



**Gikenyi B & 6 others v Attorney-General (On Behalf of the Presidency) &
3 others; Muturi & 5 others (Interested Parties) (Petition E336 of 2024)
[2025] KEHC 15444 (KLR) (Constitutional and Human Rights) (31 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15444 (KLR)

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

PETITION E336 OF 2024

LN MUGAMBI, J

OCTOBER 31, 2025

BETWEEN

**DR. MAGARE-GIKENYI B 1ST PETITIONER
LINAH NYABATE KINGSLEY 2ND PETITIONER
PHILEMON ABUGA NYAKUNDI 3RD PETITIONER
PAULINE NDUATA KINYANJUI 4TH PETITIONER
SHALLUM KAKA NYAKUNDI 5TH PETITIONER
JAMLICK OTONDI ORINA 6TH PETITIONER
AGNES WANZUU WAMBUA 7TH PETITIONER**

AND

**ATTORNEY-GENERAL (ON BEHALF OF THE PRESIDENCY) 1ST
RESPONDENT
PUBLIC SERVICE COMMISSION 2ND RESPONDENT
NATIONAL ASSEMBLY 3RD RESPONDENT
GOVERNMENT PRINTER CHIEF EXECUTIVE OFFICER .. 4TH RESPONDENT**

AND

**HON.JUSTIN BEDAN NJOKA MUTURI INTERESTED PARTY
LAW SOCIETY OF KENYA INTERESTED PARTY
KATIBA INSTITUTE INTERESTED PARTY
KITUO CHA SHERIA INTERESTED PARTY**



REBECCA MIANO INTERESTED PARTY
DORCAS AGIK ODHONG ODUOR INTERESTED PARTY

JUDGMENT

Introduction

1. The Petition dated 11th July 2024 was amended on 19th July 2024 and further amended on 4th September 2024. The Petition is supported by the 1st Petitioner's affidavit in support and a further affidavit sworn on 4th September 2024.
2. The Petition assails the process that led to the alleged dismissal of the 1st Interested Party as the Attorney General of the Republic of Kenya, vide Executive Order No.6 of 2024. The Petitioner alleges that the 1st Interested Party's removal from office violated Article 132(2)(b) of *the Constitution* as read with Section 12 of the Office of the Attorney General Act.
3. As a result, the Petitioners seeks the following reliefs against the Respondents:
 - a. A declaration that H.E. The President Of The Republic Of Kenya, could not constitutionally remove from office Hon. Attorney General, Hon. Justin Bedan Njoka Muturi, 1st Interested Party herein in the manner which the presidential press release dated July 11th 2024 and Gazette Notice No. 8440 Vol.CXXVI-NO102 dated 12th July 2024 or/and any other date any document of any other dates which has an effect of removing the Hon. Attorney General.
 - b. A declaration that the actions of H.E. The President Of The Republic Of Kenya (herein represented by the 1st Respondent) done pursuant to the presidential press statement and/or Gazette Notice dated 20th August 2024 and/or any other gazette notice and/or document of any other date to extent of purporting to appoint Mrs. Dorcas Oduor, 6th Interested Party herein and/or any other person as nominee and/or appointee for office of the Attorney General when the term of the 1st Interested Party wasn't over, is illegal and unconstitutional and hence void ab initio.
 - c. A declaration that the presidential press release dated July 11th 2024 and Gazette Notice No. 8440 Vol.CXXVI-NO102 dated 12th July 2024 or/and any other date any document of any other dates, which has an effect of removing Hon. Justin Bedan Njoka Muturi, 1st Interested Party herein, from office of Attorney General is unconstitutional, null and void.
 - d. A declaration that exhibit AO-1 & AO-2 and replying affidavit by Mr. Arthur A. Osiya and any other party herein to extent that it purports to illegally change the contents of the initial Gazette Notice dated 12/7/2024 and presidential communication released on 11/7/2024 constitutes perjury and is illegal manufacturing of evidence and hence the same is illegal and unconstitutional.
 - e. A declaration be issued that the removal from office Hon. Attorney General, Hon. Justin Bedan Njoka Muturi, 1st Interested Party herein through a July 11th Gazette Notice No. 8440 Vol.CXXVI-NO102 dated 12th July 2024 or/and any other date any document of any other dates, contravened inter alia Articles 1, 2(1, 2 and 4), 3(1), 10, 28, 73, 74, 75[1], 129, 131, 132, 135, 156, 159, 165, 201, 232, 236, 248(3)(b) and 249 of *the Constitution* as read with



Section 12 of the *Office of the Attorney-General Act* No. 49 of 2012 and hence the same is illegal, unconstitutional, null and void.

