



**Okoti & 4 others v Attorney General & 12 others (Petition 227,
281 & 282 of 2013 (Consolidated)) [2014] KEHC 7539 (KLR)
(Constitutional and Human Rights) (5 February 2014) (Judgment)**
Okiya Omtatah Okoti & 3 others v Attorney General & 5 others [2014] eKLR
Neutral citation: [2014] KEHC 7539 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 227, 281 & 282 OF 2013 (CONSOLIDATED)
I LENAOLA, M NGUGI & WK KORIR, JJ
FEBRUARY 5, 2014

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

PARLIAMENTARY SERVICE COMMISSION 2ND RESPONDENT

SALARIES & REMUNERATION COMMISSION 3RD RESPONDENT

NATIONAL ASSEMBLY 4TH RESPONDENT

AS CONSOLIDATED WITH

PETITION 281 OF 2013

BETWEEN

LAW SOCIETY OF KENYA (LSK) PETITIONER

AND

**THE NATIONAL ASSEMBLY OF THE REPUBLIC OF
KENYA 1ST RESPONDENT**

PARLIAMENTARY SERVICE COMMISSION 2ND RESPONDENT

THE SPEAKER OF THE NATIONAL ASSEMBLY 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT



THE SALARIES & REMUNERATION COMMISSION 5TH RESPONDENT
THE CONTROLLER OF BUDGET 6TH RESPONDENT

AS CONSOLIDATED WITH
PETITION 282 OF 2013

BETWEEN

COSMUS NGENO KOECH 1ST PETITIONER
DANIEL CHEGE KAMAU 2ND PETITIONER
UZALENDO INSTITUTE FOR LEADERSHIP AND DEMOCRACY 3RD
PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT
THE PARLIAMENTARY SERVICE COMMISSION 2ND RESPONDENT
THE CLERK OF THE NATIONAL ASSEMBLY 3RD RESPONDENT
THE CLERK TO THE SENATE 4TH RESPONDENT

Constitutionality of Acts of Parliament pertaining to the Remuneration & Benefits of Members of National Assembly.

Reported by Emma Kinya and Opiyo Lorraine

***Constitutional Law** - jurisdiction - jurisdiction of the High Court to determine issues arising out of parliamentary debates and resolutions - circumstances in which the court can interfere with parliamentary debates - duty of the High Court to check the constitutionality of the resolutions and statutes made by the legislature.*

***Constitutional Law** - Constitutional Commissions - mandate of the Salaries and Remuneration Commission to determine the remuneration and benefits of members of the National Assembly - where the members of the National Assembly passed a resolution nullifying the Gazette Notice published by the SRC regulating the remuneration of the members of the National Assembly - whether the resolution passed by the national Assembly was unconstitutional - whether the conduct of the members of the National Assembly amounted to gross misconduct - Constitution of Kenya, 2010 article 230 (4)(5), 249, 251; Salaries and Remuneration Commission Act, 2011 section 11.*

***Constitutional Law** - interpretation of Acts of parliament - whether certain Acts of parliament pertaining to the remuneration and benefits of members of the National Assembly are unconstitutional - Parliamentary Pensions Act, National Assembly Remuneration Act (cap 5).*

Brief facts

On 1st March, 2013 through a Special Issue of the Kenya Gazette, the Salaries and Remuneration Commission (SRC) (3rd Respondent) published the remuneration of various categories of state officers. The gazette notice specifically dealt with the remuneration of Members of Parliament (the Senate and the National Assembly). The Members of the National Assembly were aggrieved by the terms set for them on their remuneration and benefits by the 3rd Respondent and they immediately put into place mechanisms for setting aside the decision of the 3rd Respondent as contained in the notice. This culminated in a resolution by the National Assembly



to nullify all the notices contained in the Special Gazette Issue. The resolution was communicated to the 3rd Respondent through a letter with a Certificate signed by the Clerk to the National Assembly annexed to it.

Issues

- i. Whether the High Court had jurisdiction over matters under discussion by Parliament in view of the privilege enjoyed by Parliament in the discharge of its worth.
- ii. Whether the decision by the National Assembly to debate and pass a motion quashing the Gazette Notices issued by the SRC containing the remuneration and benefits of state officers was unconstitutional.
- iii. Whether the conduct by the National Assembly in nullifying the Gazette Notices published by the SRC amounted to gross misconduct and unconstitutional.
- iv. Whether the SRC had violated the Constitution in setting the salaries of Members of Parliament.

Held

1. In passing the Constitution, Kenyans gave the responsibility of making laws to Parliament. The decision of the people had to be respected, so that the High Court could only interfere with the work of Parliament in situations where Parliament acted in a manner that defied logic and violated the Constitution. To agree with the National Assembly that the High Court could not interrogate its work would amount to saying that the National Assembly could fly beyond the reach of the radar of the Constitution.
2. Parliamentary privilege consisted of the rights and immunities which the two Houses of Parliament and their members and officers possessed to enable them to carry out their parliamentary functions effectively. Without that protection, members would be handicapped in performing their parliamentary duties, and the authority of Parliament itself in confronting the executive and as a forum for expressing the anxieties of citizens would be correspondingly diminished.
3. Members of Parliament should not look over their shoulders when conducting debates in Parliament. They have to express their opinions without any fear. The Court should be hesitant to interfere, except in very clear circumstances in matters that were before the two Houses of Parliament and even those before the County Assemblies. However, the mandate of the High Court was to check the constitutionality of the resolutions and statutes made by the legislature. In the case before the Court, a resolution had been made and the Court had a duty to interrogate the constitutionality of that resolution.
4. While the High Court had powers to overturn certain resolutions of Parliament, it had to restrain itself in not trespassing into that part of the legislative field which had been reserved by the Constitution, and for good reasons, to the legislature. Therefore the High Court had jurisdiction to entertain the petitions.
5. The proceedings in respect of the said resolution and certificate of nullification were captured in the Hansard and were forever part of the history of the Kenyan nation. The question whether the National Assembly had the constitutional authority to nullify the Gazette Notices was and remained unaddressed. To leave the question raised by the petitioners with regard to whether or not Parliament exceeded its mandate in passing the said resolution and issuing the subsequent certificate unanswered would be to leave a critical question at this time in our constitutional history unaddressed, and to leave uncertainty with regard to the constitutional mandate of the SRC, an important constitutional commission, *vis a vis* the oversight role of Parliament.
6. Courts, should be reluctant to intervene in the question of removal of the Commissioners of SRC, considering that the tribunal appointed by the President would among other things consider whether the reasons for the proposed removal met the constitutional threshold. In the case before the court, the National Assembly did not resolve to remove the Commissioners of SRC. The Court would therefore have no reason to venture into the question of their removal since it had not arisen.
7. It was not the mandate of the High Court to enter into the merits of the decision made by the SRC, for to do so was to interfere with the constitutional mandate of the SRC. Unless clear evidence was placed before the Court, of violation of the Constitution or of statute, or of such unreasonableness in its decision making as would justify interference by the Court, it was not the duty of the Court to inquire into the methods or



modalities used by the SRC to arrive at its decision in setting the remuneration of Members of the National Assembly.

8. The SRC was doing its job, exercising its constitutional mandate and function with regard to the remuneration of State Officers, when it issued the Special Issue of the Kenya Gazette on 1st March, 2013. In moving to quash the Gazette Notice containing the remuneration and benefits of its members, the National Assembly stepped into the arena reserved for the SRC by the Constitution.

9. Parliamentarians were expected to operate within the letter and the spirit of the Constitution. Parliament, like all other state organs, was not above the law. Members of the National Assembly, like all other state officers, and the National Assembly, like all other state organs were compelled by the Constitution to adhere to the national values and principles of governance found in article 10 of the Constitution. Therefore the resolution by the National Assembly to nullify the Gazette Notices published by the SRC was unconstitutional

10. There was nothing unconstitutional in the Appropriation Act, the Supplementary Appropriation Act and the Statutory Instruments Act. An Appropriation Act simply provided for the expenditure of public funds. Public funds could only be expended in the manner provided by the law and the fact that funds had been set aside did not mean that the same could be utilized in an unlawful manner.

