



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Magare-Gikenyi B & 3 others v Attorney-general & 3 others; Koskei & 2 others (Interested Parties) (Petition E014 of 2024) [2025] KEHC 17609 (KLR) (20 November 2025) (Judgment)

Neutral citation: [2025] KEHC 17609 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
PETITION E014 OF 2024**

PN GICHOHI, J

NOVEMBER 20, 2025

IN THE MATTER OF: THE CONSTITUTIONAL VALIDITY OF SECTIONS 8(3), 8(5), 8(6)(A), 8(8), 12A(1), 12A(2), 12A (4) AND 12A(8), NATIONAL GOVERNMENT COORDINATION ACT CAP. 127, LAWS OF KENYA, AS AMENDED BY NATIONAL GOVERNMENT ADMINISTRATION (AMENDMENT) ACT, 2024

AND

IN THE MATTER OF: ARTICLES 1, 2, 3(1), 10, 19, 20, 21, 22, 23, 24, 25, 27, 28, 47, 48, 50(1), 52, 53, 54, 55, 56, 57, 73, 74, 75(1), 93, 94, 95, 129, 130, 131, 132, 135, 152(1), 153, 155, 156, 159, 162(1), 165(1), (3)(A, B AND (D)(I-III)), 230, 232(1 AND 2), 233(1), 234(1 AND 2), 236, 248, 249(1 AND 2), 253, 258(1 AND 2(C)), 259(1) AND 260.

AND

IN THE MATTER OF: ALLEGED VIOLATIONS OF OR THREATS OF VIOLATIONS OF RIGHTS OR FUNDAMENTAL FREEDOMS IN THE BILL OF RIGHTS UNDER ARTICLES 19, 20, 21, 24, 25, 27, 28, 47, 48, 52, 53, 54, 54, 55, 56 AND 57 OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF: ALLEGED VIOLATIONS OF OR THREATS OF VIOLATIONS OF ARTICLES 1, 2[1, 2, 4 AND 6], 3, 6, 10, 73, 74, 75[1], 93, 94, 95, 129, 130, 131, 132, 152(1), 153, 155, 156, 159, 230, 232, 234, 236, 248, 249, 259 AND 260 OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF: RULE 4, 10, 11, 13 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL FREEDOMS)- HIGH COURT PRACTICE AND PROCEDURE RULES 2013)

AND

IN THE MATTER OF: THE DOCTRINES OF BILL OF RIGHTS,



CONSTITUTIONALISM, RULE OF LAW AND LEGITIMATE EXPECTATIONS

BETWEEN

DR MAGARE-GIKENYI B 1ST PETITIONER
ELIUD KARANJA MATINDI 2ND PETITIONER
BLAIR ANGIMA OIGORO 3RD PETITIONER
OKIYA OMTATAH OKOITI 4TH PETITIONER

AND

HON. ATTORNEY-GENERAL 1ST RESPONDENT
PUBLIC SERVICE COMMISSION 2ND RESPONDENT
SALARIES AND REMUNERATION COMMISSION 3RD RESPONDENT
NATIONAL ASSEMBLY OF KENYA 4TH RESPONDENT

AND

FELIX K KOSKEI INTERESTED PARTY
KATIBA INSTITUTE INTERESTED PARTY
LAW SOCIETY OF KENYA INTERESTED PARTY

JUDGMENT

Introduction

1. The Petitioners describe themselves as public-spirited Kenyans, defenders of *the Constitution* and individuals committed to the promotion of democratic governance, non-discrimination and the rule of law. They bring this petition in their individual capacities and in the public interest pursuant to Articles 22(1) and 258(1) of *the Constitution*.
2. The 1st Respondent is the Hon. Attorney-General, the principal legal adviser to the government and a constitutional office established under Article 156 of *the Constitution*. The 2nd Respondent is the Public Service Commission (PSC), a constitutional commission established under Article 233(1), whose functions include, inter alia, the recruitment and appointment of persons to public office. The 3rd Respondent is the Salaries and Remuneration Commission (SRC), established under Article 230(1), with the constitutional mandate to set and regularly review the remuneration and benefits of State officers. The 4th Respondent is the National Assembly of Kenya, established under Article 95 of *the Constitution* of Kenya.
3. The 1st Interested Party, Felix K. Koskei, is the current holder of the office of Head of Public Service and Chief of Staff in the Executive Office of the President. The 2nd and 3rd Interested Parties, Katiba Institute and the Law Society of Kenya respectively, were joined as interested parties by dint of their previously involvement as interested parties in litigation concerning the constitutional validity of the office of Chief Administrative Secretary (CAS), including Okiya Omtatah Okoiti & another v Public



The Petition

4. By the Petition dated 28th May, 2024, the Petitioners' challenged the constitutional validity of sections; 8(3), 8(5), 8(6)(a), 8(8), 12A(1), 12A(2), 12A(4), and 12A(8), of the National Government Coordination Act, as amended by the National Government Administration (Amendment) Act, 2024.
5. They contended that the new Act, National Government Coordination Act, by creating the office of the Chief Administrative Secretaries (CAS) and Chief of Staff and Head of Public Service, not only infringes upon judicial decisions, but also violates various Articles of *the Constitution*, including Article 201 regarding public finance, and principles such as the separation of powers as outlined in Articles 1(3)(c), 159, and 94. The core of their argument is that these new offices are unconstitutional and lead to an unlawful burden on public finances. They therefore sought the following Orders: -
 1. A declaration that Sections 8(3), 8(5), 8(6), 8(8), 12A (1), 12A (2), 12A (4) and 12A (8) of National Government Coordination Act Chapter 127 Laws of Kenya, are unconstitutional, null and void.
 2. Upon making declarations as above, this Honourable Court be pleased to issue an ORDER:
 - a. Voiding Sections 8(3), 8(5), 8(6)(a), 8(8), 12A (1), 12A (2), 12A (4) and 12A (8), of the National Government Coordination Act, Chapter 127, Laws of Kenya.
 - b. The court is pleased to issue an order of judicial review by way of CERTIORARI , quashing the purported appointment of the 1st interested party Mr.Felix K. Koskei or any other person as chief of staff and head of civil service.
 - c. The court is pleased to issue an order of judicial review by way of PROHIBITION, prohibiting respondents from appointing and/or purporting to make any appointments in regard to the positions of chief administrative secretary(CAS) and/ or as chief of staff and head of civil service.
 - d. That pursuant to order(c) above, the court is pleased to issue an order of judicial review by way of CERTIORARI, quashing any appointments to the position of chief administrative secretary(CAS) which may occur during the hearing and determination of the petition.
 - e. That any other order or/and modification of petitioners' prayer(s) which this Honourable court may deem fit so as to achieve objects of justice for majority of Kenyans as a whole.
 - f. That this being a public interest Petition filed in defence of *the Constitution*, ordering each party herein to meet their costs.
6. The Petitioners contended that by creating the office of the Chief Administrative Secretaries (CAS) and Chief of Staff and Head of Public Service, The National Government Coordination Act, 2024 not only infringes upon judicial decisions, but also violates various Articles of *the Constitution*, including Article 201 regarding public finance, and principles such as the separation of powers as outlined in Articles 1(3)(c), 159, and 94.



7. They invoked Article 3(1) of *the Constitution* which imposes an obligation on every person, including State organs and the courts, to respect, uphold, and defend *the Constitution*. They stated that their right to institute these proceedings is rooted in Articles 22 and 258 of *the Constitution*, which empower individuals, such as themselves, to approach the court where rights and fundamental freedoms in the Bill of Rights are denied, violated, or threatened, or where *the Constitution* is contravened or at risk of contravention.
8. Regarding this Court’s jurisdiction to hear and determine this Petition, the Petitioners cited Articles 23 and 165 and Articles 1(3) (c), 159, and 162(1) further clarify that judicial authority derives from the people and is exercised by the courts, with the High Court possessing broad original jurisdiction to interpret *the Constitution* and resolve constitutional disputes.
9. On the legal foundation of the Petition, they cited array of constitutional provisions including Articles 1 and 2 which emphasises the supremacy of *the Constitution* and the sovereignty of the people, Article 10 on national values and principles of governance such as democracy, integrity, the rule of law, transparency, and accountability, which bind all State organs. The Petitioners also relied heavily on provisions of the Bill of Rights—Articles 19 through 28, 47, 48, and 50(1), which protect equality, freedom from discrimination, human dignity, fair administrative action, access to justice, and the right to a fair hearing. They further referenced Articles 73 to 75 on the responsibilities and ethical conduct of State officers, as well as Articles 93 to 95 which delineate Parliament’s role in law-making and constitutional oversight.
10. They referred to Article 129 of *the Constitution*, which establishes that executive authority is derived from the people of Kenya and must be exercised in accordance with *the Constitution*, prioritising service to the people for their well-being and benefit, Article 130 for establishing the national executive, comprising the President, Deputy President, and the Cabinet. They also included Article 131, which sets out the President’s authority to exercise executive power on behalf of Kenyans, with assistance from the Deputy President and Cabinet Secretaries, while always acting in accordance with *the Constitution*.
11. Furthermore, the Petitioners cited Article 132, which outlines the President’s functions, including the nomination, appointment, and dismissal of State and public officers with National Assembly approval as required, and the power to establish public service offices upon the recommendation of the Public Service Commission. Article 135 was referenced for requiring all Presidential decisions in performing constitutional functions to be in writing, bearing the President’s seal and signature.
12. The Petitioners also highlighted Article 152(1), which constitutes the Republic’s Cabinet; Article 153 for establishing the individual and collective responsibility of Cabinet members to act constitutionally and be accountable to both the President and Parliament by providing regular reports; Article 154 that establishes the office and functions of the Secretary to the Cabinet, while Article 155 that establishes the office of Principal Secretary and their appointment process; Article 156 that establishes the office, functions, duties, and powers of the Attorney-General, including the duty to promote, protect, and uphold the rule of law and defend public interest.
13. In the context of the judiciary, Article 159 was cited for decreeing that judicial authority vests in courts and tribunals established by or under *the Constitution*, requiring its exercise in accordance with *the Constitution*. Article 162 (1) for establishing the systems of courts, including the High Court as a superior court; . Article 165(3)(a, b, and d) for vesting the High Court with jurisdiction to hear and determine the Petition.
14. Regarding independent commissions, the Petitioners cited Article 230, which establishes the Salaries and Remuneration Commission (SRC), its powers, functions, and guiding principles; Article



- 232(1) and (2) on values and principles of public service, including fair competition and merit as the basis for appointments and promotions; Article 233(1) which establishes the Public Service Commission (PSC); and Article 234 which details the functions and powers of the PSC, including any conferred by national legislation, subject to *the Constitution*; Article 236 that protects public officers from dismissal without due process; Article 248 that lists the PSC and SRC as independent constitutional commissions; and Article 249 that defines their objects, including protecting the people's sovereignty, securing observance of democratic values and principles by State organs, and promoting constitutionalism.
15. Finally, the Petitioners asserted their right to bring these proceedings under Article 258, including in the public interest. They also highlighted Article 259, which mandates that *the Constitution* be interpreted to promote its purposes, values, and principles; advance the rule of law, human rights, and fundamental freedoms; permit the development of law; and contribute to good governance. Article 260 provides for the interpretation of *the Constitution*.
 16. While laying out detailed factual basis of their Petition, they challenged the constitutionality of the National Government Administration Laws (Amendment) Act, 2024, which has already commenced on 17th May, 2024, for establishment of the offices of the Head of Public Service in the Executive Office of the President and the Chief Administrative Secretary.
 17. With regard to the office of the Head of Public Service, the Petitioners argue that Section 8(3) of the Act unlawfully establishes a new executive office within the Executive Office of the President, yet that such an office is not contemplated under Article 130 of *the Constitution*, which defines the composition of the national executive to include only the President, Deputy President, and the Cabinet. They argued that no constitutional amendment has been made to enlarge the executive, and that the creation of this statutory office usurps or duplicates the functions already conferred by *the Constitution* upon other offices, such as the Secretary to the Cabinet under Article 154.
 18. The Petitioners took issue with Section 8(5) of the impugned Act, which provides that the Head of Public Service shall serve at the pleasure of the President. They argued that this provision revives the repealed colonial doctrine of pleasure, contrary to the 2010 Constitution, which requires that appointments and dismissals in the public service be based on law, reason, due process and constitutional values such as fairness and dignity. They argued that the provision allows arbitrary dismissal, violates the right to fair administrative action under Article 47, the right to a fair hearing under Article 50(1), and protections accorded to public officers under Article 236.
 19. It was stated that their challenge of Section 8(6) was that it assigns to the Head of Public Service the roles of supporting the President in executing government business, acting as Chief of Staff, and administering the Executive Office of the President, yet these are core executive functions already constitutionally assigned to the Deputy President and Cabinet Secretaries under Article 131(1)(b), and the Secretary to the Cabinet under Article 154(3)(d). They assert that the effect of this provision is to unlawfully expand the composition and hierarchy of the executive and to delegate presidential powers outside constitutionally prescribed bounds.
 20. Further, the Petitioners impugned Section 8(8), which provides that any person who held the office of Head of Public Service prior to commencement of the amendments shall continue to do so as if appointed under the new law, contending that this transitional provision effectively regularises the appointment of Mr. Felix Koskei without subjecting him to the competitive and merit-based recruitment process mandated by Article 232(1)(g) of *the Constitution* and Section 46(1) of the *Public Service Commission Act*. The Petitioners therefore argued that this violates the principles of good governance, transparency, and equality, and unlawfully discriminates against other qualified Kenyans.



