

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E199 OF 2023

BETWEEN

ELIUD KARANJA

MATINDI.....PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST
RESPONDENT

**DEPARTMENTAL COMMITTEE ON DEFENCE,
INTELLIGENCE AND FOREIGN RELATIONS,
NATIONAL ASSEMBLY OF
KENYA.....2ND**

RESPONDENT

NATIONAL ASSEMBLY OF KENYA.....3RD
RESPONDENT

PUBLIC SERVICE COMMISSION.....4TH
RESPONDENT

NOORDIN HAJI, CBS.....5TH
RESPONDENT

J U D G M E N T

Introduction

1. The Petition dated 15th June 2023 is supported by the Petitioner’s affidavit in support of similar date and further supplementary affidavits dated 23rd June 2023, 14th July 2023 and 24th July 2023.

2. The Petition challenges the 5th Respondent's appointment to the office of the Director General of the National Intelligence Service (NIS) vide Gazette Notice No.7688 dated 13th June 2023.
3. The Petitioner avers that the 5th Respondent's appointment is a gross violation of the Constitution owing to the fact at the time of the appointment, there were several unresolved petitions pending at the 4th Respondent against the Petitioner questioning his integrity, competence and suitability to hold the office of the Director of Public Prosecutions, which is a public office.
4. Consequently, the Petitioner seeks the following remedies against the Respondents:

Declarations

- i. The 5th Respondent was ineligible for nomination, approval and appointment to be Director-General, NIS, as, at the dates of the nomination, vetting, approval for appointment, appointment and assumption to office, he was the subject of unresolved petitions seeking his removal from the office of DPP [his immediate former State office] on grounds of non-compliance with Chapter Six of the Constitution, incompetence, gross misconduct and misbehaviour. His personal integrity, competence and suitability as the DPP was also the subject of ongoing legal proceedings in the High Court Petition HCCHRPET E492 OF 2022.***

- ii. The 5th Respondent was ineligible for nomination, approval and appointment to be Director-General, NIS, as, at the dates of the nomination, vetting, approval for appointment and appointment to office, he was the holder of an office declared by the Constitution to be an independent office and the nomination for approval was otherwise than after a public, competitive recruitment process.**
- iii. Persons who hold a State/public office declared to be an independent office by the Constitution or statute, are ineligible for nomination and/or appointment to another State/public office otherwise than after a public, competitive recruitment process.**
- iv. H.E. The President Of The Republic violated the Constitution and the law by nominating the 5th Respondent, for approval by the National Assembly and, upon approval, appointing and presiding over his assumption to office of Director-General, NIS, notwithstanding knowing that the 5th Respondent was, as, at the dates of the nomination, vetting, approval for appointment, appointment and assumption to office, the subject of petitions seeking his removal from the office of DPP [his immediate former State office] on grounds of non-compliance with Chapter Six of the Constitution, incompetence, gross misconduct and misbehaviour.**
- v. The 2nd Respondent failed to discharge its constitutional mandated and, thereby, violated the Constitution and the law, by carrying out a sham approval process which ended with it recommending to the 3rd**

Respondent to approve the 5th Respondent for appointment to the office of Director-General, NIS, notwithstanding that the 5th Respondent was, as, at the dates of the nomination, vetting and approval for appointment, the subject of petitions seeking his removal from the office of DPP on grounds of non-compliance with Chapter Six of the Constitution, incompetence, gross misconduct and misbehaviour.

- vi. The 2nd Respondent failed to carry out its constitutional mandated and, thereby violated the Constitution and the law, by failing to use its powers and require a report from the 4th Respondent on the status of any petitions received under Article 158 of the Constitution, as read together with Section 9, ODPP Act, 2013, Section 76, Public Service Commission Act, 2017 and applicable regulations, seeking the removal of the 5th Respondent from the office of DPP for non-compliance with Chapter Six of the Constitution, incompetence, gross misconduct or misbehaviour.**
- vii. The 2nd Respondent failed to carry out its constitutional mandated and, thereby violated the Constitution and the law, by failing to ensure adequate public participation as part of the approval/vetting process to determine the suitability of the 5th Respondent to be approved for appointment to the office of Director-General, NIS.**
- viii. Based on the record of the report prepared by the 2nd Respondent after vetting the 5th Respondent, the 2nd Respondent's decision to recommend approval of the 5th**

Respondent, was not constitutionally and statutorily founded.

- ix. The 2nd Respondent failed to carry out its constitutional mandate and, thereby violated the Constitution and the law by failing to take into account the submitted written statements contesting the suitability of the 5th Respondent to be recommended for approval and appointment to the office of Director-General, NIS, including by misdirecting itself as to the role of EACC in the process of removal from office of the DPP, even as it acknowledged that this duty reposed in the 4th Respondent.**
- x. The 3rd Respondent violated the Constitution and the law by approving the appointment of the 5th Respondent, based on the recommendations of the 2nd Respondent, despite knowing that, at the date of the nomination, recommendation for approval and approval for appointment to the office of Director-General, NIS, he was the subject of unresolved petitions and legal proceedings challenging his personal integrity, competence and suitability thereby making him ineligible to be approved for such appointment.**
- xi. The 4th Respondent violated the Constitution and the law by refusing to submit a report to the 2nd Respondent, setting out the details and status of the petitions it had received for the removal of the 5th Respondent from office of DPP on the basis of his non-compliance with Chapter Six of the Constitution, gross incompetence, gross misconduct or misbehaviour, subsisting at the dates of the nomination and the**

subsequent approval/vetting hearing conducted by the 2nd Respondent.

