Suyianka v Attorney General & 2 others; Mutua & 20 others (Interested Parties) (Constitutional Petition E312 of 2025) [2026] KEHC 1364 (KLR) (Constitutional and Human Rights) (22 January 2026) (Judgment)

Neutral citation: [2026] KEHC 1364 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E312 OF 2025

B MWAMUYE, J

JANUARY 22, 2026

IN THE MATTER OF THE CONTRAVENTION AND THREATENED CONTRAVENTION OF CONSTITUTION UNDER ARTICLES 10, 22, 23, 165 (2) (B) & (D), 131, 132, 201, 232, 233, & 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE PUBLIC SERVICE COMMISSION ACT CAP 185 LAWS OF KENYA

AND

IN THE MATTER OF DEFENCE OF THE CONSTITUTION UNDER ARTICLE 3 (1), 258 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF INTERPRETATION, ENFORCEMENT AND PROTECTION OF CONSTITUTION UNDER ARTICLES 10, 22, 23, 165, 131, 132, 201, 232, 233, & 260.

BETWEEN

LEMPAA SUYIANKA ..... PETITIONER

AND

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

HE CABINET SECRETARY, NATIONAL TREASURY ..... 2ND RESPONDENT

PUBLIC SERVICE COMMISSION ..... 3RD RESPONDENT

AND

PROF MAKAU MUTUA ..... INTERESTED PARTY

MOSES KURIA KIARIE ..... INTERESTED PARTY

DAVID NDII ..... INTERESTED PARTY

PROF EDWARD KISIANG'ANI ..... INTERESTED PARTY

MONICA JUMA ..... INTERESTED PARTY

JOSEPH BOINNET ..... INTERESTED PARTY

JAOKO OBURU ..... INTERESTED PARTY

DR SILVESTER OKUMU KASUKU ..... INTERESTED PARTY

HARRIET'TE CHIGAI ..... INTERESTED PARTY

MAJOR (RTD) ALI MAHAT SOMANE ..... INTERESTED PARTY

PROFESSOR ABDI GULIYE ..... INTERESTED PARTY

STEVEN OTIENO ..... INTERESTED PARTY

DR DOMINIC MENJO ..... INTERESTED PARTY

DR NANCY LAIBUNI ..... INTERESTED PARTY

CHRISTOPHER DOYE NAKALEU ..... INTERESTED PARTY

KARISA NZAI ..... INTERESTED PARTY

HENRY KINYUA ..... INTERESTED PARTY

KENNEDY OGETO ..... INTERESTED PARTY

ABDI GULIYE ..... INTERESTED PARTY

DR. SYLVIA KANG'ARA ..... INTERESTED PARTY

LINDA MUSUMBA ..... INTERESTED PARTY

JUDGMENT

Introduction

1. This Judgment concerns a Constitutional Petition dated 28th May 2025, as amended, filed by Lempaa Suyianka, the Petitioner. 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 to 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 several advisory offices without adhering to the mandatory constitutional and statutory framework. The Petitioner contends that the creation of these offices and the appointments thereto violated several constitutional provisions, including Articles 10, 132(4)(a), 201, 232 and 234. It is alleged that the process bypassed the mandatory recommendation of the 3rd Respondent (Public Service Commission-PSC), 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 this Court, verbatim:

"a. A declaration that:

i. The offices occupied by the Interested parties are public offices.

ii. The establishment and staffing of the offices occupied by the Interested Parties was undertaken contrary to the *Constitution* and the law.

iii. The 1st Respondent violated the *Constitution* and the law in creating and staffing the offices occupied by the interested parties and other similarly situated offices contrary to the *Constitution* and the law.

iv. The action of the 1st Respondent of creating and staffing the offices occupied by the interested parties and other similarly situated offices amounts to establishing a government otherwise than in compliance with this Constitution.

v. The 4th Respondent is in dereliction of duty and in violation of Article 249 for being wilfully blind, aiding or acquiescing to the creation and staffing of offices in public service contrary to the *Constitution* and the law.

vi. Inundation of the public service with advisors violates Article 201 (d) of the *Constitution* of Kenya.

vii. Lack of a law to cap the number of advisors that the president can employ is violation of the *Constitution*.