11. Pensions were protected by the Constitution. Section 32 of the Sixth Schedule of the Constitution provided that the law applicable to pensions in respect of holders of constitutional offices under the repealed Constitution ought to be either the law that was in force at the date on which those benefits were granted or any law in force at a later date that was not less favorable to the person. Given those clear constitutional provisions it would therefore be erroneous to find that an Act of Parliament namely the Parliamentary Pensions Act which provided for pension for former Members of Parliament as unconstitutional.

12. The remuneration and benefits of the members of the 11th Parliament and any other Parliament coming into existence thereafter could only be determined by the SRC. The National Assembly Remuneration Act was therefore unconstitutional and no longer served any purpose in the statute books of Kenya, therefore the said Act of Parliament was unconstitutional.

Petition allowed.

Orders

The National Assembly exceeded its mandate by purporting to annul Gazette Notices issued by the SRC on 1st, March 2013. Its decision was therefore both unlawful and unconstitutional.

In view of the provisions of article 260 of the Constitution of Kenya, 2010 the National Assembly Remuneration Act was unconstitutional.

No order as to costs.

Citations

East Africa

1. *Commission for the Implementation of the Constitution v Attorney General & another* Civil Appeal No 351 of 2012 - (Followed)
2. *Jobo, Ali Hassan & another v Suleiman Said Shabbal & 2 others* Civil Appeal No 12 of 2013 - (Followed)
3. *Mwau, John Harun & 3 others v Attorney General & 2 others* [2012] 1 KLR 73 - (Mentioned)
4. *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited* [1989] KLR 1 - (Explained)

South Africa

1. *National Coalition for Gay and Lesbian Equality & others 13 others, Case CCT No 10/99* - (Mentioned)

Canada

2. *Canada (House of Commons) v Vaid* [2005] 1 SCR - (Followed) **Statutes**

East Africa

3. Appropriations Act, 2008 (Act No 7 of 2008) In general - (Interpreted)



4. Constitution of Kenya, 2010 articles 2, 2(4); 3; 7(1)(2); 10; 27; 73(1)(a)(c); 75(1)(b); 93; 94; 94(4); 95; 95(5) (a)(b); 116(3); 117(1); 122; 124; 127; 156; 159; 165; 165(d); 206; 207; 223; 226; 230; 248(2)(h); 249; 251; 259; 260 - (Interpreted)
5. Constitution of Kenya, 2010 Sixth Schedule section 32 - (Interpreted)
6. Law Society of Kenya Act (cap 18) section 3 - (Interpreted)
7. Leadership and Integrity Act, 2012 (Act No 19 of 2012) In general - (Interpreted)
8. National Assembly (Powers and Privileges) Act (cap 6) section 12 - (Interpreted)
9. National Assembly (Remuneration) Act (cap 5) - (Unconstitutional)
10. Parliamentary Pensions Act (cap 196) In general - (Interpreted)
11. Salaries and Remuneration Commission Act, 2011 (Act No 10 of 2011) section 11 - (Interpreted)
12. Statutory Instruments Act, 2013 (Act No 23 of 2013) In general - (Interpreted)

JUDGMENT

Introduction

1. This judgment deals with three Constitutional Petitions which challenge the constitutionality of the decision of the National Assembly to nullify certain Gazette Notices issued by the Salaries and Remuneration Commission (SRC) in respect of salaries for state officers. The Petitioners also question the constitutionality of several Acts of Parliament relating to the terms of service of Members of the National Assembly.

Procedural Background

2. The first Petition is No 227 of 2013 in which the parties are Okiya Omtatah Okoiti being the Petitioner and the Attorney General, the Parliamentary Service Commission (PSC), the Salaries and Remuneration Commission (SRC) and the National Assembly being the 1st to 4th Respondents respectively.
3. The second Petition is No 281 of 2013 in which the Petitioner is the Law Society of Kenya (LSK) and the 1st to 6th Respondents are the National Assembly of the Republic of Kenya, the PSC, the Speaker of the National Assembly, the Attorney General, the SRC and the Controller of Budget. By a ruling delivered on 31st May, 2013, this Court (DS Majanja, J) consolidated the two Petitions so that Okiya Omtatah Okoiti became the 1st Petitioner and LSK became the 2nd Petitioner. The Attorney General, PSC, the SRC and the National Assembly became the 1st, 2nd, 3rd and 4th Respondents, respectively. The Speaker of the National Assembly and the Controller of Budget were struck off from these proceedings.
4. Subsequent to the consolidation of the two Petitions, a third Petition being Petition No 282 of 2013 was filed by Cosmus Ngeno Koech, Daniel Chege Kamau and Uzalendo Institute for Leadership and Democracy (Uzalendo). The 1st to 4th Respondents were named as the Attorney General, the PSC, the Clerk of the National Assembly, the Clerk of the Senate and the Controller of Budget. Through directions issued on 11th July, 2013 by this Court (Lenaola, J) this third Petition was consolidated with petitions Nos 227 and 281 of 2013, with Petition No 227 of 2013 becoming the lead file.
5. Mr Cosmus Ngeno Koech therefore became the 3rd Petitioner while Mr Daniel Chege Kamau and Uzalendo Institute became the 4th and 5th Petitioners, respectively. The Clerk of the National Assembly and the Clerk of the Senate consequently became the 5th and 6th Respondents. The Controller of Budget who had been named in Petition No 282 of 2013 as the 5th Respondent was at the time of



consolidation struck off the proceedings. The 5th and 6th Respondents did not participate in these proceedings and no further reference will be made to them in this judgment.

The Parties

6. The 1st Petitioner, who will also be referred to as Mr Omtatah, describes himself as a tax paying, public-spirited citizen, a human rights defender and the Executive Director of an organization known as Kenyans for Justice and Development Trust (KJDT). The 2nd Petitioner, LSK, is a statutory body corporate established under section 3 of the [Law Society of Kenya Act](#), cap 18 of the Laws of Kenya. LSK is a professional body charged with the responsibility of overseeing the practice of law in Kenya. Mr Koech (the 3rd Petitioner) and Mr Kamau (the 4th Petitioner) are Advocates of the High Court of Kenya who also describe themselves as public-spirited citizens like Mr Omtatah. The 4th Petitioner is the Executive Director of the 5th Petitioner, a duly registered non-governmental organization.
7. The 1st Respondent is the Attorney General of the Republic of Kenya and is the principal legal adviser to the Government. The 2nd Respondent (PSC) is a creature of article 127 of the [Constitution](#) and among its objectives and functions is to ensure the efficient and effective operations of Parliament and the well being of the members and staff of Parliament. The 3rd Respondent (SRC) is established under article 230 of the [Constitution](#), while the 4th Respondent, The National Assembly, is established under article 93 of the [Constitution](#). For clarity, article 93 of the [Constitution](#) establishes the Parliament of Kenya which is made up of the National Assembly and the Senate. The decision being challenged in these proceedings is that of the National Assembly.

The Petitions

8. While the prayers of the Petitioners are intertwined and although the Petitions have been consolidated, we find it necessary for the sake of completeness and clarity to reproduce certain of the prayers contained in each of the three Petitions.

Petition No 227 of 2013

9. In the Amended Petition dated 29th May, 2013, the 1st Petitioner has a long list of orders which he seeks from this Court. However, the questions set out in the prayers to the Petition which he asks the Court to determine clearly bring out the specific orders he seeks from the Court. He asks the Court to determine:
 - (i) Whether MPs have the power and/or legal capacity to determine their salaries, allowances and other benefits.
 - (ii) Whether under the [Constitution](#) of Kenya, the 3rd Respondent violated any law or any principles when setting the salaries and remuneration of the Members of the 11th Parliament.
 - (iii) Whether the salaries, allowances and other benefits of Members of the 11th Parliament which were gazetted by the 3rd Respondent are constitutional and valid.
 - (iv) Whether the Government can legitimately make grants of whatever nature to Members of the 11th Parliament.
 - (v) Whether by issuing threats to the 3rd Respondent, Members of the 11th Parliament are interfering with the autonomy of the Independent Commission.