- xii. The appointment of the 5th Respondent to the office of Director-General, NIS, as notified by the Kenya Gazette No. 7688 dated 13th June 2023, was unconstitutional, null and void.**

Orders

- xiii. Quashing the nomination, by H.E. the President, of the 5th Respondent to the office of Director-General, NIS.**
- xiv. Quashing the recommendation by the 2nd Respondent for the 5th Respondent to be approved for appointment to the office of Director-General, NIS.**
- xv. Quashing the report tabled in the National Assembly on 6th June 2023 by the 2nd Respondent following its vetting/approval hearing of the 5th Respondent to be approved for appointment to the office of Director-General, NIS.**
- xvi. Quashing the approval by the 3rd Respondent for the 5th Respondent to be appointed to the office of Director-General, NIS.**
- xvii. Quashing the Kenya Gazette Notice No. 7688 dated 13th June 2023, notifying the appointment of the 5th Respondent as Director-General, NIS.**
- xviii. Quashing the appointment, by H.E. the President vide Kenya Gazette Notice No. 7688 dated 13th June 2023, of the 5th Respondent as Director-General, NIS.**

- xix. Nullifying the 5th Respondent's assumption to the office of Director-General, NIS, on 14th June 2023.***
- xx. Requiring parties in these proceedings to meet their own costs.***
- xxi. Any others orders or directions that this Court deems just and fit to grant to meet the exigencies of justice and the requirements of the Constitution.***

Petitioner's Case

5. On 16th May 2023, H.E. Dr. William Samoei Ruto nominated the 5th Respondent for appointment as the Director-General, NIS which appointment was subject to the approval of the 3rd Respondent.
6. The Petitioner depones that the 3rd Respondent through the Clerk on 20th May 2023 notified of the 5th Respondent vetting hearing before the 2nd Respondent on 29th May 2023 and invited the public to submit their views concerning his suitability for the office of Director General – NIS, by 29th May 2023. He depones that he submitted his written statement on 29th May 2023 which contested the suitability of the 5th Respondent.
7. The 5th Respondent appeared before the 2nd Respondent as scheduled and requested to answer the vetting committee's questions to the exclusion of members of the public and the

media, which request was approved in part. He avers that this was the first time such a request had been made.

8. The Petitioner takes issue with the continuation of the vetting process as at the time there were 6 petitions before the 4th Respondent seeking the 5th Respondent's removal from office and further his suit **HCCHR PET MISC No. E037 of 2021** was still pending in Court. He alleges that the 5th Respondent erroneously informed the vetting committee that all the petitions before the 4th respondent had been withdrawn.
9. Upon conclusion of the interview, the 2nd Respondent tabled its Report to the 3rd Respondent, recommending the 5th Respondent's appointment. The Petitioner asserts that in giving this recommendation, the 2nd Respondent misdirected itself as to the nature of the statements contesting the 5th Respondent's suitability thereby making a recommendation outside the provisions of the Constitution and the applicable laws.
10. Further to this, the Petitioner argues that the 2nd Respondent overlooked and misdirected itself on the question of the 5th Respondent being enjoined in **HCCHRPET 492/2022** in his personal capacity and which is yet to be determined and further the role of the Ethics and Anti-Corruption Commission (EACC).

11. The Petitioner contends that despite the 4th Respondent being mandated to receive petitions for removal of the 5th Respondent as a Director of Public Prosecutions (DPP), pursuant to Article 158 of the Constitution as read with Section 9 of the Office of Director of Public Prosecutions (ODPP) Act, similarly pursuant to Section 76 of the Public Service Commission Act, the 3rd Respondent failed to write to the 4th Respondent seeking information about any pending petitions for removal of the 5th Respondent.
12. He faults the 3rd Respondent for seeking information from the EACC which does not have any mandate to hear and determine petitions for removal from office of the DPP. The Petitioner stresses that the 2nd and 3rd Respondents were required by the Constitution and the law to seek reference and background checks from the 4th Respondent on matters touching on the 5th Respondent's personal integrity, competence and suitability, however failed to do so.
13. The Petitioner further contends that the 2nd Respondent is empowered to seek information from any person to enable it to fulfil its mandate yet failed to seek information from the 4th Respondent and relied on the 5th Respondent's word, without making further interrogation, defeating the whole purpose of a vetting process. On this basis, the Petitioner argues that the 2nd Respondent's Report and its

recommendation is legally untenable as it goes against the Constitution and applicable law.

14. The 4th Respondent is similarly faulted for failing its constitutional mandate in that it did not write to the 3rd Respondent to inform it on the pending petitions before it.
15. In the Petitioner's opinion, had the 2nd and 3rd Respondents applied the Constitution and applicable laws under Article 73(2)(a), as read together with Article 158 of the Constitution, Section 4(4), NIS, Act, 2012, Section 9, ODPP Act, 2013 and Section 76, Public Service Commission Act, 2015, they would have found that the 5th Respondent did not meet the constitutional and statutory requirements to be approved for appointment to the office of Director-General, NIS.
16. The Petitioner alleges that the 5th Respondent's appointment was a foregone conclusion even before his nomination, owing to the speed with which he was appointed and resigned from the office of the Director of Public Prosecutions.
17. Essentially, the Petitioner in this Petition stresses that the 5th Respondent was ineligible for nomination, vetting, approval for appointment, appointment and assumption to the office of Director-General, NIS due to the outstanding and unresolved petitions for his removal from office before the

4th Respondent, which impugn his personal integrity, competence and suitability for the to the office of Director-General, NIS.

18. Further to this that the 5th Respondent was ineligible as at the dates of the nomination, vetting, approval for appointment and appointment to office, as he was still the DPP, which is an independent state and public office. The Petitioner argued that the only way the 5th Respondent could have attained this office in the circumstances is through a competitive recruitment process not a nomination as in this case.