viii. Lack of a law to cap the number of advisors the 1st Respondent can appoint is not a carte blanche to inundate and saturate the civil service with unconstitutional illegal offices.

ix. That appointing the advisors across government ministries is duplicitous and wasteful

b. Orders:

i. Quashing all the offices occupied by the Interested Parties.

ii. Requiring the Interested Parties to pay back to the exchequer all the monies and benefits paid and payable to them on account of occupying the impugned offices.

iii. Requiring the 4th Respondents to:

a. Conduct and complete an audit within 60 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 forthwith.

c. File a progress report with this Court every 30 days and another in 75 days of the date of the Judgment to report on its compliance with Orders in a and b.

iv. Costs of this Petition on a higher scale.

v. Such further, other and consequential orders as this Honourable Court may deem fit to make."

4. The 1st and 2nd Respondents did not file substantive responses or submissions to oppose the Petition. The 3rd Respondent filed a detailed Replying Affidavit and comprehensive written submissions asserting full compliance with the law.

5. A Preliminary Objection was raised by the initial 1st Respondent (the President of the Republic of Kenya) on grounds of presidential immunity under Article 143 of the *Constitution*. The Preliminary Objection was heard and determined prior to this judgment. A ruling was delivered striking out the President of the Republic of Kenya as a party to these proceedings in his personal capacity. Consequently, the Honourable Attorney General became the 1st Respondent, the Cabinet Secretary for the National Treasury the 2nd Respondent, and the Public Service Commission the 3rd Respondent. The petition thus proceeds against these state organs.

Background

6. The factual background is largely uncontested and is anchored from the pleadings and the extensive bundle of correspondence annexed to the 3rd Respondent's Replying Affidavit (marked PF-1). Following the assumption of office by the President after the August 2022 general elections, a series of communications arose between the Chief of Staff and Head of the Public Service (in the Executive Office of the President) and the 3rd Respondent herein.

7. The correspondence reveals a process wherein the Executive Office of the President requested the PSC to establish various supernumerary posts (posts created outside the normal establishment) and to appoint specified individuals to those posts.

8. In response, the PSC, through various decision letters, granted the requests. It established the requested supernumerary posts and appointed the named individuals to those posts on "Local Agreement Terms" for a fixed period of three years, renewable once, but expressly tied to the tenure of the President or the requesting State Officer. The letters also set out the grades and salaries for the positions, which were in some instances equal with senior civil service.

9. The Petitioner, an advocate of the High Court and a citizen, argues that this entire process was unconstitutional. His case is not that the appointments did not happen, but that the way they happened, the establishment of these offices and the selection of the office-holders violated fundamental constitutional and statutory framework.

The Petitioner's Case

10. The Petitioner's case is anchored on the supremacy of the *Constitution* and the rule of law. His core legal arguments are as follows:

a. Modes of Creating Public Offices: It is averred that the *Constitution* provides only three legitimate ways to create a public office: (a) explicitly by the *Constitution* itself; (b) by an Act of Parliament (for State Offices under Article 260); or (c) by the Public Service Commission,

either on its own motion under Article 234(2)(a)(i) or upon the President's request in accordance with the recommendation of the PSC under Article 132(4)(a). The Petitioner argues that the impugned offices do not fall under (a) or (b).

b. Violation of Article 132(4)(a) and PSC's Role: The Petitioner asserts that the President of the Republic of Kenya did not establish these offices "in accordance with the recommendation of the Public Service Commission." Rather, the process was reversed: the President of the Republic, through his Chief of Staff, effectively dictated the creation of specific offices for specific individuals, and the PSC merely "rubber-stamped" these directives. This, the Petitioner argues, undermines the PSC's constitutional mandate to independently recommend and establish offices based on objective criteria. The Petitioner relied on *Katiba Institute v President & 2 others* [2020] eKLR which emphasized that the president ought to act within the confines of the *Constitution* and any deviation renders such actions null and void.

c. Breach of Public Service Values (Article 232): It is averred that the appointments deliberately disregarded the values and principles of public service enshrined in Article 232(1) 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*.

d. Lack of Public Participation: 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 these advisory offices were created in a covert and unilateral manner as there was complete lack of public participation, notification, or transparency which rendered the process null and void. Reliance was placed on the decision in *Law Society of Kenya v Attorney General & Another* [2016] eKLR to buttress his argument.

