REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 238 OF 2016

IN THE MATTER OF THE ENFORCEMENT AND INTERPRETATION OF THE CONSTITUTION UNDER ARTICLES 258, 259 AND 260 OF THE CONSTITUTION

AND

IN THE MATTER OF THE OFFICE OF THE ATTORNEY GENERAL UNDER ARTICLE 156 AS READ WITH ARTICLE 152 OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 2, 129 AND 131 OF THE CONSTITUTION

AND

IN THE MATTER OF THE COUNCIL OF LEGAL EDUCATION ACT, NO. 27 OF 2012, THE COPYRIGHT ACT, 2001 AND OTHER RELATED ACTS OF PARLIAMENT AS CONTEMPLATED UNDER EXECUTIVE ORDER NO. 2/2013 OR ANY OTHER SUBSEQUENT EXECUTIVE ORDERS RELATING TO THE RESPONDENT

BETWEEN

GEORGE BALA…….…….……...….PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL…….....…RESPONDENT

JUDGEMENT

Introduction

1. The Petitioner herein, **George Bala**, describes himself in this petition as a citizen of the Republic of Kenya and, according to him, brings this petition both on his behalf and in the public interest.

2. The Respondent is the Attorney General of the Republic of Kenya and is described in this petition as a public and constitutional officer established under Article 156 of the Laws of Kenya (sic) with well-defined functions under the Constitution.

3. According to the petitioner, the offices of Attorney General and Cabinet Secretary are separate and distinct and the manner and procedure of appointment to those offices are different, separate and distinct. Further, the Constitution provides and envisages that the functions of the offices of Attorney General and Cabinet Secretary are distinct, separate different. To the petitioner, the makers of the Kenyan Constitution could not have envisaged, on a true interpretation of the Constitution, that one person holds concurrent offices of Attorney General and Cabinet Secretary. It was therefore the Petitioner's position that the respondent is not a Cabinet Secretary and therefore cannot purport to perform the functions of a Cabinet Secretary.

4. However on or about 20th May, 2013, an executive order No. 2/12013 was released and published by the President on the strength of the powers vested in the President by Article 152 of the Constitution by which executive order the respondent was assigned portfolio responsibilities and functions that, *inter alia*, relate to the Council of Legal Education as established by the ***Legal Education Act***, No. 27 of 2012 (hereinafter referred to as "the Act"). According to the Petitioner, whereas the president is perfectly in order to assign duties and functions to the respondent by virtue of Article 156(4)(c) of the Constitution, the President is not allowed to assign the respondent functions and duties that an Act of Parliament has bestowed on a Cabinet Secretary and that in assigning functions to the respondent, the President must be in clinical compliance with the Constitution and there is no room for the President to assign functions to the Respondent that offends the constitution.

5. It was averred that the Act makes provision for certain acts to be performed expressly by a Cabinet Secretary such as the appointment of the members of the Council of Legal Education and that the Respondent has been purporting to exercise those functions in his capacity as a Cabinet Secretary yet these functions are reserved for a Cabinet Secretary under the ***Legal Education Act***, No. 27 of 2012.

6. Apart from that, with regard to the Kenya Copyright Board established under the ***Copyright Act***, 2001, the respondent has been exercising the powers vested in a Cabinet Secretary by purporting to appoint members of the board of directors of the Copyright Board in his capacity as a Cabinet Secretary since the ***Copyright Act*** vests such powers in a Cabinet Secretary.

7. To the Petitioner, the above are just examples of the myriad instances of the unconstitutional acts of the respondent in exercising or purporting to exercise the functions and powers specifically vested in a Cabinet Secretary under certain pieces of legislation.

8. It was contended that the variation of the character of the office of a cabinet secretary and or the conferment of the functions and responsibilities of a cabinet secretary is unconstitutional, invalid, null and void and that what executive order No. 2/2013 has done is to purport to confer functions and responsibilities reserved for a Cabinet Secretary contrary to the Constitution, an act that is invalid, null and void. Consequently, the supposed exercise of the functions of a Cabinet Secretary by the respondent on the strength of the executive order No. 2/2013 or any such lesser document is contrary to the Constitution, invalid, null and void and should not be allowed to continue since the Respondent is contemplated by the Constitution to be independent, impartial and sound legal adviser to the national government devoid of any conflict of interest. Therefore the respondent in the purported exercise of the functions of a cabinet secretary under the ***Legal Education Act***, No. 27 of 2012 and other related pieces of legislation as envisaged under executive order 2/2013 is gravely conflicted, a matter that runs contrary to the constitutional expectations of his office.

9. The Petitioner contended that the exercise of powers and functions by the respondent, powers and functions the Constitution and the enabling statutes do not vest in him amounts to usurpation of constitutional powers and amendment of the constitution by way of an administrative instrument, executive order No. 2/2013 and its subsequent related executive orders, a matter that is grossly unconstitutional since the respondent is not a Cabinet Secretary and the Constitution did not envisage that the respondent can be a Cabinet Secretary with the power to exercise the functions of a Cabinet Secretary.

10. It was therefore pleaded that the aforesaid executive order is contrary to the constitution in so far as it confers on the Respondent, cabinet secretarial powers and functions and is therefore invalid, null and void

to that extent.

11. To the Petitioner, whereas the Respondent can perform any other functions as contemplated under Article 156(4)(c) of the Constitution, his functions are exclusive of those functions that the Constitution or any other law bestows or vests in a Cabinet Secretary. To the Petitioner, the exercise by the respondent of cabinet secretarial functions and powers, an office he does not hold, is a serious violation of the Constitution that precludes a public officer from exercising powers of an office he does not hold.

12. The Petitioner therefore argued that it is imperative in the spirit of defending the Constitution and the rule of law that this petition is heard and determined and that an injury due to this violation is remedied appropriately.

13. The Petitioner asserted that every member of the public individually or collectively is enjoined to respect, uphold and defend the constitution and this violation by the Respondent is a serious affront to constitutionalism and sets a dangerous precedent in the violation of the constitution, a serious harm to the country and every citizen.

14. I t was submitted on behalf of the Petitioner that the separation and distinction in the office of the Attorney General and the Cabinet Secretary is evident in the creation of the two offices and this appears in Articles 156(1) and 152(1)(d) of the Constitution. A further distinction is with respect to the qualification of the two offices since under Article 156(3) of the Constitution the qualifications for appointment of the Attorney General are the same as those of the Chief Justice. On the other hand there are virtually no qualifications particularly in terms of academics for the appointment of a Cabinet Secretary save for Article 152(3) which bars a Cabinet Secretary from being a Member of Parliament. The third distinction, according to the Petitioner is in the manner of their appointment and removal. To the Petitioner, the Attorney General has no security of tenure and serves at the pleasure of the President while under Article 152 there is a clear procedure for the removal of a Cabinet Secretary.

15. It was submitted that whereas in Third Schedule to the Constitution the oath of office of the Cabinet Secretary is prescribed, there is none for the Attorney General. It was therefore submitted that for the Attorney General to perform the functions of a Cabinet Secretary, he must take the oath or affirmation set in the Third Schedule to the Constitution which the Respondent has never done.

16. It was submitted hat Article 260 of the Constitution lists the Cabinet Secretary and Attorney General as separate state offices and that this distinction is also to be found in the composition of Cabinet under Article 152(1) of the Constitution.

17. It was contended that Article 73 of the Constitution contemplates that no public officer or state officer should suffer from conflict of interests and the Respondent being a public officer is bound thereby. Pursuant to this and Article 156(4) of the Constitution, it was submitted that the Attorney General should be independent and in promoting, protecting and upholding the rule of law and defending the public interests must be above confidence issues. By performing the functions of a Cabinet Secretary, it was contended that the Respondent would be placed in place of conflict of interest. Further since the Respondent is supposed to give legal advice to State Corporations,, to be placed in charge of some State Corporations would lead to conflict of interest on his part.