1st Respondent's Case

19. Opposing the Petition and application, the 1st Respondent filed its grounds of opposition dated 8th January 2024 on the premise that:

- i. The Petitioner has not adduced any evidence in support of the allegation made against the 1st Respondent.*
- ii. No tribunal constituted in accordance with the provisions of Article 158(4) of the Constitution made any finding that warranted the removal of the 5th Respondent from the Office of Director of Public Prosecutions.*
- iii. The Public Service Commission did not send any petition to the President disclosing the existence of any ground under Article 158 (1) of the Constitution.*

- iv. *The allegations on what either the Public Service Commission or the Tribunal constituted under Article 158(4) of the Constitution would have found and recommended is at best speculative and cannot legally form the basis of impeaching the 5th Respondent's nomination, approval and appointment into the office of Director-General, National Intelligence Service.*
- v. *Neither this Court nor the National Assembly can substitute the role of the Public Service Commission and the Tribunal under Article 158 of the Constitution.*
- vi. *The Petition is antithetic to the doctrine of separation of powers as it seeks to replace the National Assembly's role with this Court in the approval process on the appointment of the Director-General National Intelligence Service.*
- vii. *This Court should not reconstitute itself as the vetting/approving body as propagated by the Petitioner in the case.*
- viii. *It would be grossly unjust for alleged acts of commission or omission attributed upon an independent constitutional commission like the Public Service Commission to be visited upon the 5th Respondent as sought in the Petition.*
- ix. *Pendency of legal proceedings neither vitiates the presumption of innocence nor dispenses with the legal and evidential burden of proof required to arrive at an adverse finding that would have disqualified the 5th Respondent under obtaining law.*
- x. *The Petition is speculative on what National Assembly may or may not have found.*

- xi. It would be a travesty of justice for this Court to draw a negative inference on the 5th Respondent's exercise of his constitutional and lawful right to seek and obtain legal relief from the judiciary as propagated by the Petitioner.*
- xii. Article 79 of the Constitution provides for the establishment of an independent ethics and anti-corruption commission with the status and powers of a commission under chapter fifteen for purposes of ensuring compliance with and enforcement of the provisions of chapter six of the constitution, this Court cannot therefore assume primary responsibility in lieu of the constitutional repository of the function as proposed by the Petitioner.*
- xiii. The Petitioner has failed to plead and prove any specific infraction of the constitution by the 5th Respondent that would serve to bar the 5th Respondent from being appointed as Director General of the National Intelligence Service, the Petitioner is improperly seeking to take over and canvass unresolved complaints by parties who despite full knowledge of the appointment process of the 5th Respondent into office deliberately elected not to urge the same.*
- xiv. The petition is premised on inadmissible evidence as the same is sought to be adduced contrary to the provisions of sections 106A and 106B of the Evidence Act.*
- xv. The Petition is based on evidence that is not original to the Petitioner, therefore hearsay and inadmissible.*

2nd and 3rd Respondents' Case

20. These Respondents filed their Replying Affidavit through the Clerk of the 3rd Respondent, Samuel Njoroge sworn on 18th July 2023. He stated that following the nomination of the 5th Respondent through the Notification of Presidential Action dated 18th May 2023, the matter was transmitted to the House pursuant to Section 7(2) of the NIS Act and Section 5 (1) of the Public Appointments (Parliamentary Approval) Act.
21. Thereafter, on 20th May 2023, the National Assembly pursuant to Article 118 of the Constitution and Section 6(4) of the Public Appointments (Parliamentary Approval) Act invited the public to give its views, comments and memoranda on the 5th Respondent's nomination by 29th May 2023. In this regard, the 2nd Respondent received 26 memoranda including one by the Petitioner. 22 of these were in favour of the 5th Respondent's nomination while the rest against it.
22. He further depones that, the 3rd Respondent wrote to the Kenya Revenue Authority (KRA), the Ethics and Anti - Corruption Commission (EACC), the Directorate of Criminal Investigations (DCI), the Higher Education Loans Board (HELB) and the Office of the Registrar of political Parties (ORPP), seeking reference and background checks for the 5th Respondent. It is noted that these organs in their responses cleared the 5th Respondent for appointment. Related to this,

he avers that the 3rd Respondent's is not legally required to seek clearance from the 4th Respondent.

23. He depones that the 5th Respondent was invited on 23rd May 2023 to appear before the 2nd Respondent for a hearing. The hearing was conducted on 30th May 2023 and by the 5th Respondent request, the hearing was not done in public. He stated that the 5th Respondent's suitability was based on the criteria set out under Section 7 of the Public Appointments (Parliamentary Approval) Act and the constitutional requirements.
24. In the end, the 2nd Respondent determined that the 5th Respondent had met the requisite requirements for appointment as the Director General and made the recommendation to the 3rd Respondent. This Report was tabled before the House on 6th June 2023. The National Assembly approved his nomination on 13th June 2023 and gazetted the same vide Notice No.7688.He was sworn in as the Director General of the NIS the following day.
25. In light of this, it is asserted that these Respondents adhered to the constitutional and statutory requirements in the appointment of the 5th Respondent.

4th Respondent's Case

26. In reply, the 4th Respondent through its Chief Executive Officer, Simon K. Rotich filed a Replying Affidavit sworn on 22nd June 2023.
27. He confirms that the 4th Respondent's authority with regard to removal from office of a person holding the office of the Director of Public Prosecutions is provided under Article 158(2) and (3) of the Constitution. Tied to this, he deponed that the 4th Respondent in 2021 received two petitions seeking the removal of the 5th Respondent as the Director of Public Prosecutions (DPP).
28. However, the 5th Respondent filed **Nairobi HCCHR Misc. Petition No. E037 of 2021** and obtained orders halting the 4th Respondent going on with the further consideration of the petitions. The suit had not been determined at the time of swearing this affidavit.
29. He depones that almost the same time, the 4th Respondent received further 8 petitions seeking the removal of the 5th Respondent from office. He notes however that 6 of these petitions had been withdrawn prior to the nomination of the 5th Respondent for appointment as the Director General of the NIS.
30. He further makes known that soon after the 5th Respondent's nomination, the 4th Respondent received 2 additional petitions seeking his removal as the DPP. The 4th Respondent

was however not able to consider these petitions owing to the existing Court order.

