Katiba Institute v Attorney General & 2 others; Ndii & 20 others (Interested Parties) (Petition E317 of 2025) [2026] KEHC 258 (KLR) (Constitutional and Human Rights) (22 January 2026) (Judgment)

Neutral citation: [2026] KEHC 258 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E317 OF 2025

B MWAMUYE, J

JANUARY 22, 2026

IN THE HIGH COURT OF KENYA AT NAIROBI CONSTITUTIONAL AND HUMAN RIGHTS DIVISION PETITION NO. E317 OF 2025

IN THE MATTER OF THE SUPREMACY OF THE CONSTITUTION, THE PRESERVATION OF ITS VALUES AND PRINCIPLES, INCLUDING THE RULE OF LAW AND LEGALITY AND THE BILL OF RIGHTS, AND SAFEGUARDING THE POWERS OF CONSTITUTIONAL COMMISSIONS

AND

IN THE MATTER OF THE CONSTITUTIONALITY OF THE NEWLY CREATED OFFICES KNOWN AS ADVISORS TO THE PRESIDENT

AND

IN THE MATTER OF VIOLATIONS AND/OR THREATENED VIOLATIONS OF ARTICLES 1(1), (3) & (4); 2(1) & (4); 10, 19(1) & (2); 20; 21(1); 22; 23; 27; 47; 48; 132, 230, 232, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

KATIBA INSTITUTE ..... PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL ..... 1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION ..... 2ND RESPONDENT

THE SALARIES AND REMUNERATION COMMISSION ..... 3RD RESPONDENT

AND

DAVID NDII ..... INTERESTED PARTY

MONICA JUMA ..... INTERESTED PARTY

JAOKO OBURU ..... INTERESTED PARTY

MAKAU MUTUA ..... INTERESTED PARTY

HARRIET CHIGAI ..... INTERESTED PARTY

ALI MAHAT SOMANE ..... INTERESTED PARTY

ABDI GULIYE ..... INTERESTED PARTY

DOMINIC MENJO ..... INTERESTED PARTY

SYLVIA KANG'ARA ..... INTERESTED PARTY

EDWARD KISIANG'ANI ..... INTERESTED PARTY

JOSEPH BOINNET ..... INTERESTED PARTY

SYLVESTER KASUKU ..... INTERESTED PARTY

NANCY LAIBUNI ..... INTERESTED PARTY

KENNEDY OGETO ..... INTERESTED PARTY

AUGUSTINE CHERUIYOT ..... INTERESTED PARTY

HENRY KINYUA ..... INTERESTED PARTY

JOE AGER ..... INTERESTED PARTY

KARISA NZAI ..... INTERESTED PARTY

MOHAMMED HASSAN ..... INTERESTED PARTY

STEVEN OTIENO ..... INTERESTED PARTY

CHRISTOPHER DOYE NAKULEU ..... INTERESTED PARTY

JUDGMENT

Introduction And Background

1. This judgment concerns a constitutional Petition dated 27th May 2025 instituted by Katiba Institute, a research and litigation organization dedicated to the promotion of constitutionalism. The Petition challenges the constitutional and legal validity of the establishment of various offices designated as "Advisors to the President" and the subsequent appointment of 21 individuals to those offices, whom in this Petition are the 1st – 21st Interested Parties respectively.

2. The gravamen of the Petitioner's case is that the President of the Republic of Kenya, acting through the 1st Respondent, unilaterally created a number of advisory offices without adhering to the mandatory constitutional and statutory framework. The Petitioner contends that the establishment of these offices and the appointments thereto violated several constitutional provisions, including Articles 10, 132(4)(a), 201, 230, 232, and 234. It is alleged that the process bypassed the mandatory recommendation of the 2nd Respondent (Public Service Commission – PSC), ignored the advisory role of the 3rd Respondent (Salaries and Remuneration Commission – SRC), was conducted in secrecy without public participation, and resulted in a bloated, duplicative, and wasteful executive structure.

3. The Petitioner therefore seeks the following orders from the High Court, verbatim: -

"a. A declaration that the creation of the offices of advisors to the president is ultra for failure to involve the Public Service Commission.

b. A declaration that the creation of the offices of advisors to the president is unconstitutional for failure to seek the advice of the Salaries and Remuneration Commission.

c. A declaration that the creation of the offices of advisors to the President was undertaken without conducting public participation in violation of Articles 10 and 232 of *the Constitution*.

d. A declaration that the creation of the offices of advisors to the President called for compliance with Articles 10, 132(4)(a), 201(a), 232(1) and 234(2)(c) of *the Constitution* and Regulation 27 of the Public Service Regulations, No 3 of 2020.

e. A declaration that the creation of the offices of advisors to the President was an administrative action because they affected the legal rights and interests of the general public. As such they had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness laid out in article 47 of *the Constitution* and Fair Administrative Actions Act.

f. A declaration that the President created offices of advisors to the President in contravention of Article 201 and article 201and 232 of *the Constitution* as well as sections 27 and 30 of the *Public Service Commission Act* and Regulation 27 of the Public Service Regulations, No 3 of 2020 to the extent that there were no comprehensive plans informed by the public body workload analysis, the failure to supply information on the current authorized establishment, level of grading, designation, extra posts required and evidence of optimum utilization of existing posts, the failure to supply information that the office including its level of grading, qualification and remuneration shall not disadvantage similar offices in the public service or occasion unfair competition for staff among public bodies, the failure to supply financial implications of creating the office and the failure to supply a statement confirming compliance with the law.

g. A declaration that the appointments to the offices of advisors to the President violated Articles 10 and 232 of *the Constitution* and Regulation 27 of the Public Service Regulations, No 3 of 2020.

h. A declaration that the Respondents violated Article 35 of *the Constitution* of Kenya and Section 5 (1) of the *Access to Information Act*, CAP 7M.

i. An order of certiorari quashing the decision to create the offices of advisors to the President as well as the appointments made to those offices.

j. An order in the nature of a structural interdict directing the Public Service Commission to:

a. Conduct and complete an audit within 20 days of the Court's Judgment to identify all offices established by the President and the national executive contrary to *the constitution* and the law.

b. Abolish the offices identified by its audit in a above

c. File a progress report with this Court every 40 days of the date of the Judgment to report on its compliance with Orders in a and b.

k. Any other prayers this Court deems fit. "

4. The 1st Respondent (the Honourable Attorney General), the 2nd Respondent (PSC), and the 3rd Respondent (SRC) have all opposed the Petition. The 1st and 2nd Respondents have filed detailed Replying Affidavits and written submissions, asserting full compliance with the law. The 3rd Respondent primarily argues that the Petition discloses no reasonable cause of action against it and fails the test of precision required in constitutional litigation.