21. Regarding the office of Chief Administrative Secretary, the Petitioners challenged its statutory creation under Section 12A(1), arguing that the CAS role has been judicially determined to be equivalent to that of a Principal Secretary, which is a constitutional office created under Article 155. They cited the High Court's decision in *Okiya Omtatah Okoiti & Another V Public Service Commission and 73 Others; Law society of Kenya & Another(Interested parties)* [2021] eKLR and its reaffirmation in the case of *Matindi & 3 Others V President of the Republic of Kenya & 4 others; Controller of budget & 50 Others (Interested parties) Petition E080, E084 & E150 of 2023 (Consolidated)* [2023] KEHC 19534 (KLR), which found that the office of CAS must meet all the constitutional requirements applicable to Principal Secretaries, including being designated a State office under Article 260.
22. The Petitioners stated that Parliament lacks power to create or modify constitutional offices through statute, and that the impugned provision attempts to circumvent judicial authority and constitutional processes.
23. In regard to their challenge on Section 12A (2), which allows the PSC to determine the number (complement) of CASs to be appointed, the Petitioners argued that the power to determine the size and structure of the Cabinet and State departments lies with the President under Article 132(3)(b), read together with Article 155(2). They asserted that giving such power to the PSC undermines the separation of powers, frustrates the fiscal oversight role of the Salaries and Remuneration Commission under Article 230(5), and potentially imposes an unlimited financial burden on public resources contrary to Article 201 of *the Constitution*.
24. The Petitioners contended the eligibility criteria for appointment as a CAS, as set out under Section 12A(4) of the National Government Administration (Amendment) Act 2024, arguing that since CASs are equivalent to Principal Secretaries, their eligibility must conform to the same standards under Section 47 of the *Public Service Commission Act*. They argued that providing different, and arguably less rigorous, criteria is unconstitutional and contrary to judicial pronouncements.
25. On constitutionality of Section 12A(8) which provides that the remuneration of CASs shall be determined by the PSC on the recommendation of SRC, they argued that the section violates Article 230(4), which exclusively vests the power to set and review the remuneration of State officers in the SRC.
26. They argued that this delegation of remuneration functions to the PSC undermines the independence and constitutional mandate of the SRC and violates the principle of institutional separation entrenched in Chapter Fifteen of *the Constitution*.
27. The Petition was supported by the Affidavit sworn by the 1st Petitioner on 20th May, 2024, where the Petitioner reiterated the contents of the Petition and urged this Court to find that these legislative changes are unconstitutional and to issue appropriate reliefs.

Responses

28. The 1st Respondent, did not file any response to the Petition herein.

2nd Respondent filed grounds of opposition dated 24th April, 2025

29. The 2nd Respondent opposed the Petition and sought for its dismissal or striking out stating that: -
 1. The impugned sections of the National Government Administration Laws (Amendment) Act, 2024 enjoys a general presumption of constitutionality and which presumption has not been rebutted by the Petitioners herein.



2. The determination, by the Public Service Commission (PSC), of the complement of Chief Administrative Secretaries (CAS) is in accordance with Article 234(2)(a) of *the Constitution* as read together with the relevant provisions of the *Public Service Commission Act*, Cap.185 of the Laws of Kenya and the Public Service Commission Regulations, 2020. In any event, no request has been submitted to the Commission for the recruitment of any CAS.
3. The enactment of Section 12 of the National Government Coordination Act was done in strict compliance with the judgment of this Honourable Court in NRB HC Petition No.32 of 2018 consolidated with Petition No. of 2018 Okiya Omtatah Okoiti & Others vs The Attorney-General & Others.
4. Being offices in the public service under the mandate of PSC, the terms and conditions of service for the Chief Administrative Secretaries is to be determined by the Public Service Commission pursuant to Article 234(2)(g) of *the Constitution* with advice, if any, from the Salaries and Remuneration Commission in accordance with Article 230(4)(a) of *the Constitution*.
5. The appointment of the 1st Interested Party as the Head of Public Service had been done prior to the enactment of the amendments to the National Government Coordination Act. As such, the said appointment had been saved by the impugned amendments pursuant to Section 8(12) of the National Government Coordination Act as it was not a fresh appointment made under the amended Act.
6. The Petition has not been pleaded with specificity in that the Petitioner has not demonstrated with the required degree of certainty and precision the nature of the provisions of *the Constitution* that have been violated and the manner in which the alleged provisions have been violated. This is contrary to the dictate of the Mumo Matemu and Anarita Karimi Njeru decisions.
7. The Petitioner/Applicant has not made out a case for the grant of the judicial review orders sought.
8. The Petition is glossed with mere statements of law with no correlation to the dispute at hand and no orders have been sought against the Commission.

3rd Respondent grounds of opposition 9th April, 2025

30. The 3rd Respondent (SRC) opposed the Petition arguing that; -
 1. It is a Constitutional Commission established under Article 230 of *the Constitution*, operationalized by the *Salaries and Remuneration Commission Act* and its mandate is to, inter alia :-
 - i. set and regularly review the remuneration and benefits of all State officers; and
 - ii. advise the national and county governments on the remuneration and benefits of all other public officers.
 2. By dint of Article 94 (1) of *the Constitution* the legislative authority of the Republic is vested in and exercised by Parliament. By virtue of the doctrine of separation of powers, the 3rd Respondent had and has no role whatsoever in the legislative process that resulted in the enactment of the National Government Administration (Amendment) Act, 2024.



3. The 3rd Respondent neither had the Constitutional nor statutory authority to legislate, enact, or influence the passage of the National Government Administration (Amendment) Act, 2024, rendering any claims against it regarding this legislation fundamentally misconceived.
4. The Petitioners have omitted to frame their case with precision as required under the High Court's pronouncement in the case of Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272. The petition fails the requirement as it does not state the alleged constitutional provisions violated by the 3rd Respondent and the acts or omissions complained of with reasonable precision.
5. That in accordance with the well-established principle of *ei incumbit probatio qui dicit, non qui negat* (the burden of proof lies with the one who asserts, not the one who denies), the Petitioners bear the evidentiary burden of proving their allegations against the 3rd Respondent. The Petitioners:
 - i. Have provided no credible evidence demonstrating any action or omission by the 3rd Respondent that contravenes *the Constitution*;
 - ii. Have failed to establish any causal link between the 3rd Respondent's conduct and the alleged constitutional violations; and
 - iii. Have not satisfied even the prima facie threshold of proof required to sustain the petition against the 3rd Respondent.
6. The Petition discloses no reasonable cause of action against the 3rd Respondent because: -
 - i. The 3rd Respondent has at all material times acted within its constitutional and statutory mandate.
 - ii. The Petition does not seek any specific relief against the 3rd Respondent, rendering its inclusion in these proceedings without legal basis or purpose; and
 - iii. The absence of any prayer for relief against the 3rd Respondent is fatal to the Petitioners' case and confirms the lack of cause of action.
7. The Petition against the 3rd Respondent is, therefore, scandalous, frivolous, and vexatious and abuse of the Court's process.
8. The petition as against the 3rd Respondent has no merit and should therefore be dismissed with costs to the 3rd Respondent.

4th Respondent's (National Assembly) grounds of opposition dated 24th April, 2024

31. The 4th Respondent opposed the Petition on the following grounds:-
 1. The Petition fails to establish any clear or demonstrable breach of *the Constitution*. It is predicated on a misinterpretation of the structure and functions of the National Executive vis-à-vis the National Government. As such, the Petition does not meet the threshold for judicial invalidation of legislation as articulated in *Law Society of Kenya v Attorney General & Another* [2013] eKLR.
 2. The Petitioners erroneously conflate the roles of the National Executive with administrative structures within the National Government. Offices such as the Head of Public Service and National Government Administration Officers are lawfully created under Article 132(4)(a)



and Section 8 of the National Government Coordination Act (NGCA), and are not part of the Cabinet or the National Executive as defined under Article 130(1) of *the Constitution*.

3. The impugned provision, which states that certain officers “serve at the pleasure of the President,” must be interpreted in harmony with Sections 3 and 4 of the NGCA and Articles 10, 47, and 232 of *the Constitution*, which limit executive discretion and safeguard the right to fair administrative action. Courts have repeatedly cautioned against reading statutory phrases in isolation—see *Stanbic Bank Kenya Limited v Santowels Limited* (Petition E005 of 2023).
4. Section 8(8) of the NGCA merely affirms continuity of lawful appointments and is a standard legislative mechanism designed to avoid administrative disruption. It does not confer fresh powers nor violate principles of good governance or public participation. The Petitioners’ challenge to this section is speculative and unsupported by evidence.
5. The position of Chief Administrative Secretary (CAS) has already been judicially considered and its legal framework settled in *Matindi & Others v National Assembly & Others* [2023]eKLR and *Okoiti v Public Service Commission* [2021]eKLR. The matter is res judicata and currently sub judice before the Court of Appeal in Civil Application Nos. E314, E300, E309 of 2023 and E296 of 2022. The Petition therefore offends the doctrines of judicial restraint and hierarchy of courts.
6. Following the 2023 High Court directive, Parliament lawfully enacted the National Government Administration Laws (Amendment) Act, 2024 to anchor the CAS position in legislation. The Petitioners’ attempt to re-litigate this issue disregards the constitutional principle of inter-institutional comity between the judiciary and legislature.
7. Duly enacted legislation enjoys a presumption of constitutionality. The Petitioners have not provided cogent evidence to rebut this presumption. As held in *Council of Governors & 47 Others v Attorney General & 3 Others* [2020] eKLR, a party challenging legislation must show clear inconsistency with *the Constitution*, which the Petitioners herein have not done.

1st Interested Party’s grounds of opposition dated 25th November, 2024,

32. He (Hon. Felix K. Koskei) opposed the Petition on the following grounds by his stating that:-

1. The question of the constitutionality of the office of the Head of Public Service established under Section 8(3) of the National Government Coordination Act has been determined with finality by the Employment and Labour Relations Court in ELRC Petition No. 24 of 2018, *Okiya Omtatah vs Joseph Kinyua & Another* (2018)eKLR; ELRC Petition 51 of 2018, *Okiya Omtatah vs Joseph Kinyua & 2 Others*; ELRC Petition No 42 & 27 of 2014, *Okiya Omtatah Okoiti & 3 Others vs Anne Waiguru, CS Devolution & Planning & 6 Others* and by this Honourable Court in Petition No. 33 & 42 of 2018, *Okoiti & Another vs Public Service Commission & 73 Others* [2021] KEHC 464 (KLR). The question is now res judicata and not subject of re-litigation before this Honourable Court.
2. The question of the constitutionality of the Office of the Chief Administrative Secretary established under Section 12A(1) of the National Government Coordination Act has been determined by this Court in High Court Petition No. E080, E084 & E150 of 2023 (Consolidated), *Matindi & 3 Others v The National Assembly of Kenya & 4 Others* [2023] KEHC 19534 (KLR), Petition No. 33 & 42 of 2018, *Okoiti & Another vs Public Service Commission & 73 Others* [2021] KEHC 464 (KLR), ELRC Petition No. E174 of 2022, Law



Society of Kenya vs Public Service Commission & Others. The question is now res judicata and not subject of re-litigation before this Court.

3. This Court in High Court Petition No. E080, E084 & E150 of 2023 (Consolidated), Matindi & 3 Others v The National Assembly of Kenya & 4 Others [2023] KEHC 19534 (KLR) found at paragraph 248 of its Judgment that His Excellency the President of the Republic of Kenya may establish an Office in the Public Service with the approval of the National Assembly through the enactment of a Statute. This was done vide the National Government Administration Laws (Amendment) Act, 2024.
4. In any event, the issues now raised in the Petition in respect of the Office of the Chief Administrative Secretary are subject of Pending appeal before the Court of Appeal as held in Civil Application No. E314,E300 & E309 of 2023 & E296 of 2022, Attorney General v Matindi & 55 Others [2023] KECA 1475 (KLR).
5. The entire Petition is inimical to the overriding objective in Articles 48 and 159(2)(a) and(b) of *the Constitution* of Kenya, 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21, Laws of Kenya and Rule 3(2) as read together with Rules 3(4) &(5) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
6. The Petition is bad in law, frivolous, vexatious and an abuse of the process of this Court and therefore, the 1st Interested Parties hereby give notice that he shall seek to have it struck out in limine and for the Petition to be fixed for hearing.