- f. A declaration that the pleasure doctrine is not applicable in Kenya under *the Constitution*.
- g. A declaration that the holder of Attorney General office is only removed from office as per constitutional and statutory dictates inter alia pursuant to Articles 10, 232, 236 & 132(2) of *the Constitution* as read with Section 12 of the *Office of the Attorney-General Act* No. 49 of 2012 with concomitant application of principles of natural justice and fair hearing as provided in inter alia Article 47 of *the Constitution*.
- h. Judicial review orders of certiorari quashing presidential press release dated July 11th 2024 and Gazette Notice No. 8440 Vol.CXXVI-NO102 dated 12th July 2024 or/and any other date any document of any other dates which has an effect of removing from office Hon. Attorney General, Hon. Justin Bedan Njoka Muturi, 1st Interested party herein
- i. Judicial review orders of certiorari quashing Gazette Vol.CXXVI-127, Gazette Notice No-10346 DATED 20/8/2024 or/and any other document which had an effect of appointing the 6th Interested Party as the Attorney General of the Republic of Kenya.
- j. Judicial review orders of mandamus compelling the Respondents to initiate proper legal/ constitutional process of removal and/or appointment of Attorney General of the Republic of Kenya.
- k. This Court be pleased to issue a judicial review orders of prohibition, prohibiting the Respondents, either by themselves, anyone else acting at their behest, instructions or directions or any other person whatsoever, from taking any action whatsoever pursuant to or in reliance on or in fulfillment of any duty or obligation or implementation of presidential press release dated July 11th 2024 and Gazette Notice No. 8440 Vol.CXXVI-NO102 dated 12th July 2024 or/and any other date any document of any other dates which has an effect of removing from office Hon. Attorney General, Hon. Justin Bedan Njoka Muturi, 1st Interested Party herein and/or presidential press statement and/or Gazette Notice Vol.CXXVI-1, Gazette Notice NO-10346 dated 20/8/2024 and/or any other gazette notice and/or document of any other date to extent of purporting to appoint Mrs. Dorcas Oduor 6th Interested Party herein and/or any other person as appointee for office of the Attorney General.
- l. Judicial orders of mandamus compelling the 2nd Respondent to advise the presidency of values of management of public servants and/or state offices and compel the 1st Respondent to comply with relevant constitutional provisions and/or any other law.
- m. The Court be pleased to bar the 6th Respondent from acting or performing the functions of the office of Attorney General of the Republic of Kenya.
- n. Any other appropriate relief the Court may deem just to grant.
- o. The cost of this suit to be borne by the 1st Respondent (presidency).

Petitioners' Case

- 4. The 1st Petitioner on behalf of the six others, contends that the President of Kenya H.E. Dr. William Samoei Ruto illegally, irregularly and unconstitutionally removed the 1st Interested Party from the



office. He states that this was done through a Presidential Press Release dated 11th July 2024 and which informed as follows:

“Upon reflection, listening keenly to what the people of Kenya have said and after a holistic appraisal of the performance of my Cabinet and its achievements and challenges, I have, in line with the powers given to me by Article 152(1) and 152(5)(b) of the Constitution and Section 12 of the Office of the Attorney-General Act, decided to dismiss with immediate effect all the Cabinet Secretaries and the Attorney-General from the Cabinet of the Republic of Kenya except the Prime Cabinet Secretary and Cabinet Secretary for Foreign and Diaspora Affairs.”