- (vi) Whether by dint of article 40(6) [of the Constitution] the Members of the 11th Parliament have a right to keep any unlawful payments they received or may receive as a result of manipulating and blackmailing the 3rd Respondent.
- (vii) Whether the National Assembly Remuneration Act (chapter 5 of the Laws of Kenya) and the Parliamentary Pensions Act (chapter 196 of the Laws of Kenya) were repealed at the expiry of the term of the 10th Parliament or they are still in force under the new Constitution.
- (viii) Whether the promulgation of the Constitution of Kenya, 2010, effectively annulled both the reports of the Cockar and Akiwumi Tribunals (Commissions) appointed under the former Constitution by the Parliamentary Service Commission to review the terms and conditions of service for members of the National Assembly.
- (ix) Whether Parliament can revoke legal notices gazetted in the Kenya Gazette.
- (x) Whether Parliament can legislate to directly set and determine any public official's salary, allowances and benefits.
- (xi) Whether Parliament can use its budget allocation powers to usurp the SRC's powers to directly determine the salaries and remuneration of State officers.

Petition No 281 of 2013

10. In its Petition dated 30th May, 2013, the 2nd Petitioner, the LSK, prays for orders as follows:-

- a. A Declaration that the report of the Committee of the 1st Respondent on Delegated Legislation dated 23rd May, 2013 and the Motion No 8 adopting it by the 1st Respondent dated 28/5/2013 seeking to investigate the conduct of the Chairperson and Commissioners of the Salaries and Remuneration Commission are illegal, wrong, unlawful, contrary to the Constitution of Kenya and are therefore null and void ab-initio.
- b. A Declaration that the report of the Committee of the 1st Respondent on Delegated Legislation dated 23/5/2013 and the Motion No 8 of the 1st Respondent dated 28/5/2013 adopting the said report and the Nullification Certificate declaring Gazette Notices Nos 2885, 2886, 2897 and 2888 dated 1/3/2013 as unconstitutional, unlawful, ultravires and is therefore null and void.
- c. A Declaration that articles 2, 3, 93, 94, 95, 122, 127, 156, 159, 165, 206, 207, 223, 226, 230, 249, 259, 251, 260 and 116 of the Constitution being part of the Constitution constitute the Supreme law of this country and any conflict and/or inconsistency between them and any of the Provisions of the National Assembly Remunerations Act, The Parliamentary Pensions Act, the Appropriations Act, The Supplementary Appropriations Act 2013, The Statutory Instruments Act 2013 and any actions taken thereunder are null and void to the extent of such conflict or inconsistency.
- d. A Declaration that Gazette Notices Nos 2885, 2886, 2887 and 2888 dated 1/3/2013 issued by the 5th Respondent complies with the Constitution of Kenya and is therefore lawful, constitutional and binding and must be enforced by the 1st, 2nd, 3rd, 4th, 5th and 6th Respondent.
- e. A Conservatory and/or a perpetual order of injunction permanently restraining the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents by themselves, their agents, servants and/or employees from enforcing Motion No 8 dated 28/5/2013 of the 1st Respondent which adopted the report of



its Committee on Delegated Legislation dated 23/5/2013 seeking to investigate the conduct of the Chairperson and Commissioners of the Salaries and Remuneration Commission.

- f. A Conservatory and/or perpetual order of injunction permanently restraining the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents by themselves, their agents, servants and/or employees from enforcing Motion No 8 and Certificate of Nullification dated 28/5/2013 in which the 1st Respondent adopted the report of its Committee on Delegated Legislation dated 23/5/2013 declaring Gazette Notices Nos 2885, 2886, 2887 and 2888 dated 1/3/2013 unconstitutional, unlawful, ultra vires and null and void.
- g. A conservatory or mandatory order of injunction directing the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents by themselves, their agents, servants and/or employees to forthwith enforce Gazette Notices Nos. 2885, 2886, 2887 and 2888 dated 1st March, 2013 and No. 3143 dated 8th March, 2013 issued by the 5th Respondent and pay members of the National Assembly their salaries in accordance therewith.
- h. Any other relief that this Honourable Court may deem fit and just to grant.
- i. The 1st, 2nd and 3rd Respondents be condemned to pay the costs of this Petition.

Petition No 282 of 2013

11. In their petition dated 31st May, 2013, the 3rd to 5th Petitioners seek orders as follows:-

1. A declaration that the National Assembly (Remuneration) Act cap 5 is discriminatory against the Petitioners, public officers and the people of Kenya and therefore unconstitutional thus null and void.
2. A declaration that the National Assembly (Remuneration) Act cap 5 usurps the powers of the Salaries and Remuneration Commission and is therefore unconstitutional thus null and void.
3. A declaration that the action by the members of the national assembly on May 28, 2013 purporting to nullify a gazette notice by the Salaries and Remuneration Commission, a constitutional commission, violated articles 73(l)(a)(c) & 75(l)b of the Constitution and the *Leadership and Integrity Act*.
4. A declaration that the members of the 11th National Assembly are unfit to hold public office by virtue of their misconduct, mischief and blatant breach of the express provisions of the Constitution, committed on 28th May, 2013.

The Facts

12. Having set out the procedural history of the three petitions before us and the respective prayers each of the petitioners seeks, it is useful at this point to summarize the facts giving rise to the petitions, which are largely undisputed.
13. Through a Special Issue of the Kenya Gazette of 1st March, 2013, the SRC published the remuneration of various categories of state officers. Gazette Notice No 2886 (the Notice) specifically dealt with the remuneration of Members of Parliament (the Senate and the National Assembly). The members of the National Assembly were aggrieved by the terms set for them by the SRC and they immediately put into place mechanisms for setting aside the decision of the SRC as contained in the Notice. This culminated in a resolution by the National Assembly to nullify all the notices contained in the Special Gazette Issue of 1st March, 2013.



14. The Gazette Notices nullified were No 2885 (Remuneration and Benefits of State Officers in the Executive), No 2886 (Remuneration and Benefits of State Officers in Parliament), No 2887 (Remuneration and Benefits of State Officers in the Constitutional Commissions and Independent Offices) and No 2888 (Remuneration and Benefits of State Officers serving in the County Government). The decision of the National Assembly was communicated to the SRC by a letter dated 28th May, 2013. Annexed to the letter was a Certificate signed and dated 29th May, 2013 by the Clerk to the National Assembly which was in the following terms :-

“Certificate - Nullification of Gazette Notices No 2885, 2886, 2887 and 2888 by Salaries and Remuneration Commission 1, Justin Nthiiri Bundi, Clerk of the National Assembly, do hereby certify that the Assembly, in exercise of its oversight role under article 95(a) and (b) of the Constitution, did on Tuesday, 28th May, 2012, resolve that:-

1. Gazette notice numbers 2885, 2886, 2887 and 2888 dated 28th March, 2013 and Published by the Salaries and Remuneration Commission in the Kenya Gazette of 1st March, 2013 are unconstitutional, unlawful, ultra vires and therefore null and void.
 2. The *National Assembly Remuneration Act* (cap 5) and the *Parliamentary Pensions Act* (cap 196) of the Laws of Kenya being in force shall continue to govern the remuneration of Members of Parliament.
 3. The Salaries and Remuneration Commission and other Constitutional Commissions to strictly adhere to the *Constitution* and the law when executing their Constitutional mandates.
 4. The National Assembly in the exercise of its powers under article 95(5) of the *Constitution* to review the conduct, composition and functioning of the Salaries Commission as well as all other Constitutional Commissions and Independent offices.”
15. It is the decision of the National Assembly contained in the Certificate whose contents we have set out above that precipitated the present controversy before us, at the core of which is the issue whether, by making the decision communicated in the said Certificate, the National Assembly usurped the role of the SRC and thereby acted in contravention of the *Constitution*.