5. All interim applications have been determined, and the matter now proceeds for final determination on the merits of the Petition. The Court has carefully considered the voluminous pleadings, affidavits, annexed documents (including the bundle marked "PF-1"), and the detailed written submissions filed by all parties.

The Petitioner's Case

6. The Petitioner's case is anchored on a historical and purposive interpretation of the 2010 Constitution. It posits that *the Constitution* was a radical break from a past characterized by patrimonialism and where public offices were created and filled as rewards for political loyalty, cronyism, and ethnic affiliation.

7. The Petitioner argues that to cure these ills, the 2010 Constitution erected a robust normative value-based system, established independent commissions as checks on executive power, and prescribed detailed procedures for public appointments to ensure merit, transparency, and fiscal responsibility.

8. The Petitioner avers that the impugned actions of the President and the relevant Respondents in appointing the Interested Parties to unconstitutional, wasteful, duplicative, and superfluous advisory offices represents a regression to the dark days that characterized the former constitutional dispensation.

9. The Petitioner's core legal arguments, are as follows:

a. Ultra Vires Action: It is averred that the President of the Republic acted beyond his powers under Article 132(4)(a) of *the Constitution*. While this Article empowers the President to establish an office in the public service, the Petitioner argues that the Article expressly conditions this power by limiting its exercise to presidential actions strictly in accordance with the recommendation of the Public Service Commission. The Petitioner asserts that the President of the Republic either failed to seek this recommendation or that the PSC's subsequent ratification was a mere rubber-stamp of a fait accompli that was devoid of the substantive and independent consideration required by the law. This, coupled with the alleged failure to involve the SRC regarding the financial implications of the offices, it is argued rendered the entire process fatally and irredeemably flawed.

b. Violation of Specific Statutory Procedures: The Petitioner's analysis of the Bundle "PF-1" provided by the PSC proceeds to argue that the correspondences therein reveal a procedurally flawed process that contravened the *Public Service Commission Act* and the Public Service Commission Regulations, 2020. Key failures highlighted include:

i. Non-compliance with Section 27 of the PSC Act, which requires a written request to establish an office to be based on comprehensive workload analysis, indicate financial

implications, and include a verification statement; none of which, the Petitioner claims, is evident in the annexed letters.

ii. A recurrent pattern where letters from the President's Office request appointment of specific individuals before or without a distinct, prior request for establishment of the office itself, thereby 'jumping the gun' and illegally reversing the statutory sequence and flow.

iii. Non-compliance with Regulation 27 of the PSC Regulations, which mandates that the PSC determines the number of advisors needed, and that a request for creation and appointment of an advisory office must state that the proposed advisor's competencies do not exist within the public service and that they will not duplicate existing roles. The Petitioner contends the annexed letters are generic and do not satisfy these criteria.

iv. The complete absence of any minutes or resolutions of the PSC demonstrating its collective deliberation on these weighty matters, casting doubt on the commission's independent decision-making.

c. Breach of National Values and Principles (Article 10): The Petitioner submits that the creation of these advisory offices, which have significant public finance implications and affect the structure of the National Executive, was a consequential act of governance that fundamentally required public participation. The Petitioner alleges that the offices were established in a covert and unilateral manner and thus the process violated the values of transparency, accountability, and public participation enshrined in Article 10 of *the Constitution*. The Petitioner relied on the decisions in Communications Commission of Kenya & 5 others -v- Royal Media Services Limited & 5 others [2014] eKLR; British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Limited -v- Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party) (Petition 5 of 2017) [2019] KESC 15 (KLR) (26 November 2019) & 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) (Constitutional and Human Rights) (3 July 2023) (Judgment) in support of its arguments.

d. Violation of Public Service Principles (Article 232): It was argued that the appointments are alleged to violate Article 232 as they were not based on fair competition and merit, were not transparent, were not made by PSC or recommended by PSC and do not reflect Kenya's diverse communities. The process, described as handpicking, bypassed the competitive and inclusive recruitment processes envisaged by *the Constitution*.

e. Imprudent Use of Public Funds (Article 201): Relying on the decision in Institute for Social Accountability & another v Senate & 5 others (Petition 1 of 2018) [2022] KESC 39 (KLR), it was argued by the Petitioner that creating a large, undefined number of high-ranking advisors, many with salaries comparable to Cabinet Secretaries and performing duplicated roles to those of Cabinet Secretaries, without a clear needs assessment or fiscal sustainability analysis from the SRC, constitutes a reckless and wasteful use of scarce public resources, offending the principle of prudence under Article 201(d) and Regulation 27 of the Public Service Regulations, No. 3 of 2020.

f. Violation of the Right to Information (Article 35): The Sate's alleged failure to proactively publish details regarding the rationale, number, functions, and remuneration of these advisors is said to breach the constitutional right of access to information. The Petitioner cited Nairobi

Law Monthly Company Limited -v- Kenya Electricity Generating Company & 2 Others [2013] Eklr and Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR para 28; Brümmer v Minister for Social Development and Others (CCT 25/09) [2009] ZACC 21; 2009 and submitted that the failure to publish information which is important to the nation is direct violation of the values and principles of governance under Article 10(2) and the right to access information under Article 35 of *the Constitution*.

g. Violation of Fair Administrative Action (Article 47): The decision to create the offices and make appointments was characterized by the Petitioner as an administrative action profoundly affecting the public's legal interests. The Petitioner argues that the failure to give notice, invite public input, or provide reasons rendered the process procedurally unfair. It relied on the decisions in Republic v Fazul Mahamed & 3 others Ex-Parte Okiya Omtatah Okoiti [2018] eKLR and Kuto v Kenya Magistrates and Judges Association; Independent Electoral and Boundaries Commission & another (Interested Parties) (Petition [2023] KEHC 26157 (KLR) in support of its arguments.

10. The Petitioner heavily relies on the reasoning in Okoiti & another v Public Service Commission & 73 others (the "CAS 1" case) [2021] eKLR and 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) (the "CAS 2" case) (supra), where the High Court invalidated the creation of the Office of Chief Administrative Secretary (CAS) for, inter alia, lack of public participation, failure to involve the SRC, and non-compliance with Sections 27 and 30 of the PSC Act. The Petitioner urges this Court to apply the same principles and grant the reliefs sought.

The Respondents' Cases

The 1st Respondent

11. The 1st Respondent's case is primarily contained in the Replying Affidavit of Arthur A. Osiya CBS, the Principal Administrative Secretary in the Executive Office of the President, the 1st Respondent's Grounds of Opposition and the written submissions. It is the 1st Respondent's overall argument that all the impugned actions and decisions were squarely constitutional, statutorily compliant, and in keeping with the principles of good governance.