5. This communication was thereafter followed up with issuance of Gazette Notice No. 8440 Vol. CXXVI-No. dated 12th July 2024 being subject of Executive Order No.6 of 2024. The Petitioner avers that the removal from office was anchored in the pleasure doctrine contrary to Article 10, 132 and 156, 232 and 236 of the Constitution as read with Section 12 of the Attorney General’s Office Act.
6. The Petitioner states that on 19th July 2024, the President vide another Press Release nominated the 5th Interested Party for the post. This party was expected to be vetted alongside the cabinet secretary nominees. Conversely, the President went ahead and nominated the 1st Interested Party and 5th Interested Party for posts in the Cabinet. Following their vetting as such, they were sworn in office on 8th August 2024. The President thereafter on 30th July 2024, nominated the 6th Respondent for the post of Attorney General. She was later vetted and appointed on 20th August 2024.
7. The 1st Petitioner asserts that despite the 1st Interested Party’s blatant removal from office, this Court in its Ruling pronounced that the 1st Interested Party in fact resigned from office. The Court noted as well that only the 1st Interested Party can adduce evidence to ascertain the manner in which he exited the office. According to him, a Court of law should not introduce evidence or speculate.
8. The 1st Petitioner unconvinced by the evidence adduced by the 1st Respondent, contends that they attached an edited Gazette Notice No.8440 dated 12th July 2024 to indicate that the 1st Interested Party had indeed resigned when in fact the original Gazette Notice indicated that the 1st Interested Party’s appointment had been rescinded by the President. Consequently, he asserts that this edit and change was made illegally and a clandestine manner. Considering this, he maintains that the eventual appointment of the 6th Interested Party was illegal as there was no vacancy to be filled as at the time, thus the action was null and void ab initio.
9. Turning to the pleasure doctrine, the 1st Petitioner argues that Section 12 of Office of the Attorney-General Act extinguished operation of this doctrine in removal of the holder of that office. Consequently, the 1st Petitioner argues that the President has no powers to dismiss an Attorney General without adhering to the set dictates and within the principle of a fair hearing as envisaged under Article 47 as read with Article 236 of the Constitution. He asserts therefore that the 2nd Respondent failed in its mandate to protect the 1st Interested Party as a public and state officer.
10. In view of the foregoing, the 1st Petitioner impugns the constitutional validity of the Presidential Press release statement and Gazette Notice dated 11th July 2024 that removed the 1st Interested Party from office and subsequently led to the nomination of the 5th and 6th Interested Party and eventual appointment of the 6th Interested Party. In a nutshell, he claims that the President’s actions are unconstitutional, null and void as failed to follow the statutory and constitutional requirement of the due process.



1st Respondent's Case

11. The 1st Respondent through the Principal Administrative Secretary, Arthur A. Osiya filed a Replying Affidavit sworn on 29th July 2024.
12. He depones that the 1st Interested Party tendered his resignation as the Attorney General of the Republic of Kenya, to the President. He states that the President accepted his resignation.
13. He avers as a result that the office of the Attorney General became vacant necessitating the President's appointment of the next Attorney General.

2nd Respondent's Case

14. The 2nd Respondent through its Chief Executive Officer, Paul Famba filed its Replying Affidavit sworn on 7th August 2024.
15. He asserts that the Petition is premised on erroneous facts on how the 1st Interested Party was dismissed from office. He notes that he learnt from Arthur A. Osiya that the 1st Interested Party resigned from office not dismissed as alleged by the 1st Petitioner.
16. He states that vide a letter dated 11th July 2024, the 1st Interested Party tendered his resignation letter to the President which was accepted. He avers that pursuant to Article 135 of *the Constitution*, the decision was published in the Kenya Gazette No.8440 dated 12th July 2024.
17. On this basis, he argues that the Petition is based on conjecture and guesswork and reliance on unauthenticated documents that do not meet the requirements of inter alia, Article 135 of *the Constitution*. Consequently, he contends that the Petition lacks merit and so should be struck out. In addition, he argues that the Petition is an abuse of the Court process as raises no reasonable cause of action against the 2nd Respondent.

3rd Respondent's Case

18. The 3rd Respondent's Clerk, Jeremiah Ndombi filed a Replying Affidavit sworn on 13th November 2024.
19. He depones that the President nominated the 1st Interested Party for the position of Cabinet Secretary, Ministry of Public Service and Human Capital Development. By a letter dated 24th July 2024, the President forwarded the 1st Interested Party's name to the Speaker for approval as a Cabinet Secretary under Article 152(2) of *the Constitution* and Sections 3 and 5 of the *Public Appointments (Parliamentary Approval) Act*. This communication was relayed to the 1st Interested Party by the Speaker on the same day. Thereafter, the Speaker directed that the Committee on Appointments conduct approval hearings and submit its report within 28 days, in compliance with Section 8 of the Act.
20. He states that the 1st Interested Party appeared before the Committee on 4th August 2024 wherein he informed them that he had resigned as the Attorney General so as to be able to assist the President in re-organizing his Cabinet. The Committee's Report was tabled on 7th August 2024 and the 1st Interested Party's name forwarded to the President for appointment under Article 152(2) of *the Constitution*.
21. He depones that on 30th July 2024, the President forwarded the name of the 6th Interested Party for approval for appointment as the Attorney-General. This message was conveyed to the House the next day vide Communication No. 006 of 2024. Subsequently, the Speaker forwarded the 6th Interested