18. In support of these submissions, the Petitioner relied on Article 259 of the Constitution; **Republic vs. Mann [1969] EA 357**; **Njoya & 17 Ors vs. Attorney General & 4 Ors [2013] eKLR**; **Mwangi & 7 Ors vs. Attorney General [2002] 2 KLR 709**; **Gideon Mwangangi Wambua vs. Independent Electoral and Boundaries Commission and 2 Ors MBS Election Petition Nos. 4 & 9 of 2013**; **Minister for Home Affairs & Another vs. Fischer [1979] 3 All ER 21**.

19. He therefore sought the following reliefs:

> **a. A declaration that the respondent is not a cabinet secretary and therefore cannot perform or purport to perform the functions specifically reserved for a cabinet secretary under any**

piece of legislation.

b. A declaration that the respondent's purported exercise of cabinet secretarial functions under the Legal Education Act, 27 of 2012 or under any other piece of legislation is contrary to the constitution, invalid, null and void.

c. A declaration that executive order No. 2/2013 or any other executive order in so far as it purports to assign the respondent cabinet secretarial functions and powers is contrary to the constitution, invalid, null and void.

d. An order of judicial review in the nature of certiorari bringing before this honourable court for the purposes of being quashed the portions of the executive order No. 2/2013 that purports to assign the respondent cabinet secretarial powers and functions.

e. Costs.

Respondent's Case

20. In opposing the Petition, the Respondent relied on the following grounds of opposition:

1. THAT the petition does not disclose any constitutional violation by the respondent.

2. THAT the petitioner herein has not proved the unconstitutionality of any portion or portions of the Executive Order no. 2/2013.

3. THAT the merging of the affairs previously under the Ministry of Justice with the Office of the Attorney General and the reading of the Article 156(4)(c) renders the petition hollow and without merit.

4. THAT the petition is misconceived, incompetent and bad in law and the orders sought by the petitioner have no basis since the Executive effectively constituted the Attorney General and the Office of the Attorney General and Department of Justice as a Ministry capable of performing the functions set out under the Legal Education Act and any other pieces of legislation, and it is the Attorney General who has been exercising those functions.

5. THAT under the Interpretations and General Provisions Act 1968 a "Minister" is defined as a person appointed as a Minister of the Government of Kenya under the Constitution, or the President, the Vice-President or the Attorney-General; this definition has included the Attorney General and therefore the Attorney General has been considered a Minister and as such can carry out functions and responsibilities that can be assigned to a Minister.

6. THAT further, the Interpretations and General Provisions Act (Revised 2012) clearly defines "the Cabinet Secretary" to mean the Cabinet Secretary for the time being responsible for the matter in question, or the President where executive authority is retained by him: Provided that for the purposes of the administration of laws relating to the legal sector, the expression shall, subject to any assignment under Article 132 (3) (c) of the Constitution, include the Attorney-General.

7. THAT Article 152 (1)(c) of the Constitution of Kenya declares that the Attorney General is a member of the Cabinet and thus capable of dispensing any and all functions as assigned to his office by the President or an Act of Parliament and thus the petition lacks merit to state otherwise as the case.

8. THAT there is no statutory nor Constitutional limitation on the President in re-organization of government in the allocation of duties to each individual appointee in the Cabinet and there is no definition of specific duties of each Cabinet Secretary and the

President is free in determining their duties as he deems fit for an efficient arrangement.

9. <u>THAT</u> the petitioner has failed to show where and how the Constitution creates an independent office of the "Cabinet Secretary" which is distinct and has been constituted under the constitution making it separate from the Cabinet where the Attorney General is a member.

10. THAT the petition is made in bad faith, the petitioner has failed to bring to light any actions that amount to contravention of the spirit of the Constitution or any Act of Parliament and is frivolous and vexatious and a total waste of valuable judicial time resources.

21. In his submissions, the Respondent contended that the Administration of matters relating to the legal sector requires legal expertise such as that which the Attorney General is ordinarily expected to have a proper and holistic construction of the constitution would require that matters legal are not administered by a person not qualified in the law. To the Respondent, it does not matter that the person so assigned to deal with such matters has qualifications far in excess of those of a Cabinet Secretary under the constitution, as is seen in Article 156(3). It was therefore submitted that a holistic construction of the Constitution should not therefore also arrive at the conclusion that simply because the Attorney General, being a state officer as any other cabinet secretary, has sworn a different oath of office, is by this fact alone disqualified from performing any other duties assigned to him by the President under Article 156 whether those are stated by the ***Legal Education Act*** to be executable by a Cabinet Secretary. It matters not that Article 152 does not provide that the Respondent can perform the duties of a Cabinet Secretary which duties, in any event, are not specifically defined in the Constitution.

22. It was therefore submitted that it is trite that the neither the law nor a Constitution has ever been able to cater for all possible situations and eventualities hence the need for an interpretation that makes sense and is in accord with the general context of both the legal environment and the structural environment; by the legal is meant the law to be administered and by the structural is the office structure of the government offices intended to administer the law. To the Respondent, it is generally accepted that the Constitution does not burden the President with specific names of ministries or specific sectors which the Cabinet Secretaries, once he appoints them, should be in charge of but is granted the discretion of organizing his Government in the best manner possible in the circumstances, hence the Executive Order now impugned.

23. It was the Respondent's case that in reading the Constitution, the Petitioner has failed to appreciate the whole spirit and objects of the same. On the face of it all, the envisaged handling of all matters legal under the Office of the Attorney General places the functions in various statutes under the stewardship of the Attorney General, hence the Office of the Attorney General and Department of Justice.

24. It was contended that in that regard, two crucial documents are of great importance in the interpretation of the Constitution in respect of the status of the Attorney General:

i. the Interpretations and General Provisions Act (Revised 2012) and

ii. Executive Order No. 2/2013.

25. The ***Interpretations and General Provisions Act (Revised 2012),*** it was submitted defines a "Cabinet Secretary" in section 3 as a person appointed as a Cabinet Secretary of the Government of Kenya under the Constitution of Kenya and further provides that for the purposes of the administration of laws relating to the legal sector, the expression shall subject to the assignment under Article 132(3)(c) of the Constitution include the Attorney General. Article 132(3)(c) provides for a framework through which the President may assign responsibility for the implementation and administration of any Act of Parliament to a cabinet secretary.

26. It is thus clear that in respect of such responsibilities assigned, for instance for the implementation of

the ***Legal Education Act of. 27 of 2012,*** the President appointed the Attorney General through Executive Order No. 2/2013 to perform functions as would have a Cabinet Secretary. In the Respondent's view, it is very clear from the reading of the ***Interpretations and General Provisions Act (Revised 2012)*** that for the purposes of administration of laws relating to the legal sector to which the ***Legal Education Act*** **No 27 of 2012** falls, the Attorney General is a Cabinet Secretary. This is backed by the **Executive Order 2/2013** by the President.

27. It was submitted that Article 132(3) further goes ahead to give the prerogative powers which the Constitution confers upon the President this being inter *inter alia* directing and coordinating functions of the Ministries and Government departments and by a decision published in the *Gazette*, assigning responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any Act of Parliament.

28. The Constitution expressly gives the President the discretion to choose and assign functions to whichever Ministry as long as the responsibility is not inconsistent with any Act of Parliament fettered only by the requirement that matters legal may be handled by the Attorney General.

29. It was the Respondent's view that the Constitution being the supreme law is accommodative of the fact that in interpreting this Article, an Act of Parliament can be referred to in order to give effect to the same so long as it is does not become inconsistent with the same. The Respondent disclosed that prior to the Constitution of Kenya 2010, Minister was deemed to include the Attorney General. Under the Constitution of Kenya 2010, the Attorney General has been considered a Cabinet Secretary for the purposes of bringing into effect Article 132(3) in simple terms the executive powers of the President and thus reason for Executive Order no. 2/2013.