12. It is averred by the 1st Respondent that the appointments were made strictly in accordance with Article 132(4)(a) of *the Constitution* and in full compliance with the detailed procedure set out in Regulation 27 of the PSC Regulations, 2020. Additionally, it is asserted that the PSC was responsible for the appointments, determined the number needed, acted on written requests from the President of the Republic which specified the unique competencies of the proposed advisors, and ensured the advisors were vetted, inducted, and given non-supervisory, non-duplicative roles on time-bound contracts and that the appointments were financed from the approved budgetary allocation to the Executive Office of the President.

13. Regarding lawfulness of the appointments, it was submitted that Article 132(4)(a) of *the Constitution* vests a clear power in the President, exercisable upon the PSC's recommendation, which was obtained as evidenced in bundle "PF-1" filed by the PSC. The 1st Respondent cited Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR and Kenya Youth Parliament & 2 Others v Attorney General & 2 Others [2012] eKLR to emphasize that courts should not interfere with administrative discretion absent clear illegality, irrationality, or procedural impropriety. Flowing from this, the 1st Respondent contends the Petitioner has failed to demonstrate any such fundamental defect, illegality, or omission in the process of appointment of the Interested Parties.

14. On public participation, it was submitted that the appointment of 'personal public advisors to the President' is an internal administrative staffing matter within the Executive Office of the President and not a legislative or major policy decision with general public application. Moreover, it was argued that the appointments do not create new public offices, they do not alter public policy, and they do not confer rights upon members of the public and therefore they do not attract the constitutional requirement of public participation as articulated under Article 10 of *the Constitution*. The 1st Respondent relied on the decision in William Odhiambo Ramogi & 3 Others v Attorney General & 4 others; Muslims for Human Rights (MUHURI) & 2 others (Interested Parties) [2020] eKLR, which distinguished between internal operational decisions and those with significant external public effect, holding that the former do not attract public participation.

15. In pouring cold water on the Petitioner's claims, the 1st Respondent underscored that the entire process strictly adhered to Article 132 (4)(a) and Regulation 27 of the Public Service Commission Regulations, 2020 rendering it lawful, constitutional, and beyond reproach.

16. Finally, the 1st Respondent, echoing the Anarita Karimi Njeru v Republic (1979) KLR 154 principle which was reiterated in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 Others (supra) argued that the Petition is speculative, lacks precision, and is devoid of any evidential or legal foundation. Further, it is argued that the Petitioner has failed to establish any direct or casual connection between the establishment of the advisory offices and any specific alleged violation of *the Constitution*, nor has the Petitioner demonstrated the manner in which the Respondents' actions violated *the Constitution*.

17. In that regard, the 1st Respondent urged this Court to dismiss the Petition in limine.

The 2nd Respondent

18. The 2nd Respondent's case is set out in the Replying Affidavit of its Secretary/CEO, Paul Famba, and its written submissions. The 2nd Respondent's defence is a two-pronged one, arguing full compliance on one hand while also raising technical objections on the other.

19. Mr. Famba depones that the PSC, in exercise of its constitutional mandate under Article 234, established the posts of Advisors with respect to the Interested Parties through the PSC Regulations, 2020. He annexes a bundle "PF-1", comprising correspondence between the Office of the President and the PSC, as proof that the Commission received written requests, considered them, and issued approval decisions. He asserts that Regulation 27 was fully complied with in the process.

20. It was submitted that the Petition is a mere reproduction of constitutional provisions without demonstrating how specific constitutional provisions were infringed, contrary to the principles set out in the seminal and oft-cited cases of Anarita Karimi Njeru v Republic (supra) and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (supra).

21. The 2nd Respondent asserts that the Petitioner bears the evidential burden but the Petitioner has failed to adduce concrete evidence in support of the allegations it has made. Reliance was placed on the decisions in Gitobu Imanyara & 2 Others v Attorney General (2016) eKLR, Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] eKLR and John Munuve Mati v Returning Officer Mwningi North Constituency & 2 Others (2018) eKLR to buttress this argument.

22. The PSC examined the processes and requirements under Article 234 of *the Constitution*, Sections 27 & 29 of the PSC Act, and Regulation 27 of the PSC Regulations, 2020 and argued that the required process was followed to the letter. It distinguishes the "CAS" cases from the present case by arguing

that the position of an Advisor to the President is specifically provided for in Regulation 27, unlike the CAS Office which was not.

23. The 2nd Respondent cited Denis Itumbi v Public Service Commission & 3 others [2023] eKLR and Eric Muthuuri Nyamu v Ministry of Water, Sanitation and Irrigation & 2 Others (2023) eKLR and submitted that the impugned offices of advisors which the Interested Parties hold were legally established as the Petitioner has not challenged the constitutional validity of the provisions of Section 27, 29 and 92 of the PSC Act and also Regulation 27 of the Commission's Regulations, 2020.

24. On whether the PSC failed in its constitutional duties to proactively provide information as alleged by the Petitioner, the 2nd Respondent denied that such an obligation existed in the context of the appointments of the Interested Parties. On the contrary, the 2nd Respondent argued that it was incumbent on the Petitioners to seek whatever information it sought pursuant to the provisions of Article 35 of *the Constitution* and the *Access to Information Act* before, or indeed instead of, approaching court.

25. It was also submitted that the Petitioner's attempt to challenge the 2nd Respondent's response through submissions, without a supplementary affidavit, is impermissible as submissions are not evidence. The 2nd Respondent relied on Daniel Toroitich Arap Moi v Mwangi Stephen and Another (2011) eKLR in support of its argument.

26. Further, it was argued that the CAS Case which the Petitioner heavily relies on is distinguishable from this Petition as the CAS positions are not established in the PSC Regulations, 2020 and that the advisors appointed do not report to any Cabinet Secretary unlike the CAS who were reporting to the Cabinet Secretary.

27. The Court was thus urged to dismiss the Petition with costs for lack of merit.

The 3rd Respondent

28. The 3rd Respondent's filed Grounds of Opposition and written submissions arguing that the Petition discloses no cause of action against it.

29. The 3rd Respondent contends that the Petition fails the Anarita Karimi Njeru v Republic (supra) test of precision, as it does not state with reasonable clarity and precision what specific actions or omissions as well as constitutional provisions the 3rd Respondent specifically is alleged to have violated. Further reliance was placed on Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (supra) and Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (supra) to argue that the Petitioner's failure to delineate with precision which aspects the 3rd Respondent's conduct allegedly violated specific constitutional provisions renders it impossible for the 3rd Respondent to mount an effective defence thus 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*.

30. It is averred that the burden of proof lies with the Petitioner to prove its allegations against the 3rd Respondent which it has failed to do as the Petitioner has not provided any credible evidence or established any causal link demonstrating any action or omission by the 3rd Respondent that contravenes *the Constitution*. Additionally, it is argued that the Petition does not disclose any reasonable cause of action against the 3rd Respondent.