- Party's Curriculum Vitae to the Committee for approval and to undertake approval hearings within 28 days. The nominee was alerted on the same.
22. Equally, he states that for the purposes of conducting public participation, the 3rd Respondent vide print media on 31st July 2023 advertised the approval hearings. The public was requested to submit memoranda by way of written statements on oath with supporting evidence concerning information on the nominees.
 23. Likewise, on 1st August 2024, the 3rd Respondent wrote to the EACC, HELB, DCI, ORPP and KRA, seeking references and background checks on the suitability of the nominee. He notes that these offices cleared the 6th Interested Party. The Committee as well examined the 6th Interested Party's academic credentials, relevant professional training and experience, knowledge of sector issues and personal integrity in accordance with Sections 6(7) and (8) of the Act.
 24. Following these procedures, he avers that the Committee recommended that the House approves the appointment of the 6th Interested Party as the Attorney General in its Report dated 13th August 2024. The 6th Interested Party was subsequently appointed and sworn into office. In light of this, he states that the 3rd Respondent conducted the approval process of the 1st and 6th Interested Party, in accordance with *the Constitution* and the law.
 25. In closing, he asserts that contrary to the 1st Petitioner's assertions, the 1st Interested Party was not dismissed from office as Attorney General but resigned under Section 11 of the Office of the Attorney General Act and which resignation was acknowledged and accepted by the President.

4th Respondent and Interested Parties' Case

26. These parties' responses and submissions are not in the Court file or Court Online Platform (CTS).

Petitioners' Submissions

27. On 13th November 2024, the 1st Petitioner filed submissions and listed the issues for determination as: whether courts can introduce a narrative and/or evidence not provided by parties; whether one can dispute erroneous judicial notice and whether an affidavit of 1st interested party is a pre-requisite in determining the constitutionality and/or legality or otherwise of president's administrative action?, whether the manner of dismissing the 1st interested party through televised presidential executive using pleasure doctrine is constitutional and/or legal?, whether the 1st interested party did indeed resign from the office of the attorney general?; and assuming that he resigned, whether the documents presented was a forgery and/or afterthought to meant to defeat the already filed Petition?, what is the effect (if any) of the purported resignation of the 1st interested party long after having been fired by the president and whether the same can cure the illegal/unconstitutional administrative actions and/or omissions by the president?, whether the subsequent events of purported nominations and/or appointments of the 5th and 6th interested parties which were done without valid vacancy can stand the doctrine of legality, constitutionalism and rule of law? and whether the actions and/or omissions of respondents thwarted legitimate expectation of Kenyans.
28. The 1st Petitioner on the first issue submitted that this Court issued its Ruling based on the judicial notice doctrine which he challenges. This is since the Court purported the 1st Interested Party's resignation despite the nationwide televised address by the President dismissing the 1st Interested Party and the Cabinet Secretaries. According to him therefore, this Court's judicial notice was erroneous.



Reliance was placed in *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd* (Civil Appeal 36 of 1983) [1985] KECA 39 (KLR) where it was held that:

“The doctrine of judicial notice “is an instrument of great capacity in the hands of a competent judge, and is not nearly as much used, in the region of practice and evidence, as it should be ..”(Thayer Pr. Treatise, 1898, p 309).

Sarkar on Evidence, 10th Ed P 517, tells us that some facts are so notorious in themselves or of such public (knowledge) and universal character that the court is bound to recognise and take notice of them. Such facts do not require proof

Judicial notice taken of a fact merely dispense with proof but it is not conclusive, and a party is not prevented from disputing its correctness by offering proof.”

29. Furthermore, the 1st Petitioner argued that the averments of the 1st Interested Party have no bearing in this Petition as alluded to by this Court. This is since its focus is the constitutionality of Executive Order No.6 dated 11th July 2024. According to him, the 1st Interested Party cannot cure the unconstitutionality or illegality of the President’s administrative action. In addition, the 1st Petitioner argued that the Court cannot introduce evidence not placed before it.