31. He stated that since the 4th Respondent never finalized consideration of the petitions, it was not able to provide a Report to the 3rd Respondent through the 2nd Respondent during the 5th Respondent's vetting. He avers nonetheless giving such a Report would have been prejudicial to the 5th Respondent as it would have amounted to condemning him without a hearing in violation of Article 47 of the Constitution.
32. He adds that the same would have also been in violation of Article 158 (3) of the Constitution which only permits issuance of a Report to the President once the 4th Respondent is satisfied that a ground under clause (1) is existent. For this reason, he asserts that the 4th Respondent was not under any obligation to inform the 3rd Respondent of the pending petitions against the 5th Respondent. He as such argues that the Petition lacks merit and hence should be dismissed with costs.

5th Respondent's Case

33. In response, the 5th Respondent filed his Replying affidavit sworn on 8th July 2023. On preliminary note, the 5th Respondent asserts that the Petition fails to meet the constitutional threshold of Petitions as set out in **Anarita**

Karimi Njeru v Republic (1979) eKLR and reaffirmed in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**. This is because it does not provide the particulars of the alleged complaints against him and the manner in which he violated the specified provisions.

34. The 5th Respondent further asserts that the Petitioner has failed to discharge the burden of proof as required under Section 107(1), 109 and 112 of the Evidence Act for grant of the interlocutory orders. He also cited inter alia the case of **Commission for Human Rights and Justice v Torrut & 5 others (Petition E024 of 2021) [2022] KEHC 11931 (KLR)** that addressed the question of standard of proof.
35. Further, he contended that the Petitioner did not provide proof to support the claim of non - compliance with Chapter six of the Constitution other than making general allegations based on hearsay and false information. He argued that the Petitioner filed this matter with an ulterior motive to tarnish his reputation and termed the Petitioner's case as frivolous and vexatious.
36. In answer to the Petitioner that there were pending Petitions for his removal at the 4th Respondent that question the exercise of his mandate when held the office of the DPP, the 5th Respondent asserted that the decision to withdraw cases in the year 2021/2022 was in line with the Constitution and

discretion given under Article 157(8) of the Constitution, hence his actions and conduct as the DPP were in line with the law and the Constitution. He thus argued that withdrawal of cases as cannot constitute a ground for removal of the DPP from office nor does it support the claim for incompetence or lack of integrity.

37. He pointed out that the Petitioner's complaint against him ought to have been lodged in the right forum yet this was not done. He in the same way prior to filing of this Petition did not lodge any complaint with the 5th Respondent during his tenure as the DPP. He for this reason, he urged the Court to dismiss this Petition with costs.

Petitioner's Submissions

38. The Petitioner filed submissions dated 31st January 2025.
39. He maintained that the 5th Respondent was not eligible for nomination, approval and appointment to the office of Director General - NIS. He reiterated that it is clear that at the dates of the nomination, approval, appointment and assumption to the office, the 5th Respondent was subject of at least 6 unresolved petitions seeking his removal as DPP before the 4th Respondent, filed in line with Article 158 of the Constitution.
40. The Petitioner further argued that **Section 4(4), National Intelligence Service (NIS) Act**, imposes an explicit,

mandatory duty on the President and the 3rd Respondent to observe the provisions of Article 73(2)(a) of the Constitution, in appointing a person to the office of Director General - NIS. He argued that despite the constitutional and statutory requirements, the President and the 3rd Respondent, nominated, approved for appointment and appointed, the 5th Respondent to the office of the Director General - NIS.

41. The Petitioner contended that in exercising the powers donated by Articles 124(4), 132(2)(f) and 242 of the Constitution, Section 7, NIS Act and the Public Appointments (Parliamentary Approval) Act, the Respondents were under a duty to uphold and protect the Constitution, which they failed to do. In failing to do so, the Petitioner argued that the Respondents unlawfully exercised the powers donated to them under the Constitution thereby subverting and destroying the effect and operation of other the constitutional provisions.
42. The Petitioner relying in **Law Society of Kenya v Attorney General & another [2021] eKLR** submitted that the Constitution must be read and interpreted holistically, with each provision sustaining the others and none destroying the others. Further reliance was placed on **Robert Alai v Attorney General & another [2017] eKLR**.
43. The Petitioner further faulted the Petitioner's nomination as a State Officer yet was required to be subjected to a fair

competition and be selected on merit. He argued that, instead, his selection was at the behest of the President. The Petitioner submitted that this was contrary to the explicit requirements of Article 73(2)(a) of the Constitution as read with Section 4(4), NIS Act.

44. The Petitioner also submitted that the 4th Respondent in **HCCHRPET MISC. No. E037 of 2021** informed the Court that it was desirous to consider the petitions received under Article 158 of the Constitution. He argued that the Respondents' deliberate actions of nonetheless nominating, approving and appointing the 5th Respondent as Director General - NIS, rendered this process moot thus their actions unconstitutional, null and void. On this premise, the Petitioner emphasized that the 5th Respondent was not eligible for the office.
45. The 3rd Respondent is faulted for taking into account irrelevant information and factors concerning the 5th Respondent's suitability for appointment to the office while failing to consider relevant information such as the pending petitions. He stresses that this was not in line with the compliance requirements under Section 4(4) NIS Act. The Petitioner asserted that it is trite law that where a decision-maker takes into account irrelevant considerations in making a decision or fails to take into account relevant considerations in that process, the resulting decision is

irrational and, hence, unconstitutional, null and void as held in **Democratic Alliance - v - The President of the Republic of South Africa & 3 Others (Case CCT 122/11 [2012] ZACC 24)**.

46. Additional reliance was placed on **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)** and **Okoiti v Attorney General & 3 others; Sugut & 6 others (Interested Parties) (Petition E104 of 2023) [2024] KEHC 15701 (KLR)**.