31. It further argues that the Petitioner has adduced no evidence whatsoever to demonstrate that the SRC was aware of, consulted in, or failed in its mandate regarding the creation of the advisory offices. It invokes the evidential burden under Section 107 of the *Evidence Act*, arguing this burden has not been

discharged against it by the Petitioner and relied on the decision in Mbuthia Macharia v Annah Mutua & Another [2017] eKLR to buttress its argument.

32. For those reasons, the 3rd Respondent urges this Court to dismiss the Petition as against the 3rd Respondent, with costs.

Interested Parties

33. The Interested Parties did not participate in this Petition. The Court, being satisfied that they were properly served and also that they had due notice of the pendency of this Petition, notes that each of the Interested Parties have a constitutional right to choose not to participate in these proceedings.

Analysis And Determination

34. Having considered the pleadings and submissions filed and exchanged by the Parties, the following issues arise for determination by this Court:

    i. Whether the Petition meets the threshold of precision required for constitutional litigation, particularly as against the 3rd Respondent;

    ii. Whether the establishment of the offices of Advisors to the President and the appointment of the Interested Parties thereto was done in accordance with *the Constitution* and the relevant statutory framework;

    iii. Whether the establishment of the said offices and the appointments thereto required and violated the constitutional principles;

    iv. Whether the Respondents violated the right to access information under Article 35 of *the Constitution*;

    v. Whether the Respondents violated the right to fair administrative action under Article 47 of *the Constitution*; and

    vi. What reliefs, if any, should issue.

The Precision of the Petition and the Case against the 3rd Respondent

35. The principle in Anarita Karimi Njeru v Republic (supra) forms part of the bedrock of constitutional litigation in Kenya. It requires a petitioner to set out with a reasonable degree of precision the complaint, the constitutional provisions alleged to be infringed, and the manner of alleged infringement with respect to each party said to have contravened *the Constitution*.

36. This is not a mere technicality but a necessity for fairness in hearing and determinations of constitutional cases. The Anarita Principle enables the respondents in constitutional litigation to understand the case against them and to formulate specific answers and competent defences to the allegations made against them.

37. The Anarita Principle also enables the court to fairly adjudicate on whether a petitioner has met the burden and standard of proof as against a particular respondent. A vague petition that lacks specificity as against one or more respondents places the court in a position where the court may unfairly ascribe negative connotations to a weak defence by a respondent that was advanced not because the respondent was at fault but rather because the respondent simply couldn't understand what it ought to have defended itself against.

38. Applying this principle, I find that the Petition is elaborate and cites numerous constitutional articles alleged to have been violated with sufficient specificity as against the 1st and 2nd Respondents. It alleges a specific course of conduct; the unilateral creation of offices and handpicking of appointees that is said to violate a web of interconnected constitutional provisions including Articles 10, 132, 201, 232 and 234. The particulars, while broad, are tied to identifiable actions. The 1st and 2nd Respondents have comprehensively responded to these allegations, demonstrating they understood the case against them. The Petition, therefore, meets the Anarita karimi Njeru v Republic (supra) threshold as against these two respondents.

39. However, the case against the 3rd Respondent (SRC) stands on a different footing. The Petition's allegations against the SRC are derivative and vague. It is alleged that the SRC should have been involved or that its advice should have been sought regarding the financial implications of the offices. However, the Petition does not pinpoint a specific constitutional or statutory duty the SRC breached in the context of establishing these particular offices. Specifically, when should the SRC's advice been sought, by whom, and under what provisions of law?

40. Furthermore, the Petitioner has not demonstrated that a specific request for advice was made to the SRC and it refused to give it, or that the SRC was legally obligated to inject itself into the impugned office-establishment process pro-actively, and if so, at what stage or stages.

41. Crucially, the burden of proof lies on he who asserts, in this case, the Petitioner. The 3rd Respondent's Grounds of Opposition are therefore merited. This finding is in concert with the holding in Mochama v Ogoti [2025] KEHC 1468 (KLR), in which the court held that a claim must be proved by evidence, it cannot stand on mere allegations. In arriving at the position, the High Court stated as follows: -

> "...In the case of Janet Kaphiphe Ouma & Another v Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007, Ali Aroni, J citing the decision in Edward Muriga suing through Stanley Muriga v Nathaniel D. Schulter, Civil Appeal No. 23 of 1997 held that:
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> "In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence."
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> 16. Guided by the above case, I find the statements in the defence filed on 10th December 2014 remain mere allegations having not been substantiated orally in court by the Appellant to controvert the Respondents testimony."

42. Consequently, I find that the Petitioner has failed to disclose a reasonable cause of action against the 3rd Respondent, and the Petition as against the SRC is dismissed. Noting that the 3rd Respondent is a publicly-funded entity, and this being a matter within the arena of public interest litigation, the case against the 3rd Respondent is dismissed with each party bearing its own costs.

Compliance with the Constitutional and Statutory Framework

43. This is the core of the dispute. The legal framework is hierarchical: Article 132(4)(a) of *the Constitution* is the foundational power, conditioned on the PSC's recommendation. The *Public Service Commission Act*, 2017, gives flesh to the PSC's functions, and the Public Service Commission Regulations, 2020, provide the detailed procedure for appointing advisors. All must be complied with substantively for an action under them to be lawful.

44. Article 132(4)(a) states: "The President may... (a) establish an office in the public service in accordance with the recommendation of the Public Service Commission..."

45. The phrase "in accordance with the recommendation" is critical, as it is a command of our supreme law that clearly defines and limits the exercise of the presidential power that *the constitution* has vested in the Head of State and Government. The constitutional requirement for the President of the Republic to act in accordance with the recommendation of the PSC is a deliberate constitutional check on executive power, designed to inject objectivity, professionalism, and a consideration of public service values into the process.

46. Article 259(11) of *the Constitution* reinforces this position by requiring that where a function is to be performed "with the recommendation... of another person," it may only be lawfully performed "only on that advice, recommendation...".

47. The 1st and 2nd Respondents rely entirely on the correspondence in bundle "PF-1" as proof of this recommendation having been issued by the 2nd Respondent. The Petitioner, however, challenges the substantive validity of this recommendation. This raises the question: what constitutes a valid "recommendation" in this context? Is it any piece of paper from the PSC that says "approved," or must it be the product of an independent, deliberative process that applies the governing legal criteria and upholds the constitutional principles and values that underpin our democracy?