30. On the second issue, the 1st Petitioner stressed that the President dismissed the 1st Interested Party without following due process as outlined in Section 12 of the Office of the Attorney General Act. In this provision, the 1st Petitioner asserted that the President does not have power to dismiss the Attorney General without adherence to the set legal procedure and Article 10,25(b),27 and 47 of [the Constitution](#).

31. To buttress this point reliance was placed in *Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others* [2007] 2 KLR 240 where it was held that:

“It is implied that power given to authorities or persons by an Act of Parliament must be exercised fairly, and the court has the power to reach out where the exercise of that power is unfair and I further endorse Lord Scarman’s quote in *Reg vs. Secretary of State for the Environment Ex Parte Nottingham Shire Country Council* [1986] AC where he stated: “A power which is abused should be treated as a power which has not been lawfully exercised.”

32. The 1st Petitioner submitted that the President had dismissed the 1st Interested Party through the pleasure doctrine which he argued has no place in the modern constitutional dispensation. Considering this, he argued that the manner of dismissal was unconstitutional, illegal null and void. Reliance was placed in *Cecilia Wangechi Ndungu V County Government of Nyeri & Another* [2014] eKLR where it was held that:

“The court holds that elected and appointed leaders, state officers or public officers, do not hold individually generated goals that constitute political will and goals mysterious to [the Constitution](#).....The court therefore holds that any public authority must be exercised in accordance with the constitutional tests... The court upholds its opinion in *Richard Bwogo Birir –Versus- Narok County Government and 2 Others* [2014] eKLR thus,

“The court has carefully considered the enumerated constitutional provisions and holds that all persons holding public or state office in Kenya in the executive, the legislature, the judiciary or any other public body and in national or county government are servants of the people of Kenya. The court holds that despite the level of rank of state or public office as may be held, no public or state officer is a servant of the other but all are servants of the



people. Thus, the court holds that the idea of servants of the crown is substituted with the doctrine of servants of the people under the new Republic as nurtured in *the Constitution of Kenya, 2010*.”

33. Comparable reliance was placed in *County Government of Garissa & another v Idriss Aden Mukhtar & 2 others* [2020] eKLR.
34. Turning to the third issue, the 1st Petitioner referring to the original Gazette Notice dated 11th July 2024 maintained that the 1st Interested Party’s appointment contrary to the other parties’ claims was rescinded by the President. He speculates that the 1st Interested Party later on resigned and the edited Gazette Notice released.
35. The 1st Petitioner asserted that the 1st Respondent’s Affidavit through Arthur A. Osiya was not tested by cross examination and also that the 4th Respondent failed to file its response to explain the existence of the two Gazette Notices. For these reasons, he stressed that the 1st Interested Party did not resign as made to believe. He even went ahead to claim that the issued Gazette Notices by Arthur A. Osiya were forgeries and afterthoughts meant to defeat this Petition.
36. On the next issue, the 1st Petitioner questioned the constitutional validity of a resignation issued after an illegal process and whether the same can cure such an illegal action. In his view, the 1st Interested Party’s resignation had no effect as followed an illegal procedure. Reliance was placed in *Magare Gikenyi B v Antony Mwaura & 2 others; Ethics and Anti-Corruption Commission & 2 others (Interested Parties)* [2024] KEHC 8456 (KLR) where the Court held that:

“The Court of Appeal in the Matemu case rejected any approach that ‘would pose a “recharacterization risk in similar forms of constitutional litigation’This Court takes the view therefore that it is not the outcome of litigation that is determinative of its nature, but its substance at the time of seizure and proceedings..... The petition was a challenge to the constitutionality of the process and manner of the appellant’s appointment.”

37. The 1st Petitioner equally argued in the following issue that the subsequent nomination and appointment of the 5th and 6th Interested Party where there was no valid vacancy were also null and void. Reliance was placed in *Mr. Ronoh Sitienei & 4 others v Pharmacy & Poisons Board; Attorney General & 4 others Interested Party* [2019] KEELRC 247 (KLR) where it was held that:

“Thus the Court finds that there was no valid vacancy to be filled by the 1st respondent in purported exercise of the statutory power to appoint members of the Board of Management of the 2nd interested party...”