47. According to the Petitioner, the 3rd Respondent failed to adhere to the constitutional requirements that govern public participation as mandated by Articles 10(2)(a) and 118(1)(b) of the Constitution in relation to public participation. In his view, the 3rd Respondent through the 2nd Respondent did not undertake adequate public participation when it approved the 5th Respondent for appointment. The Petitioner alleged that the 3rd Respondent adopted the recommendation without any further interrogations thus misdirecting itself. To this end, the Petitioner argued that he had substantiated his case against the Respondents in relation to the 5th Respondent's nomination and eventual appointment as the Director General - NIS.

1st Respondent's Submissions

48. On 18/2/2025, the 1st Respondent was represented by Mr. Marwa who was holding brief for Mr. E. Bitu. He informed this Court the 1st Respondent filed submissions dated 3/4/2025. The Court directed Counsel to re-upload the submissions on the CTS as at that point, it could not access them on the CTS. The Court stated thus:

“The 1st Respondent to re-upload its submissions and serve the Petitioner”

49. On 7/7/2025, Mr. E. Bitu for the 1st Respondent informed the Court he had re-uploaded the 1st Respondent submissions and reserved all the parties. However, despite this, the Court could not locate the 1st Respondent’s submissions on the Court online portal (CTS) or physically in the Court file at the point of writing this judgment.

2nd and 3rd Respondents’ Submissions

50. The 2nd and 3rd Respondents through Counsel Emacar Andrew filed submissions dated 11th October 2023. He attacked the Petition stating that it does not meet the threshold set out in **Anarita Karimi Njeru Case** (supra).

51. He submitted that this Court’s jurisdiction is limited to an interrogation of whether the Constitution and the law was complied with. Reliance was placed in **Pevans East Africa Limited & another v. Chairman, Betting Control and Licensing Board and 7 Others (2013) eKLR** where the Court of Appeal held that:

“Courts must decline to intervene at will in the Constitutional spheres of other organs, particularly when they are invited to substitute their judgment over that of other of the organs in which constitutional power reposes, because those organs have expertise in their area of mandate, which the court do not normally have.”

52. Turning to the substantive issue, counsel submitted that the only issue for determination is whether the nomination, recommendation, approval and appointment of the 5th Respondent violated the Constitution and the law. Counsel in this regard argued that this process was carried out lawfully as detailed in the 2nd and 3rd Respondents’ affidavit.
53. In a nutshell, the 5th Respondent’s nomination by the President complied with Section 7(1) & (2) of the NIS Act and the notification in compliance with Section 5(1) of the Public Appointments (Parliamentary Approval) Act, 2011. Once the notification was received the Speaker of the 3rd Respondent in compliance with Standing Order 45 of the National Assembly Standing Orders committed the matter to the 2nd Respondent.
54. This was then followed by a call to the public to participate in the process by the 3rd Respondent as required under Article 118 (1) of the Constitution and Section 6(4) and (9) of the Public Appointments (Parliamentary Approval) Act.
55. Correspondingly the 2nd Respondent received a green light from KRA, EACC, DCI, HELB and ORPP on the suitability of

the 5th Respondent. In like manner, Counsel stressed that there is no legal requirement for the 2nd and 3rd Respondent to seek clearance from the 4th Respondent concerning the 5th Respondent's nomination for the Director General of NIS post.

56. It is further noted that the exclusion of the 5th Respondent's interview from the public was done in line with Articles 24 and 35 of the Constitution as read with Section 6(1) of the Public Appointments (Parliamentary Approval) Act. At the conclusion of the process and satisfied that the 5th Respondent had met the requirements, the 2nd Respondent recommended his appointment which the 3rd Respondent effected on 13th June 2023.
57. Considering these factors, it is asserted that it is clear that due process was followed in the nomination and appointment of the 5th Respondent. For this reason, it is argued that the Petition lacks merit and hence should be dismissed with costs.

4th Respondent's Submissions

58. The 4th Respondent's submissions were neither in the Court file nor in the Court online portal (CTS).

5th Respondent's Submissions

59. Taib and Taib Advocates LLP on behalf of the 5th Respondent filed submissions dated 8th April 2025.
60. On a preliminary note, Counsel submitted that the Petition is moot and speculative in relation to the unresolved petitions under Article 158 of the Petition, as none of the petitions resulted in a tribunal's adverse findings or presidential action against the 5th Respondent. Counsel relied in **Chilango & Another v Independent Electoral and Boundaries Commission & 3 Others [2022] KEHC 10779 (KLR)** where it was stressed that:

“Speculative and conjectural allegations are not considered reliable, and they are not allowed as evidence in court cases... Courts rely only on factual evidence and not litigants’ guesses about what else may have occurred. This is what I will describe as ungrounded assumptions. Courts must avoid speculative reasoning that invokes ‘common-sense’ assumptions not grounded in the evidence. This Petition suffers from speculation and conjuncture. On this ground alone, I dismiss it.”

61. Counsel submitted that the law demands that the Petitioner must plead with specificity the constitutional provisions violated and provide factual evidence in support of his case, which was not done in this case. Counsel noted that the Court in **Chilango & Another** (supra) stressed that:

“A party citing violation of Articles of the Constitution must plead with specificity the articles alleged to be

violated and the facts supporting the alleged violation. A Petitioner's obligation to provide the grounds of his entitlement to relief requires more than labels, conclusions, speculation, or assumptions. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are probable (even if doubtful in fact)."

62. Additional reliance was placed on **Anarita Karimi Njeru** (supra) and **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**.

63. Furthermore, Counsel submitted that the Petitioner was inviting the Court to usurp the constitutional mandates of the President contrary to the doctrine of separation of powers. Counsel stressed that Courts in exercising restraint must defer to constitutional processes unless irrationality is proven. To buttress this point reliance was placed in **Re the Matter of the Interim Independent Electoral Commission [2011] eKLR** where it was held that:

"Separation of powers is an integral principle in Kenya's Constitution... The effect of the Constitution's detailed provision for the rule of law is that the legality of executive or administrative actions is to be determined by the Courts, which are independent of the Executive...None of the governmental organs function in splendid isolation."