48. I am guided by the Court of Appeal's reasoning in Mumo Matemu (supra). While cautioning against judicial overreach into administrative discretion, the Court above stated that judicial intervention is warranted where there is clear evidence of illegality, arbitrariness, or a fundamental procedural defect rendering the process unconstitutional. The Court of Appeal emphasized examining the process cumulatively in addition to its stages as the means by which a trial court could establish if judicial intervention under *the constitution* was required.

49. Examining the "PF-1" bundle cumulatively reveals a pattern that significantly undermines the assertion of a substantive and independent recommendation. Several letters from the Office of the President are framed not as requests to establish an office based on demonstrated need, but as communications that the President has identified, selected, or appointed a specific individual and seeks the PSC's concurrence or its action to hasten the appointment.

50. This puts the cart before the horse. The statutory sequence under the PSC Act requires the establishment of the office first, based on objective criteria. The PSC's responses often compound this error by purporting to approve the creation of the office and the appointment in a single sentence, even where the request letter did not explicitly seek creation.

51. Most strikingly, there is a complete absence of any documentation showing the PSC's internal deliberative process. There are no minutes of Commission meetings, no reports analyzing the requests against the criteria in Section 27 of the PSC Act or Regulation 27, no records of discussions or consideration of the financial implications or the uniqueness of the proposed advisors' skills, or an examination of whether there was indeed a gap that could not be filled using internal human resource or human resources from the wider public service.

52. The "recommendation" appears as a series of brief, approving letters, often issued within days of the request. In one instance, the PSC's response dated 12th March 2025 states it "considered the request" and approved both creation of the office and the appointment of a specific person. The speed and lack of any visible deliberative record raise a legitimate doubt as to whether a genuine, independent consideration, as envisioned by *the Constitution*, took place.

53. There is, of course, room for super-efficient governmental action. Indeed, the same is much desired by the people of Kenya. However, the exchanges of between the 1st and 2nd Respondent were tilt heavily towards the rubberstamping of a pre-ordained outcome rather than a deliberate, process-driven, and meritorious process that yielded not a fait accompli but rather a well-considered and lawful outcome.

54. A constitutional recommendation is not a mere rubber stamp. It is a shield against caprice and the return to the former ways that bedeviled public appointments. In the analogous context of the National Police Service Commission's recommendation with respect to the Inspector-General of Police, the Court in Mwau v Inspector General, National Police Service & 3 others; National Security Council & another (Interested Parties) [2025] KEELRC 2951 (KLR) emphasized the importance of an independent and transparent process. While the context differs, the principle that a constitutional commission must exercise its recommendatory power independently and visibly holds true in this case just as it did in that case.

55. The pattern evidenced in "PF-1" suggests a process where the outcome of the appointment of a specific presidential advisor was predetermined, and the PSC's role was reduced to a procedural formality. This, in my view, falls short of the substantive recommendation required by Article 132(4)(a). It is a fundamental procedural defect that renders the establishment of these offices constitutionally infirm.

56. The Public Service Commission is an independent constitutional commission. To paraphrase that famous saying regarding Caesar's wife, constitutional commissions must not only be independent but they must be seen to be independent.

Compliance with Sections 27 and 30 of the *Public Service Commission Act*

57. Section 27 of the PSC Act lays down meticulous conditions that must be satisfied before the PSC can establish an office. The requesting authority (here, the President of the Republic through his authorized officer being the 1st Respondent) must provide information demonstrating, among other things: comprehensive plans based on workload analysis; the financial implications; how the office sought supports core functions; current establishment data; and assurance that the office will not disadvantage similar posts or cause unfair competition. Crucially, Section 27(2) requires a written statement verifying that all these conditions have been met.

58. A perusal of the request letters in "PF-1" reveals a glaring deficiency. None of the letters contain the detailed information mandated by Section 27(1). They are brief, rarely exceeding a page, and focus almost exclusively on recommending a named individual. They do not attach workload analyses, financial implications beyond perhaps a generic grading if at all, or comparative data on existing posts. Most damningly, none contain the verification statement required by Section 27(2). This omission is not minor; it is a direct contravention of a mandatory statutory provision that operationalizes Article 10 Principles and Values within the establishment and appointments process.

59. The 1st and 2nd Respondents' silence on this specific failure is telling. Their Affidavits in Reply assert compliance but they do not particularize and demonstrate the stated compliance, particularly with respect to demonstrating how the Section 27 conditions were met or where the verification statement is located.

60. To deny non-compliance is not enough, the 1st and 2nd Respondents having adduced the bundle "PF-1" ought to have actually shown that there was compliance. Their own documents tell a different story from that of compliance.

61. This Court's finding in the CAS 1 case is directly applicable to this point. Justice Mrima, examining a similar two-page request letter for the establishment of the CAS office, found it failed the Section 27

threshold because it did not indicate financial implications, lacked information on grading and unfair competition, and omitted the verification statement. He held: "The law required that such information be availed."

62. The letters in the present case suffer from identical, if not more severe, deficiencies. The attempt to distinguish the CAS cases because the "Advisor" post is in the Regulations is unpersuasive. Regulation 27 governs the appointment process after an office is established. The establishment of the office itself is governed by the PSC Act, particularly Sections 27 and 30. The Respondents have not shown compliance with this anterior and critical stage.

63. Section 30 of the Act specifically addresses a request from the President. It mandates that such a request be in writing and that the Commission act "in accordance with the conditions provided for in this Part." The "conditions" are those in Section 27. Therefore, the President's request is subject to the same rigorous requirements. The evidence adduced by the 1st and 2nd Respondents themselves shows these requirements were ignored. Consequently, the establishment of the offices with respect to the Interested Parties violated the *Public Service Commission Act*.

Compliance with Regulation 27 of the PSC Regulations, 2020

64. Even if the office establishment stage were somehow regularized, the appointment process did not meet the Regulation 27 requirements. Regulation 27(2) is pivotal: "The Commission shall determine the number of advisors who shall be appointed for the President and Deputy President as may be needed for carrying out the functions of office." This vests in the PSC a proactive, controlling function to cap and rationalize the number of advisors based on objective need.

65. There is no evidence whatsoever that the PSC ever performed this determinative function. The correspondence shows a reactive process: the President's Office requests appointment of A, then B, then C, and the PSC approves each one. There is no document where the PSC, after an assessment of the Presidency's needs, stated: "The functions of the Office of the President require X number of advisors in the following fields..." The number appears to be open-ended and driven entirely by unilateral proposals from the Executive Office. This is a clear abdication of the PSC's regulatory responsibility under Regulation 27(2).

66. Further, Regulation 27(6) requires the written request to state that the proposed advisor's technical competencies do not exist in the public service and that they match the job requirements. The pro forma letters in "PF-1" use stock phrases like "possesses vast knowledge and experience" but do not contain the specific, comparative analysis required to justify why existing public officers including Cabinet Secretaries, Principal Secretaries, and technical staff across ministries could not provide the needed advice. The requirement is designed to prevent duplication and ensure such appointments of advisors are exceptional, not the norm. The generic justifications provided fail to meet this standard.