The 1st Petitioner’s Case

16. In his submissions in support of his Petition, Mr Omtatah contends that the decision of the National Assembly contravenes the *Constitution* in that the function of determining remuneration and benefits for state officers, including members of the National Assembly, is by virtue of article 230 of the *Constitution*, vested in the SRC. He argues that although among the functions of the PSC is ensuring the well being of members and staff of Parliament, that mandate does not extend to the determination of salaries and allowances which role is exclusively donated to the SRC by the *Constitution*.
17. The 1st Petitioner asserts that any powers found in any Act of Parliament which contravenes the provisions of the *Constitution* are null and void and no reliance can be placed on such an Act of Parliament. He argues that the decision by the SRC to gazette the remuneration for state officers was constitutional and lawful and the SRC Commissioners should not be threatened and vilified for executing their mandate; and that Parliament has no power to interpret the *Constitution* as the mandate to interpret the same has been given to the High Court.



18. The 1st Petitioner further submits that the SRC did not violate the basic principle which prohibits an employer from unilaterally varying an employee's pay downwards without consultation and subsequent consent; that the members of the 11th Parliament were all new employees and had contested for their seats knowing that the SRC was in the process of reviewing pay for state officers; and that they also knew through the Gazette Notice of 1st March, 2013 what their pay would be and that is what they accepted when they took their oath of office.
19. Finally, it was Mr Omtatah's contention that the National Assembly Remuneration Act and the Parliamentary Pensions Act died with the 10th Parliament and the National Assembly's attempt to revive the two Acts is therefore unconstitutional.

The 2nd Petitioner's Case

20. The case of the 2nd Petitioner is similar to that of the 1st Petitioner and can be summarized as follows: that the decision by the National Assembly to debate and pass Motion No. 8 of 23rd May, 2013 quashing the Gazette Notices issued by the SRC containing the remuneration and benefits of state officers is unconstitutional, illegal and unlawful and this Court should issue a declaration to that effect.
21. LSK contends that the act of nullifying the Gazette Notices was an exercise in futility since the decision of the SRC is independent of the Gazette Notices. It asserts that the National Assembly, in usurping the powers of the SRC, relied on provisions of laws which had been rendered obsolete by the promulgation of the 2010 Constitution. The 2nd Petitioner therefore urges this Court to find and declare as unconstitutional and unlawful any of the provisions of the National Assembly Remuneration Act, the Parliamentary Pension Act, the Appropriations Act, the Supplementary Appropriations Act 2013 and the Statutory Instruments Act 2013 in so far as they conflict and/or are inconsistent with articles 2, 3, 93, 94, 95, 122, 127, 156, 159, 165, 206, 207, 223, 226, 230, 249, 259, 251, 260 and 116 of the Constitution.
22. The 2nd Petitioner through paragraph 22 of the Petition argues:- "23 That the Hon the Speaker of the house has failed, refused and/or neglected to perform his constitutional responsibility of giving constitutional guidance to the house in that:-
Particulars
 - a. He has wrongfully assumed the role of a trade unionist by leading the agitation for increased salaries and the defiance of the Constitution and the law by Members of the National Assembly.
 - b. He has made pronouncement to the effect that the actions and Gazette Notices issued by the 5th Respondent are illegal, unconstitutional or of no consequences.
 - c. He announced that he and the Parliamentary Service Commission will take steps to annul the said Gazette Notice and to pay members of the National Assembly a different salary scale.
 - d. He has initiated, allowed and/or permitted the National Assembly and the Delegated Legislation Committee to undertake an illegal exercise of purportedly setting aside the said Gazette Notices and determining, prescribing, and paying its salary.
 - e. He has incited, allowed and/or permitted the National Assembly to be the judge, prosecutor, and executioner in its own cause and over the 5th Respondent."
23. It is also important to mention for the sake of clarity that after consolidation of the Petitions, the 5th Respondent became the 3rd Respondent and reference to the 5th Respondent in the above cited paragraph is therefore a reference to the SRC.



The case for the 3rd, 4th & 5th Petitioners

24. On their part, the 3rd, 4th and 5th Petitioners argue that the [National Assembly Remuneration Act](#) is unconstitutional in that it usurps the powers of the SRC which is a constitutional commission. They contend that the said legislation is discriminatory since it applies different standards when it comes to the setting of salaries and allowances for members of Parliament as compared to those of other public servants. The Petitioners therefore assert that the legislation contravenes article 27 of the [Constitution](#) which advocates nondiscrimination, and the Act should be declared unconstitutional in accordance with article 2 of the [Constitution](#).
25. The Petitioners argue further that the legislative authority granted to Parliament by article 94 of the [Constitution](#) is a power to be exercised in the public interest and is not to be used for self-aggrandizement as the members of the National Assembly have purported to do. They submit that members of the National Assembly cannot purport to advance their own personal interests against the will and aspirations of the people of Kenya, the majority of whom are engulfed in abject poverty and poor state of living.

“ 21. The Petitioners contend that the decision of the National Assembly to nullify the Gazette Notices published by the SRC is inconsistent with article 230 and chapter Six of the [Constitution](#) on Leadership and Integrity; that the decision by members of the National Assembly to debate and pass a motion touching on their remuneration and benefits contravenes the clear provisions of article 122(3) of the [Constitution](#) which states that a Member of Parliament shall not vote on any question in which the member has a pecuniary interest; that article 75 of the [Constitution](#) provides that a State officer should behave in a manner that avoids any conflict between personal interests and public or official duties; compromises any public or official interest in favour of personal interest; or demeans the office the officer holds.”

26. The Petitioners consequently submit that the nullification of the Gazette Notices by the Members of the National Assembly amounts to misconduct by state officers and is contrary to a Member of Parliament’s oath of office.

The Response The 1st Respondent’s Case

27. The 1st Respondent replied to the Petition by way of grounds of opposition dated 31st May, 2013 and filed in Court on the same date. We have reviewed the said grounds of opposition and find nothing for or against the Petitions. The 1st Respondent simply refers the Court to the constitutional provisions that create the PSC and the SRC. At the hearing of this matter, Mr Kuria for the Attorney General indicated that he was associating himself with the submissions of the SRC.

The 2nd and 4th Respondents’ Case

28. The 2nd and 4th Respondents vehemently opposed the Petition through a Replying Affidavit sworn by the Speaker of the National Assembly, Hon Justin BN Muturi, on 10th July, 2013 and further grounds of opposition dated 10th September 2013. These Respondents have advanced a total of nine grounds on the basis of which they contend that the petitions before us should not succeed.
29. The first argument that they advance is that the job evaluation conducted by the SRC failed to take into account the provisions of articles 94, 95 and 96 of the [Constitution](#) which set out the job description