1st Interested Party's Replying Affidavit sworn on 11th December, 2024

33. From the onset, he stated that the Petitioner's Supporting Affidavit is incompetent and should be struck out as it pre-dates the Petition itself.
34. The Affiant averred that the constitutionality of the Head of Public Service office, established under Section 8(3) of the National Government Coordination Act, has been previously determined by various courts, making the issue res judicata. He stated that the Courts have found the office was found to be constitutionally established under Article 132(4)(a) of *the Constitution*.
35. Regarding Section 8(5) of the Act, which states the Head of Public Service shall serve at the pleasure of the President, he stated that provision aligns with the President's constitutional power to appoint and dismiss public officers under Article 132(2)(f). He clarified that the Head of Public Service supports the President in facilitating government business and performing assigned functions. He therefore refuted claims of independent or overreaching authority.
36. He argued that the National Assembly intended a seamless transition for the incumbent Head of Public Service under the new Act, without requiring re-application or vetting, to maintain stability in public administration. On that basis, he confirmed that he has meet the statutory qualifications.
37. He contended that the constitutionality of the Chief Administrative Secretary (CAS) office under section 12A(1) of the Act is res judicata, citing previous High Court and Employment and Labour Relations Court decisions. He elaborated that the National Assembly enacted the National Government Administration Laws (Amendment) Act, 2024, to establish the CAS office following a High Court judgment. Furthermore, that issues regarding the CAS office are subject to a pending appeal before the Court of Appeal.
38. He concluded by stating that the Petition is frivolous, vexatious, and an abuse of the court process. He urged its dismissal with costs.



Submissions

Petitioners' submissions

39. The Petitioners maintained that sections 8(3), 8(5), 8(6), 8(8), 12A(1), 12A(2), 12A(4), and 12A(8) of the National Government Coordination Act, Chapter 127 of the Laws of Kenya are unconstitutional, null, and void, hence their prayer to have the sections voided and the 1st Interested Party's appointment as Chief of Staff and Head of Civil Service be quashed and appointments to the positions of Chief Administrative Secretary (CAS) and Chief of Staff and Head of Civil Service be prohibited.
40. Underscoring that Kenya is a sovereign state where power belongs to the people, and the judiciary's role is to protect their interests, the Petitioners emphasised the importance of interpreting *the Constitution* in a manner that promotes its purposes, values, and principles, advances the rule of law, human rights and good governance, as mandated by Article 259 of *the Constitution*.
41. They cited the case of Institute of Social Accountability & Another v National Assembly & 4 Others High Court [2015] EKLK that cited the case of Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011]eKLR to support the principle of purposive and liberal interpretation of *the Constitution*, reading it as an integrated whole. That case further referenced Tinnyefuza v Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3) for the concept of constitutional provisions sustaining each other.
42. On the principle of the rule of law, they asserted that stated and State Agencies can only perform functions permitted by law, they referenced the common law principle established in Entick v Carrington [1965] 2 WILS, also supported by Hardware & Ironmongery v Attorney General (E.A) 1972, which dictates that public power must conform to *the Constitution* and enabling statutes.
43. Further, they cited the case of Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested Parties) [2020] eKLR to highlight that courts enforce the rule of law by ensuring public bodies act within their conferred powers. In addition, they cited Umoja Rubber Products Limited v Kenya Power & Lighting Company Limited (Civil Appeal 175 Of 2019) [2023] KEHC 19751 (KLR) to argue that both purpose and effect are relevant in determining constitutionality, and either an unconstitutional purpose or effect can invalidate legislation.
44. Regarding illegality, the Petitioners referred to Republic v Vice Chancellor Moi University & 2 others Ex parte Benjamin J. Gikenyi Magare [2019] EKLK, to assert that public bodies must operate within the bounds of *the Constitution* and law and that public power must have a legal source.
45. Further, they relied on Center for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR on principles of interpretation which include avoiding absurdity, unworkable results, illogical outcomes, and actions adverse to public interest.
46. They highlight that public opinion has a minimal role, and the court's fidelity is to *the Constitution's* letter and spirit arguing that Article 24(3) of *the Constitution* is significant provision for applying these principles.
47. In regard to ft failure by a party to file response to the Petition, the Petitioners submitted, the Petition should be decided on the basis of the uncontested facts and law. In support , they cited Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR. Furthermore, they invoked the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR, that even in



the absence of a defence, the claimant must prove their case and the balance of probabilities remains unchanged.

48. Further, they submitted that the Petitioners' pleadings are deemed to meet the specificity requirements for constitutional petitions as set out in *Anarita Karimi Njeru v Republic* [1979] eKLR and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.
49. Regarding specific violations, they submitted that Section 8 (3) of the National Government Coordination Act, which establishes the office of the Head of Public Service, unconstitutionally expands the national government executive beyond the President, Deputy President, and Cabinet, thus violating Articles 1(1), 1(3)(a), and 130(1) of *the Constitution*.
50. They maintained that by stating that the Head of Public Service shall serve at the pleasure of the President, Section 8(5), this potentially undermines constitutional principles of fair administration and security of tenure.
51. They argued that the office of the Chief of Staff and Head of Public Service existed before the impugned legislation and was established under Article 132(4)(a) of *the Constitution* and therefore, the Petitioners questioned the criteria for the 1st Interested Party's appointment to this office, noting he was not appointed through fair competition and merit, thus failing to meet qualifications in Section 8(7) of the impugned statute. They argued this appointment was not in accordance with Section 46 of the *Public Service Commission Act*, as read with Section 8(4) of the amended National Government Coordination Act.
52. They further asserted that the office of the CAS is a State office under Article 260 of *the Constitution*, as determined in *Okoiti & another v Public Service Commission & 73 others; Law Society of Kenya & another (Interested Party) (Petition 33 & 42 of 2018 (Consolidated))* [2021] KEHC 464 (KLR). hence, the Public Service Commission's (PSC) functions under Article 234(1) and (2) do not apply to State offices, meaning that the PSC cannot determine the complement of CASs contravening Article 234(3) (a) of *the Constitution*.
53. They argued that Section 12A of the National Government Coordination Act is inconsistent with *the Constitution* and thus void as it unconstitutionally empowers the PSC to determine remuneration and benefits for CASs, a function exclusively reposed in the Salaries and Remuneration Commission (SRC) under Article 230(4)(a) of *the Constitution* as reiterated by the Court in *Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested Parties)* [2020] eKLR and *Parliamentary Service Commission & 4 others v Salaries and Remuneration Commission & 7 others* [2025] KECA 275 (KLR).

Petitioners' Supplementary Submissions

54. They were an emphasis of their Petition and Affidavits and specifically addressed the arguments in the 2nd Respondent's Grounds of Opposition, asserting that the judicial determination on the office of Chief Administrative Secretaries (CAS) had firmly established it as a State office, thereby precluding the 2nd Respondent from any role in determining the complement of CASs, as their functions do not extend to State offices. Furthermore, the Petitioners argued that the determination of remuneration and benefits for CASs falls exclusively under the constitutional mandate of the 3rd Respondent, making the 2nd Respondent's involvement in this aspect unconstitutional.
55. They maintained that the selection criteria and appointment of the 1st Interested Party (Felix K. Koskei) to the office of Chief of Staff and Head of Public Service, remained undisclosed, with no evidence to demonstrate that his appointment followed a process of fair competition and merit. In



the circumstances, they argued that he did not meet the qualifications stipulated in Section 8(7) of the impugned statute. Consequently, the Petitioners submitted that his appointment was not in compliance with Section 46 of the *Public Service Commission Act*, read in conjunction with Section 8(4) of the challenged amendments to the National Government Coordination Act, which, in their view, means he cannot lawfully benefit from Section 8(8) of the impugned legislation.

56. In summation, the Petitioners urged this Court to find that the creation and operationalisation of the CAS and Head of Public Service offices under the impugned amendments are constitutionally flawed. They therefore sought declarations that the relevant sections are null and void. They urged the Court to issue conservatory orders halting any further implementation of the said provisions.

3rd Respondent's Submissions

57. The 3rd Respondent submitted on only one issue, that is, whether the Petition dated 28th May, 2025 has met the reasonable precision test of admissibility of constitutional petitions as set out in the classic case of *Anarita Karimi Njeru V The Republic (1976-1980) 1 KLR 1272* that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important, if only to ensure that justice is done to his case, that he should set out with a degree of precision that of which he complains, the provisions said to be infringed and the manner they are alleged to be infringed.
58. Similarly, that in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR* the Court of Appeal emphasised the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. Further that the Court of Appeal held that due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims.
59. Similarly that in the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR* and while reiterating the *Anarita Karimi Njeru* case, the Supreme Court held that although Article 22 (1) of *the Constitution* gives every person the right to initiate any pleadings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his/or her grievance.
60. Arising from the foregoing case law, the 3rd Respondent submitted that constitutional petitions must demonstrate with a reasonable degree of precision the nexus between the impugned acts and the constitutional provisions alleged to have been violated. It was argued that this requires not just a general invocation of constitutional articles but a clear articulation of how these provisions are implicated by the respondent's conduct.
61. According to the Respondent, blanket allegations without specific reference to the conduct of each respondent are insufficient to sustain a constitutional petition. Similarly, that in the instant case, the Petition fails to satisfy this well-established constitutional threshold as it is bereft of any specific allegation against the 3rd Respondent. It was argued that the Petitioners have neither identified any constitutional provision allegedly violated by the 3rd Respondent nor demonstrated how the 3rd Respondent's actions or omissions have contributed to the alleged constitutional infringements.
62. It was argued that a careful examination of the Petition reveals that the Petitioners have merely included the 3rd Respondent as a party without articulating any discrete constitutional violations attributable to it and therefore, this approach runs counter to the precision requirement where Courts have repeatedly held that each respondent is entitled to know with specificity what constitutional infractions they are alleged to have committed.



63. It was argued that the Petitioner's failure to delineate with precision which aspects of the 3rd Respondent's conduct allegedly violated specific constitutional provisions renders it impossible for the 3rd Respondent to mount an effective defence, thereby violating its right to fair administrative action under Article 47 of *the Constitution* and the right to fair hearing under Article 50 of *the Constitution*.
64. The 3rd Respondent submitted that this fatal deficiency renders the Petition fundamentally defective and incapable of sustaining any cause of action against it. The Respondent urged this Court to find that *the Constitution* is not a tool for blanket allegations but a shield that requires precision when invoked for protection. Therefore, that in accordance with the authoritative pronouncements in Anarita Karimi Njeru cases and subsequent judicial decisions, this Court should find that the Petition falls short of the constitutional threshold of precision required to maintain proceedings against the 3rd Respondent, and consequently, dismiss the Petition with costs to the 3rd Respondent as it constitutes an abuse of the court process and undermines the integrity of constitutional adjudication.

4th Respondent's Submissions

65. On allegation The Respondent herein submitted on five issues, that is; whether Sections 8(3) and 8(6) of the NGCA unconstitutionally expand the National Executive, whether Section 8(5) of NGCA reintroduces the pleasure principle as was pre 2010 Constitution contrary to Articles 10 and 47, whether Section 8(8) violates constitutional principles of good governance and public participation, whether the establishment of the office of Chief Administrative Secretary under Section 12 A is unconstitutional and whether the Petition discloses a basis for judicial intervention.
66. On allegation that Sections 8(3) and 8(6) of the NGCA unconstitutionally expand the National Executive, hence unconstitutional, the 4th Respondent argued that Articles 130 (1),131 and 132 of *the Constitution* clearly outline the composition and authority of the National Executive. Further that Section 8(6) of the NGCA does not purport to alter this structure but defines the administrative support roles within the Presidency.
67. It was explained that the Head of Public Service is an office within the public service, not a member of the Cabinet and that it supports the President. He argued that this is constitutionally permitted under Article 132 (4)(a), which allows the President to establish offices within the public service in consultation with the Public Service Commission.
68. The 4th Respondent submitted that the Petitioners confuse the National Executive and the National Government, which, though related, are distinct. He elaborated that while Article 130(1) of *the Constitution* defines the National Executive to comprise the President, the Deputy President, and the rest of the Cabinet, which includes the Attorney-General and Cabinet Secretaries. The National Executive, on the other hand, refers specifically to the highest level of leadership within the executive arm of the National Government, tasked with implementing national policy and providing direction in governance.
69. It was submitted that Article 6 (2) of *the Constitution* introduces a two-level structure of government: the national government and the 47 county governments and that the national government encompasses more than just the National Executive as it includes other national organs such as Parliament, the Judiciary, and national administrative structures that operate across the country in coordination with county governments.
70. Further, it was submitted that Article 132 enumerates the specific functions of the President as the Head of State and Government; sets out the President's role within the National Executive, including appointing cabinet members, chairing cabinet meetings and ensuring that international obligations



are fulfilled. He added that these executive functions should not to be confused with the broader governmental functions performed by other national institutions and offices under the umbrella of the national government.