67. Therefore, the appointment process also failed to comply with the mandatory provisions of Regulation 27.

Involvement of the Salaries and Remuneration Commission

68. Article 230(4)(a) mandates the SRC to set and regularly review the remuneration and benefits of all State officers. The advisors, being appointed to public offices with remuneration from the Consolidated Fund, are public officers if not state officers, and their remuneration undoubtedly impacts the public compensation bill. Article 230(5) requires the SRC to consider fiscal sustainability.

69. The establishment of multiple high-ranking advisory offices has significant financial implications. In the CAS 1 case, the court underscored that the SRC's input was constitutionally-inevitable and a mandatory constitutional step for creating the CAS offices due to their impact on the national compensation bill. The logic is irresistible here. The positions in question are graded in senior ranks and carry substantial remuneration packages.

70. While I have found no standalone cause of action against the SRC, the failure of the 1st and 2nd Respondents to seek and incorporate the SRC's advice on the fiscal implications of creating these offices is a further constitutional flaw in the establishment process. Section 27(1)(b) of the PSC Act explicitly requires the financial implications of creating the office are indicated. How can this be credibly done without input from the constitutional body tasked with ensuring the sustainability of the public wage bill? The PSC cannot unilaterally decide this. By proceeding without the SRC's analysis, the 1st and 2nd Respondents violated the spirit of Article 230 and rendered the establishment process procedurally and substantively incomplete.

Violation of National Values, Public Service Principles, and Fiscal Prudence Public Participation (Articles 10 & 201)

71. The national values in Article 10, including democracy, participation of the people, transparency, and accountability, bind all state organs. Article 201(a) specifically calls for public participation in financial matters. The question is whether the creation of these advisory offices attracted the duty of public participation.

72. The Respondents rely on William Odhiambo Ramogi & 3 Others v Attorney General & 4 others; Muslims for Human Rights (MUHURI) & 2 others (Interested Parties) (supra) to argue this was an internal operational decision that would not require public participation. With respect, the analogy is inapt. In the above cited authority, the issue concerned internal security deployments and procurement within the Kenya Ports Authority. The creation of multiple senior and publicly-funded offices within the highest office of the land is of a wholly different character. It affects the structure of the executive, has substantial recurring fiscal costs, and potentially alters the dynamics of policy formulation. It is a decision of high governance and public interest that is very much fitting for public participation.

73. The jurisprudence is clear: the more a decision transcends the internal workings of an entity and impacts the public, the greater the duty of participation. In Ng'ang'a (Chairman) & 2 others (Nyandarua County Recreation & Entertainment Association Suing Through Its Officials) v County Executive Committee Member for Cultural Activities, Public Entertainment & Alcoholic Drinks Control, Nyandarua County & another; County Assembly of Nyandarua (Interested Party) [2022] KEHC 10887 (KLR), the High Court held that public participation is required for any issue of governance and any issue that affects the lives of the people. The creation of these offices is such an issue. The court in the above case, while arriving at the conclusion, stated thus;

> "In Kenya, public participation is enshrined as one of our national values and principles of good governance that bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets *the Constitution*, enacts, applies any law or makes or implements public policy decisions."

74. Furthermore, both the CAS 1 and CAS 2 cases are directly applicable to the present controversy. In CAS 1, the court held that creating the CAS office impacted on the public finance and transcended the borders of the PSC, thus requiring public participation. In CAS 2, a three-judge bench found the creation of additional CAS posts unconstitutional for, among other reasons, lack of public

participation. The reasoning applies with equal, if not greater, force to advisors situated in the President's Executive Office itself. The Respondents claim that participation was satisfied during the making of the Commission's 2020 Regulations is misconceived. That addressed the general framework for advisors. It did not address the specific, multiple creations of offices that followed, each with its own cost and functional implications. No public participation was undertaken for these specific decisions.

75. To be clear, the President of the Republic of Kenya is this nation's highest-ranking state and public officer and the holder of this nation's highest government office. The President of the Republic is not just the Head of the National Executive but indeed the Head of State and Government, the Commander in Chief of the Defence Forces, and a Symbol of National Unity. The proposed creation of an advisor to the President is thus a matter of significant national concern and one which undoubtedly should be subjected to public participation.

76. Cabinet Secretaries and Principal Secretaries, and High Commissioners and Ambassadors, are all officers of our Republic who advise the President of the Republic. Their appointment processes feature public participation, which then begs the question on why those of Presidential Advisors should not? There is no reason in law that they should not, and indeed there is a plethora of reasons why public participation should apply to the creation of AND appointment to cabinet-level or cabinet-level approaching offices. It should always be borne in mind that while public participation does not entail necessarily adopting the position taken by the public, effective and constitutionally compliant public participation requires that the views of the public were sought, a reasonable period and facilitation was put in place for their informed feedback, and the resultant views were demonstrably considered in arriving at the final decision. None of this featured in the instant case.

77. I therefore find that the establishment of the offices of Advisors to the President without any form of public participation violated Articles 10 and 201(a) of *the Constitution*.

Values and Principles of Public Service (Article 232)

78. Article 232(1)(f) and (g) are crucial: public service must be characterized by transparency and provision to the public of timely, accurate information and, subject to affirmative action, fair competition and merit as the basis of appointments and promotions.

79. The process followed was the antithesis of transparency. It was conducted through confidential correspondence, with details of positions, criteria, and salaries undisclosed to the public. It was the very definition of an opaque process.

80. More fundamentally, it flagrantly violated the principle of fair competition and merit. The positions were never advertised. There was no open call for applications, no shortlisting based on objective criteria, no interviews conducted by an independent panel. Specific individuals were simply named by the President's Executive Office and thereafter appointed as fair accompli. This is precisely the handpicking or jobs for the boys culture that Article 232 was designed to eliminate. As stated in Republic v Anti-Counterfeit Agency Ex parte Moses Maina Maturu [2016] KEHC 7985 (KLR), *the Constitution* of Kenya 2010 introduced a clear criteria for appointments to state and public offices to replace the old order of ethnicity driven appointments, politicization of the public service, cronyism, and recycling of persons who had been rejected by the electorate at the ballot box that was much maligned and resoundly rejected by the people of Kenya when they promulgated the 2010 Constitution. In making the determination, the court in Republic v Anti-Counterfeit Agency Ex parte Moses Maina Maturu [2016] KEHC 7985 (KLR), had the following to say: -

> " 30. Under Article 232 of *the Constitution*, the values and principles of public service include high standards of professional ethics; efficient, effective and

> economic use of resources; responsive, prompt, effective, impartial and equitable provision of services; involvement of the people in the process of policy making; accountability for administrative acts; transparency and provision to the public of timely, accurate information; and subject to affording adequate and equal opportunities for appointment, training and advancement, at all levels of men and women, the members of all ethnic groups and persons with disabilities; fair competition and merit as the basis of appointments and promotions. These values and principles of public service apply to public service in all State organs in both levels of government and all State corporations."