64. Turning to the substantive allegation, Counsel submitted that there was full compliance with Article 73(2)(a) of the Constitution as read with the NIS Act in that the nomination

process adhered to constitutional standards, including integrity vetting by the EACC. Counsel stressed that no evidence had been adduced to the contrary. To buttress this point reliance was placed in **Gikenyi B v Mwaura & 2 Others; Ethics and Anti-Corruption Commission & 2 Others (Interested Parties) [2024] KEHC 8456 (KLR)** where it was held that:

“Pending petitions or unresolved allegations under constitutional removal procedures (e.g., Article 158 for DPP removal) do not, by themselves, disqualify a candidate from appointment to another public office unless there is a specific legal bar or adverse finding by a competent tribunal... The mere existence of unresolved petitions, without more, cannot be used to fetter the constitutional discretion of appointing authorities... To hold otherwise would undermine the presumption of innocence and create a weapon for political sabotage.”

65. Counsel further argued that the Petition is an affront to executive authority as the President exercised his discretion under Article 132(2)(f) of the Constitution to nominate the 5th Respondent’s owing to his exemplary service as the DPP.
66. Counsel added that due process was employed as can be gleaned from the public participation exercise and EACC’s clearance. Counsel objected the Petitioner’s view that the operation of Article 158 of the Constitution created a constitutional conflict. Counsel argued that both processes are independent and Constitution permits parallel processes where no legal overlap exists.

67. Counsel as well argued that the Petitioner’s allegations are offensive to the presumption of innocence under Article 50(2(a) of the Constitution and edicts of discharge of the burden of proof under Sections 109 and 110 of the Evidence Act. Counsel pointed out that the Petitioner had made several accusations, however failed substantiate them. Counsel reiterated that the cited petitions remain fictitious and incapable of any scrutiny.
68. Moreover, Counsel emphasized that the Petitioner’s reliance on newspapers articles cannot suffice as the Court of Appeal in **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR** held that a statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in the absence of the maker of the statement appearing in Court and deposing to have perceived the fact reported.
69. In view of the foregoing, Counsel argued that the Petition lacks merit and is speculative as the 5th Respondent’s appointment was lawful. Counsel as such urged the Court to uphold the doctrine of separation of powers by declining to interfere with the 3rd Respondent’s exercise of authority.

Analysis and Determination

70. It is my considered view, that the issues that arise for determination are:

- i. Whether the Petition satisfies the constitutional threshold of a Constitutional Petition.***
- ii. Whether the nomination, approval, and appointment of the 5th Respondent was done in contravention of the Constitutional and Statutory mandate thereby rendering his appointment as the Director General- NIS unconstitutional and unlawful.***

Whether the Petition satisfies the threshold of a Constitutional Petition

71. A constitutional petition must identify the specific article of the Constitution alleged to have been violated and provide details regarding the manner of violation. That was the holding in the locus classicus case of **ANARITA KARIMI NJERU VS. REPUBLIC [1979] EKLR** where the court stated thus:

“... 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...”

72. The Court of Appeal in the case of **COMMUNICATIONS COMMISSION OF KENYA & 5 OTHERS VS. ROYAL MEDIA SERVICES LIMITED & 5 OTHERS [2014] ECLR**

also stated that:-

“Although article 22(1) of the Constitution gives every person the right to initiate proceedings 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. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

73. In his Replying affidavit sworn on 8/7/2023 as well as submissions by Counsel, the 5th Respondent contended that the Petition does not meet the threshold of a Constitutional Petition stating that the Petition merely made allegations against him without supplying the particulars as to the manner the 5th Respondent had violated those constitutional provisions. The 2nd Respondent’s Counsel also submitted that the Petition is not pleaded with reasonable precision and specificity.

74. I have carefully studied the Petition. The following paragraphs in the Petition stand out:

Paragraph 30, 33 & 66 states:

- 30.** *The 5th Respondent has been enjoined in this Petition in his private and personal capacity for numerous breaches of the Constitution and the law at every stage of the process -nomination, approval hearing, approval and appointment, culminating in his assumption to office of the DIRECTOR GENERAL, NIS, following his appointment to that office by H.E THE PRESIDENT.*
- 32.** *In accordance with the Constitution and the law, including Articles 1, 3 (1), 10, 74, 75, 157, 158, 238, 242, and 259 (1), the 5th Respondent was under a binding, enduring duty not to accept his nomination for appointment to the DIRECTOR GENERAL, NIS while he was still the DPP. Further, and in addition, the 5th Respondent was under binding, continuing constitutional duty not to accept the nomination and subsequent appointment to the office of DIRECTOR GENERAL, NIS until questions raised regarding personal integrity, competence and suitability to hold office of DPP, had been dealt with in accordance with the law.*
- 33.** *In addition to four [4] Petitions submitted to the PUBLIC SERVICE COMMISSION under Article 158 (2) of the Constitution as read with Section 9, ODPP Act, 2013, Section 76 of the Public Service Commission, Act 2017, and the applicable regulations, the 5th Respondent was aware that his personal integrity, competence and suitability to hold the office of DPP was the subject of ongoing judicial inquiry in the High Court Petition HCCHRPET E492/2022, in which he has been*

enjoined in a personal capacity. He was further personally aware of the Petitions seeking removal as DPP which are in issue in the High Court Petition HCCHRPETMISC 037/2021.