71. It was argued that by failing to differentiate these entities, the Petitioners incorrectly attribute actions and responsibilities of national government officers and institutions to the National Executive. That this error leads to the mischaracterisation of the role and mandate of institutions such as the National Government Administration Officers (NGAOs), who are appointed under the National Government Coordination Act to coordinate government functions at the grassroots level. That these officers, while part of the national government apparatus, are not members of the National Executive.
72. Accordingly, the 4th Respondent urged this Court to adopt the correct constitutional interpretation that maintains the distinction between the National Executive and the broader National Government, as intended by the framers of *the Constitution* of Kenya, 2010.
73. It was reiterated that the head of Public Service is not a member of the National Executive, neither is he the secretary to the Cabinet. He argued that the functions of the Secretary to the Cabinet provided under Article 154 of *the Constitution* and those of the Head of Public under Section 8(6) of the National Government Coordination Act are distinct.
74. The 4th Respondent elaborated that whereas the Secretary to the Cabinet, as established under Article 154, is responsible for the internal workings of the Cabinet, that is arranging Cabinet business, keeping records, and conveying decisions, this role is centred on facilitating Cabinet processes and ensuring that executive decisions are properly documented and communicated.
75. In contrast, that the Head of Public Service, created under Section 8(6) of the National Government Coordination Act, oversees the broader national civil service, providing policy coordination, supervising senior public officials and ensuring implementation of government programs. This office is operational and performance-driven, aimed at enhancing the efficiency and accountability of the public service. That though in practice these roles may be held by the same person, their legal mandates remain distinct. Therefore, conflating them ignores *the Constitution*'s design for specialization and institutional clarity, and risks misinterpreting the functional limits of each office. On that note, the 4th Respondent invited this Court to affirm this important distinction.
76. On the allegation of reintroduction of pleasure doctrine under Section 8(5), it was submitted that the phrase serve at the pleasure of the President must be interpreted purposively, within the broader constitutional framework established by Articles 10, 47, and 232 of *the Constitution*. He argued that while the expression may suggest unfettered discretion based on the pleasure of the president, such language cannot be interpreted literally or in isolation.
77. It is the 4th Respondent's position that Kenya's constitutional architecture is firmly rooted in the principles of good governance, rule of law and respect for human rights and that Article 10 mandates that all public officers, including the President, are bound by national values and principles of governance such as transparency, accountability, and participation of the people.
78. Moreover, that Article 47 guarantees every person the right to fair administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. Similarly, Article 232(1)(e) emphasises accountability for administrative acts, while Article 232(1)(g) requires that decisions affecting public officers be made under merit, fair competition, and integrity. Accordingly, presidential discretion is not unfettered, rather that it must operate within these constitutional boundaries.
79. The 4th Respondent submitted that indeed, Section 3(a) of National Government Coordination Act provides that the first objective of the Act is to facilitate the exercise of executive authority pursuant to



Articles 131(1)(b) and 132(3)(b) and (c) of *the Constitution*. Therefore, it will be improper to interpret any provision of the Act without breathing in Articles 131 and 132 of *the Constitution*.

80. Further, that Section 4 of the National Government Coordination Act provides that in fulfilling its mandate, the National government shall act in accordance with the national values and principles of *the Constitution* in particular, those set out in Articles 10, 189, 201(d) and 232.
81. The 4th Respondent therefore submitted that isolating the phrase at the pleasure of the president without the overarching principles and values set out in Sections 3 and 4 of the National Government Coordination Act and concluding that it excludes the principles and values of *the Constitution* would be improper.
82. Further, it submitted that in legislative drafting, it is a common practice to articulate overarching principles and values in the initial sections of a statute. This approach serves to provide clear guidance for the interpretation and application of the statute, ensuring consistency and avoiding unnecessary repetition throughout the legislative text. To support this position, reliance was placed in the House of Lords decision in *Attorney-General v Prince Ernest Augustus of Hanover* 245 [1957] AC 436; [1957] 1 All ER 49 where Lord Viscount Simonds stated:
- “No one should profess to understand any part of a statute ... before he had read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous.”
83. Similarly, that, Lord Normand in that cases put it as follows:-
- “In order to discover the intention of Parliament it is proper that the court should read the whole Act, inform itself of the legal context of the Act ... and of the factual context, such as the mischief to be remedied ... It is the merest commonplace to say that words abstracted from context may be meaningless or misleading. ... No part of a statute can be regarded as independent of the rest.”
84. Further reliance was placed on the Supreme Court of Kenya decision in *Stanbic Bank Kenya Limited v Santowels Limited* (Petition E005 of 2023) [2024] KESC 31 to argue that the apex Court affirmed this position when it held that;-
- “Consequently, words and particularly general words, should not be read in isolation. Rather, their colour and content should be discerned from their context. As such, we find that the following sentiments of Viscount Simonds in *A-G v. HRH Prince Ernest Augustus of Hanover* [1957] 1 All ER 49 at 53, HL still remain true: “English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back into the sentence with the meaning which you have assigned to them as separate words ...”
85. Based on the foregoing, the 4th Respondent urged this Court not to simplistically lift the phrase at the pleasure of the president and give it a dictionary meaning without reading the whole Act, especially the preamble and Sections 3 and 4, which give overarching principles and values.
86. He added that when read purposively and holistically, bearing in mind the preamble and Sections 3 and 4 of the Act, Section 8(5) must be understood to mean that while the President retains discretion in



- such appointments, that discretion must conform to the constitutional standards of fair administrative action and be exercised in a manner that promotes efficiency, fairness, and respect for human dignity.
87. Regarding Section 8(8) of the National Government Coordination Act, the 4th Respondent submitted that as transitional clause, the section simply affirms continuity in office, an established legislative mechanism designed to ensure stability and orderly transition when statutory provisions are amended or clarified. It was explained that this provision reflects a standard drafting technique used in legislation to protect ongoing administrative arrangements from legal uncertainty or disruption due to statutory amendments. That it does not confer new powers or validate unlawful appointments, but rather preserves the status quo of legally constituted office-holders in order to promote administrative continuity and avoid a governance vacuum.
88. It was argued that this approach is consistent with legislative best practices and is aimed at ensuring that the operations of government continue seamlessly while respecting the overarching legal framework. It was elaborated that Section 8(8) merely acknowledges this existing lawful appointment and does not purport to make or validate a fresh one. That neither does it alter this constitutional process nor substitutes it, rather that it simply recognises the continuity of the office-holder within the framework of statutory amendments. Further, that it does not expand the President's powers, nor does it oust the jurisdiction of the PSC. Rather, it reflects a legislative acknowledgment of a properly constituted appointment.
89. The 4th Respondent submitted that Article 10(2) outlines key national values that must inform all actions by public officials and institutions. However, the Petitioners have not provided concrete evidence or cogent argument showing that Section 8(8), as drafted or applied, offends any of these principles.
90. On the contrary, that the provision serves a practical administrative purpose ensuring continuity and legal clarity during statutory transitions without undermining transparency or accountability. Moreover, that there is nothing in the text or effect of Section 8(8) that suggests arbitrary conduct, usurpation of constitutional power, or infringement of public participation.
91. On whether the establishment of the office of Chief Administrative Secretary under Section 12 A is unconstitutional and whether the Petition disclosed basis for judicial intervention, it is the 4th Respondent's position that Kenya's constitutional architecture is firmly rooted in the principles of good governance, rule of law and respect for human rights. Article 10 mandates that all public officers, including the President, are bound by national values and principles of governance such as transparency, accountability, and participation of the people. Moreover, Article 47 guarantees every person the right to fair administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. Similarly, Article 232(1)(e) emphasizes accountability for administrative acts, while Article 232(1)(g) requires that decisions affecting public officers be made under merit, fair competition, and integrity. Accordingly, presidential discretion is not unfettered, rather that it must operate within these constitutional boundaries.
92. Regarding the legality and constitutionality of the Chief Administrative Secretary (CAS), it was submitted that this issue has already been conclusively adjudicated by the High Court in *Matindi & Others v National Assembly & Others* [2023] KEHC 19534 (KLR) and earlier in *Okoti v Public Service Commission & Others* [2021] KEHC 464 (KLR). That in *Matindi &* another case, the Court addressed extensive constitutional challenges surrounding the establishment, recruitment, and functions of the CAS office. After detailed analysis, the Court rendered a comprehensive judgment that clarified the legal framework and procedural requirements for creating such a position. This followed the precedent in *Okoti* case, where the High Court had similarly addressed the scope of the



- Public Service Commission's role in vetting new public offices and underscored the need for public participation and adherence to constitutional standards.
93. It was argued that these decisions collectively form a well-reasoned judicial foundation that settles the legal position on the CAS office, including how it should be created, filled, and limited within the constitutional and statutory framework. As such, the matters raised by the Petitioners in relation to the CAS position are both *res judicata* and *sub judice*, as several appeals are pending before the Court of Appeal in Civil Application Nos. E314, E300, E309 of 2023 and E296 of 2022.
 94. The 4th Respondent submitted that the principle of *res judicata*, under Section 7 of the *Civil Procedure Act*, bars the re-litigation of issues that have been directly and substantially in issue in a previous suit between the same or related parties, and that have been conclusively determined by a competent court. However, that the Petitioners now attempt to reopen an issue that has already been thoroughly adjudicated and is actively under appellate review.
 95. Furthermore, that by operation of the *sub judice* rule, this Court ought to refrain from entertaining any matter that is directly in issue in a case pending before a court of competent jurisdiction. Accordingly, that the appeals pending before the Court of Appeal relate directly to the constitutional validity and implementation of the CAS position. Thus, to entertain the same issues here would risk contradictory judgments, judicial confusion and erosion of the appellate process.
 96. In light of the foregoing, the 4th Respondent urge this Court to decline delving into the question of the CAS position, and instead await the outcome and directions of the Court of Appeal.
 97. Further, it was argued that argued in any event, the National Assembly acted within the parameters of the High Court's ruling in *Matindi* by legislatively establishing the CAS position through the National Government Administration Laws (Amendment) Act, 2024. He stated that the 2023 High Court judgment expressly indicated that for the CAS position to pass constitutional muster, it must be anchored in legislation following public participation and in compliance with the requirements of the Public Service Commission. Consequently, that the National Assembly heeded this directive by passing the National Government Administration Laws (Amendment) Act, 2024, thereby giving the CAS position a proper statutory foundation.
 98. It was submitted that this legislative response is not only in line with the judiciary's guidance, but also reflects the constitutional principle of dialogue between the branches of government where Parliament responds to judicial pronouncements through lawful legislative action. Therefore, that the Petitioners' attempt to challenge this constitutionally compliant response by Parliament is unfounded and misplaced.
 99. On the threshold for declaring a statutory provision unconstitutional, the 4th Respondent argued that the same is set deliberately high; that a court does not lightly strike down legislation enacted by Parliament, a co-equal arm of government especially for mere dissatisfaction with policy choices, political disagreement, or speculative assertions, which do not justify such a drastic remedy, rather that *the Constitution* demands clear and cogent evidence that the impugned provision either violates constitutional text or undermines its values in substance or effect.
 100. Further, it is submitted that under Articles 10 and 259 of *the Constitution*, this Court is enjoined to interpret legislation in a manner that advances constitutional values, promotes the objects of governance and respects institutional boundaries. That indeed, Article 259(1) specifically directs that *the Constitution* be interpreted in a manner that gives effect to its purposes, values, and principles, while Article 10(1) binds all State organs, including the judiciary, to uphold national values and principles of governance in the discharge of their functions. Courts must therefore be cautious not to supplant



legislative intent with judicial preferences, lest they usurp the sovereign will of the people as expressed through Parliament.

101. The 4th Respondent submitted that the Petitioners have not demonstrated that the provisions they challenge are unconstitutional, either in their text, purpose, or effect. There is no inconsistency with the express language or spirit of *the Constitution*. In the absence of a clear and proven violation, this Court must uphold the presumption of constitutionality that attaches to duly enacted legislation. Accordingly, the Petition must fail.