e. Creation of *De Facto* State Offices without Legislation: The Petitioner contends that several of the impugned offices such as the National Security Advisor and Senior Advisor for Constitutional Affairs possess the character, profile, and remuneration of State Offices as contemplated under Article 260. The Petitioner therefore argued that by that definition, they can only be established by an Act of Parliament and that their creation through administrative letters from the PSC, is therefore unconstitutional.

f. Duplication, Waste and Violation of Public Finance Principles: It was argued that these advisors to the President of the Republic duplicate roles and functions already performed by Cabinet Secretaries, Principal Secretaries, and the mainstream civil service. According to the Petitioner, establishing a separate, costly advisory framework constitutes a reckless and wasteful use of scarce public resources offending the principle of prudence under Article 201(d) of the *Constitution*. The Petitioner placed reliance on the decisions in *Okiya Omtatah v AG* [2021] eKLR and *Council of Governors v AG* [2020] eKLR in support of his arguments.

g. Dereliction of Duty by the PSC: It was argued that by agreeing to and facilitating the allegedly unconstitutional appointments, the PSC disregarded its mandate under Articles 232, 234 and 249. In support of his arguments, the Petitioner relied on the decisions in *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] eKLR and *Okiya Omtatah Okoiti v Public Service Commission & 2 others* [2019].

11. It was also submitted that Regulation 27 which the PSC relied on, itself cannot supersede the fundamental constitutional principles under Articles 232 and 260. The Petitioner argued that the

written requests from the President of the Republic were made without any objective basis, rendering the statement speculative and dishonest thus violating the provisions of Regulation 27(6).

The 3rd Respondent's Case

12. The Public Service Commission, as the 3rd Respondent, is the main opposing party. Its case, presented through the Replying Affidavit of its Secretary/CEO, Mr. Paul Famba and its written submissions, is a defence of both the legal framework used and the specific process followed.

13. 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.

14. 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* (1979) KLR 154 and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR.

15. The 3rd 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 Mwingi North Constituency & 2 Others* (2018) eKLR to buttress this argument.

16. 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.

17. The 3rd 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*.

18. On whether the PSC failed in its constitutional duties to proactively provide information as alleged by the Petitioner, the 3rd Respondent denied that such an obligation existed in the context of the appointments of the Interested Parties. On the contrary, the 3rd 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.

19. The court was thus urged to dismiss the Petition with costs for lack of merit.

Interested Parties

20. The Interested Parties did not participate in this Petition. The Court, being satisfied that they were properly served and 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

21. From the pleadings and submissions of the parties, the following issues arise for the court's determination:

    i. Whether the establishment of the advisory offices occupied by the Interested Parties was done in compliance with the *Constitution*, specifically Articles 132(4)(a) and 234.

    ii. Whether the appointment of the Interested Parties to the said offices complied with the values and principles of public service under Article 232 of the *Constitution*, particularly the principle of fair competition and merit.

    iii. Whether the impugned offices constitute "State Offices" as defined in Article 260 of the *Constitution*, requiring establishment by an Act of Parliament.

    iv. Whether the process of establishing and staffing the offices violated the constitutional requirement for public participation under Article 10.

    v. Whether the creation and maintenance of the impugned offices amount to an imprudent and irresponsible use of public funds contrary to Article 201(d) of the *Constitution*.

    vi. Whether the 3rd Respondent, the Public Service Commission, failed in its constitutional duty under Articles 232, 234, and 249.

    vii. What reliefs, if any, should be granted.

Compliance with Articles 132(4)(a) and 234 on Establishment of Offices

22. The constitutional provision for creating public offices is outlined with care. Article 234(2)(a) vests the Public Service Commission with the exclusive power to "establish and abolish offices in the public service" and to "appoint persons to hold or act in those offices." Concurrently, Article 132(4)(a) empowers the President to establish an office in the public service in accordance with the recommendation of the Public Service Commission.

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

24. The phrase "in accordance with the recommendation" is not a mere formalism. 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.