38. On the final issue, the 1st Petitioner submitted that he had a legitimate expectation that the President and the Respondents would follow the law and Constitution hence the violation breached the legitimate expectation of Kenyans. Reliance was placed in *Communications Commission of Kenya & 5 Others .vs. Royal Media Services Limited & 5 Others, Petition No. 14 of 2014* where the principles of legitimate expectation were set out as:

- “(a) there must be an express, clear and unambiguous promise given by a public authority;
- (b) the expectation itself must be reasonable;



- (c) the representation must be one which was competent and lawful for the decision-maker to make; and
- (d) there cannot be a legitimate expectation against clear provisions of the law or *the Constitution.*”

1st Respondents’ Submissions

- 39. Chief State Counsel, Emmanuel Bitta filed submissions dated 6th December 2024.
- 40. Counsel submitted that the 1st Petitioner’s case is solely based on the claim that the 1st Interested Party was removed from office illegally yet Section 11 of the *Office of the Attorney-General Act*, provides that an Attorney General may resign from office in writing addressed to the President.
- 41. Counsel asserted that the 1st Interested Party’s resignation from office is an issue of fact and therefore not a matter of evidence. He adds that this fact within the knowledge of the 1st Interested Party and the President was substantiated by Arthur Osiya in the Replying Affidavit. Counsel pointed out that the 1st Interested Party’s resignation letter was adduced in the said Replying Affidavit.
- 42. Counsel argued that this fact was not rebutted by the 1st Interested Party who is a party and neither were the 1st Petitioner’s claims proved. Counsel stressed that the 1st Petitioner bears the legal and evidential burden of proof of his allegations. Counsel thus submitted that since the Petition was premised on a question of fact, it fails and thus ought to be dismissed.
- 43. Reliance was placed in *Edward Akongó Oyugi & 2 Others v Attorney General (2019) eKLR* where it was held that:

“Section 107 (1) of the *Evidence Act* [36] provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Sub-section (2) provides that “when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.” Additionally, I have severally stated that all cases are decided on the legal burden of proof being discharged (or not). Lord Brandon once remarked: -[37]

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[38] :-

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

2nd Respondent’s Submissions

- 44. This party’s response and submissions are not in the Court file or Court Online Platform (CTS).

3rd Respondent’s Submissions

- 45. Counsel for the 3rd Respondent, Mbarak Awadh Ahmed filed submissions dated 9th May 2025 and set out the issue for determination as: whether it should intervene in a process where the law has been followed, the procedures have been observed, and no constitutional violation has been demonstrated.



46. Counsel submitted that Section 11 of the Office of the Attorney General Act, outlines that the Attorney-General may resign from office in writing, addressed to the President. In this matter, it was submitted that the 1st Interested Party resigned voluntarily from his position as Attorney General paving way for the constitutional process of nominating and appointing a new Attorney General.
47. Counsel submitted that following this, the President exercised his constitutional authority to nominate a candidate for the position of Attorney General, then forwarded the name to the National Assembly for vetting and approval, in accordance with the *Public Appointments (Parliamentary Approval) Act*. Counsel submitted that the process was carried out in full compliance with the relevant constitutional provisions and parliamentary procedures, as evidenced in Jeremiah Ndongi's affidavit.
48. Counsel contended that the 1st Petitioner had not identified or substantiated any procedural violations or irregularities in the 3rd Respondent's vetting and approval process. He stressed that the 3rd Respondent had carried out these duties in accordance with the law.
49. Counsel submitted in addition that the doctrine of separation of powers requires the Court to respect the constitutional mandate of the 3rd Respondent in the vetting and approval of public officers. To buttress its position reliance was placed in *Democratic Alliance v The President of the Republic of South Africa & 3 Others: CCT 122/11 [2012] ZACC 24* where it was held that:

“The rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected and given full effect. If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large.”
50. Like dependence was placed in *Speaker of the Senate v Attorney-General & 4 Others [2013] eKLR* and *Trusted Society of Human Rights Alliance v Attorney General & 2 Others [2015] eKLR*.

Analysis and Determination

51. In my humble view, the main issues that arise for determination in this matter are as follows:
 - i. Whether or not the 1st Interested Party's exit from the office of the Attorney General followed due process.
 - ii. Whether the Respondents violated the Petitioners' and Kenyan's legitimate expectation.
 - iii. Whether the Petitioners are entitled to the relief sought.

Whether or not the 1st Interested Party's exit from the office of the Attorney General followed due process

52. Article 2 (1) *the Constitution*, declares supremacy of *the Constitution* and states that it binds all persons and all state organs at both levels of government while Article 2 (2) underscores no person may claim or exercise state authority except as authorized under *the Constitution*.
53. In *Hugh Glenister vs. President of the Republic of South Africa & Others Case CCT 41/08; [2008] ZACC 19* the Court underscored the supremacy of court as follows:

“In our constitutional democracy, the courts are the ultimate guardians of *the constitution*. They not only have the right to intervene in order to prevent the violation of *the Constitution*, they also have the duty to do so. It is in the performance of this role that courts



are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds.”