1st Interested party's Submissions

102. On whether the Supporting Affidavit is incompetent, he submitted that the Supporting Affidavit filed by the Petitioners, sworn on 20th May, 2024, is incompetent since the Petition itself is dated 28th May, 2024, more than a week after the Affidavit was sworn. Therefore, that the Petition did not exist at the time the Petitioners were swearing the supporting Affidavit. In support of the argument for incompetence, the Interested Party cited *Phillis Wamaitha Wahinya & 2 others v Simeon Njogu Wahinya* [1976] KEHC 24 (KLR), where the High Court (Chesoni J)(as he then was) cited with approval Halsbury's Laws of England (3rd Edn) page 393, paragraph 632, which states that;-

“an affidavit sworn before action is valueless, even though filed after issue of the writ”.

103. It was argued that the Court in *Phillis Wamaitha Wahinya*(Supra) held that the law contemplates the commencement of a suit first before an affidavit can be sworn, concluding that an affidavit which is sworn before action is valueless and cannot be acted on even if it is filed after issue of the summons. It was emphasized that, in that case, the applicants' affidavit was valueless as it was sworn before the action.

104. Further reliance was placed on *Jayndrakumar Devechand Devani v Haridas Vallabhadas Bhadresha and Another* (Civil Appeal No. 21 of 1971) [1971] EACA 11 (10 November 1971), where the Court of Appeal for Eastern Africa (Mustafa JA) held that;-

“the appellant's affidavit, which was sworn three days before the suit was filed and the chamber summons issued on 26th October 1970, was probably inadmissible having been sworn before the institution of proceedings”.

105. Consequently, it was submitted that the Supporting Affidavit is incompetent and ought to be struck out as it cannot precede the document it is designed to support. Even if not struck out, it was argued to be valueless and not actionable, as held in the aforementioned cases.

106. On what parameters for determining whether Statutes enacted by Parliament are unconstitutional in Kenya, the 1st Interested Party submitted that Superior Courts have established principles to guide the Court in determining the constitutionality of statutes. The first one being the presumption that statutes are constitutional after enactment as stated by the Court in *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR, where Mumbi Ngugi J (as she then was) at paragraph 70 cited with approval *Ndyanabo v Attorney General of Tanzania* [2001] EA 497, which affirmed the presumption of constitutionality for every Act of Parliament.

107. It was further submitted that the burden of proving otherwise rests upon the Petitioners in this case and that burden is discharged when the Petition clearly identifies the contravened constitutional provisions and the offending statutory provision as was emphasised in *Aids Law Project v Attorney General & 3 Others* [2015] eKLR .



108. The Interested Party also referenced *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR, where Mumbi Nguji J (As she then was), cited with approval *U.S v Butler*, 297 U.S 1 [1936], stating that when an Act of Congress is challenged, the judicial branch's duty is to lay the article of *the Constitution* which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.
109. It was further contended that, besides comparing the statute with the constitutional provision, the Court is also guided by the objects and purpose of the statute itself. This was supported by paragraph 66 of *Andare case* (supra) and the decision in *Muranga Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others*[2011] eKLR, where it was held that:-
- “in order to determine the constitutionality of a statute, it had to consider the purpose and effect of the impugned statute or section thereof”. If either the purpose or the effect infringed a constitutional right, the statute would be declared unconstitutional. The principle of harmonization, requiring all constitutional provisions concerning an issue to be considered together.”
110. Further reliance was placed in the case of *Law Society of Kenya v Attorney General & 3 others* [2016] eKLR, where the Court cited with approval the Canadian case of *The Queen V. Big M. Drug Mart Limited*, which stated that:-
- “both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation”.
111. The Interested Party then pointed to the Supreme Court's recent review of these positions in *Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others; Bhatia (Amicus Curiae) (Petition E031, E032 & E033 of 2024 (Consolidated))* [2024] KESC 63 (KLR) where the Apex Court opined that, as Kenya is a democracy where the people exercise sovereign power directly or indirectly through representatives, any enacted legislation is deemed responsive to the people's needs. Therefore, legislation is presumed constitutional unless proven otherwise.
112. On whether the establishment of the Office of Head of Public Service vide Sections 8(3), 8(5), 8(6) and 8(8) of the National Government Coordination Act (NGCA) is unconstitutional, null and void, it was submitted that the Petitioners' assailed the establishment of the Office of the Head of Public Service (HOPS) on three grounds: the constitutionality and functions of the office (Section 8(3) & (6) of the Act), the tenure of the office (serving at the pleasure of the President) (Section 8(5) of the Act) and the transition of the Head of Public Service by the 1st Interested Party (Section 8(8) of the Act).
113. On the constitutionality of the Office of the Head of Public Service, the Interested Party submitted that the Office of the Head of Public Service is not a new office in Kenya, having existed since independence. It was explained that under *the Constitution* of Kenya, 2010, there are two cadres of offices: State Offices and Public Offices. Article 260 defines a State Office to include the President, Deputy President, Cabinet Secretary, Secretary to the Cabinet, Principal Secretary, or an office established and designated as a State Office by national legislation. A public office, conversely, is an office in national or county government or public service where remuneration is paid from the Consolidated Fund or Parliament-provided monies. Public service means the collectively of individuals, other than State Officers, performing a function within a State Organ.
114. It was acknowledged that the Offices of the President, Deputy President, Cabinet Secretary, and Secretary to the Cabinet are State Offices expressly established under Articles 130(1) and 154(1) of *the*



- Constitution. Hence, it was submitted that Article 130(1) defines the National Executive to include the President, Deputy President, and the Cabinet.
115. Further that, the National Government Administration Laws (Amendment) Act 2024 was enacted to amend statute law on national government administration and for connected purposes and that the main objective of the National Government Coordination Act (NGCA), under Section 3, is to facilitate the exercise of Executive Authority pursuant to Articles 131(1)(b) and 132(3)(b) and (c) of the Constitution, provide for effective coordination and administration of national government functions, and establish an administrative and institutional framework.
 116. It was submitted that Article 131(1)(b) vests executive authority in the President, with assistance from the Deputy President and Cabinet Secretaries, and Article 132(3)(b) mandates the President to direct and coordinate ministries and government departments.
 117. Further, it was submitted that Parliament's establishment of offices under the National Government Coordination Act should be viewed as facilitative of the President's exercise of Executive Authority to effectively coordinate and administer national government functions. That Section 7(2) of the Act permits the President to use a framework including the Office of the President, the Cabinet, the Head of the Public Service, the Cabinet office, Chief Administrative Secretary, and coordination committees to coordinate national government functions. These offices, it was argued, all facilitate the President in discharging constitutional obligations.
 118. The Interested Party therefore submitted that the Office of Head of Public Service should be viewed in this light:- Section 8(3) of the Act establishes it as an Office in the Executive Office of the President, expressly referred to under Section 8(2), and specifically stated as an Office in the Public Service. Crucially, it was argued that this is not an Office in the National Executive as set out in Article 130(1) of the Constitution, as claimed by the Petitioners. Thus, there is no expansion of the National Executive as alleged.
 119. Secondly, it was submitted that the functions of the Office of the Head of Public Service are distinct from those constitutional functions vested in the Deputy President under Article 147, Cabinet Secretary under Article 153 and Secretary to the Cabinet under Article 154(3).
 120. That whereas the Deputy President is the Principal Assistant to the President and deputises the President, exercising assigned functions while a Cabinet Secretary is accountable to the President for their powers and functions and Section 9(3) of the National Government Coordination Act designates them responsible for policy formulation and implementation in their respective Ministries. The functions of the Secretary to the Cabinet under Article 154(3) of the Constitution and Section 11 of the NGCA include being in charge of the Cabinet Office, arranging business, keeping minutes, conveying decisions, and performing other Cabinet-directed functions.
 121. Conversely, that the function of the Head of Public Service is set out under Section 8(6) of the Act as supporting the President in facilitating the organisation and execution of government business. The Head of Public Service is the Chief of Staff to the President and the Administrative Head of the Executive Office of the President, performing other functions as assigned by the President. That this responsibility is further reinforced by Executive Order No. 2 of 2023, which lists distinct responsibilities for the HOPS, including being the Administrative Head of the Executive Office of the President, Coordinator and convener of Principal Secretaries Committees, promoter of ethics and good governance, transmitter of Executive Directives, and overseeing state corporations.
 122. It was submitted that nowhere in the impugned Section 8(6) does the Head of Public Service exercise any of the powers and functions vested in the Deputy President, Cabinet Secretary, Secretary to the



Cabinet, or the President. The functions of the office of the Head of Public Service are distinct, separate, and do not usurp any Executive functions. That these distinct responsibilities are further detailed in The Public Service Commission Human Resource Policies and Procedures Manual for the Public Service, 2016 Edition.

123. The Interested Party highlighted that this Court and the Employment and Labour Relations Court have already considered the establishment and function of the Office of the Head of Public Service vis a vis other Constitutional office, specifically that in ELRC Petition No. 24 of 2018, Okiya Omtatah vs Joseph Kinyua & Another [2018]eKLR, Abuodha J considered whether the Head of Public Service office conflicted with the Office of the Chairperson of the Public Service Commission. The ELRC observed at paragraphs 19, 20 and 23 that the office of the President is an institution, and the 1st respondent, in his capacity as Head of Public Service, was responsible for the general efficiency of public service for coordination of the activities of public service and the overall organization of the machinery for the execution of government policies. He argued that the Court in that case was not persuaded that the Head of Public Service usurped the Chairperson of Public Service Commission's power.

124. Further that in ELRC Petition 51 of 2018, Okiya Omtatah =vs= Joseph Kinyua & 2 Others, where the establishment of the Head of Public Service office was challenged, Ongaya J held that; -

“the office of the Head of Public Service is duly established in accordance with Article 132 (4) (a) of *the Constitution* and the holder of that office...is charged with the responsibility of aiding the President in undertaking the constitutional and statutory function of directing and coordinating the functions of ministries and government departments per Article 132 (3) (b) and Sections 7 and 8 of the *National Government Co-ordination Act*, 2013.”

125. He added that the Court also found the matter was res judicata in view of the judgment in Okiya Omtatah -Vs- Joseph Kinyua and the Public Service Commission Petition 24 of 2018 at Nairobi and further, that the Court clarified that the responsibilities of the Head of Public Service office flow from the President's functions under Article 132(3)(b).

126. The Interested party submitted that constitutionality of the office of the Head of Public service was further put to scrutiny in ELRC Petition No 42 & 27 of 2014, Okiya Omtatah Okoiti & 3 Others vs Anne Waiguru, CS Devolution & Planning & 6 Others, where a Three Judge bench, Mbaru, Abuodha & Ndolo JJ, held that;-

“the President may perform any other executive function and establish an office in the public service in accordance with the recommendations of the PSC.”

127. It was submitted that in the above case, the Court found that the Head of Public Service was properly appointed in accordance with the powers bestowed upon the Presidency under article 132(4) of *the Constitution*, read together with the functions outlined under the National Government Coordination Act read together with the functions of the PSC and its advisory opinion on various offices including that of the State House Chief of Staff and Head of Public Service. The Court then declared his appointment constitutional and lawful.

128. Further that in Petition No. 33 & 42 of 2018, Okoiti & Another vs Public Service Commission & 73 Others [2021] KEHC 464 (KLR), Mrima J)held that;-

“*the Constitution* and the PSC Act permits the President to establish any office in the public service upon the recommendation by PSC...there exists the position of the Head of Public



Service in the public service, created by the President upon PSC recommendation, and from its title, it must be the senior most position. The Court also noted that the constitutionality of the HOPS position was contested in Nairobi Employment and Labour Relations Court Petition No 24 of 2018 Okiya Omtatah v Joseph Kinyua & another (2018) eKLR, where the Court found the position created within constitutional and statutory parameters and dismissed the petition.”