30. It was hence submitted that the Respondent is a Cabinet Secretary for the purpose of the ***Legal Education Act*** **No 27 of 2012** and that he is well within his duties in appointing the members to the Council of Legal Education, a duty assigned to him by the President who was exercising his Constitutional Powers. In the Respondent's view, the petitioner failed to appreciate the reading of the statute as a whole. The respondent has been conferred with the powers to exercise those functions contemplated through the Executive Order No. 2/2013.

31. It was therefore submitted that Article 132(3)(c) of the Constitution provides that the President shall by a decision published in the Gazette assign responsibility for the implementation and administration of any Act of Parliament to the Cabinet Secretary, to the extent it's not inconsistent with any Act of Parliament. In this case it was submitted that the President assigned the Respondent duties to implement and administer and Act of Parliament which Act is the ***Legal Education Act*** **No 27 of 2012** in the exercise of the powers as conferred by the Constitution.

32. The Respondent submitted that Article 156(4)(c) states that the Attorney General shall perform any other functions conferred on the office by an Act of Parliament or by the President and that the President conferred upon the Attorney General the functions of a Cabinet Secretary for the purposes of the ***Legal Education Act No 27 of 2012.*** It was therefore submitted that the Respondent is neither exercising nor attempting to exercise powers which he does not have but he is well within the powers conferred to him by the Constitution and through the President. It thus follows that in accordance with the Constitution, the Respondent is properly exercising powers to act and perform the functions as contemplated in the Acts of Parliament relating and incidental to the Executive Order No. 2/2013. Therefore the Respondent in exercising that which the Constitution has given express provisions to does not in any way amount to violation of the Constitution but rather it is giving life to the Constitution itself.

33. In addition, in the light of Article 156 of the constitution, the distinction between duties in the legal sector, of a Cabinet Secretary and those of the respondent, has not been made to warrant any declaration as sought in the prayers in petition. To the Respondent, the Petitioner has not stated who in the absence of the Cabinet Secretary contemplated in the ***Legal Education Act*** **No 27 of 2012** is supposed to exercise those functions, which is a gap that the Court may not be able to fill in if it grants the prayers sought. It was the Respondent's case that where the claim is as plainly insubstantial as the current case the court

will decline the orders sought. In this respect the Respondent relied on **Trusted Society of Human Rights Alliance vs. AG & 2 Others [2012] eKLR.**

34. The Respondent reiterated that in exercising the functions of a Cabinet Secretary, his action does not amount to contravention of the Constitution since the President was guided by the Constitution in conferring upon the Respondents the powers of a Cabinet Secretary. He further submitted that the petitioner had not shown how the Respondent has violated or contravened any part of the Constitution.

35. It was further submitted that the Constitution clearly has conferred upon the Presidency the power to assign functions to his Cabinet in whatsoever arrangement under Article 132(3)(c). Under Article 132(3), the constitution of Kenya 2010 specifically cut down discretion to create any number of ministries the President wished. It thus follows that if the constitution would have wanted to control the assignment of responsibilities by the President it would have put in place mechanisms to ensure the same is followed. Accordingly, the Executive Order No 2/2013 does not in any way contravene or violate the Constitution and the President in assigning functions to the members of his Cabinet in the said order was exercising his powers as are conferred on him by the Constitution. To the Respondent he acted by a directive from the Executive and being a member of the executive agencies bound to implement and execute the policies of the executive, he is bound to exercise all functions, assignments and responsibilities accorded to him by the President.

36. Finally, since historically executive orders have been used to constitute appointments and responsibilities upon various government departments and Ministries, the mere change of the heads of the ministries title does not envisage total overhaul of the system.

37. As to whether there would be any conflict of interest if the Attorney General appointed members of the council of legal education in exercise of his powers as a cabinet secretary, it was submitted that since under section 5 of the ***Legal Education Act*** **No 27 of 2012** revised 2015, President appoints the Chairperson of the Council of Legal Education, there would be no conflict of interest for the reason that there are no personal interests involved. The issuance of advice to Government offices is a public duty as is the constitution of the Board. The process of the appointment would be made public as the same will be gazetted in the Kenya *Gazette* and therefore it would be made sufficiently public.

38. It was submitted that the Petitioner did not show how the Attorney General, in performing his duties as a Cabinet Secretary, would be in contravention of the Constitution in the absence of being any personal benefit to be gained.

39. To the Respondent, the petitioner failed to prove the merits of this petition in totality. And urged the Court to dismiss the petition with costs.

Determinations

40. I have considered the issues raised in this petition.

41. The first issue for determination is whether these proceedings meet the criteria for a Constitutional question. **Nyamu, J** (as he then was) in **Muiruri vs.Credit Bank Ltd & Another Nairobi HCMCS No. 1382 of 2003 [2006] 1 KLR 385** was of the view that:

> **"A constitutional issue in my view is that which directly arises from court's interpretation of the Constitution. For example – what is a fair trial is a constitutional issue and the courts have interpreted what is the meaning of a fair trial."**

42. In this case the petitioner is questioning the constitutional and legal status of the Attorney General vis-à-vis the Cabinet Secretary as well as the powers of the President under the Constitution. In my view this is an issue that falls squarely with the realm of constitutional interpretation and that calls for the invocation of this Court's powers under Article 165(3)(d) of the Constitution.

43. In this Petition, it is my view that the real issue for determination revolves around the role of the Attorney General vis-à-vis that of a Cabinet Secretary; whether the Attorney General is a Cabinet Secretary; and whether the Attorney General can perform the role of a Cabinet Secretary.

44. I appreciate that in determining this issue Article 259(1) of the Constitution must be kept in mind. The said Article provides 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 the human rights and***
>
> ***fundamental freedoms in the Bill of Rights;***
>
> ***(c) permits the development of the law; and***
>
> ***(d) contributes to good governance.***

45. This position is jurisprudentially reflected in numerous decisions both local and foreign.

46. In **Ndyanabo vs. Attorney General [2001] 2 EA 485** the Tanzania Court of Appeal held that in interpreting the Constitution, the Court would be guided by the general principles that, (i) the Constitution was a living instrument with a soul and consciousness of its own, (ii) fundamental rights provisions had to be interpreted in a broad and liberal manner, (iii) there was a rebuttable presumption that legislation was constitutional, (iv) the onus of rebutting the presumption rested on those who challenged that legislation's status save that, (v) where those whom supported a restriction on a fundamental right relied on a claw back or exclusion clause, the onus was on them to justify the restriction.

47. Again in **Kigula and Others vs. Attorney-General [2005] 1 EA 132** the Uganda Court of Appeal sitting as a Constitutional Court held that the principles of constitutional interpretation are as follows (1) that it is now widely accepted that the principles which govern the construction of statutes also apply to the interpretation of constitutional provisions and that the widest construction possible, in its context, should be given according to the ordinary meaning of the words used; (2) that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other; (3) that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument; (3) that a Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms are to be given a generous and purposive interpretation to realise the full benefit of the rights guaranteed; (4) that in determining constitutionality both purpose and the effect are relevant; and (5) that Article 126(1) of the Constitution of the Republic of Uganda enjoins Courts to exercise judicial power in conformity with law and with the values, norms and aspirations of the people. See also **Besigye and Others vs. The Attorney-General [2008] 1 EA 37** and **Foundation for Human Rights Initiatives vs. Attorney General HCCP NO. 20 of 2006 (CCU) [2008] 1 EA 120.**