66. *Had the 2nd and 3rd Respondents applied the Constitution of Kenya and applicable laws, especially Article 73 (2) (a) as read together with Article 158 of the Constitution, Section 4(4), NIS Act, 2012, Section 9 ODPP Act, 2013 and Section 76 -Public Service Commission Act, they would have found that, in view of outstanding Petitions seeking removal of the 5th Respondent from office as DPP, including the two Petitions in the personal knowledge of the 5th Respondent, the Petition from TIA and ongoing legal proceedings in HCCHRPET E492/2022, the 5th Respondent's personal integrity, competence and suitability was subject to ongoing unresolved enquiries. Under those circumstances, the 5th Respondent did not meet the requirements to be approved for appointment to the office of DIRECTOR GENERAL, NIS.*

75. In my view, even without scrutinizing this Petition further, the above paragraphs provide a sufficient basis, that details the allegations of violation of the Constitution attributable to the 5th Respondent that the Petitioner alleges make his appointment unsuitable. He clearly states that the Petitioner has unresolved questions about his integrity and cites specific cases including Petitions filed at PSC (4th Respondent) and pending cases before the High Court. He also cites the specific Constitutional provisions that are implicated by pendency of the unresolved Petitions, in

particular Article 73 (2) (a) which relates to integrity, competence and suitability.

76. In my view, the Petition as framed meets the threshold required in pleading a constitutional Petition, in that it identifies the Articles of the Constitution alleged to have been violated- namely Article 1, 3 (1) 10, 74, 75, 157, 238, 259 (1) and most fundamentally, 73 (2) (a)- that placed the duty of integrity, competence and suitability on the 5th Respondent as a State Officer and which was mandatory for him to observe. The Petition goes ahead to give a descriptive narrative of the manner the said breach was enabled and/or occasioned- namely, the 5th Respondent being aware of questions surrounding his integrity in view of unresolved Petitions at the PSC and High Court cases yet unbothered, accepting the nomination while he was still serving as DPP, which actions the Petitioner pleads directly infringes Article 73 (2) (a) of the Constitution.
77. The pleading sets out with clarity and reasonable precision, the substratum of the case that not only the 5th Respondent is confronted with, but all the Respondents and there is no vagueness in what they have to meet and defend. Whether or not the Petitioner is capable of proving these allegations or that they produce the consequences alleged, is a different matter as that is question of proof which must be established by cogent and admissible evidence.

78. I therefore find that the test set out in **Anarita Karimi Njeru case** has been fully satisfied by the instant Petition.

Whether the nomination, approval, and appointment of the 5th Respondent was done in contravention of the Constitutional and Statutory mandate thereby rendering his appointment as the Director General-NIS unconstitutional and unlawful.

79. The Petitioner alleged that the Respondents nominated the 5th Respondent to the position of Director-NIS while he was still serving in the position of the Director of Public Prosecutions. The Petitioner alleged that this was unlawful and unconstitutional as the position ought to have been subjected to fair competition and selected on merit yet the nomination of the 5th Respondent who was still serving as the DPP was done by the President which the Petitioner submitted was in contravention of Article 73 (2) (a) of the Constitution read with Section 4(4) of the National Intelligence Service Act.

80. The procedure for the appointment of Director General=NIS is provided for **under Section 7** of the National Intelligence Service Act Cap 206 as follows:

Section 7 - Director-General

- (1) *There shall be a Director-General of the Service who shall, **with the approval of the National Assembly, be appointed by the President.***
- (2) ***The President shall nominate a person for appointment as the Director-General and submit the name of the nominee to the National Assembly.***
- (3) *The National Assembly shall, within fourteen days after it first meets after receiving the names of the nominee—*
 - (a) *consider the suitability of the nominee;*
 - (b) *either approve or reject the nominee for appointment; and*
 - (c) *the Speaker shall notify the President of the decision of the National Assembly.*
- (4) *If the National Assembly approves the nominee, the President shall, within seven days after receiving the notification to that effect, appoint the nominee as the Director-General.*
- (5) *If the National Assembly rejects a nominee submitted by the President, the National Assembly shall request the President to submit a new nominee and the provisions of this section shall apply with necessary modifications with respect to the new nominee.*
- (6) *If, after the expiry of a period of sixty days from the date of the nomination of a person for appointment as a Director-General under subsection (2), the National Assembly has neither approved nor rejected the nomination of the*

person, the nominee shall be deemed to have been approved by the National Assembly.

81. Section 4 (4) of the Act provides that in appointing a person as Director General, the President and the National Assembly shall observe the provision of Article 73 (2) (a) of the Constitution.
82. Article 73 (2) (a) of the Constitution states:
- 2) *the guiding principles on leadership and integrity include-*
 - a) *selection on the basis of personal integrity, competence and suitability, or election in free and fair elections.*
83. Contrary to the position taken by the Petitioner, neither Section 7 of the National Intelligence Service Act, Section 4 (4) nor the Constitution imposes a duty on the President to nominate the Director General - NIS on the basis of competitive recruitment such as advertisement, shortlisting and selection by independent panel.
84. Further the discretion of the President in carrying out the nomination is not constrained by excluding from nomination by the President serving State officers from nomination for consideration for appointment to the position. The only conditions placed on both the President and the National Assembly by the Act and the Constitution is to ensure the

person nominated meets the threshold of personal integrity, competence and suitability. In any case, one of key requirements for the appointment as specified in Section 8 (1) (d) is that one must have ***'served in a senior management position in the Service or public service for at least ten years'*** which in essence uplifts service in public service a qualifying factor as opposed to a limitation.

85. Furthermore, Section 8 (2) of the National Intelligence Service Act expressly provides for persons precluded from consideration for appointment to the position of Director General of NIS and being a serving State officer is not one of the constraints. The only category of persons exempted are:

Section 8 (2) A person is not qualified for appointment as Director-General if that person —

- (a) is a member of Parliament, a member of a county assembly, a governor or a deputy governor;*
- (b) has, in the immediately preceding period of five years, served as a member of Parliament, a member of a county assembly, a governor, a deputy governor, a trade union official or held an office in a political party;*
- (c) holds dual citizenship;*
- (d) has been convicted of a criminal offence and has been sentenced to imprisonment for a term exceeding six months without an option of a fine;*

(e) *has previously been removed from office for contravening the provisions of the Constitution or any other written law; or*

(f) *is an undischarged bankrupt.*

86. The President's choice is purely discretionary subject to the person nominated meeting the integrity, competence and suitability requirements and if, they do not fall in the excluded category under Section 8 (2) of the Act. The Court cannot interfere with the President choice unless it is shown he acted outside the authority over the state or the constitution.