129. From the foregoing decisions, it was submitted that both the ELRC and this Court have fully addressed issues regarding the constitutionality in the establishment of the Office of the Head of Public Service, its functions, and its relevance in supporting the President in directing and coordinating national government functions. The Courts have also pronounced themselves on the relationship of the Office of the Chief of Staff and Head of Public Service vis a vis the Office of the Chairperson of the Public Service Commission, His Excellency the Deputy President, and the rest of the Cabinet. Accordingly, that the same issues cannot be the subject of re-litigation before this Honourable Court.
130. On whether the tenure of the Office of Head of Public Service under Section 8(5) of the Act is constitutional. The Interested Party submitted that the pleasure doctrine, also known as servants of the pleasure doctrine, derives from the Latin maxim *durante rege placito*, meaning during the pleasure of the King. He argued that this doctrine allows the President to dismiss civil servants at any time without cause. He however argued that this doctrine has undergone modifications over time, especially in Kenya. In support of this position, reliance was placed on the case of *Richard Bwogo Birir v Nairobi County Government & 2 others* [2014] eKLR, where the Employment and Labour Relations Court (ELRC) noted that the doctrine of pleasure under a measureless tenure had been exhausted in Kenya. The ELRC stated that while a holder of an office under pleasure could be removed at any time without notice, without assigning reasons, and without a hearing, this doctrine was undergoing a series of modifications.
131. Similarly, that the Court of Appeal in *County Government of Nyeri & another v Ndung'u* (2015) KECA 101 (KLR), examined the pleasure doctrine, stating that it applies to the dismissal of a Member of the County Executive Committee under Section 31(a) of the *County Governments Act*. The Court of Appeal emphasized that the power to dismiss should be exercised only where there is a valid reason, and that the person dismissed should be given a chance to be heard.
132. The Interested Party further cited *County Government of Garissa & another v Idriss Aden Mukhtar & 2 others* [2020] KECA 546 (KLR), where the Court of Appeal confirmed that the discretion to dismiss a CEC under Section 31(a) of the *County Governments Act* must be valid and compelling.
133. Equally, that the Head of Public Service, although serving at the President's pleasure, is part of the public service, and therefore benefits from the protections afforded to all public servants regarding due process and fair administrative action.
134. The Interested Party submitted that Section 8(5) of the National Government Coordination Act is constitutional, as it provides that the Head of Public Service serves under the President within the Executive Office of the President. It was further submitted that this provision aligns with the provisions of Article 132(4)(a) of *the Constitution* on the appointment and dismissal of public officers and is not unconstitutional as alleged by the Petitioners.
135. On whether the transition of the 1st Interested Party as the Head of Public Service under Section 8(8) of the Act is unlawful, he submitted that Section is not discriminatory against other qualified persons. It was argued that the Section recognises the existence of the Office of the Head of Public Service established way back in 2013. He relied on previous judicial decisions including ELRC Petition 51 of



- 2018, Okiya Omtatah vs Joseph Kinyua & 2 Others and ELRC Petition No 42 & 27 of 2014, Okiya Omtatah Okoiti & 3 Others vs Anne Waiguru, CS Devolution & Planning & 6 Others, which affirmed the constitutionality of the Head of Public Service office under Article 132(4)(a) of *the Constitution*.
136. He therefore submitted that he was appointed way back in October 2022, when the mandate to appoint the Head of Public Service reposed solely in the President upon the creation of the Office of the Head of Public Service and therefore, his appointment in October 2022 predates the present challenge to its constitutionality or legality.
137. In support, he cited the case of Okiya Omtatah Okoiti & 3 others v Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 5 others (Petition 42 & 27 of 2014 (Consolidated)) [2021] KEELRC 2306 (KLR) that held that the then-Chief of Staff and Head of Public Service, appointed by the then-President, was lawfully appointed under Article 132(4) of *the Constitution*. Therefore, the 1st Interested Party's appointment as Head of Public Service was lawful, constitutional, and did not violate *the Constitution*.
138. It was also submitted that the purpose of transitional provisions in the Constitutions and statutes is to ensure a smooth transition between existing and new law that transitional clause prevents legal or practical problems that might otherwise disappear or arise when a law is repealed. It was submitted that Section 23(3)(c) of the *Interpretation and General Provisions Act* preserves any existing right, privilege, obligation, or liability acquired before the commencement of new law. It was therefore argued that Section 8(8) of the National Government Coordination Act did not affect the appointment of the 1st Interested Party as Chief of Staff and Head of Public Service since October 2022. To buttress this argument, he referenced the Supreme Court decision in Constitution Assemblies Forum v Attorney General & 3 others; Parliamentary Service Commission (Interested Party) (Petition 22 of 2017) [2022] KESC 66 (KLR), which held that transitional and consequential provisions in *the Constitution* are supposed to bridge between two constitutional dispensations.
139. On constitutionality of Sections 12A(1), 12A(2), 12A(4) and 12A(8) of National Government Coordination Act, he referred to various decisions of the High Court and ELRC on the establishment of the Office of the CAS under Article 132(4)(a) of *the Constitution* and argued that in Okoiti & 3 Others v The National Assembly (E300 & E309 of 2023 & E296 of 2022, [2023] KEHC 20234 (KLR)) and Malindi Civil Application & 5 Others (E300 of 2023) [2023] KEHC 1934 (KLR), the issue of concern related to budgetary allocation and cost, not the CAS office's unconstitutionality.
140. He submitted that in ELRC Petition No. E174 of 2022, Law Society of Kenya vs Public Service Commission & Others (unreported), the ELRC found the legal parameters for the establishment of the CAS office were met. In High Court Petition No. E080, E084 & E130 of 2023 (Consolidated), Matindi & 3 Others v The National Assembly (E314 & E309 of 2023) KEHC 19534 (KLR); the High Court (Kimondo, Ong'adi & Visram JJ) considered decisions of the High Court and the ELRC and found that the CAS office is lawfully established and designated as a State Office by national legislation.
141. It was submitted that a CAS holds a constitutional office and that the position is a public service office and not one in the national executive. That the process of nomination and appointment of the CAS was explained, stating that the President has the power to appoint CASs based on recommendations from the Public Service Commission (PSC) and that Article 132(4)(a) provides that the President may establish any public office with the PSC's recommendation.
142. He stated that the establishment of the CAS office facilitates the organization and execution of government business by supporting the President, Deputy President, and Cabinet Secretaries. That the CAS's role is to assist the Cabinet Secretary in ministries, unlike Principal Secretaries who direct and coordinate. He stated that CASs are State Officers who are part of the National Executive.



143. He further submitted that the President has the power to establish the office of the Chief Administrative Secretary, and that this power is not limited by *the Constitution*, arguing that the role of the CAS is crucial in policy formulation and implementation, and it is distinct from that of the Principal Secretary. He argued that the number of CASs is determined by the President, and their qualifications are determined by the President with the PSC's recommendation.
144. On budgetary implications for the CAS office, he acknowledging that the Court in *Matindi v The National Assembly*(Supra) found that the serious omission regarding the financial matters of the CAS office was unconstitutional. However, it was argued that the Petitioners' claims regarding the unconstitutionality of the CAS office are similar to those already raised in the *Matindi* case.
145. He raised the doctrine of mootness and cited the case of *Thomas Korompo & 2 others v James Omariba Nyaoga & 5 others; Kenya National Highways Authority (Interested Party)* [2021] KELRC 2 (KLR), where the ELRC took the view that a matter is moot if it concerns matters already decided by another competent court.
146. Further reliance was placed on the case of *Dande & 3 others v Inspector General, National Police Service & 5 others* (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR), where the Supreme Court opined that the doctrine of mootness requires that controversy must exist throughout judicial proceedings, which means that a court will not have the effect of resolving a live controversy affecting or potentially affecting the rights of parties. The Supreme Court further held that a matter is moot if the Court cannot grant effective relief.
147. It was submitted that previous challenges to the Head of Public Service and Chief Administrative Secretary offices have already been heard and determined by competent courts. The Interested Party argued that these issues cannot be re-litigated.
148. On what Orders should issue, he submitted that the Petitioners have not established a proper basis for the declaration of Sections 8A and 12A of the National Government Coordination Act as unconstitutional and therefore, the Petition should be dismissed with cost as in the case of *Jasbir Singh Rai & 3 Others Vs Tarlochan Singh Rai & 4 Others* [2014] eKLR.

Highlighting of submissions

149. Dr. Magare stated that dating his Supporting Affidavit eight days before the Petition was a typing error. He therefore, urged the Court to apply Article 159 of *the Constitution* to focus on the substance of the case rather than the procedural error.
150. On the core legal arguments, the 1st Petitioner challenged the creation of the offices and the non-merit-based nature of the appointments. Dr. Magare directly countered the argument that the appointment of the 1st Interested Party in 2022 was not challenged, stating that this has no basis in law. He further argued that the four cases cited by the opposition to support their position do not apply, and that the issues raised in this petition have not been previously litigated.
151. He further submitted *Anarita* case often cited for its threshold test, is merely an orbiter, and that the court should instead follow the jurisprudence of the *Mumo Matemo* case. While referencing Article 260 of *the Constitution*, he maintained that the creation of the designated Chief Administrative Secretaries (CAs) was unconstitutional. Ultimately, he prayed for the petition to be allowed, asserting that the court has the power under Article 165 to declare any office unconstitutional.
152. On his part, Mr. Murakaru Wahome Advocate for the 3rd Respondent, argued that the petition should be dismissed against the SRC because it failed to meet the threshold of the *Anarita* case, had no cause



of action against the commission, and did not articulate which specific constitutional provisions the SRC had violated. He cited the Supreme Court case on communication commissions(supra) and the Court of Appeal decision in the Mumo Matemo case to support his position.

153. On his part, Mr. Sore for the 4th Respondent emphasised the distinction between the National Executive and the National Government. He argued that the issue of the competitiveness of the recruitment of the current office holder falls under the exclusive jurisdiction of the Employment & Labour Relations Court. Furthermore, he noted that the issue of the Chief Administrative Secretaries (CAs) is pending a decision before the Court of Appeal and urged the court to leave the matter for that court to decide.
154. On his part, Mr. Ouma, for the 1st Interested Party, questioned the competence of the supporting affidavit, arguing that since it was sworn on 20th May, 2024, while the petition itself was dated 28th May, 2024, the affidavit was valueless and could not be relied upon. He claimed this left the petition bare and unsupported.
155. On the substance of the Petition, he argued that the constitutionality of the office of the Head of Public Service has already been determined by previous rulings from the High Court and the Employment & Labour Relations Court in several consolidated petitions, in which Hon. Omtata was a party.
156. Mr. Ouma also pointed out that the National Assembly did not designate the office of Head of Public Service as a State office under Article 260 of *the Constitution*, and therefore, the petitioners could not ascribe malice to the National Assembly for this. He concluded by asserting that the power to dismiss a presidential appointee is exclusive to the President and noted that his client's appointment in October 2022 was never challenged.

Analysis and Determination

157. This court has considered the Petition, the responses and the submissions made by the parties. The issues, for determination are as follows;
 1. Whether the petition is rendered fatally defective if the affidavit filed in support thereof bears a date prior to the date of the petition itself.
 2. Whether Sections 8(3), 8(5), 8(6)(a), 8(8), 12A(1), 12A(2), 12A(4), and 12A(8) of the National Government Coordination Act are constitutional, null, and void.
 3. Who bears the costs of the petition.
158. On the issue of the Supporting Affidavit predating the Petition, this Court has considered the case law cited and further notes that under Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly referred to as the Mutunga Rules) provide at Paragraph 11 that; -The petition filed under these rules may be supported by an affidavit.(2)If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.”
 1. Further, Order 19 Rule 8 of the Civil Procedure Rules provide that; -“Unless otherwise directed by the court an affidavit shall not be rejected solely because it was sworn before the filing of the suit concerned.
 2. The Respondents have not alleged that the deponents lacked personal knowledge of the facts contained within the affidavit. Furthermore, in the written submissions and the highlighting of the same, Dr. Magare informed this Court that the date indicated therein was a typographical error and urged the Court to regularise the Affidavit under Article 159 of *the Constitution*.



3. This Court is satisfied that the Supporting Affidavit having been dated earlier than the Petition may not be fatal so as to call for striking out this Petition as sought herein. The Petition will be determined on merit.

Whether Sections 8(3), 8(5), 8(6)(a), 8(8), 12A(1), 12A(2), 12A(4), and 12A(8) of the National Government Coordination Act are constitutional, null, and void.

162. To start with, all constitutional petitions are required to be pleaded with reasonable precision, and a party who alleges violation of rights must clearly state the nature of injury, the rights violated and the manner in which they have been violated. This principle was enunciated in the oft cited case of Anarita Karimi Njeru v Republic [1979] eKLR in which Trevelyan and Hancox, JJs stated:-

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

163. This principle was upheld in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR by the Court of Appeal, which observed as follows:-

“The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today: “The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

164. This Court looked at the specific provisions of the law which the Petitioners allege are unconstitutional. They Section 8 of the *National Government Co-ordination Act* (Cap. 127) provides that; -

- “(1) Pursuant to Article 132(3)(b) of *the Constitution*, the President shall be responsible for the coordination of functions of Ministries, State and government departments.
- (2) For purposes of co-ordination of national government functions under *the Constitution*, this Act or any other written law, the Office of the President shall have such number of National Government Administrative Officers as shall be necessary for the effective and efficient co-ordination of national government functions.
- (3) There is established the office of the Head of Public Service in the Executive Office of the President which shall be an office in the public service.
- (4) The President shall, on the recommendation of the Public Service Commission appoint the Head of the Public Service.



- (5) The Head of the Public Service shall serve at the pleasure of the President.
- (6) The Head of the Public Service shall—
 - (a) support the President in facilitating the organization and execution of Government business;
 - (b) be the Chief of Staff to the President and the administrative head of the Executive Office of the President; and
 - (c) perform such other functions as may be assigned by the President.
- (7) A person shall be qualified for appointment as the Head of the Public Service if he or she—
 - (a) holds a degree from a university recognized in Kenya;
 - (b) has at least ten years' proven experience in public administration, leadership or public affairs; and
 - (c) meets requirements under Chapter Six of *the Constitution*.
- (8) A person who, immediately before the commencement of this section, was appointed and held office as the Head of the Public Service shall continue to hold that office as if appointed under this section.”