48. In **Olum & Another vs. Attorney General (1) [2002] 2 EA 508** the Uganda Court of Appeal held that in order to determine the constitutionality of a statute, the Court had to consider the purpose and the effect of the impugned statute, or section thereof and that if the purpose was not to infringe a right guaranteed by the constitution, the Court had to go further and examine the effects of its implementation. If either the purpose or the effect of its implementation infringed a right guaranteed by the constitution, the statute or section in question would be declared unconstitutional. The Court further held that in interpreting the constitution, the constitutional interpretation principle of harmonization, which was to the effect that all the provisions of the constitution concerning an issue should be considered together, would be applied and in addition the widest construction possible, in their contexts, had to be given to the words used according to their ordinary meaning and each general word held to extend to all ancillary and subsidiary matters. Moreover, constitutional provisions were to be given a liberal construction unfettered by technicalities because though the language of the constitution did not change, changing circumstances

may give rise to new and fuller import to the meaning of the words used. Similar holding was made in **Obbo and Another vs. Attorney General [2004] 1 EA 265**, in which the Supreme Court of Uganda held that no laws, rules or regulations let alone decisions of any authority which are in conflict with the provisions of the Constitution can stand in opposition to those constitutional provisions since the constitution is the supreme law of the land. The Court's view was that the Uganda Constitution is to be interpreted both contextually and purposefully since it is an ambulatory living instrument designed for the good governance, liberties, welfare and protection of all persons in Uganda. The task of expounding a Constitution is crucially different from that of construing a statute as a statute defines present rights and obligations. It is easily enacted and easily repealed. A Constitution by contrast is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and when joined by a bill or charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. In the same vein in **Republic vs. The Honourable the Chief Justice of Kenya & Others Ex Parte Moijo Mataiya Ole Keiwua Nairobi HCMCA NO. 1298 of 2004** it was held that the Constitution must not be construed in a narrow or pedantic manner and that construction which must be beneficial to the widest possible amplitude of its powers must be adopted, or that a broad and liberal spirit should inspire those, whose duty is to interpret the Constitution. Further in **Richard Nduati Kariuki vs. Honourable Leonard Nduati Kariuki & Another HCMA No. 7 of 2006 (HCK) [2006] 2 KLR 356**, the High Court held that the Constitution is a living document. It is a house with many rooms, windows and doors. It is conservative enough to protect the past but flexible enough to advocate new issues and the future. Constitutional Theory, the Court held, has set various models of interpreting constitutional tests i.e. Historical, textual, structural, doctrinal, ethical and prudential. The Constitution formalizes the historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. Ordinarily the value content of law relates to the purpose or underlying basis of that law. Such judgment is based on the views and values of the people that make the law and those who the law regulates.

49. Similarly, in **Olum & Another vs. Attorney General (2) [1995-1998] 1 EA 258** it was held that Article 137 of the Constitution confers jurisdiction to the Court, *inter alia,* in a matter where it is alleged that an Act of Parliament or any other law is inconsistent with or in contravention of the Constitution. According to the Court although the national objectives and directive principles of State policy were not on their own justiciable, they and the preamble of the Constitution should be given effect wherever it was fairly possible to do so without violating the meaning of the words used. According to the Court in cases of great public interest, the Attorney General should be made a party and if he is left out, the Constitutional Court will join him as a Respondent of its own volition under Order 1, rule 10(2) of the Civil Procedure Rules.

50. In **Osotraco Ltd vs. Attorney General [2003] 2 EA 654**, it was held that the constitution of Uganda is the supreme law, and any law that is inconsistent with it, is void to the extent of the inconsistency vide article 2 of the Constitution. It was held in that case that section 273 of the Constitution requires existing law to be construed with such modifications, adaptations, qualifications and exceptions, as may be necessary to bring it into conformity with the Constitution. The Court's view was that under article 137(5) of the Constitution, if any question arises as to the interpretation of the Constitution in a court of law, the court may, if it is of the opinion that the question involves a substantial question of law refer the question to the constitutional court for decision in accordance with clause (1) of article 137 since it is the Constitutional Court to determine any question with regard to interpretation of the Constitution. However, where the question is simply the construing of existing law with such modifications, adaptations, qualifications and exceptions as to bring such law into conformity with the Constitution, this may be determined by the Court before which such a question arises.

51. Back home in **Ruturi & Kenya Bankers Association vs. Minister for Finance [2002] 1 KLR 84; [2001] EA 253,** the Court held that being a Court that was constitutionally given unlimited original jurisdiction, the High Court has jurisdiction to determine every issue raised in the matter. It was however held that a statute or enactment worded in a language which is difficult to follow, or is ambiguous or contradictory or impossible to apply, is not necessarily thereby rendered unconstitutional since it only

gives rise to questions of interpretation by the Court while with regard to inconsistencies and repugnancy in parts of the Act, these are not things that necessarily render a statute unconstitutional since they things which are resolved by the rules of statutory interpretation in real factual situations.

52. Back to Uganda in **Ssemwogerere and Others vs. Attorney General (3) [2004] 2 EA 247,** the Supreme Court of Uganda held that the Constitutional Court's jurisdiction to declare an Act of Parliament inconsistent with or in contravention of the Constitution goes altogether with the one for interpreting the Constitution and is unlimited since the Constitutionality or otherwise of an Act of Parliament must be construed vis-à-vis the Constitution and for the purposes of exercising these jurisdictions by the Constitutional Court there can be no distinction between an Act passed to amend the Constitution or an Act passed for other purposes.

53. In **Ngare vs. Attorney General And Another [2004] 2 EA 217** it was held relying on **Republic vs. El Mann [1969] EA 357; Njoya & Others vs. Attorney General and Others [2004] 1 EA 194 (HCK); Njogu vs. Republic [2000] LLR 2275 (HCK)** that in interpreting the Constitution, regard must be had to the language and the wording of the Constitution so that where there is clearly no ambiguity the Court has no reason to depart therefrom since ambiguity and inconsistency cannot be the same thing. The Court while citing **Ssemogerere and Others vs. Attorney General [2004] 2 EA 276 (SCU)** held that the purpose of legislation must be looked at to see whether or not it is unconstitutional.

54. However the High Court in **Karua vs. Radio Africa Limited T/A Kiss Fm Station and Others Nairobi HCCC NO. 288 of 2004 (HCK) [2006] 2 EA 117; [2006] 2 KLR 375** stated that while a liberal and not an overly legalistic approach should be taken to constitutional interpretation the charter should not be regarded as an empty vessel to be filled with whatever meaning the court might wish from to time. The interpretation of the charter, as all constitutional documents, is constrained by the language structure and history of the constitutional text, by constitutional traditions and by the history, traditions and underlying philosophies of the society. See also **Kanzika vs. Governor, Central Bank of Kenya & 2 Others Nairobi HCMCA No. 1759 of 2004 (HCK) [2006] 2 KLR 545**. Similarly, in **Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP NO. 466 of 2006 (HCK) [2007] KLR 331 Rawal, J** (as she then was) held that our Constitution is not a cloud that hovers over the beautiful land of Kenya – it is linked to our history, customs, tradition, ideals, values and on political, cultural, social and economic situations. Its dynamics and relevance is rooted in these values. Cut off from these factors it would become redundant and irrelevant. The Constitution is not a skeleton of dry bones without life and spirit. The least it is expected to have and which cannot be denied is the spirit of its framers. The Court should not limit the ambit of public interest or agree to confine it only to past definitions or categories since our Constitution inspires us to give public interest the widest leverage and to uphold it. It follows that a wrong action or decision does not necessarily elevate the matter to a constitutional issue in order to warrant a party aggrieved thereby instituting proceedings by way of a Constitutional Petition. As was appreciated in **Pattni & Another vs. Republic [2001] KLR 264** in which **Harrikson vs. Attorney General of Trinidad and Tobago [1980] AC 265** was cited with approval:

> **"The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution is fallacious...the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the provision if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom."**

55. In that decision it was appreciated that:

> **"No human right or fundamental freedom recognised in the Constitution is contravened by a judgement or order that is wrong and is liable to be set aside on appeal for an error of fact or**

substantive law even where the error has resulted in a person serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. And where there are no higher courts to appeal to, then, no one can say that there was an error. The fundamental human right is not a legal system that is infallible but one that is fair and it is only errors of procedure that are capable of constituting infringement to the rights protection by section 1(a) and no mere irregularity in procedure is enough, even though it goes to jurisdiction, . The error must amount to failure to observe one of the fundamental rules of natural justice."

