot do so if it not independent. Subjecting persons duly elected by peers as required by the Constitution to approval by the National Assembly will not only expose them to ridicule, possible political patronage and horse trading, but would also defeat the spirit of the Constitution, thus interfere with independence of JSC and ultimately, that of the Judiciary. In fact the final Report of Committee of Experts (COE's Final Report) paragraph 8.11.5 bears the fact that only the two lay members of the JSC appointed by the President should be subject to approval by the National Assembly.
94. It was contended that approval by the National Assembly provides checks on those elected to JSC with some scope of public scrutiny of the appointment process. That may well be true, but the Constitution limited that to the persons appointed under Article 171(2) (h) in so far as membership to JSC is concerned. That, in my view, is the constitutional reality we must be prepared to live with, uphold and defend. We cannot over emphasize Article 250 while down playing the import of Article 171 of the same Constitution. They are equal, complementary and deserve equal consideration.

Constitutionality of section 15(2)

95. The second petitioner also challenged the constitutionality of Section 15 (2) of the Judicial Service Act on grounds that it does not provide for compulsory approval of JSC commissioners by the National Assembly as required by Article 250 of the Constitution. According to Mr. Mwangi, all commissioners to constitutional commissions are subject to approval. Mr. Mbaraka and Mr. Kuria agreed with Mr. Mwangi. Senior Counsel Omogeni had his own view of the unconstitutionality of Section 15 (2). Learned senior counsel contended that there is no requirement for formal appointment of JSC commissioners after their election or nomination under Article 171(2) (b) (c) (d) (f) and (g) hence Section 15(2) is unconstitutional for providing that commissioners be appointed by the President within three days after he receives their names. Mr. Issa disagreed with all of them arguing that there is nothing wrong in the President, acting as head of state, making a formal appointment of the commissioners. To him, section 15(2) has no unconstitutional purpose or effect.
96. I have already held that there is no constitutional requirement that JSC commissioners contemplated in Article 171(2)(b)(c)(d) and (f) be approved by the National Assembly, and that Article 250 (2) does not also apply to JSC Commissioners. In that regard, therefore, section 15(2) cannot be constitutionally invalid for failure to provide for mandatory approval of JSC Commissioners by the National Assembly. Consequently, the submissions by Mr. Mwangi, supported by Mr. Mbaraka and Mr. Kuria have no constitutional or legal foundation. I must observe, though, that I am surprised, and it is the first time the National Assembly and the Attorney General argue that a legislation enacted by the National Assembly is constitutionally invalid, a serious indictment on the National Assembly's ability to act in accordance with the Constitution. If not for anything else, this admission betrays any good intentions the National Assembly and the Attorney General may have had in supporting the second petition.
97. What about Senior counsel Omogeni 's submission that Section 15)2) is unconstitutional for providing that names of the commissioners be sent to the President for formal appointment? First and foremost, the principles upon which a statute or statutory provision may be declared constitutionally



invalid are clear. The provision must violate or contradict a clear provision of the Constitution to the extent that it cannot be reconciled with the offended article; and second, the purpose of enacting the statute or statutory provision must be unconstitutional or the implementation of the impugned statute or statutory provision must have an unconstitutional effect. In other words, the statute or statutory provision must have an unconstitutional purpose or effect

98. In the case of *The Queen v Big M Drug Mart Limited* [1986] LRC 332, it was stated that both purpose and effect are relevant in interpreting the Constitution, while 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.”

99. Section 15(2) provides that where 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. The section simply directs that names be sent to the President for formal appointment. It does not confer any discretion on the President once he receives the names. He is under legal obligation to appoint the nominee(s) within three days of receipt of the name(s). Once the President receives names of commissioners determined in accordance with provisions of Article 171(2)(b)(c)(d)(f) and (g) his mandate is to formally appointment them and nothing more.
100. The National Assembly, fully cognizant of and appreciating the unique functions and mandate of JSC, assigned a period of three days within which the President must sign the instrument(s) formally appointing the nominee(s) as commissioner(s). Article 132(4) of the Constitution mandates the President to perform any other executive function provided for in the Constitution and in national legislation. In that regard, appointment of nominees as JSC commissioners is an executive function conferred on the President by section 15(2) of the Judicial Service Act. I do not therefore see any constitutional invalidity in the impugned section 15(2).

Conclusion

101. Having considered the twin petitions, the constitution and the law, as well as the authorities relied on, I am satisfied that the first petition raises a genuine constitutional grievance in so far as there was an attempt to subject an elected member of JSC to approval by the National Assembly contrary to the constitutional edict. The first petition therefore, succeeds to that extent. I am not however satisfied that there is any constitutional invalidity with regard to section 15(2) of the Judicial Service Act. Regarding the second petition, I find no merit in it and it is ordered to be dismissed.
102. Consequently, I make the following Orders.
- (a) A declaration is hereby issued that Justice Mohammed Warsame, the 1st interested party herein, having been elected by Judges of the Court of Appeal as a member of the Judicial Service Commission in accordance with Article 171(2) (c) as read with section 16 of the Judicial Service Act, is not subject to approval by the National Assembly under Article 250(2) of the Constitution.



- (b) An order is hereby issued invalidating the purported nomination by the President of Justice Mohammed Warsame, the 1st interested party herein as a member of judicial service commission and forwarding his name to the National Assembly for approval and any subsequent decision by the National Assembly in that regard.
- (c) A permanent injunction is hereby issued prohibiting the National Assembly, the 1st respondent herein, from vetting or approving Justice Mohammed Warsame, the 1st interested party herein, as a member of Judicial Service Commission.
- (d) The 1st and 2nd respondents in the first petition do bear the petitioner's costs; while the interested parties bear their own costs.
- (e) The second petition is dismissed with no order as to costs.

Dated, Signed and Delivered at Nairobi this 6th Day of July 2018

E C MWITA

JUDGE