165. Further, Article 130 of *the Constitution* which provides for the composition of the National Executive that;-

- “(1) The national executive of the Republic comprises the President, the Deputy President and the rest of the Cabinet.
- (2) The composition of the national executive shall reflect the regional and ethnic diversity of the people of Kenya.”

166. Further Article 154(3) on the other hand provides for the function of the secretary of the cabinet and states that; -

- “The Secretary to the Cabinet shall—
- (a) have charge of the Cabinet office;
 - (b) be responsible, subject to the directions of the Cabinet, for arranging the business, and keeping the minutes, of the Cabinet;
 - (c) convey the decisions of the Cabinet to the appropriate persons or authorities; and
 - (d) have other functions as directed by the Cabinet.”

167. The Petitioners contention is that Section 8(3) unlawfully establishes an executive office within the Executive Office of the President, a structure not contemplated by Article 130 of *the Constitution*. They contend that this office effectively usurps or duplicates functions constitutionally assigned to



- other offices, particularly the Secretary to the Cabinet under Article 154(3)(d), leading to an unlawful expansion of the executive.
168. Furthermore, they assert that by stating that the Head of Public Service serves at the pleasure of the President, Section 8(5) revives a colonial doctrine that infringes upon the right to fair administrative action provided for under Article 47, the right to a fair hearing in Article 50(1) and general protections for public officers under Article 236 of *the Constitution*.
 169. They also challenge Section 8(8) for purportedly regularising the appointment of Mr. Felix Koskei without competitive and merit-based recruitment, thus violating Article 232(1)(g) and Section 46(1) of the *Public Service Commission Act*, and undermining principles of good governance, transparency, and equality.
 170. The Respondents contend that the creation and operational framework of the Head of Public Service office are constitutionally sound. They assert that the office serves a necessary administrative and coordinative role within the Executive, complementing existing structures without usurping their mandates. They argue that at pleasure doctrine, when applied to such a high-level political appointee, does not necessarily violate fair administrative action principles, provided that the appointment and removal processes meet fundamental due process requirements. They also defend the appointment process of the current office holder as compliant with the law.
 171. The Interested Party raised the doctrine of res judicata, asserting that previous challenges to the Head of Public Service office have already been litigated and determined by competent courts and therefore that the issue raised in the petition are moot and cannot be re-litigated, thereby seeking to prevent the court from re-examining the constitutionality of this office.
 172. While both the Head of Public Service and the Secretary to the Cabinet occupy vital administrative and coordinative positions within the Kenyan Executive, their distinct functions are delineated by their respective legal frameworks.
 173. The Head of Public Service, as outlined in Section 8(6) of the *National Government Co-ordination Act*, primarily serves as the President's chief administrative aide and the overarching manager of the public service.
 174. This role involves supporting the President in facilitating the organisation and execution of broader Government business, indicating a wide scope of oversight and coordination across various governmental operations.
 175. The Head of Public Service also functions as the Chief of Staff to the President and is the administrative head of the Executive Office of the President, highlighting a direct supportive and managerial role within the President's immediate office. Furthermore, this position is flexible, undertaking any other functions specifically assigned by the President.
 176. In contrast, the Secretary to the Cabinet, defined in Article 154 of *the Constitution* and further referenced in Section 11 of the *National Government Co-ordination Act*, is specifically dedicated to the administration and coordination of Cabinet affairs. Their functions are more precisely focused on the operational aspects of the Cabinet itself. This includes heading the Cabinet Office, managing Cabinet business by arranging its agenda, meticulously keeping the minutes of Cabinet meetings, and effectively conveying the Cabinet's decisions to the relevant individuals or authorities for implementation. The Cabinet may also direct the Secretary to the Cabinet to perform additional specific duties.



177. In essence, the key functional differences lie in their scope and primary focus. The Head of Public Service commands a broader mandate, serving as the administrative head of the entire Executive Office of the President and overseeing the public service generally. Their role is largely about supporting the President directly and managing the machinery of government. Conversely, the Secretary to the Cabinet's role is more specialised and confined to the administrative and procedural facilitation of the Cabinet's collective work, ensuring its smooth operation, record-keeping, and communication of decisions.
178. Having determined that the role of the Head of Public Service and secretary to the cabinet are distinct, the next question is whether the establishment of the office of the Head of Public Service in the Executive Office of the President, expands the Executive and thus unconstitutional. Article 132(3) and (4) of *the Constitution* provides that;-
- “The President shall—
- (a) chair Cabinet meetings;
 - (b) direct and co-ordinate the functions of ministries and government departments; and
 - (c) by a decision published in the Gazette, assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any Act of Parliament.
- (4) The President may—
- (a) perform any other executive function provided for in this Constitution or in national legislation and, except as otherwise provided for in this Constitution, may establish an office in the public service in accordance with the recommendation of the Public Service Commission;
 - (b) receive foreign diplomatic and consular representatives;
 - (c) confer honours in the name of the people and the Republic;
 - (d) subject to Article 58, declare a state of emergency; and
 - (e) with the approval of Parliament, declare war.”
179. *The Constitution* clearly delineates the role of coordinating the functions of ministries and government departments to the President, which functions the president does not perform personally but does so by establishing an office in the public service in accordance with the recommendation of the Public Service Commission and hence appoint persons to assist him in performance of this function.
180. Though specific office of the head of Public Service is not explicitly provided for under *the Constitution*, the President has been given powers in the above cited Article of *the Constitution* to operationalise its office by creating and filling specific offices in the public service. This informed the 4th Respondents following request made by His Excellency the President through the 2nd Respondent to amend the National Government Coordination Act to introduce the Office of the Head of Public Service which is clearly indicated as an office in the Public Service and not a State office, though directed to serve the Executive Office of the President.



181. The creation of this particular office of the Public Service has been a subject of various judicial pronouncements. In the *Okiya Omtatah v Joseph Kinyua & another* [2018] KEELRC 1657 (KLR) Abuodha J. found that the office of the Chief of Staff and Head of Public Service was properly constituted, citing a request from the President and a subsequent recommendation from the Public Service Commission (PSC) in line with Article 132(4)(a) of *the Constitution*.
182. Constitutionality of the office of the Head of Public service was reiterated by Ongaya J in *Okiya Omtatah Okoiti v Joseph Kinyua, Public Service Commission & Attorney General*, ELRC Petition 51 of 2018, where the Court stated that;-
- “To answer the 2nd issue for determination the Court has already found that the office of the Head of Public Service is duly established in accordance with Article 132 (4) (a) of *the Constitution* and the holder of that office, the 1st respondent, is charged with the responsibility of aiding the President in undertaking the constitutional and statutory function of directing and coordinating the functions of ministries and government departments per Article 132 (3) (b) and sections 7 and 8 of the *National Government Coordination Act*, 2013. The Court has already found that the matter was res judicata in view of the judgment in *Okiya Omtatah –Versus- Joseph Kinyua and the Public Service Commission* Petition 24 of 2018 at Nairobi (Abuodha J).”
183. The issue of constitutionality of the office of the Head of Public service was further the subject in ELRC three judge bench, *Monica Mbaru, Jorum Abuodha, and Linnet Ndolo JJ in Okoiti & 3 others v Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 5 others* (Petition 42 & 27 of 2014 (Consolidated)) [2021] KEELRC 2306 (KLR), which held that; -
- “Accordingly, the 2nd respondent is properly appointed in accordance with the powers bestowed upon the Presidency under article 132(4) of *the Constitution*, read together with the functions outlined under the National Government Coordination Act read together with the functions of the PSC and its advisory opinion on various offices including that of the State House Chief of Staff and Head of Public Service. This is constitutional and lawful.”
184. Finally, *Mrima J in Okoiti & another v Public Service Commission & 73 others; Law Society of Kenya & another* (Interested Parties) [2021] KEHC 464 (KLR), affirmed that the office of the Head of Public Service was created within the constitutional and statutory parameters.
185. Considering the pronouncement of these Courts, it is settled that the issue of creation of the office of the Head of Public Service has already been determined as such enactment of section 8(3) to breathe life to the creation of this office cannot be said to be unconstitutional.
186. On the alleged introduction of pleasure doctrine under section 8(5) of the National Government Coordination Act, the Act indeed makes dismissal of the Head of Public Service at the pleasure of the President. The Petitioners argue that this phrase revives the colonial doctrine of pleasure.
187. They contend that this doctrine is unconstitutional as it allows for arbitrary dismissal and violates the right to fair administrative action under Article 47) and the right to a fair hearing provided under Article 50(1), which require that public officers be given due process and a fair hearing before any adverse action is taken against them. The Petitioners’ position is that the “at pleasure” doctrine undermines these fundamental rights and the protections guaranteed to public officers under *the Constitution* in Article 236.



188. This Court notes that Article 260 of *the Constitution* defines a public officer as any State officer; or any person, other than a State Officer, who holds a public office; It follows therefore that the Office of Head of Public Office having being designated as such at Section 8(3) of the *National Government Co-ordination Act*, is a public officer.

189. Article 236 of *the Constitution* effectively abolished the pleasure doctrine in Kenya's public service. For emphasis Article 236 of *the Constitution* provides that:-

“A public officer shall not be— (a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or (b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.”

190. The only discretionary power the Executive retains is in the nomination and appointment of officials, which is still subject to a vetting process. The law post 2010 constitution, demands that removal from public or state office is constitutionally chained with the rules of natural justice.

191. The pleasure doctrine was discussed by in the case of Appeal in County Government of Nyeri & another v Ndung'u [2015]KECA1011[KLR] 18 March 2015 where it was held that;-

“..In order to determine whether the doctrine of pleasure is applicable and the extent of its application in Kenya, we are guided by the following dicta in David Dunsmuir (supra) that “ the interpretation of the law is always contextual . The law does not operate in a vacuum. The adjudicata is required to take into account the legal context in which he was to apply the law.”

192. While the court therefore found that the pleasure doctrine was applicable under *the Constitution* but in a qualified and limited extent. Differently constituted, the Court of Appeal in Narok County Government & another v Richard Bwogo Birir & another [2015] eKLR, the Court of Appeal agreed with the sentiment of Employment and Labour Relations Court(Byram Ongaya J) 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. The hierarchy of state and public officers can be complex, detailed and conceivably very long vertically and horizontally but despite the rank or position held, the court holds that they are each a servant of the people and not of each other as state or public officers. They are all servants of the people. The court holds that there are no masters and servants within the hierarchies of the ranks of state and public officers in our new Republic. The court further finds that the string that flows through the constitutional provisions is that removal from public or state office is constitutionally chained with due process of law. In the opinion of the court, at the heart of due process are the rules of natural justice. Thus, the court finds that the pleasure doctrine for removal from a state or public office has been replaced with the doctrine of due process of law. Article 236 is particularly clear on the demise of the pleasure doctrine in Kenya's public or state service” “In the new Republic, the court holds that public service by public and state officers is guided by the doctrine of servants of the people and the doctrine of due process and not by the doctrines



of the servants of the crown and the pleasure doctrine. In the opinion of the court, the demise of the pleasure doctrine and the demise of the doctrine of servants of the crown in the new Republic's constitutional framework constitute the very foundation of the Republic, namely, Kenya is a sovereign Republic and all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with *the Constitution*. The court however found that the doctrine was not applicable in Kenya under *the constitution* .”