56. In my view, our current Constitution pervades all aspects of life so much so that any action taken by a party may easily be transformed into a constitutional issue by simply citing some provision of the Constitution however remote. Parties who intend to commence legal proceedings by way of a Constitutional Petition therefore ought to take note of the sentiments of the Court in **Ngoge vs. Kaparo & 4 Others [2007] 2 KLR 193,** where the Court expressed itself as follows:

"We find that the making of an allegation of contravention of chapter 5 provisions *per se*, without particulars of the contravention and how that contravention was perpetrated would not justify the court's intervention by way of an inquiry where the particulars of contravention and how the contravention took place are plainly lacking in the pleadings...Any such inclination to demand an inquiry every time there is a bare allegation of a constitutional violation would clog the Court with unmeritorious constitutional references which would in turn trivialise the constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process. Where the facts as pleaded in this case, do not plainly disclose any breach of fundamental rights or the Constitution there cannot be any basis for an inquiry..."

57. It is important in determining this petition to appreciate the nature of the Constitution of Kenya, 2010. Our Constitution, it has been held is a transformative Constitution. It is because of this that it is provided in Article 10 that all State organs, State officers, public officers and all persons whenever they make or apply policy decisions are bound by the national values and principles of governance which include participation of the people, inclusiveness, integrity, transparency and accountability. Our Constitution, in my view is a value-oriented Constitution as opposed to a structural one. Its interpretation and application must therefore not be a mechanical one but must be guided by the spirit and the soul of the Constitution itself as ingrained in the national values and principles of governance espoused in the preamble and *inter alia* Article 10 of the Constitution. The distinction between the two was made by **Ulrich Karpen** in ***The Constitution of the Federal Republic of Germany*** thus:

"…the value –oriented, concerned with intensely human and humane aspirations of personality, conscience and freedom; the structure-oriented, concerned with vastly more mundane and mechanical matters like territorial boundaries, local government, institutional arrangements."

58. Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality. As appreciated by **Ojwang, JSC**, in **Joseph Kimani Gathungu vs. Attorney General & 5 Others Constitutional Reference No. 12 of 2010**:

"A scrutiny of several Constitutions Kenya has had since independence shows that, whereas the earlier ones were designed as little more than a regulatory formula for State affairs, the Constitution of2010 is dominated by s "social orientation", and as its main theme, "rights, welfare, empowerment", and the Constitution offers these values as the reference-point I governance functions."

59. As was appreciated by the majority **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Sup. Ct. Advisory Opinion Appl. No. 2 of 2012** at para 54:

"Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions. A consideration of different constitutions are highly legalistic and minimalistic, as regards express safeguards and public commitment. But the Kenya Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a constitution takes such a fused form in its terms, we believe, a court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm."

60. The Court is therefore required in the performance of its judicial function to espouse the value system in the Constitution and to avoid the structural minimalistic approach. The German Federal Constitutional Court in **Luth Decision BVerfGE 7, 198 I. Senate (1 BvR 400/51)** noted as follows:

"But far from being a value free system the Constitution erects an objective system of values in its section on basic rights and thus expresses and reinforces the validity of the basic rights. This system of values, centering on the freedom of human being to develop the society must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration and judicial decisions. It naturally influences private law as well, no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit."

61. The foregoing position was aptly summarised by the South African Constitutional Court in **Carmichele vs. Minister of Safety and Security (CCT 48/00) 2001 SA 938 (CC)** in the following terms:

"Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court: 'The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and the judiciary.' The same is true of our Constitution. The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed."

62. Therefore the Constitution of Kenya, 2010, just like the post Nazi German Basic Law and the post-apartheid 1996 Constitution of South Africa, as 'a transformative instrument' is the key instrument to bring about a better and more just society". See **Michaela Hailbronner** in ***Traditions and Transformations: The Rise of German Constitutionalism***.

63. It is my view that our position is akin to the one described by the German Constitutional Court in **BVverfGE 5, 85** that:

"Free democratic order of the Basic Law…assumes that the existing state and social conditions can and must be improved. This presents a never-ending task that will present itself in ever new forms and with ever new aspects."

64. This is my understanding of Article 20(2)(3) and (4) of the 2010 Constitution which provides as

follows:

> ***(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.***
>
> ***(3) In applying a provision of the Bill of Rights, a court shall—***
>
> > ***(a) develop the law to the extent that it does not give effect to***
> >
> > ***a right or fundamental freedom; and***
> >
> > ***(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.***
>
> ***(4) In interpreting the Bill of Rights, a court, tribunal or other***
>
> ***authority shall promote—***
>
> > ***(a) the values that underlie an open and democratic society***
> >
> > ***based on human dignity, equality, equity and freedom; and***
> >
> > ***(b) the spirit, purport and objects of the Bill of Rights.***

65. To a limited extent, a holistic approach and interpretation of Article 20(3)(a) of the Constitution imports limited legislative role since the High Court is empowers in applying the Bill of Rights to develop the law by ensuring that the spirit of the Bill of Rights is kept alive.

66. To paraphrase **Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; Vol. 1 KAR 1192; [1986-1989] EA 57,** the Constitution is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle. It must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. As appreciated **In the Matter of the Estate of Lerionka Ole Ntutu [2008] KLR 452:**

> **"Constitution of any country of the world should not represent a mere body or skeleton without a soul or spirit of its own. The Court would not like to discard the possibility of the court adopting broader view of using the living tree principle of the interpretation of the Constitution where they are "amongst others, ambiguity, unreasonableness, obvious imbalance or lack of proportionality or absurd situation."**

67. Similarly in **Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006,** it was held that:

> **"…the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits."**

68. Nyamu, J (as he then was) in **Richard Nduati Kariuki vs. Honourable Leonard Nduati Kariuki & Another [2006] 2 KLR 356** expressed himself as hereunder:

> **"The Constitution is a living document. It is a house with many rooms, windows and doors. It is conservative enough to protect the past but flexible enough to advocate new issues and the future."**

69. It follows that the norms and values identified in Article 10 of the Constitution are bare minimum or just examples. This must be so because Article 10(2) of the Constitution provides that:

> ***"The national values and principles of governance include…"***

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

71. As regards the status of the Attorney General, as opposed to the retired Constitution, the Respondent correctly appreciates that prior to the Constitution of Kenya 2010, Minister was deemed to include the Attorney General. Article 30(1) of the Constitution, 2010 provides as hereunder:

> ***The national executive of the Republic comprises the President, the Deputy President and the rest of the Cabinet.***

72. Article 152(1) on the other hand provides that:

> ***(1) The Cabinet consists of—***
>
> ***(a) the President;***
>
> ***(b) the Deputy President;***
>
> ***(c) the Attorney-General; and***
>
> ***(d) not fewer than fourteen and not more than twenty-two Cabinet Secretaries.***

73. As clear from the above provision, the Attorney General's place in the executive is distinct and separate from those of the Cabinet Secretaries. If this were not so it would mean that the President can only appoint a maximum of twenty-one Cabinet Secretaries together with the Attorney General. Under Article 152(2) the President nominates and with approval of the National Assembly, appoints Cabinet Secretaries. The said Cabinet Secretaries, who are not to be Members of Parliament can only assume office by swearing or affirming faithfulness to the people and the Republic of Kenya and obedience to the Constitution, before the President and in accordance with the Third Schedule. They serve at the mercy of the President but may also be removed if the National Assembly supports the motion for the purpose by one-quarter of all the members of the Assembly which motion must eventually be carried by a majority of the members of the Assembly.

74. It is worth noting that whereas the Attorney General is pursuant to Part 3 of the Constitution a member of the Cabinet, apart from being mentioned as such member, Part 3 has nothing else to do with the Attorney General. It is Part 4 that substantially deals with the office of the Attorney General and that part is entitled "Other Offices". Whereas the procedure for appointment of the Attorney General is substantially the same as that of a Cabinet Secretary, the Constitution specifically provides for the qualifications that one must meet in order to be appointed as the Attorney General. There are no such requirements for the position of Cabinet Secretaries. His role is that of the principal legal adviser to the Government and the national Government's legal representative in court or in any other legal proceedings

to which the national government is a party, other than criminal proceedings. The Attorney General also performs any other functions conferred on the office by an Act of Parliament or by the President. Under Article 153(2) Cabinet Secretaries are accountable individually, and collectively, to the President for the exercise of their powers and the performance of their functions. The Attorney General, on the other hand is required by Article 156(6) to promote, protect and uphold the rule of law and defend the public interest. Apart from that Article 260 of the Constitution defines "State Office" as meaning the office of *inter alia*, Cabinet Secretary and Attorney General.