- of a Member of Parliament. They contend that Price Water House Coopers Ltd, which had been contracted by the SRC to carry out job evaluations for state officers failed to consider that Members of Parliament have two work stations, one in Parliament at Nairobi and the other in the constituency. They argue that even at the time the job evaluation exercise was on-going, the SRC had already developed a job structure for state officers in which it placed Members of Parliament at level 5.
30. The Respondents further contend that the PSC wrote to the SRC repeatedly informing the SRC that the salary structure was unconstitutional; that it supplied the SRC with reports (the Cockar Report of 2002 and the 2009 Akiwumi report) that had previously been compiled on the terms and conditions of service for Members of Parliament in order to guide it in doing its work but the SRC ignored these reports. The two Respondents further argue that the job evaluation took into consideration extraneous matters like providing that educational qualifications was to account for 20% of the total score yet the Constitution does not provide for educational requirements for elected state officers. The Respondents also submit that the job evaluation tool used by the SRC was meant for the private sector and could not be used to evaluate a job in the public service and more so an elective one.
 31. Their second argument is that the decision by the SRC to reduce the earnings of a Member of Parliament amounted to an unfair labour practice. The Respondents contend that at the time the public officers resigned to vie for political office, they were aware that the remuneration for the office of a Member of Parliament was Kshs 851,000 and paying Members of Parliament anything short of this amount would result in an unfair labour practice.
 32. Thirdly, the Respondents contend that the salaries and remuneration of a Member of Parliament are governed by the National Assembly Remuneration Act as was held by General and others. As for the pension of Members of Parliament, the Respondents submitted that the Parliamentary Pensions Act was applicable to the members who had served in the previous Parliament. They submit that the SRC's attempt to do away with pensions clearly goes against the provision of section 32 of the sixth schedule of the Constitution. We shall revert to the provisions of this section later in this judgment.
 33. The 2nd and 4th Respondents contend further that the 11th Parliament is a successor of the 10th Parliament and any suggestion that the terms of service of the members of the 11th Parliament should be determined independent of previous Parliaments is unconstitutional and illegal. They contend that since the Constitution protects the remuneration and benefits of judges and holders of independent offices and constitutional commissions, it would be discriminatory and unconstitutional to imagine that the remuneration and benefits of Members of Parliament are not protected.
 34. The 2nd and 4th Respondents assert, further, that the SRC infringed article 124 of the Constitution by purporting, through its regulations, to limit the maximum sittings of a Parliamentary Committee to four per week.
 35. The sixth argument by the 2nd and 4th Respondents is that the SRC breached article 127 of the Constitution by purporting to prevent the PSC from providing services such as transport, housing and gratuity to members of Parliament.
 36. In their seventh ground in opposition to the Petition, the said Respondents contend that this Court should find that the National Assembly, in nullifying the Gazette Notices, was exercising its oversight role as provided under article 95(5)(a) and (b) of the Constitution since the SRC had breached the Constitution and the law when setting the remuneration and benefits for state officers. They further assert that this Court should not entertain this Petition as matters before a House of Parliament are privileged, placing reliance in support of this argument on article 117(1) of the Constitution which provides that "there shall be freedom of speech and debate in Parliament." They submit that this



position is fortified by section 12 of the [National Assembly \(Privileges and Immunities\) Act](#) which provides that:

“No proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in any court.”

37. The last ground raised by the 2nd and 4th Respondents is that following the nullification of the Gazette Notices by the National Assembly, the SRC had proceeded to review and set the remuneration of Members of Parliament in a manner that is lawful and constitutional and the unconstitutionality or otherwise of the Gazette Notices is no longer an issue. They contend therefore that this petition has been overtaken by events.
38. Finally, the 2nd and 4th Respondents contend that the Petition is fatally defective and a violation of the Constitutional rights of the Members of the 11th Parliament in that the Petitioners seek orders that would be highly prejudicial to the rights of the Members of Parliament without enjoining them in the matter and allowing them an opportunity to be heard individually. In furtherance of this argument these Respondents contend that the Petition is grossly misconceived and an abuse of the Court process as the Petitioners seek to invoke the Court’s jurisdiction in determining matters of ethics and integrity on unnamed Members of Parliament whilst there is a clear procedure in the [Leadership and Integrity Act](#) 2012 on how to determine a violation of the Act. They therefore urge that the Petitions be dismissed.

The 3rd Respondent’s Case

39. The SRC opposed the Petition through a Replying Affidavit sworn by its Secretary, Grace A Atieno on 21st May, 2013. The SRC contends that it set the remunerations and benefits of state officers including Members of Parliament, acting on its mandate as provided by article 230 of the [Constitution](#). The SRC avers that it conducted a job evaluation to determine the job worth of the state offices taking into consideration fiscal sustainability, affordability, principles of fairness, equity and transparency in wage setting and that the exercise was carried out in a scientific manner to ensure that the wage structure is defensible, justified and fair.
40. The SRC further states that it invited participation from the public, stakeholders and representatives of the state offices and there was thus adequate consultation. Further, the SRC contends that it gazetted the remuneration and benefits before the 4th March, 2013 general elections to ensure that incoming state officers and legislators had constructive knowledge of their remuneration and benefits. It is the SRC’s case that it is the organ mandated by the [Constitution](#) to set the remuneration and benefits of all state officers including Parliamentarians.
41. The SRC therefore asserts that the remuneration package of Kshs 532,500 a month, including benefits, was scientifically determined and compared favourably with the pay of Members of Parliament in other jurisdictions. The SRC asserted that it has all along acted independently and any claim by the Petitioners that it has been arm-twisted by MPs so as to award them remuneration and benefits higher than those published in the Gazette is therefore misplaced. The SRC further asserts that the [Constitution](#) is the supreme law of the land and any law that is not in consonance with it, is therefore null and void.
42. The SRC further submits that as a creature of article 248(2)(h) of the [Constitution](#), it has a duty to comply with article 249 of the [Constitution](#) and that it fully complied with the [Constitution](#) when setting remuneration and benefits for state officers; and that there is no reason for disbanding it.



43. While the SRC opposes the Petitioners' respective cases in general terms, it is in agreement with the Petitioners on several issues. It contends that it did not review the salaries of MPs downwards since the 11th Parliament came into being following the elections held on 4th March, 2013 and the terms and conditions of service for the Members of the 11th Parliament cannot be compared to those for the Members of the 10th Parliament. The SRC is therefore in agreement with the Petitioners that there is no constitutional basis for pegging the remuneration and benefits paid to Members of the 11th Parliament to those of the Members of the 10th Parliament.
44. The SRC also agrees with the Petitioners' contention that Members of Parliament have no constitutional powers and mandate to confer upon themselves privileges and advantages that are not given to them by the Constitution; and further, that the National Assembly Remuneration Act and the Parliamentary Pensions Act which governed the terms and conditions of the Members of the 10th Parliament have since been repealed or substantially amended by virtue of article 2(4) as read with section 7(1) and (2) of the sixth schedule of the Constitution.
45. The SRC submitted that the decision by one of the Members of the National Assembly to file a motion with a view to triggering the formation of a tribunal for the removal of its Commissioners is designed to intimidate the SRC and will not augur well for the constitutional democracy that the people of Kenya seek to nurture. Further, it asserts that by virtue of article 116 of the Constitution, MPs cannot set their own remuneration and benefits.

Issues for Determination

46. The parties to the matters before us have made various submissions and arguments in support of their respective cases, and proposed certain issues and questions for determination by this Court. The jurisdiction of this Court has been questioned in view of the privilege that attaches to matters under discussion by Parliament; it has also been argued that the issues raised in the petitions before us are moot in view of the fact that the SRC has settled the issue of the salaries and remuneration of Members of Parliament; the power of Members of Parliament to legislate in relation to their salaries has been challenged, as has the constitutionality of, among others, the National Assembly Remuneration Act and the Parliamentary Pensions Act.
47. As earlier stated, the crux of the dispute before us is the Certificate issued by the Clerk of the National Assembly on 28th May, 2013 nullifying the Gazette Notices issued by the SRC. Various arguments have been advanced by the parties, touching on the powers of this Court to determine the issues raised with regard to the said Certificate as well as the powers of the National Assembly with regard thereto. In our view therefore, the four main issues that arise for our determination are:-
1. Whether this Court has jurisdiction to hear this matter;
 2. Whether these petitions are moot;
 3. Which body is mandated by the Constitution to determine the remuneration and benefits for Members of Parliament;
 4. Whether the National Assembly Remuneration Act and the Parliamentary Pensions Act pertaining to the remuneration and or benefits of Members of the National Assembly are unconstitutional.
48. In addition, there are three subsidiary issues which have been raised by the parties in their respective pleadings and submissions for our consideration. These relate to the constitutionality of the alleged threats by members of the National Assembly to remove members of the SRC, questions as to the



legality of the acts of the SRC in setting the salaries of members of Parliament; and the conduct of the members of the National Assembly in making the resolution, the subject of these petitions. The arguments in respect thereto can be reduced to the following three issues:

- i. Whether the threat to remove the SRC Commissioners by the National Assembly is unconstitutional;
- ii. Whether the SRC violated the Constitution in setting the salaries of Members of Parliament;
- iii. Whether the conduct of members of the National Assembly in nullifying the Gazette Notices issued by SRC amounted to Gross Misconduct.