81. It is my finding that the impugned process is a direct throwback to that retired and rejected public service order and it violates Article 232.

Prudent Use of Public Funds (Article 201)

82. Article 201(d) mandates that public money shall be used in a prudent and responsible way. Prudence implies careful, economical, and non-wasteful use. Creating an unspecified and seemingly expanding number of high-salaried advisors, without a demonstrable needs assessment from the PSC, without a fiscal sustainability analysis from the SRC, and without abolishing any existing roles to offset the new costs; cannot be described as prudent and meeting the constitutional standard for the same.

83. On the contrary, it creates a clear risk of duplication within the existing advisory functions of Cabinet Secretaries, the Attorney-General, Principal Secretaries, Ambassadors, High Commissioners, and the slew of Constitutional, Statutory, and internal offices that the Head of State and Government could and should draw advice from.

84. This duplication wastes precious and scarce public funds in a way in which *the Constitution* cannot abide. It is thus the finding of this Court that Article 201(d) of *the Constitution* was violated by the 1st and 2nd Respondents in the establishment and appointments processes with respect to the Interested Parties.

Violation of the Right to Information (Article 35)

85. Article 35(3) imposes a duty on the state to publish and publicize important information affecting the nation. The *Access to Information Act* gives effect to this right. The court in Law Society of Kenya v Attorney General & 3 others [2023] KEELC 20682 (KLR) affirmed this position when it stated as follows: - "Pursuant to article 35(3), the state is obligated to publish and publicise any important information affecting the nation. These constitutional provisions are buttressed by the *Access to Information Act*, 2016 which was enacted to give effect to article 35 of *the Constitution* and to provide a framework for disclosure of information by public and private entities to the public based on constitutional principles relating to accountability, transparency and public participation and access to information."

86. The creation of new, costly government offices is unquestionably important information affecting the nation. The total secrecy surrounding the number, functions, and cost of these offices until this litigation forced some disclosure is a blatant violation of this constitutional duty. The public had a right to know these details proactively. The Respondents' failure to publish them breached Article 35.

87. Once more, I am compelled to underscore that the subject of who is advising our nation's highest State and Public Officer is a matter of extreme public interest not merely one of extreme interest to the public. The public most definitely has a right to know whom and why is sought to advise the human

embodiment of our national unity, for how long, within which scope, for how much remuneration, based on what needs, with what competencies and qualifications that are not within the existing ranks, and with what safeguards, amongst others.

88. Pre-2010, Kenyans were largely spectators to governance. Their role was that of electoral automatons whose participation in public life was limited to one day, every five years (barring by-elections), to cast their vote and thereafter be silent and uninvolved until the next elections. Under this new and current order, the citizens are individually and collectively active participants in the governance of this nation, albeit having delegated much of the day-to-day responsibilities of steering the nation across three branches and two levels of government.

89. To be the active citizens envisaged, and indeed demanded, by *the Constitution* of Kenya 2010, the people of Kenya must be proactively given all the information required for them to exercise their role as the Sovereign.

90. That is the point that is often lost when we discuss public participation, access to information, and other transformative aspects of our new constitution. The People of Kenya are the Sovereign, the Masters, the Employers, the Ultimate Makers and Unmakers, and the Well from which the Waters of Legitimacy nourish the soils of governance.

91. "we, The People of Kenya..." are the powerful opening words of the Preamble to *the Constitution* of Kenya, making undisputably clear that the establishing sovereign power under *the Constitution* exclusively belongs to and is singularly derived from the People of Kenya; and it is exercisable either directly by them or indirectly strictly on their behalf by the branches of government, levels of government, or entities that the People have directly or through delegation created.

92. For the people of Kenya to fully be the Sovereign that they are, they need to participate as appropriate in as much of public life and public affairs as is possible and practical. This necessarily requires access to information. As our Sovereign, our Masters, our Bosses, and the source of our Authority and Legitimacy; every State and Public Office should as far as possible and with only care to such limitations as are strictly necessary, be proactive in providing information of sufficient quality and content as to meet and exceed the expectations and needs of Kenyans as they seek to exercise their constitutionally recognized rights.

93. In that regard, the actions and omissions of the 1st and 2nd Respondents regrettably fell woefully short of these standards, and it is my finding that the general right to information under Article 35 in that respect was violated in this matter.

Violation of Fair Administrative Action (Article 47)

94. The decision to establish the impugned offices and make appointments to them was an administrative action of the highest order, affecting the legal interests of the public in how their government is structured and how their taxes are spent. Article 47 of *the Constitution* and the *Fair Administrative Action Act* require such action to be lawful, reasonable, and procedurally fair.

95. For the reasons exhaustively detailed above, the actions were unlawful. It was unreasonable; lacking in justification, prudence, and proportionality. It was procedurally unfair; taken without notice to the public, without affording the public a hearing, and without providing reasons. It therefore violated Article 47.

96. While ultimately a public body is not necessarily bound to follow the views of the public, it is required, in appropriate instances and contexts, to provide information, seek views, provide opportunities to be heard and feedback, and to thereafter, if practicable, give reasons.

97. Our democracy, as reimagined in 2010, is the product of our dark and unfortunate past. We The People, gave to ourselves and to every generation to come, a Constitution that fundamentally rejected authoritarianism and the Rule of Rulers as opposed to the Rule of Law.

98. We gave unto ourselves and to every generation to come the right to Fair Administrative Action because we had borne the scars of unfair administrative action. We rejected the past ways of pre-determined decisions from above in favour of well-reasoned decisions based on transparency, accountability, and careful consideration because we desired a fundamental break from the old way of doing things.

99. Fair Administrative Action is not a throwaway phrase that is high-sounding but in actual fact hollow. It is a major artery of our body public that flows directly from the heart of our Constitution. Any action, no matter how well-intentioned or how beneficial, if conducted without compliance to fair administrative action runs the profound risk of invalidation in light of *the Constitution*.

100. In the present case, there can be no doubt that the impugned actions indeed fell far short of fair administrative action, as particularized in Paragraph 95 above. For that reason, the only outcome possible is a finding, which I hereby make, the 1st and 2nd Respondents actions violated the right to Fair Administrative Action under Article 47 of *the Constitution*.