54. In the context of this case, the Petitioner wants this Court to interrogate the legality and/or constitutionality of the President’s impugned action on the departure of the 1st Interested Party from the office of the Attorney General.

55. The constitutional court of South Africa in *Masethla vs. President of the Republic of South Africa* 2008 1 BCLR 1 (CC) explained the concept of legality as follows:

“Legality is an implicit principle in our constitutional ordering, requires the President, to act “in accordance with the law and in a manner consistent with *the Constitution*.” This means that the power conferred “must not be misconstrued”. It was established that the President had the power to dismiss the head of the NIA. In the view of the judge, the legality constraint was thus adhered to. The second constraint of rationality requires the decision to be rationally related to the purpose for which the power was given.”

56. In *Republic v Fazul Mahamed & 3 others Ex-Parte Okiya Omtatah Okoiti* [2018] KEHC 9435 (KLR) the Court underscored legality principle as follows:

“7. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decision to be allowed to stand, it must be demonstrated that the decision is grounded on law. As such, the Respondents’ actions must conform to the doctrine of legality...”

“(t) he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law”

57. In this case, the Petitioner alleged that the law governing the removal of the 1st Interested party from office of Attorney General was not complied with when the President announced that he had relieved the 1st Interested Party his duties via the Presidential Press release dated 24/7/2024 as follows:

“Upon reflection, listening keenly to what the people of Kenya have said and after a holistic appraisal of the performance of my Cabinet and its achievements and challenges, I have, in line with the powers given to me by Article 152(1) and 152(5)(b) of *the Constitution* and Section 12 of the *Office of the Attorney-General Act*, decided to dismiss with immediate effect all the Cabinet Secretaries and the Attorney-General from the Cabinet of the Republic of Kenya except the Prime Cabinet Secretary and Cabinet Secretary for Foreign and Diaspora Affairs.”

58. The factual proposition relied upon by the Petitioner as the foundation of this Petition is however strongly contested by the Respondents who have maintained that the exit from office of Attorney General i.e. 1st Interested Party was through resignation not what the Petitioner was contending in the Petition.



59. It was thus incumbent upon the Petitioner to establish first, through admissible and credible evidence that, indeed the manner of exit of the 1st Interested Party was as alleged in the Petition and that it was occasioned by the President in utter disregard of the applicable law or *the Constitution*.

60. Under the *Evidence Act*, Cap 80, the burden of proof lies on whoever alleges as provided in the following provisions:

Section 107. Burden of proof

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

61. The Supreme Court in *Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] KESC 66 (KLR) guided as follows:

“(49) Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[50] This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

62. Likewise, the Supreme Court in *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another* [2017] KESC 42 (KLR) held as follows:

“(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

(133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not



controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law.....”

63. In like manner, the Court in *Alice Wanjiru Ruhiu v Messiac Assembly of Yahweh* [2021] KEHC 13098 (KLR) observed as follows:

22. I also refer to *The Halsbury’s Laws of England*, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

64. Although *the Constitution* does not provide for the manner in which the Attorney General exits from office, the Attorney General’s Act, Cap 6A has provided for this eventuality by stating as follows:

Section 11. Resignation

The Attorney-General or the Solicitor-General may resign from office in writing, addressed to the President.

Section 12. Removal from office

1. The President may remove the Attorney-General or the Solicitor-General from office only for —
 - a. serious violation of *the Constitution* or any other law;
 - b. gross misconduct, whether in the performance of their functions or otherwise;
 - c. physical or mental incapacity to perform the functions of office;
 - d. incompetence; or
 - (e) bankruptcy.