Analysis and Determination:

Jurisdiction

49. We shall address our minds first to the question of our jurisdiction to hear and determine the issues in controversy in this matter, mindful of the words of Nyarangi J in Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited [1989] KLR 1:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

50. As is apparent from the Replying Affidavit sworn by the Speaker of the National Assembly and the submissions before us, it is the position of the 2nd and 4th Respondents that the debates and resolutions of Parliament are a no-go-zone for this Court. However, during the hearing, Counsel for the 2nd and 4th Respondents conceded that this Court has a role to play in relation to the work of Parliament.

51. That Parliament in a constitutional democracy like ours is not beyond the reach of the Court is no longer a matter for debate. In the case of Commission for the Implementation of the Constitution v The Attorney General and another, Nairobi Civil Appeal No 351 of 2012, the Court of Appeal reaffirmed this position by stating that:-

“As we have already stated earlier in this judgment, Parliament in enacting the legislation under review clearly had in mind considerations other than those spelt out in the Constitution and the Hansard Reports on their debates on the same are clear testimony to the fact. The question that then falls to be determined is whether, in the face of such constitutional failures on the part of Parliament, the Courts should adopt a passive and aloof attitude. We think not. We do not deign to intrude into, less still take over the legislative function of Parliament. Our role is as was expressed by the High Court in the case of Federation of Women Lawyers Kenya (Fida K) & 5 others v Attorney General & another Petition No 102 of 2011, [2011] eKLR:

“In actual fact it is the court’s sole mandate to provide checks and balances for the executive and the court will not hesitate to interfere when called upon to interpret the Constitution and supervise the exercise of constitutional mandate. We find that to do otherwise would be dereliction of our constitutional mandate.”

In delivering itself as aforesaid, the Court in *Fida-K* was not propounding a strange species of jurisprudence, for courts of law have for ages been the interpreters of what is



constitutionally valid and what is not. The constitutional interpretation jurisdiction that resides in the High Court, and which we must exercise when sitting on appeals from its determinations, is a critical and vital one. This is especially so when it comes to testing the constitutionality of legislative actions that touch on the special safeguards and protections that have progressively been adopted to protect persons and groups that are vulnerable or disadvantaged. In such instances, it is for the court to robustly and firmly affirm those protections that from their very nature may seem a counter-majoritarian irritation to those that have the weight or the numbers on their side.”

52. The Court of Appeal then went on to cite the decision of the Constitutional Court of South Africa as follows;

“Speaking on this counter-majoritarian theme, Justice Chalkalson, the President of the South African Constitutional Court in *The State v T Makwanyane & another* 1995 (3) SA 391 (CC) succinctly expressed the court’s interpretational autonomy which often emerges as a counterweight to majoritarian or popular instincts;

“Public opinion may have some relevance to the enquiry, but in itself it is no substitute for the duty vested in the courts to interpret the *Constitution* and to uphold its provisions without fear or favour. If public opinion were to be the decision there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty and a retreat from the new legal order established by the 1993 Constitution.” (Emphasis ours) What the 1993 constitution did for South Africa is what the 2010 Constitution did for Kenya, namely the uprooting of any enclaves and edifices of institutional or personal supremacy and the attendant absence or at best weak and ineffectual accountability mechanisms. Indeed, even before the *Constitution* came into force, Ringera J (as he then was) had in *Njoya & 6 others v Attorney General & 3 others* (No 3) [2008] 2 KLR (EP) 658 at 674, while discussing constitutional values and principles that undergird the *Constitution*, stated as follows;

“I would rank constitutionalism as the most important. The concept of constitutionalism betokens limited Government under the Rule of law. Every organ of Government has limited powers, none is inferior or superior to the other, none is supreme, the *Constitution* is supreme and they all bow to it.” (Emphasis ours)

53. The Appellate Court concluded its analysis of this issue by stating as follows;

“We respectfully endorse the sentiments of Ringera J and state that it cannot be open to any organ of state to act in any manner that violates the *Constitution*. The doctrine of parliamentary supremacy that once gave parliament near-unbridled right to legislate as it pleased is now of only historical significance in an epoch when the *Constitution* and the *Constitution* alone lays claim to supremacy and every act of every organ must be judged against its peremptory requirements. That task of judging whether an action passes constitutional muster is placed upon the Superior Courts.”



53. The position enunciated so succinctly by the Court of Appeal is a position we wish to associate ourselves with. the Constitution disperses powers among various constitutional organs and when any of these organs steps out of its area of operation, this court will not hesitate to state so. It is this Court which is, by virtue of article 165(d), clothed with jurisdiction to hear any question concerning the interpretation of the Constitution including the determination of:

- “(i) the question whether any law is inconsistent with or in contravention of this Constitution;
- (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;”

54. This is the mandate we will bear in mind as we seek to find answers to the issues raised in this petition. In passing the Constitution, Kenyans gave the responsibility of making laws to Parliament. The decision of the people must be respected, so that this Court can only interfere with the work of Parliament in situations where Parliament acts in a manner that defies logic and violates the Constitution. To agree with the National Assembly that this Court cannot interrogate its work will amount to saying that the National Assembly can fly beyond the reach of the radar of the Constitution. That is a proposition we do not agree with. Our view is that all organs created by the Constitution must live by the edict of the Constitution. Indeed, Parliament is commanded by article 94(4) of the Constitution to protect the Constitution and promote democratic governance in the Republic of Kenya.

55. Where then does our finding leave the issue of parliamentary privilege as provided by article 117(1) of the Constitution and elaborated upon in statute by section 12 of the National Assembly (Privileges and Immunities) Act” article 94 of the Constitution stipulates the role of Parliament whereas Article 95 provides the role of the National Assembly. The role of the Senate is found in article 96. A perusal of the Constitution in its entirety clearly shows that Parliament has a major role in running the affairs of this country.

In order for Parliament to operate effectively, there is need to ensure that there is free debate on the floors of the two houses. That is where the immunity of parliamentary debate comes in.

56. Our view is that Members of Parliament can debate anything under the sun. The freedom of speech in this respect is unlimited except by the Standing Orders which are made by Parliament. We are therefore persuaded by the decision in the Canadian case of Canada (House of Commons) v Vaid [2005] 1 SCR where at paragraph 42 the importance of parliamentary privilege as stated in the British Joint Commission Report is captured in the following words:-

“Parliamentary privilege consists of the rights and immunities which the two Houses of Parliament and their members and officers possess to enable them to carry out their parliamentary functions effectively. Without this protection members would be handicapped in performing their parliamentary duties, and the authority of Parliament itself in confronting the executive and as a forum for expressing the anxieties of citizens would be correspondingly diminished.”

57. In our view, Members of Parliament should not look over their shoulders when conducting debates in Parliament. They must express their opinions without any fear. The Court should be hesitant to interfere, except in very clear circumstances, in matters that are before the two Houses of Parliament



and even those before the county assemblies. It is, however, the mandate of this Court to check the constitutionality of the resolutions and statutes made by the legislature. In the case before us, a resolution has been made and we have a duty to interrogate the constitutionality of that resolution.

58. In holding as above, we are in agreement with the decision of this Court in Petition No 496 of 2013, *Commission for the Implementation of the Constitution v The National Assembly of Kenya & 2 others* (*supra*) where the Court stated that while the High Court has powers to overturn certain resolutions of Parliament, it must restrain itself in “not trespassing onto that part of the legislative field which has been reserved by the *Constitution*, and for good reasons, to the legislature”. (See also *National Coalition for Gay and Lesbian Equality & 13 others Case* CCT No 10/99).”
59. We therefore find and hold that we have jurisdiction to entertain the petitions before us.