87. Equally, it would amount to the Court's usurpation of the legislative role if this Honourable Court were to read into the NIS Act or the Constitution, a requirement that imposes a mandatory duty on the President to conduct competitive recruitment of the Director General of the National Intelligence Service or restricting him from nominating a State Officer to be considered for such the appointment against the express provisions of the statute that confer the discretion to nominate on him subject to meeting the criteria specified in Article 73(2) (a). Such action would amount to judicial overreach. As was held in the South African Court case of Pharmaceutical **Manufacturers Association of South Africa and Another: In re Ex Parte President of**

the Republic of South Africa and Others (CCT31/99)
[2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241

“... As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary’s decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately.[108] A decision that is objectively irrational is likely to be made only rarely but if this does occur, a court has the power to intervene and set aside the irrational decision...”

88. Turning on the suitability requirements, the Petitioner argued that based on the unresolved Petitions that were before the 4th Respondent (PSC) and some cases before the High Court, then the 5th Respondent was unsuitable for the nomination, approval and appointment to be the Director General of the National Intelligence Service. The 5th Respondent opposed this contention on the basis the Petitions were based on bare unsubstantiated allegations that he had not even had a chance to defend and thus using them against him would be tantamount to condemning him unheard.

89. The 2nd and the 3rd Respondent maintained that the 5th Respondent’s nomination by the President complied with Section 7(1) & (2) of the NIS Act and the notification was in compliance with Section 5(1) of the Public Appointments

(Parliamentary Approval) Act, 2011 including Standing Order 45 of the National Assembly Standing Orders upon which the Speaker committed the matter to the 2nd Respondent. As required by Article 118 (1) read with Section 6 (4) & (9) of the Public Appointments (Parliamentary Approval) Act, a call to the public to participate in the process was done by the 3rd Respondent. Further that the 2nd Respondent received clearance of the 5th Respondent from KRA, EACC, DCI, HELB and ORPP on the suitability of the 5th Respondent. The 2nd and 3rd Respondent insisted that there was no legal requirement for the 2nd and 3rd Respondent to seek clearance from the 4th Respondent concerning the 5th Respondent's nomination for the Director General of NIS position and from its perspective, the nomination and appointment of the 5th Respondent followed the due process.

90. In my humble view, the Petitioners contention is misplaced. Firstly, the Petitioner wants this Court to trespass into the Constitutional domain of the National Assembly, which has been vested with that specific mandate under Section 7 (4), 5 & 6 of the National Intelligence Service Act read together with the provisions of the Public Appointments (Parliamentary Approval) Act, 2011 to undertake that process.

91. Courts are careful not intrude into matters falling within the area of responsibility of other institutions or agencies of Government to ensure comity among constitutional organs.
92. As was held in **Law Society of Kenya v Attorney General & Another; National Commission for Human Rights & Another (Interested Parties) (2020) eKLR:**

“...Where the Constitution has reposed specific functions in an institution or organ of the State, the Court must give those organs sufficient time or leeway to discharge their constitutional mandate and only accept an invitation to intervene when those organs or bodies have demonstrably been shown to have acted contrary to their constitutional mandate or in contravention of the constitution...”

93. In the instant case, the Petitioner argued that on the basis of the unresolved Petitions in which allegations remain undetermined before the 4th Respondent against the 5th Respondent, the 5th Respondent ought to have been disqualified from being approved for this appointment on account of failure to meet the integrity requirements set out under Article 73 (2) (a) of the Constitution. The fact that these were undetermined Petitions meant that the veracity of the allegations remained untested and unproven. The Court cannot thus be asked to make conclusive findings barring the nomination, approval and appointment of the 5th Respondent based on unsubstantiated allegations in

petitions that were pending before the 4th Respondent or even pending in the High Court to the effect that based on the existence of the unresolved petitions, the the 5th Respondent nomination, approval and appointment as the Director General- NIS contravenes the mandatory integrity test specified in Article 73 (2) (a) of the Constitution.

94. In my humble view, it is the 2nd Respondent and 4th Respondents who are vested with the requisite mandate to conduct the approval process are the ones best suited to evaluate each and every concern including the relevance and the weight to attach to complaints of integrity raised in such Petitions just like all other concerns on suitability received during the public participation process and exercise their discretionary prerogative when deciding on suitability of the nominee. The Court cannot usurp this specific mandate by substituting its opinion to that of the body bestowed that particular mandate of vetting. As was held by the Court in **Captain (Rtd) Charles Masinde V Augustine Juma & 8 others [2016] eKLR**:

“The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly,

merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.”

95. In the instant matter, the Petitioner stated that the 2nd and 3rd Respondent questioned the 5th Respondent on the matter but the 5th Respondent gave information which the Petitioner contends was misleading. The Court cannot reopen and replace the decision that was made by the 2nd Respondent upon weighing and considering the relevance of the matter in absence of objective proof of irrationality, procedural impropriety or constitutional violation. As to what irrationality, procedural impropriety and unreasonableness denotes, this was explained by the Court in **Republic v Vice Chancellor Moi University & 2 Others Ex parte Benjamin J. Gikenyi Magare [2019] ECLR** as follows:

“illegality is when the decision - making authority commits an error of law in the process of taking or making the act, the subject of the complaint acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.....irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.... Procedural impropriety is when there is a failure to act fairly

on the part of the decision - making authority in the process of taking a decision. The unfairness may be its none observance of the Rules of natural justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

96. The Petitioner has thus not established any objective ground for this Court to interfere with the nomination, approval and the appointment of the 5th Respondent as the Director General-NIS.

97. The upshot is that the Petition lacks merit and is hereby dismissed. This being public interest litigation, I make no orders as to cost.

Dated, signed and delivered virtually at Nairobi this 12th day of March, 2026.

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L N MUGAMBI

JUDGE