2. Notwithstanding the provisions of subsection (1), the President may, upon election under *the Constitution*, appoint a person who is qualified as Attorney General in accordance with the provisions of *the Constitution* and this Act.
65. If therefore the Petitioner succeeds in establishing that the President removed the 1st Interested Party, then the above legal threshold set out in Section 12 must be shown to have been met, failing which the purported action would be a nullity in law.
66. On the other hand, if as contended by the Respondents, the 1st Interested Party did in fact resign, then this Petition would be a non-starter.
67. The question therefore is, has the Petitioner discharged the burden of proof to the required legal standard in respect of the facts he relies upon to assert that the 1st Interested Party was removed by the President on the strength of the press release?
68. The Petitioner relied on the press release but there was counter evidence produced by the Respondents that the 1st Interested Party was not removed but had in fact resigned to enable him be considered for a Cabinet Portfolio.
69. Authur A Osiya, Administrative Secretary in the Executive Office of the President, swore a Replying Affidavit on 27th July, 2024 in reply to the Petition in which at paragraph 3 he affirms thus:
- ‘That I am aware the Hon. Justin Bedan Njoka Muturi tendered his resignation as the Attorney General of the Republic of Kenya to His Excellency the President in writing as per *the constitution* and applicable law (annexed hereto and marked ‘A01’ is a copy of the said letter of resignation’
70. The signed letter dated 11th July, 2024 which as annexed reads as follows:
- Dr. William Samoei Ruto, CGH
His Excellency the President
Commander in Chief of Kenya Defence Forces
Executive Office of the President
Nairobi.
Re: Resignation
I, Justin Bedan Njoka Muturi, pursuant to Section 11 of the office of the Attorney General Act (Cap 6A), hereby tender my resignation as the Attorney General of the Republic of Kenya.
I wish to thank you, Your Excellency for the opportunity to serve the people and the Republic of Kenya in this capacity. I confirm my availability to support the transition that has been occasioned by my resignation and to serve the people of Kenya in any other capacity.
Yours Faithfully,
(Signed)
Hon. Justin B.N. Muturi, EGH
Attorney General
71. In the ensuing gazette notice No. 8440 of 12th July, 2024, titled



The Constitution Of Kenya

Executive No. 6 Of 2024 Reads Inter Alia:

Re: Organization Of The Government Of Kenya

Now therefore, I, William Ruto, President of the Republic of Kenya and Commander in Chief of the Defence Forces, by the authority vested in me by the Constitution and the Laws of the Republic of Kenya, do hereby:

1. Resignation Of The Attorney General

Accept the resignation of Hon. Justin B.N. Muturi, E.G.H, as the Attorney General of the Republic of Kenya in accordance with section 11 of the Office of Attorney General Act (Cap 6 A) Laws of Kenya.”

72. The 3rd Respondent on its part through the Replying Affidavit of Jeremiah Ndombi, the Clerk of the National Assembly sworn on 13th November, 2024 stated in paragraph 14 that the 1st Interested Party presented himself for Vetting and Approval as a Cabinet Secretary before the Committee of Appointments on 4th August, 2024 and confirmed that he had resigned from office to assist the President in reorganising his Cabinet as provided in law. He annexed the “Committee on Appointments Second Report on Approval Hearing of Nominees For Appointment as Cabinet Secretaries dated 7th August, 2024”- Annex JN 4). At page 225 of the Report, paragraph 1048 reads:

‘On his resignation as Attorney General’

“The nominee confirmed that he resigned from office to assist the President to reorganize the Cabinet as provided for in law.”

73. A gazette notice is in law presumed to be prima facie evidence of what it contains. Section 85 of the Evidence Act Cap 80 provides:

Gazette, etc , to be prima facie evidence

The production of a copy of any written law, or of a copy of the gazette containing any written notice purporting to be made in pursuance of a written law, where such law or notice (as the case may be) purports to be printed by government printer shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of such written law or notice.

74. Although the Petitioner in his submissions argued that that could have tampered with their documents, that was a mere allegation made without supplying the necessary proof of forgery in relation to these documents tendered to support the fact that the 1st Interested Party had in fact resigned from office and not removed by the President as pushed in the narrative by the Petitioner in this Petition.
75. The Petitioner simply relies on bare press release to drive the narrative whose source was not even authenticated raising admissibility concerns.
76. In this matter, the standard of being on a "Balance of probabilities" where scales of justice are expected to tip towards the side where on reasonable assessment by the court, the court is swayed by facts that it is satisfied are more probably correct than not, I find that the Petitioner has failed to discharge this standard of proof in regard to the factual averments forming the foundation of his Petition vis-à-vis the rebuttal offered by the Respondents.



77. I find no value in considering any other issue in the instant Petition.
78. The Petition lacks merit and is hereby dismissed.
79. Considering that this is public interest litigation, I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF OCTOBER, 2025.

.....

L N MUGAMBI

JUDGE