Whether the Petitions are Moot

60. Related to the issue of jurisdiction is the question whether the Petitions before us are now moot. The 2nd and 4th Respondents informed the Court that following the nullification of the Gazette Notices by the National Assembly, the SRC had proceeded to review and set the remuneration of Members of Parliament in a manner that is lawful and constitutional, and the question of the unconstitutionality of the Gazette Notices is no longer an issue and the Petitions before us have therefore been overtaken by events.
61. None of the Petitioners disputed this fact. On the contrary, Counsel for the 2nd Petitioner submitted that the fact that the 2nd and 4th Respondents had gone back to the negotiating table with the SRC was an admission that the National Assembly had acted unconstitutionally by nullifying the Gazette Notices.
62. It is not in dispute that a court of law should only engage itself in actual disputes between the parties before it. Judicial authority should not be directed at matters that are academic in nature. The question is whether the matter before us has been overtaken by events. We take the view that addressing the questions raised by the petitioners is not tantamount to flogging a dead horse as there are still live and important issues that the petitions before us raise that must be addressed by this Court
63. We take this view for the following reasons. The National Assembly debated the issue of remuneration and benefits for state officers and concluded that the SRC had acted illegally in gazetting the said remunerations and benefits. The resolution and the subsequent certificate of nullification, whatever its value, remain in force to date. Even after the National Assembly entered into negotiations with the SRC, no debate was initiated in the House on the resolution and certificate of nullification. The proceedings in respect of the said resolution and certificate of nullification are captured in the Hansard and are forever part of the history of our nation. The question whether the National Assembly had the constitutional authority to nullify the Gazette Notices still remains unaddressed.
64. To leave the question raised by the Petitioners with regard to whether or not Parliament exceeded its mandate in passing the said resolution and issuing the subsequent certificate unanswered would be to leave a critical question at this time in our constitutional history unaddressed, and to leave uncertainty with regard to the constitutional mandate of the SRC, an important constitutional commission, vis a vis the oversight role of Parliament. We are therefore unable to agree with the 2nd and 4th Respondents that the issues raised in the Petitions before us are moot, and that the Petitions have been overtaken by events.



Subsidiary Issues

65. Before proceeding to address ourselves to the last two of the four main issues raised by this petition, we deem it appropriate to dispense at this stage with the subsidiary issues that we set out earlier.

Whether the Threat to Remove the SRC Commissioners by Parliament is Unconstitutional

66. The Petitioners have asked us to make a finding that the threat by the National Assembly to form a tribunal with a view to removing the SRC commissioners from office is unconstitutional. Article 251 of the Constitution has provided for the removal of a member of a constitutional commission as follows:-

“ 251

- (1) A member of a commission (other than an ex officio member), or the holder of an independent office, may be removed from office only for—
 - (a) serious violation of this Constitution or any other law, including a contravention of Chapter Six;
 - (b) Gross misconduct, whether in the performance of the member’s or office holder’s functions or otherwise;
 - (c) Physical or mental incapacity to perform the functions of office;
 - (d) incompetence; or
 - (e) bankruptcy.
- (2) A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.
- (3) The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the President.
- (4) On receiving a petition under clause (3), the President
 - (a) may suspend the member or office holder pending the outcome of the complaint; and
 - (b) shall appoint a tribunal in accordance with clause
- (5) The tribunal shall consist of—
 - (a) a person who holds or has held office as a judge of a superior court, who shall be the chairperson;
 - (b) at least two persons who are qualified to be appointed as High Court judges; and



- (c) one other member who is qualified to assess the facts in respect of the particular ground for removal.
- (6) The tribunal shall investigate the matter expeditiously, report on the facts and make a binding recommendation to the President, who shall act in accordance with the recommendation within thirty days.
- (7) A person suspended under this article is entitled to continue to receive one-half of the remuneration and benefits of the office while suspended.”

67. In exercising its powers under article 251, Parliament must always be alive to the objects and authority of commissions and independent offices provided by article 249 as follows:-

“249

- (1) The objects of the commissions and the independent offices are to—
 - (a) protect the sovereignty of the people;
 - (b) secure the observance by all State organs of democratic values and principles; and
 - (c) promote constitutionalism.
 - (d) The commissions and the holders of independent offices—
 - (a) are subject only to this Constitution and the law; and
 - (b) are independent and not subject to direction or control by any person or authority.
 - (e) ”

68. Article 251 of the *Constitution* sets out the grounds under which a member of a constitutional commission may be removed, and empowers the National Assembly to receive Petitions for removal, and if satisfied that the Petition discloses a ground set out in article 251(1), send the Petition to the President.

69. Should Parliament move to recommend formation of a tribunal for a member of a commission or any holder of an independent office for reasons other than those found in the *Constitution*, then such a decision can be challenged in court. Courts, in our view, should be reluctant to intervene considering that the tribunal appointed by the President will among other things consider whether the reasons for the proposed removal meets the constitutional threshold. In the case before us, the National Assembly did not resolve to remove the Commissioners of SRC. We therefore have no reason to venture into the question of their removal since it has not arisen.

Whether the SRC Violated the *Constitution* in Setting the Salaries of Members of Parliament

70. There was extensive submission by the 2nd and 4th Respondents to the effect that the SRC violated the *Constitution* and breached statutory provisions in arriving at the remuneration and benefits of State officers. The Petitioners and the SRC also dwelt at length on the reasons why they believe the SRC acted legally and constitutionally. Our response to these opposing arguments is that it is not the mandate of this Court to enter into the merits of the decision made by the SRC, for to do so is to interfere with the



constitutional mandate of the SRC. Unless there is placed before the Court clear evidence of violation of the Constitution or of statute, or of such unreasonableness in its decision making as would justify interference by this Court, it is not the duty of the Court to inquire into the methods or modalities used by the SRC to arrive at its decision in setting the remuneration of Members of the National Assembly.

Whether the Acts of the National Assembly Amounted to Gross Misconduct

71. Another issue put forward by the Petitioners for our consideration is whether the actions of the members of the National Assembly can be said to amount to gross misconduct therefore necessitating their removal. We do not wish to dwell much on this issue save to observe that there are clear processes for removing a member of the National Assembly who violates the Constitution. Further, the individual Member of Parliament sought to be removed for alleged misconduct must be given a hearing.
72. None of the Members of the National Assembly has been made a party to these proceedings, so that for the Court to make any determination with regard to their conduct would be to do so without according them a hearing. It must also be borne in mind that there is parliamentary privilege which covers debates and deliberations within the precincts of Parliament. Taking all factors into consideration, we find that this particular prayer by the petitioners cannot be allowed.
73. We now turn to a consideration and determination of the two main issues remaining.

Which body is Mandated by the Constitution to Determine the Remuneration and Benefits of Members of Parliament”

74. The core of the dispute before us is the resolution by the National Assembly to nullify the Gazette Notices issued by SRC, and the issuance of a certificate of nullification subsequent to the said resolution. The critical question for determination is therefore whether the National Assembly exceeded its mandate in quashing the Gazette Notices issued by the SRC. This question is intertwined with the third issue identified for determination in this matter, which relates to the body in which the Constitution vests the mandate to determine the remuneration and benefits of Members of Parliament.
75. Article 230(4) of the Constitution provides that the powers and functions of the SRC shall be to -
 - “(a) set and regularly review the remuneration and benefits of all State officers; and
 - b. Advise the national and county governments on remuneration and benefits of all other public officers.”
76. At article 230(5), the Constitution provides that:-
 - “(5) In performing its functions, the Commission shall take the following principles into account—
 - (a) the need to ensure that the total public compensation bill is fiscally sustainable;
 - (b) the need to ensure that the public services are able to attract and retain the skills required to execute their functions;
 - (c) the need to recognise productivity and performance; and
 - (d) transparency and fairness.”