75. From the foregoing provisions it is clear that the Attorney General cannot be termed as a Cabinet Secretary. To do so may lead to a Cabinet whose composition may surpass the constitutional threshold. The Attorney General is not required by the Constitution to take a prescribed oath under the Constitution before assuming office. There is no express procedure for the removal of the Attorney General. He cannot for example be removed on a motion passed by the National Assembly; he protects the public interests as opposed to merely being accountable to the President.

76. It is however contended by the Respondent that under the Constitution of Kenya 2010, the Attorney General has been considered a Cabinet Secretary for the purposes of bringing into effect Article 132(3)(c). That provision empowers the President to, by a decision published in the Gazette, assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any Act of Parliament. The Respondent further relies on section 3 of the ***Interpretation and General Provisions Act*** which provides that:

> ***"the Cabinet Secretary" means the Cabinet Secretary for the time being responsible for the matter in question, or the President where executive authority is retained by him:***
>
> ***Provided that for the purposes of the administration of laws relating to the legal sector, the expression shall, subject to any assignment under Article 132(3)(c) of the Constitution, include the Attorney-General.***

77. In my view, what this provision means is that when it comes to the administration of laws relating to the legal sector the term "the Cabinet Secretary" includes the Attorney General. This interpretation is however subject to Article 132(3)(c) which provides that the powers of the President to, through a publication in the Gazette, assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, must not be inconsistent with any Act of Parliament. In other words where an Act of Parliament expressly confers functions on a particular Cabinet Secretary, the President cannot assign such functions to another Cabinet Secretary.

3. In my view section 3 of the ***Interpretation and General Provisions Act*** is what is termed as a deeming provision. It only deems the Attorney General as "the Cabinet Secretary" for the purposes of the administration of laws relating to the legal sector and only to the extent permitted by Acts of Parliament. The term "deem" was dealt by the Court of Appeal in **Telkom Kenya Ltd vs. Jeremiah Achila Gogo & Another Civil Appeal No. 153 of 2004**, as follows:

> **"The word "deemed" is used a great deal in modern legislation – sometimes it is used to impose for purposes of a statute an artificial construction of a word or phrase that would otherwise not prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain – sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible..."**

78. It must however be appreciated that the preamble to the ***Interpretation and General Provisions Act*** provides that it is an Act of Parliament to make provision in regard to the construction, application and interpretation of ***written law***, to make certain general provisions with regard to such law and for other like purposes. Section 2 thereof expressly provides that:

> ***This Act shall not apply for the construction or interpretation of the Constitution, which is not a written law for the purposes of this Act.***

79. It is therefore clear that Cap 2 cannot be invoked for the purposes of construction or interpretation of the Constitution. It is therefore my view that the Attorney General is not a Cabinet Secretary for the purposes of the Constitution. He can however be assigned duties and functions by the President as long as the same is not inconsistent with the provisions of any Act of Parliament.

80. Under section 4(5) of the ***Legal Education Act***, the Council of Legal Education comprises of *inter alia*, the Attorney General. However the appointments are to be made by the Cabinet Secretary for the time being responsible for matters relating to legal education, who is not expressly mentioned as a member of the Council. In my view the spirit of the Act contemplates that the Cabinet Secretary would a person other than the Attorney General since the resignation of members of the Council, and this includes the Attorney General, is to be made to the Cabinet Secretary.

81. It is therefore my view that to assign the Attorney General functions which in effect make him a member of the council which he himself appoints and to whom resignation of the *ex officio* members of the council is addressed is contrary to the spirit of the ***Legal Education Act***. Whereas one may argue that under section 6(6) of the said Act, it is not compulsory for the Attorney General to be personally a member of the Council, such decision depends on the good will of the holder of such office. As this Court appreciated in **Constitutional Petition No. 74 of 2011 – J Harrison Kinyanjui vs. Attorney General & Another.**

> **"the immediate pragmatic purpose of an orientation of the judicial process is to ensure *predictability, certainty, uniformity, stability* and *jurisprudential standards* that sustain the principles of the Constitution, and the rights and duties flowing from the legal set-up, and which provide sanctity for the legitimate actions of the people. This aspiration, we hold, cannot be achieved if application of the law is left to the good will of those in power at any given point in time."**

82. To this extent, I agree with the petitioner that there is some element of conflict of interest particularly where the Attorney General decides to personally participate as a member of the council. It is even more absurd when one considers that one of the members of the Council is the Principal Secretary of the Ministry for the time being responsible for legal education. In effect the Attorney General's office would be represented by two officers in the Council and in my view that is clearly not in accordance with the spirit of the ***Legal Education Act***.

83. It is therefore my view and I hold that the ***Legal Education Act*** contemplates that there would be a Cabinet Secretary for the time being responsible for matters relating to legal education other than the Attorney General. I do not buy into the argument that since the Administration of matters relating to the legal sector require legal expertise such as that which the Attorney General is ordinarily expected to have, the Attorney General must necessarily be the Cabinet Secretary in charge of legal education. As the Constitution clearly appreciates in Article 156(4)(a), the Attorney General is the principal legal adviser to the Government. There is therefore nothing stopping the Attorney General from giving appropriate legal advice to whoever is appointed as the Cabinet Secretary for the time being responsible for legal education.

84. Whereas I agree that Article 132(3) of the Constitution confers prerogative upon the President of, *inter alia*, directing and coordinating functions of the Ministries and Government departments and including assigning responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, that power must be exercised in accordance with the Constitution and the law and in determining whether or not the power has been exercised in accordance with the Constitution, this Court must do so in a manner that promotes its purposes, values and principles. In other words the spirit of the Constitution must be taken into account. It is in this light that I understand the holding in **Republic vs. The Honourable The Chief Justice of Kenya & Others Ex Parte Moijo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004** where the Court expressed itself as follows:

> **"The court agrees that the Office of President is a special and unique office, which has immense, and numerous powers and responsibilities. In the court's view these powers and**