193. From the foregoing, it is clear and this court is satisfied that the pleasure doctrine is no longer applicable or tenable in Kenya and on that basis therefore, to the extent that section 8(5) of *National Government Co-ordination Act* specifically allows the Head of the Public Service to serve at the pleasure of the President, is unconstitutional as it violates the provision of Article 47 and 50(1) of *the Constitution* of the right to fair administrative Act and fair hearing respectively.
194. On whether the transitional provision under section 8(8)) for the incumbent Head of Public Service bypasses constitutional recruitment processes. The National Government Coordination Act was assented to on 14th January, 2013. In the same year, the Office of the Chief of Staff and Head of Public Service having been created within the law, Joseph Kinyua was appointed substantively by the Public Service Commission as Chief of Staff and Public Service. His appointment was affirmed in various decision cited by the parties above.
195. In respect to appointment of the 1st Interested party herein, the Petitioners are challenging his appointment arguing that it did not follow recruitment process as envisioned under the law. As stated above, the appointed of Head of Public Service is based on the recommendation of the Public Service and not through competitive recruitment process as alleged. Whether such recommendation was made by Public Service Commission, for the 1st Interested party appointment was not substantiated before this court. Since, the Petitioner made the allegation, they ought to have substantiated their allegations further, which they did not.
196. Further, this Court notes that the 1st Interested party was appointed in 2022, prior to the amendments of the National Government Coordination Act that introduced the provision of Section 8, subject of these proceedings. It follows therefore that his appointment cannot be challenged based on the introduction of this law. In any event , his procedural appointment are matters that are better handled in the Employment and labour relations Court. This Court thus finds that the transitional clause under Section 8(8) cannot be termed as unconstitutional.
197. On the third issue whether the statutory establishment and operational framework of the Chief Administrative Secretary (CAS) office, including its creation under Section 12A(1), the determination of numbers by the Public Service Commission under Section 12A(2), eligibility criteria provide in Section 12A(4) and remuneration determination under Section 12A(8), are consistent with *the Constitution*, particularly concerning the creation of constitutional offices, presidential powers, and the mandate of the Salaries and Remuneration Commission.
198. The Petitioners argue that Section 12A(1), which statutorily creates the Chief Administrative Secretary (CAS) role, is unconstitutional. They rely on prior judicial determinations that the CAS position is functionally equivalent to a Principal Secretary, a constitutional office under Article 155, arguing that Parliament lacks the power to create or modify constitutional offices through ordinary legislation.
199. They further contend that Section 12A(2), by allowing the Public Service Commission (PSC) to determine the number of CASs, undermines the President's constitutional power regarding the size and structure of the Cabinet and State departments under Articles 132(3)(b) and 155(2) and frustrates



- the fiscal oversight role of the Salaries and Remuneration Commission (SRC) provided for under Article 230(5)), potentially imposing an unlimited financial burden contrary to Article 201.
200. They also challenge Section 12A(4) for setting eligibility criteria that do not conform to the standards required for Principal Secretaries stated under section 47 of the *Public Service Commission Act*, viewing this as unconstitutional. Lastly, they argue that Section 12A(8), which states that CAS remuneration is determined by the PSC on SRC recommendation, violates Article 230(4) by delegating the SRC's exclusive power to set and review remuneration for State officers.
 201. The Respondents argue that the creation of the CAS office falls within Parliament's legislative authority to establish offices necessary for government operations. They assert that the CAS role is distinct from that of a Principal Secretary and that its creation does not infringe upon constitutional mandates. They defended the PSC's role in determining the number of CASs as a reasonable administrative function, and the eligibility criteria as appropriate for the role. Regarding remuneration, they contended that the mechanism outlined in Section 12A(8) respects the SRC's recommendatory role while allowing for practical implementation.
 202. Similarly, the Interested party argued that previous legal challenges concerning the CAS office have been heard and determined by competent courts. They asserted that these issues are res judicata and sub judice.
 203. Indeed the issue of constitutionality of the establishment of the CAS position was previously raised in the High Court in the consolidated petition of Okoiti & another v Public Service Commission & 73 others; Law Society of Kenya & another (Interested Parties) (Petition 33 & 42 of 2018 (Consolidated)) [2021] KEHC 464 (KLR) where Mrima J found that the establishment of the CAS office and the process of appointing individuals to the positions of CAS did not comply with *the Constitution* and the law.
 204. That Court went further and stated that the establishment and appointment process for both the Chief Administrative Secretary (CAS) and Principal Secretary (PS) offices were illegal and unconstitutional. The reasoning was multifaceted; the Public Service Commission (PSC) failed to include public participation, which contravened constitutional provisions. The court also found that the PSC's recommendation for the CAS office was an administrative decision that did not comply with the requirements of Article 47 of *the Constitution* or the *Fair Administrative Action Act*, as it lacked public notice, a chance for the public to be heard, and a stated reason. Additionally, the court noted that the PSC's recommendation violated Articles 201 and 232 of *the Constitution* and relevant sections of the *Public Service Commission Act* by failing to include comprehensive plans and financial implications.
 205. The failure to advertise the CAS positions was considered a direct infringement of *the Constitution* and the *Public Service Commission Act*. Furthermore, the court determined that there was no evidence that the appointed individuals were interviewed by the PSC, a mandatory step. The court also clarified that the President's power to appoint individuals to these positions is contingent on them first being shortlisted, interviewed, and recommended by the PSC, and then approved by the National Assembly, as this process is a key requirement for upholding transparency and integrity.
 206. The Respondents filed an Appeal and sought stay of Execution of Mrima J Judgment vide Court of Appeal case in Public Service Commission & 72 others v Okiya Omtatah & 4 others Court of Appeal, Nairobi, Civil Appeal (Application) No E131 of 2021 [2021] eKLR where the Court granted stay on 23rd July, 2021.
 207. Once this stay was granted and following the judgment that declared the office of the Chief Administrative Secretary (CAS) unconstitutional, the Public Service Commission (PSC) took steps



- to re-establish the office. The PSC abolished the offices held by the original 23 appointees and began a new process, aiming to comply with the court's judgment which required competitive recruitment, National Assembly approval, and presidential appointment. On 19th September, 2022, the President, through the Head of Public Service, requested the PSC to establish the CAS office, and the PSC subsequently invited public input on the matter.
208. Pursuant to the invitation by the Public Service Commissions on public participation on the issue of appointment of CAS, the Law Society of Kenya (LSK) filed Petition No. E 174 of 2022, *Law Society of Kenya v. Public Service Commission & 2 others*, in the Employment and Labour Relation Court for a declaration that the advertisement for the creation of the office of CAS was in violation of Articles 10, 201(d), and 233(1) of *the Constitution* as well as section 27(1) of the *Public Service Commission Act*, arguing that the public notice was insufficient and that the CAS office would duplicate the roles of Principal Secretaries.
 209. In her Judgment of 16th February, 2023, Mbaru J held that the CAS office was lawfully established. Meanwhile, the PSC proceeded with a new recruitment drive, which resulted in the recommendation and appointment of 50 individuals to the CAS office. The National Assembly, however, declined to vet the nominees, citing a lack of a legal framework.
 210. In the same period, three new petitions in the High Court, namely, Petition No. E80 of 2023, Petition No E084 of 2023 and Petition. No. E150 of 2023, which were all consolidated in *Matindi & 3 others v The National Assembly of Kenya & 4 others; Controller of Budget & 50 others (Interested Parties) (Petition E080, E084 & E150 of 2023 (Consolidated))* [2023] KEHC 19534 (KLR), and heard by a three Judge bench, K Kimondo, AA Visram, HI Ong'udi JJ. The petitioners in that case challenged inter alia the constitutionality, as well as the process, through which the office of the CAS was created. They contended that the office could only be validly created by an Act of Parliament and that in any event, the creation of the office had placed an unreasonable financial burden on the public and was in violation of constitutional principles on prudent use of public resources. It was also contended that there was no public participation in the expansion of the office of CAS to 50 officers. The petitioners prayed for nullification of the office of CAS and appointments thereto on account of alleged violation of Articles 2(2), 4(2), 10(2), 94,95,132(4), 232 (1) and (2) and 259(1) of *the Constitution*.
 211. In their judgement, the majority held;-

“The newly created office of CAS fell somewhere between two constitutional or State offices: that of the cabinet secretary (CS) and that of the principal secretary (PS). Those two officers underwent vetting and approval by Parliament but the CASs had been appointed and sworn into office without parliamentary approval. Not every holder of high or State office underwent parliamentary approval. The CASs were for all purposes assistant cabinet secretaries reporting directly to the CS. The PS was relegated to the position where he reported to the CAS and the CS. Doubt was completely removed by their job description in Gazette Notice No 12432 of October 12, 2022, and duties specified therein, and the fact the CAS would be in a higher job group CSG 3 than the PS. Whereas the President could establish a State office within the ranks of the public service, it required approval by the National Assembly. Such approval could be achieved by enactment of a statute, which provided for the same and further provided an appropriate framework for a cap on the numbers of CASs if necessary. The newly created office of CAS did not meet the constitutional threshold.”
 212. Ultimately, the Court declared that the stay of execution order issued by the Court of Appeal did not reverse the previous finding that the CAS office was unconstitutional. The court further



determined that the creation of the additional 27 CAS positions lacked public participation and National Assembly approval, and it nullified the entire complement of 50 CAS offices and their appointments. In a dissenting judgment, Ong’undi, J. found that the initial 23 appointments were lawful but that the additional 27 were not, as they failed to adhere to constitutional principles.

213. Soon thereafter an Appeal was preferred to the Court of Appeal sitting in Nairobi in Attorney General v Matindi & 55 others [2023] KECA 1475 (KLR) contemporaneously, the Appellants sought stay of execution pending the hearing and determination of an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Kimondo, Ong’undi & Visram, JJ.) dated 3rd July 2023 rendered in consolidated Constitutional Petitions No. E080 of 2023, E084 of 2023 and E150 of 2023. Upon determination, the Court of Appeal declined the invite to stay execution of the Orders of the three-judge bench by its ruling rendered on 8th December, 2023.
214. The National assembly soon thereafter made amendments to the law to conform to the judgement of Mrima J. In effect, the National Government Coordination Act was amended to introduce section 12A which provides that;-

“There is established the office of the Chief Administrative Secretary which shall be an office in the public service.(2)The complement of Chief Administrative Secretaries shall be as determined by the Public Service Commission.(3)The President shall on the recommendation of the Public Service Commission appoint Chief Administrative Secretaries, observing regional and gender balance.

- (4) A person shall be eligible to be appointed as a Chief Administrative Secretary if that person—
- (a) holds a degree from a university recognized in Kenya;
 - (b) has knowledge of and experience in the public service; and
 - (c) satisfies the requirements of Chapter Six of *the Constitution*.
- (5) A person is not qualified to be appointed as a Chief Administrative Secretary if the person—
- (a) has been convicted of an offence carrying a penalty of imprisonment for a term of at least six months without the option of a fine;
 - (b) has been adjudged bankrupt by a court of competent jurisdiction;
 - (c) holds any office in a political party;
 - (d) is a public officer; or
 - (e) has been removed from any public office by impeachment or conviction by a court of competent jurisdiction.
- (6) A Chief administrative Secretary shall be responsible for—
- (a) responding to issues relating to the portfolio assigned to the office;



- (b) representing the Cabinet Secretary at any meeting as directed by the Cabinet Secretary; and
 - (c) performing any other duties assigned by the relevant Cabinet Secretary.
- (7) Functions assigned to a Chief Administrative Secretary shall not include matters relating to parliamentary affairs.
- (8) Remuneration of the Chief Administrative Secretaries shall be determined by the Public Service Commission on the recommendation of the Salaries and Remuneration Commission.”

215. Though new provisions of the law have been introduced herein, which have not been subjected to any court proceedings, the issues raised in this petition in relation to the constitutionality of the established office of the CAS , including the determination of the number of the proposed CAS office and its connected purposes, have been conclusively handled by Mrima J hence, the issues are res judicata.
216. That Court, in addition to declaring the creation of the office of Chief Administrative Secretaries unconstitutional, directed further on how the law is to be drafted to include the number, the process of recruitment and vetting of the said officers by the National Assembly. Moreover, the issue of constitutionality of the CAS office is before the Court of Appeal.
217. Accordingly, this Court finds that the matter regarding constitutionality of the CAS position has already been litigated making it res judicata. Further, the issue having been appealed to the Court of Appeal, then the issue is sub judice and therefore, this Court cannot determine the issue regarding constitutionality of Section 12A of the National Government Coordination Act in so far as it details the creation of CAS office and attendant issues.
218. On costs of this Petition. The law is now settled that costs follow event as provided for under section 27 of the *Civil Procedure Act*. The Supreme Court of Kenya in the case of Rai & 3 others v Rai & 4 others [2014] KESC 31 (KLR) regarding award of costs in public interest matter observed that:-

“In the classic common law style, the courts have to proceed on a case by case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs.....”

219. In conclusion thereof, this Court make the following Orders;-
1. Section 8(3), (8)(6)(a), and 8(8) of the National Government Coordination Act are constitutional.
 2. A declaration is hereby issued that to the extent that Section 8(5) of the *National Government Co-ordination Act* allows the Head of Public Service to serve at the pleasure of the President, it violates the right to fair administrative action under Article 47 and fair hearing under Article 50(1) of *the Constitution* and therefore unconstitutional.
 3. The issues raised on constitutionality of Section 12A of the National Government Coordination Act are in the Court of Appeal hence subjudice.
 4. Since this is a public interest litigation, each party to bear their own costs.

DATED, SIGNED AND DELIVERED NAKURU THIS 20TH DAY OF NOVEMBER, 2025.



PATRICIA GICHOHI

JUDGE

Ms Wekesa for Hon. Okiya Omtata/ 4th Petitioner

Ms Nanjama H/B for Ms Shirika for the 1st Respondent

Ms Khadhabi H/B for Mr Sore for 4th Respondents

Mr Ouma for 1st Interested Party

Kamau , Court Assistant