77. Parliament further expounded on the powers and duties vested in the SRC when it passed the *Salaries and Remuneration Commission Act*, 2011 and provided at section 11 as follows:-

- “ 11. In addition to the powers and functions of the Commission under article 230(4), the Commission shall -
- (a) Inquire into and advise on the salaries and remuneration to be paid out of public funds;
 - (b) keep under review all matters relating to the salaries and remuneration of public officers;
 - (c) Advise the national and county governments on the harmonization, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector;
 - (d) conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public offices;
 - (e) Determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation;
 - (f) Make recommendations on matters relating to the salary and remuneration of a particular State or public officer;
 - (g) Make recommendations on the review of pensions payable to holders of public offices; and
 - (h) Perform such other functions as may be provided for by the *Constitution* or any other written law.”

78. The mandate of SRC is therefore clear. Its reach extends to all state officers, who are defined by article 260 as persons ‘holding a state office.’ A ‘state office’ is defined as meaning, among others, the following offices;:

- “(a) President;
- (b) Deputy President;
 - (c) Cabinet Secretary;
 - (d) Member of Parliament;
 - (e) Judges and Magistrates;
 - (f) member of a commission to which Chapter Fifteen applies;”

79. We are aware that the National Assembly is in the process of an attempt at amending the above provisions and the issue was the subject of Petition No 496/2013 *Commission for the Implementation of the Constitution v The National Assembly of Kenya & 2 others* (*supra*) where certain orders were made by this Court.



80. In our view, however, the SRC was doing its job, exercising its constitutional mandate and function with regard to the remuneration of State Officers, when it issued the Special Issue of the Kenya Gazette on 1st March, 2013. In moving to quash the Gazette Notice containing the remuneration and benefits of its members, the National Assembly stepped into the arena reserved for the SRC by the Constitution.
81. It is essential to emphasize that all organs created by the Constitution are of equal importance. They complement and defer to each other. Where one organ is of the view that another organ has overstepped its mandate, the aggrieved body should seek a solution as provided by the Constitution. Parliament cannot and must not be allowed to run roughshod over other constitutional organs. Allowing Parliament to do as it pleases will sooner rather than later lead to a breakdown of law and order.
82. Parliamentarians are expected to operate within the letter and the spirit of the Constitution. Parliament, like all other state organs, is not above the law. Members of the National Assembly, like all other state officers, and the National Assembly, like all other state organs are compelled by the Constitution to adhere to the national values and principles of governance found in article 10 of the Constitution. We therefore agree with the petitioners that the resolution by the National Assembly to nullify the Gazette Notices published by the SRC was unconstitutional.
83. In closing on the issue of the Gazette Notices published by the SRC whose nullification we have found to be unconstitutional, it is, we believe, important to make some remarks about the place of the Kenya Gazette. Counsel for the 2nd Petitioner at one point submitted that the Kenya Gazette has been given unnecessary deference, and that the decision of the SRC remains in force despite the alleged nullification of the same by the National Assembly. We agree with regard to the latter point, but we do find the first argument with regard to the deference paid to the Kenya Gazette somewhat paradoxical. If indeed the Gazette is of no value then why did the 2nd Petitioner come to Court following the nullification of the notices published in the Gazette by the SRC? The answer should be fairly obvious.
84. The Kenya Gazette is the official bulletin of the Government of Kenya. It announces to all and sundry the decisions of the Government. The only formal way the SRC could have conveyed its decision on the remuneration and benefits of state officers was through the Kenya Gazette.
85. The position and place of the Kenya Gazette in the affairs of this nation was addressed by the Court of Appeal in the case of Ali Hassan Jobo & another v Sulaiman Said Shabbal & 2 others Court of Appeal Civil Appeal No 12 of 2013 thus:-

“(24) The Kenya Gazette is an official newspaper of the government in which official matters including official notices are published. The Gazette has evidentiary character. Section 68 of the interpretation and General Provisions Act provides:-

“The production of a copy of the Gazette containing a written law or notice, or of copy of a written law or notice purporting to be printed by the Government Printer shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of the written law or notice

Section 85 of the Evidence Act has identical provision The elections are matters of great public importance and the requirement that the result of elections be declared or published in the Gazette does not derogate from the intendment of section 76(1)(a). The requirement



of Gazettement is required, among other things, to give the declared results a seal of certainty finality, and legality.”

86. We are in agreement with regard to the place of the Kenya Gazette as the medium through which official notification and communication is made to all and sundry.

Whether Certain Acts of Parliament Pertaining to the Remuneration and Benefits of Members of the National Assembly are Unconstitutional

87. The final issue for determination in this matter pertains to the constitutionality or otherwise of certain Acts of Parliament, some of which predate the *Constitution* of Kenya 2010, and which made provision for the remuneration and benefits of Members of Parliament. The Petitioners urged this Court to find and declare as unconstitutional and unlawful any of the provisions of the *National Assembly Remuneration Act*, the *Parliamentary Pensions Act*, the *Appropriations Act*, the *Supplementary Appropriations Act* 2013 and the *Statutory Instruments Act* 2013 in so far as they conflict and/or are inconsistent with the provisions of the *Constitution*.

88. We can state at the outset in relation to the case before us that we have not found anything unconstitutional in the *Appropriations Act*, the *Supplementary Appropriations Act*, 2013 and the *Statutory Instruments Act*, 2013. An *Appropriations Act* simply provides for the expenditure of public funds. Public funds can only be expended in the manner provided by the law and the fact that funds have been set aside does not mean that the same can be utilized in an unlawful manner.

89. With regard to the *Parliamentary Pensions Act*, we take the view that pensions are protected by the *Constitution*. Section 32 of the Sixth Schedule of the *Constitution* states that:-

“The law applicable to pensions in respect of holders of constitutional offices under the former Constitution shall be either the law that was in force at the date on which those benefits were granted or any law in force at a later date that is not less favourable to the person.”

90. Given these clear constitutional provisions therefore, it would be erroneous for us to find that an Act of Parliament namely the *Parliamentary Pensions Act* which provides for pension for former Members of Parliament is unconstitutional.

91. That leaves us with the *National Assembly Remuneration Act*. The preamble of this Act states that it is:-

“An Act of Parliament to fix the salaries and allowances for the Speaker, the Deputy Speaker and Members of the National Assembly, and for the Vice-President and other Ministers, and for Assistant Ministers; and for purposes incidental thereto and connected therewith.”

92. As already stated, the remuneration and benefits of the members of the 11th Parliament and any other Parliament coming into existence thereafter can only be determined by the SRC. The *National Assembly Remuneration Act* cap 5 is therefore unconstitutional and no longer serves any purpose in the statute books of this country. We therefore agree with the Petitioners and find and hold that the said Act of Parliament is unconstitutional.

Conclusion

93. Having found that the National Assembly had no mandate to make resolutions nullifying the Gazette Notices issued by the SRC, and in light of our other findings in relation to the issues for determination in this matter, we make orders and issue declarations as follows:-



1. That the National Assembly exceeded its mandate by purporting to annul the Gazette Notices issued by the SRC on 1st March, 2013. Its decision was therefore both unlawful and unconstitutional.
 2. That in view of the provisions of article 230 and 260 of the Constitution of Kenya 2010, the National Assembly Remuneration Act cap 5 is unconstitutional.
94. With regard to costs, we find that the consolidated Petitions before us were brought in support of the implementation of the Constitution and for this reason we make no orders as to costs.
95. We are indebted to Counsel appearing for the parties in the matter for their well-researched arguments and authorities in support of their respective positions.

SIGNED AND DATED AT NAIROBI THIS 31ST DAY OF JANUARY 2014.

ISAAC LENAOLA

JUDGE

MUMBI NGUGI

JUDGE

W.K. KORIR

JUDGE

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF FEBRUARY 2014

MUMBI NGUGI

JUDGE