Conclusion

101. As I conclude, I must echo that ancient saying that "the road to hell is paved with good intentions." While it is this Court's finding that there is no evidence that the constitutional failures outlined herein above were deliberate or undertaken out of anything other than a good-faith attempt to deepen the capacity and depth of advice available to the President of the Republic as he discharges the onerous task of being the principal helmsman of our national destiny, the actions, decisions, and omissions in the process exhibit multiple and severe breaches of *the Constitution* and Statute of a fatal and incurable nature.

102. In omnibus conclusion, the Petitioner has proved on a balance of probabilities, and the Respondents have failed to successfully rebut, that the establishment of the various offices styled as "Advisors to the President" and the appointment of the 21 Interested Parties thereto was unconstitutional and unlawful. The process violated the express letter and undermining spirit of the 2010 Constitution by: -

    i. Bypassing the substantive, independent recommendatory role of the Public Service Commission under Article 132(4)(a).

    ii. Failing to comply with the mandatory conditions for establishing public offices under Sections 27 and 30 of the *Public Service Commission Act*, 2017.

    iii. Failing to comply with key provisions of Regulation 27 of the Public Service Commission Regulations, 2020, particularly the PSC's duty to determine the number of advisors.

    iv. Proceeding without the requisite input from the Salaries and Remuneration Commission on fiscal implications.

    v. Being conducted in secret, without public participation, in violation of Articles 10 and 201.

    vi. Violating the public service principles of transparency, fair competition, and merit under Article 232.

    vii. Constituting an imprudent use of public funds under Article 201(d).

    viii. Breaching the right to access information under Article 35.

ix. Constituting unfair administrative action under Article 47.

103. The impugned conduct of creating a parallel, unregulated, and perhaps even unnecessary advisory structure through an opaque, non-competitive, and irregular process offends the very heart of the constitutional ethos of creating a transparent, accountable, and efficient public service.

104. The Supreme Court in Charles Muturi Macharia & 6 Others v Standard-Group & 4 Others SC Petition No.13 (E015) of 2022 guided as follows in regard to award of remedies in constitutional matters:

> " By the provisions of Articles 22 and 23 of *the Constitution*, the High Court has the power and authority to enforce and uphold the Bill of Rights in claims of infringements. In proceedings brought by any person claiming that a right or fundamental freedom has been denied, violated or infringed, or is threatened, the court may, under Article 23 grant appropriate relief, including:
>
> a. a declaration of rights
>
> b. an injunction
>
> c. a conservatory order
>
> d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24.
>
> e. an order for compensation
>
> f. an order of judicial review."
>
> This Court in the case of Gitobu Imanyara & 2 Others v. Attorney General, SC Petition No. 15 of 2017, described Article 23 as "the launching pad of any analysis on remedies for Constitutional violations". This statement has repeatedly been made in other decisions like Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae), SC Petition No. 3 of 2018; [2021] KESC 34 (KLR) and others. As a launching pad, it is acknowledged that the list of six remedies in Article 23(3) is not closed; that the court can grant any other appropriate relief not included in the list; that whether or not to grant a constitutional relief is an act of judicial discretion which must be exercised upon known legal principles and not arbitrarily, whimsically or capriciously."

105. In Bitange Ndemo v Director of Public Prosecutions & 4 others [2016] eKLR the court held: -

> " A declaration is a formal statement by the court pronouncing upon the existence or non-existence of a legal constitutional state of affairs. It declares what the legal position is and what are the rights of the parties. It does not contain an order which can be enforced against the respondents, as it only declares what is the legal position. It is not a coercive remedy and can be carefully couched or tailored so as not to interfere with the activities of public authorities more than is necessary to ensure that those public authorities comply with the law."

106. In view of the foregoing, I allow the Petition as against the 1st and 2nd Respondents, having earlier dismissed the same as against the 3rd Respondent for offending the Anarita Principle, and I opine, hold,

and find that the following reliefs lend themselves to the grant by this Court with respect to the Petition herein:

a. A Declaration be and is hereby issued that the creation of the various offices of Advisors to the President, as particularized in the Petition and Supporting Affidavit with respect to the 21 Interested Parties herein by the actions, decisions, and omissions of the 1st and 2nd Respondents among others was unconstitutional for:

   i. Failure to act upon a valid and independent recommendation of the Public Service Commission as required by Article 132(4)(a) of *the Constitution*;

   ii. Non-compliance with Sections 27 and 30 of the *Public Service Commission Act*, 2017;

   iii. Non-compliance with Regulation 27 of the Public Service Commission Regulations, 2020, specifically the failure of the Public Service Commission to determine the number of advisors needed;

   iv. Failure to involve the Salaries and Remuneration Commission in assessing the financial implications of the offices;

   v. Being undertaken without public participation in violation of Articles 10 and 201(a) of *the Constitution*; and

   vi. Violating the values and principles of public service under Article 232 of *the Constitution*, particularly transparency, fair competition, and merit. Constituting an imprudent use of public funds contrary to Article 201(d) of *the Constitution*;

b. A Declaration be and is hereby issued that the appointments of the 21 Interested Parties to the said unconstitutional offices were and are null and void ab initio pursuant to Article 2(4) of *the Constitution*;

c. An order of certiorari be and is hereby issued to remove into this Court for the purposes of quashing, which this Court hereby does, the decisions to create the impugned Offices of Advisors to the President impugned in the Petition and the subsequent decisions appointing the Interested Parties to those offices;

d. A permanent injunction be and is hereby issued, restraining the 1st and 2nd Respondents, their agents, or anyone acting under their authority from recognizing, facilitating, or effecting any payments to the Interested Parties pursuant to their appointments to the said unconstitutional offices;

e. A structural order and interdict be and is hereby issued directing the Public Service Commission:

   i. To conduct and complete, within ninety (90) days of the date of this judgment, a comprehensive audit of all offices established within the public service for the Executive Office of the President since the promulgation of the 2010 Constitution, with particular focus on offices created since August 2022, to verify their compliance with Article 132(4)(a), the *Public Service Commission Act*, and *the Constitution*;

   ii. Based on the audit as above, to initiate, in accordance with the law, the process of abolishing any office found to have been established unconstitutionally or unlawfully; and

iii. To file a progress report with this Court within one hundred and twenty (120) days of the date of this judgment; AND

f. Considering the public interest nature of this litigation, each Party shall bear their own costs.

Orders accordingly. File closed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF JANUARY 2026.

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BAHATI MWAMUYE MBS

JUDGE

In the presence of: -

Counsel for the Petitioner – Mr. Malidzo Nyawa

Counsel for the 1st Respondent- Ms. Mwasao

Counsel for the 2nd Respondent- Mr. Odukenya

Counsel for the 3rd Respondent – Mr. Murakaru Wahome, Mr. Boniface Muthomi

Court Assistant – Ms. Lwambia