responsibilities are so vast and important that the President must always direct his undivided time and attention to his duties and responsibilities for the sake of protecting the interests of the public. Presidential immunity is the power and authority that a President has to declare that his or her discussions, deliberations and communications are confidential and secret, therefore out of reach of the jurisdiction of the High Court. It is clear that the President is always vested with certain important and unrestricted political powers and in the exercise of such powers the President is to use his own discretion. However, the President always remains accountable to his country as a political agent. To support and assist the president in performance of his day to day duties and responsibilities, constitutionally he is given the power and authority to appoint certain officers and these officers' acts are the acts of the President because the officers are merely the President's political organs through whom the president will and pleasure are communicated and carried out. The question therefore is whether all persons charged with duties and responsibilities to carry the express and implied political will of the President are immune from actual judicial review when they are said to be acting not as prescribed by law. There is a view that when acting politically and not as provided for and prescribed by the law all executive appointees' actions can only be examined politically and not legally because their acts are covered and provided for under political question doctrine which states that being political acts they are non justiciable and not reviewable by a court. It is the court's view that when the law proceeds to impose on the executive legally prescribed duties and responsibilities, the performance of which depends upon the enhancing or handling of public interest, the political officers of the executive must act consistent and according to the laws of the land…..In the court's view the performance of certain duties and responsibilities is dependent upon individual rights and responsibilities hence the duty to act consistently with and according to the law. If public officers including the President fail to act, and their failure harms the interests of the public and rights of individual citizens, their actions and omissions are subject to judicial review. The protection given to the President under section 14 of the Constitution cannot be absolute and is only meant to protect the interest of the wider citizens who have a stake in the presidency or who have elected the president to be the symbol of unity and protection of collective and individual rights of all citizens. The constitutional provisions protecting the President from legal proceedings can be said to be against public policy when it is used in a manner likely to affect the interest of an individual or issues concerning human rights and environmental protection which is meant for the greater public good. It is therefore, the duty of the High Court in that regard to say what is the law and those who apply the rule of absolute immunity must of necessity expound and interpret the rule in a broad manner likely to benefit the interest of the wider public and when two interests conflict with each other the court must decide on the operation of each. If the courts are to regard the constitution for the benefit of the citizens, it cannot be said the President is superior to the Constitution and to any other legislation…..The rationale for official immunity applies where only personal and private conduct by a president is at issue. It means that there shall be no case in which any public official can be granted any immunity from suit from his unofficial acts. There has been argument that unless immunity is available, the threat of judicial interference with executive branch through judicial review orders, potential contempt citations and sanctions would violate separation of powers principle. It is also alleged that the fear of answering to court for his actions would impair or limit the president's discharge of his constitutional powers and duties. On the part of the Court, it thinks that the President being a public servant represents the interests of the society as a whole and the conduct of his duties may adversely affect a wide variety of different individuals each of whom may be a potential source of current or future controversy. In some quarters the societal interest in providing the President with maximum ability to deal fearlessly and impartially with the public at large has long been recognised as an acceptable justification for official immunity. The immunity for the President in such circumstances is meant to forestall an atmosphere of intimidation that will conflict with his resolve to perform his designated functions in a principled fashion."

85. Therefore whether or not an issue is justiciable will depend on the legal principles surrounding the particular act done as discernible from the legal instruments appurtenant to the said action. As was held in

the above case, when the law proceeds to impose on the executive legally prescribed duties and responsibilities, the performance of which depends upon the enhancing or handling of public interest, the political officers of the executive must act consistent and according to the laws of the land and since the performance of certain duties and responsibilities is dependent upon individual rights and responsibilities, there is a duty to act consistently with and according to the law. If a public officer fails to so act, and their failure harms the interests of the public and rights of individual citizens, their actions and omissions are subject to judicial review.

86. Whereas it is not within this Court's mandate to direct the President to create a particular ministry and to assign it specific duties, where the President assigns duties to a person who is not constitutionally mandated to do so, this Court must intervene to quash that decision. It is then left to the President to decide on the next course of action. To do so does not impinge upon the doctrine of separation of powers. As was appreciated in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)**:

> **"…while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty. As O'Regan J explained in a recent minority judgment, 'the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.' In order for the founding values that lie at the heart of our Constitution to be made concrete, it is particularly important for this Court to afford a remedy, which is not only effective, but which should also be seen to be effective. The provisions of section 172(1) (a) are clear, and they admit of no ambiguity; '[w]hen deciding a constitutional matter within its power, a court...must declare that any law or conduct that is inconsistent with the Constitution is invalid'. This section gives expression to the supremacy of the Constitution and the rule of law, which is one of the founding values of our democratic state. It echoes the supremacy clause of the Constitution, which declares that the 'Constitution is supreme...; law or conduct inconsistent with it is invalid'. It follows therefore that if a court finds that the law is inconsistent with the Constitution, it is obliged to declare it invalid…".**

87. The doctrine of was dealt with by **Ngcobo, J** in the same case as hereunder:

> **"The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court. It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation."**

88. According to the learned Judge:

> **"It seems to me therefore that a distinction should be drawn between constitutional**

provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation. By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does."

89. It was further held that:

"While it imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement but leaves it to Parliament to determine what is required of it in this regard. A review by a court of whether Parliament has complied with its obligation under section 72(1)(a) calls upon a court to intrude into the domain of a principal legislative organ of the state. Under our Constitution, this intrusion is reserved for this Court only. A construction of section 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principle legislative organ of the state. Such an order will inevitably have important political consequences. Only this Court has this power. The question whether Parliament has fulfilled its obligation under section 72(1)(a) therefore requires this Court to decide a crucial separation of powers question and is manifestly within the exclusive jurisdiction of this Court under section 167(4)(e) of the Constitution."

90. I associate myself fully with the said sentiments. Since this Court is vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, it has the duty and is obliged to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. Since this petition alleges a violation of the Constitution by the Respondents, the invitation to this Court to intervene is more than welcome and the Respondents cannot obstruct it from doing so by placing road-blocks on its path by way of the doctrines of parliamentary privilege and separation of power. In other words, the two doctrines do not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution as that is one of the core mandates of this Court.

91. I therefore hold and affirm that this Court has the power to enquire into the constitutionality of the actions of the executive notwithstanding the doctrine of separation of powers. This finding is fortified under the principle that the Constitution is the Supreme Law of this country and the Executive must function within the limits prescribed by the Constitution. In cases where it has stepped beyond what the law and the Constitution permit it to do, it cannot seek refuge in illegality and hide under the twin doctrines of parliamentary privilege and separation of powers to escape judicial scrutiny.

92. In my view the doctrine of separation of powers must be read in the context of our constitutional framework and where the adoption of the doctrine would clearly militate against the constitutional

principles the doctrine must bow to the dictates of the spirit and the letter of the Constitution.

93. It is important therefore to appreciate the nature of the Constitution of Kenya, 2010. Our Constitution is a transformative constitution. This must necessarily be so since Article 10 thereof provides that all State organs, State officers, public officers and all persons whenever they make or apply policy decisions are bound by the national values and principles of governance which include participation of the people, inclusiveness, integrity, transparency and accountability. That ours is s transformative Constitution appears from Article 20(3) of the Constitution which provides that:

> ***In applying a provision of the Bill of Rights, a court shall—***
>
> > ***(a) develop the law to the extent that it does not give effect to a right or fundamental freedom;***
> >
> > ***(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.***

94.Similarly Article 259(1) of our Constitution provides that:

> ***This Constitution shall be interpreted in a manner that—***
>
> > ***(a) promotes its purposes, values and principles;***
> >
> > ***(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;***
> >
> > ***(c) permits the development of the law; and***
> >
> > ***(d) contributes to good governance.***

95. What the above provisions mean is that in the interpretation of the Constitution the Court must do so in a manner that advances the values and principles of the Constitution. Since ours is a constitutional democracy the authorities handed down in systems that practice parliamentary supremacy are not necessarily relevant to our constitutional set up. Therefore in applying authorities emanating from such systems, care must be taken to ensure that such decisions conform to our transformative constitutional framework. This was the position adopted by **Kasanga Mulwa, J** in **R vs. Kenya Roads Board exparte John Harun Mwau HC Misc Civil Application No.1372 of 2000** where he expressed himself as follows:

> **"Once a Constitution is written, it is supreme. I am concerned beyond peradventure that when the makers of our Constitution decided to put it in writing and by its provision thereof created the three arms of Government namely the Executive, the Legislature and the Judiciary, they intended that the Constitution shall be supreme and all those organs created under the Constitution are subordinate and subject to the Constitution."**

96. Our Constitution is therefore not just structurally based but is a value-oriented Constitution. Its interpretation and application must therefore not be a mechanical one but must be guided by the spirit and the soul of the Constitution itself as ingrained in the national values and principles of governance espoused in the preamble and *inter alia* Article 10 of the Constitution. The distinction between the two was made by **Ulrich Karpen** in ***The Constitution of the Federal Republic of Germany*** thus:

> **"…the value –oriented, concerned with intensely human and humane aspirations of personality, conscience and freedom; the structure-oriented, concerned with vastly more mundane and mechanical matters like territorial boundaries, local government, institutional arrangements."**

97. Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality. As appreciated by **Ojwang, JSC**, in **Joseph Kimani Gathungu vs. Attorney General& 5 Others Constitutional Reference No. 12 of 2010**:

> **"A scrutiny of several Constitutions Kenya has had since independence shows that, whereas the earlier ones were designed as little more than a regulatory formula for State affairs, the Constitution of2010 is dominated by s "social orientation", and as its main theme, "rights, welfare, empowerment", and the Constitution offers these values as the reference-point I governance functions."**

98. As was appreciated by the majority **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Sup. Ct. Advisory Opinion Appl. No. 2 of 2012** at para 54:

> **"Certain provisions of the Constitution of Kenya have to be perceived in their scope for necessary public actions. A consideration of different constitutions are highly legalistic and minimalistic, as regards express safeguards and public commitment. But the Kenya Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a constitution takes such a fused form in its terms, we believe, a court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm."**

99. The Court is therefore required in the performance of its judicial function to espouse the value system in the Constitution and to avoid the structural minimalistic approach. The German Federal Constitutional Court in **Luth Decision BVerfGE 7, 198 I. Senate (1 BvR 400/51)** noted as follows:

> **"But far from being a value free system the Constitution erects an objective system of values in its section on basic rights and thus expresses and reinforces the validity of the basic rights. This system of values, centering on the freedom of human being to develop the society must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration and judicial decisions. It naturally influences private law as well, no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit."**

100. The foregoing position was aptly summarised by the South African Constitutional Court in **Carmichele vs. Minister of Safety and Security (CCT 48/00) 2001 SA 938 (CC)** in t following terms:

> **"Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court: 'The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and the judiciary.' The same is true of our Constitution. The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed."**

101. Therefore the Constitution of Kenya, 2010, just like the post Nazi German Basic Law and the post-apartheid 1996 Constitution of South Africa, as "a transformative instrument is the key instrument to bring about a better and more just society". See **Michaela Hailbronner** in ***Traditions and Transformations: The Rise of German Constitutionalism***.

102. It is my view that our position is akin to the one described by the German Constitutional Court in **BVverfGE 5, 85** that:

> **"Free democratic order of the Basic Law…assumes that the existing state and social conditions can and must be improved. This presents a never-ending task that will present itself in ever new forms and with ever new aspects."'**

103. To paraphrase **Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; Vol. 1 KAR 1192; [1986-1989] EA 57,** the Constitution is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle. It must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. As appreciated **In the Matter of the Estate of Lerionka Ole Ntutu [2008] KLR 452:**

> **"Constitution of any country of the world should not represent a mere body or skeleton without a soul or spirit of its own. The Court would not like to discard the possibility of the court adopting broader view of using the living tree principle of the interpretation of the Constitution where they are "amongst others, ambiguity, unreasonableness, obvious imbalance or lack of proportionality or absurd situation."**

104. Similarly in **Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006,**it was held that:

> **"…the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits."**

105. Nyamu, J (as he then was) in **Richard Nduati Kariuki vs. Honourable Leonard Nduati Kariuki& Another [2006] 2 KLR 356** expressed himself as hereunder:

> **"The Constitution is a living document. It is a house with many rooms, windows and doors. It is conservative enough to protect the past but flexible enough to advocate new issues and the future."**

106. It follows that the norms and values identified in Article 10 of the Constitution are bare minimum or just examples. This must be so because Article 10(2) of the Constitution provides that:

> ***"The national values and principles of governance include…"***

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

108. These constitutional principles apply to judicial review just as they apply to constitutional petitions and references as was appreciated by the South African Constitutional Court (**Chalkalson, P**) in **Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000)** at para 33 as follows:

> **"The control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts."**

109. Article 154(4)(a) of the Constitution provides that:

> ***Each person appointed as a Cabinet Secretary…assumes office by swearing or affirming faithfulness to the people and the Republic of Kenya and obedience to this Constitution, before the President and in accordance with the Third Schedule.***

110. It therefore follows that the Executive, being a State organ, in making policy decision must adhere to the national values and principles of governance. If it does not do so, it may well fall foul of Article 10 of the Constitution. To this extent I may not agree with the position adopted by the US Supreme Court in **U.S vs. Butler, 297 U.S. 1 [1936]** line, hook and sinker when it holds that:

> ***"When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."***

111. My view on the nature of our Constitution is based on the decision of the Supreme Court of Kenya in **Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR** where it expressed itself as follows:

> **"Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute *social change* and *reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy.* This is clear right from the preambular clause which premises the new Constitution on – "*RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.*" And the principle is fleshed out in Article 10 of the Constitution, which specifies the "national values and principles of governance", and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government. The transformative concept, in operational terms, *reconfigures the interplays between the States majoritarian and non-majoritarian institutions*, to the intent that the desirable goals of governance, consistent with dominant perceptions of *legitimacy*, be achieved. A depiction of this scenario has been made in relation to the unique processes of constitution-building in South Africa, a country that was emerging from an entrenched racialist governance system. Karl Klare, in his article, "*Legal Culture and Transformative***

***Constitutionalism," South African Journal of Human Rights*, Vol. 14 (1998), 146 thus wrote [at p.147]: *"At the most superficial level, South Africans have chosen to compromise the supremacy of Parliament, and correspondingly to increase the power of judges, each to an as-yet unknowable extent."*The scholar states the object of this South African choice: *"By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed…to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law."* The history of political change in South Africa will remain highly relevant for those African countries, like Kenya, seeking to evolve democratic constitutional systems out of a past of skewed and repressive governance. And by the settled technique of the comparative method in law, we draw from that country's achievements in constitutional precedent. We in this Court, conceive of today's constitutional principles as incorporating the transformative ideals of the Constitution of 2010".**

112. I therefore associate myself with the views of **Mohamed A J** in the Namibian case of **S. vs Acheson, 1991 (2) S.A. 805** (at p.813) to the effect that:

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

113. It is my view that even where the Attorney General properly performs his duties on the strength of the deeming effect above, he can only properly do so upon swearing or affirming faithfulness to the people and the Republic of Kenya in accordance with the Third Schedule. In that event, he would be subjected to the process of removal from that position just like any other Cabinet Secretary. In my view it would be a violation of the Constitution for the President to appoint a person in the position of a Cabinet Secretary when that person in carrying out his or her mandate as such Cabinet Secretary has not sworn or affirmed faithfulness to the Constitution and when in the performance of such duties he or she is not subject to being oversighted by Parliament.

114. Having considered the issues raised in this petition, the orders which commend themselves to me and which I hereby grant are as follows:

a. A declaration that whereas the respondent the Attorney General, is a member of the Cabinet, he is not a Cabinet Secretary and therefore cannot, where to do so would be contrary to an Act of Parliament, perform or purport to perform the functions specifically reserved for a Cabinet Secretary under any piece of legislation.

b. A declaration that the respondent's purported exercise of Cabinet Secretarial functions under the Legal Education Act, 27 of 2012 or under any other piece of legislation, where the same is inconsistent with or contrary to the spirit Constitution or the law in null and void.

c. A declaration that before performing Cabinet Secretarial duties, where permitted by the Constitution and the law, the Attorney General must take the oath appropriate to Cabinet Secretaries.

d. A declaration that the Attorney General, while performing the duties of a Cabinet Secretary is subject to the process of removal from that position of a Cabinet Secretary.

e. A declaration that any executive order that purports to assign the respondent, the Attorney General, cabinet secretarial functions and powers contrary to the letter and spirit of the Constitution and the law, is invalid, null and void.

f. I however appreciate that the effect of immediate invalidity of the appointment of the Respondent as a Cabinet Secretary may not uphold public interest. In the circumstances and pursuant to Article 23 of the Constitution I declare that this decision will only affect future actions of the Respondent and the declaration of unconstitutionality of the Cabinet Secretarial functions of the Respondent will be suspended for a period of three months to enable the executive take appropriate remedial action.

g. As this is public interest litigation there will be no order as to costs. I however commend the Petitioner for taking the bold step as required of him by Article 3(1) of the Constitution to protect and uphold the Constitution.

115. It is so ordered.

Dated at Nairobi this 23rd day of January, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Adera for Mr Odero for the Petitioner

Mr Bitta for the Respondent

CA Mwangi