25. As stated by the Supreme Court in *Law Society of Kenya v Attorney General & 4 others* [2023] KESC 19 (KLR), words in a statute and by extension, the *Constitution* must be given their ordinary and natural meaning. In arriving at the conclusion, the court stated as follows: -

> "To construe the import and tenor of any provision of the *Constitution* the entire Constitution has to be read as an integrated whole, because the *Constitution* embodies certain fundamental values and principles which require that its provisions be construed

broadly, liberally and purposively to give effect to those values and principles. Where words used in any provision of the *Constitution* are precise and unambiguous then they must be given their natural and ordinary meaning. The words themselves alone in many situations declare the intention of the framers because, to borrow the words of Burton, J in Warburton v Loveland, (1832) 2 D & Cl 480, the language used 'speak the intention of the legislature.

Those values and principles reflect our historical and political realities and the people's aspirations for a democratic State, built on the rule of law and respect for human rights."

26. A recommendation is a suggestion or proposal offered as the best course of action. It is not a rubber stamp for a pre-determined decision made elsewhere.

27. The 3rd Respondent rely entirely on the correspondence in bundle "PF-1" as proof that it issued this recommendation. 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?

28. 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.

29. Examining the "PF-1" bundle cumulatively reveals a process that undermined 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.

30. This puts the cart before the horse. The PSC Act mandates that the office be established first, guided by the objective criteria. The PSC's responses often compound this error by seemingly approving the creation of the office and the appointment in a single sentence, even where the request letter did not specifically seek creation.

31. 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.

32. 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.

33. There is, of course, room for super-efficient governmental action. Indeed, the same is much desired by the people of Kenya. However, the exchanges between the 1st and 3rd 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.

34. A constitutional recommendation is not a mere rubber stamp. It is a shield against caprice and the return to the former ways that bedevilled 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.

35. 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.

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

37. Therefore, on this first issue, I find that the establishment of the impugned advisory offices was not done in a manner that fully respected the constitutional scheme envisioned in Articles 132(4)(a) and 234. The process adopted, whereby specific offices were effectively created at the behest of the Executive for specific individuals, with the PSC's role limited to formalizing the appointments, does not constitute the President of the Republic acting in accordance with the recommendation of the Public Service Commission in its true, substantive sense. The constitutional requirement for a prior independent recommendation on the establishment of these offices was circumvented.

Compliance with Article 232 – Fair Competition and Merit

38. This issue strikes at the heart of the Petitioner's case and represents one of the most significant departures from constitutional norms in the impugned process. Article 232(1) enumerates the values and principles of public service. Sub-article (g) is explicit. It states: "...fair competition and merit as the basis of appointments and promotions."

39. The principle of fair competition is not a discretionary guideline; it is a foundational pillar of a modern, efficient, and equitable public service. It serves multiple purposes: it ensures the best talent is recruited, it promotes transparency and public confidence, it guards against patronage and nepotism, and it provides equal opportunity for all qualified Kenyans.

40. Constitutional values and principles are not decorative as they are binding and must inform all state action. the *Constitution*, therefore, bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the *Constitution*, enacts, applies or interprets any law, or makes or implements public policy decisions. Such persons are called upon to be bound by the national values and principles of governance in their undertakings. The 1st and 3rd Respondent were not an exception.

41. The 3rd Respondent's defence is that Regulation 27 creates a specific, exceptional pathway for appointing advisors that operates outside the normal competitive recruitment processes. The 3rd Respondent argued that Regulation 27(6)(a) is a sufficient safeguard and substitute for competition

which bypasses the requirement for a written request stating the proposed advisor's competencies do not exist in the public service.

42. This argument is fundamentally flawed for several reasons. First, a regulation, which is subsidiary legislation, cannot legitimately create a blanket exception that nullifies a supreme constitutional principle. The principle of fair competition in Article 232(1)(g) is crucial and applies to appointments. Any exception must be explicitly stated in the *Constitution*. Regulation 27, as applied here, effectively creates a large loophole for non-competitive appointments to senior, well-remunerated positions.

43. Furthermore, 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.

44. 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 pomulated the 2010 Constitution. In making the determination, the court in Republic v Anti-Counterfeit Agency Ex parte Moses Maina Maturu (supra), 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."

45. The Petitioner correctly invokes the precedent of Okoiti & another v Public Service Commission & 73 others; Law Society of Kenya & another (Interested Parties) (Petition 33 & 42 of 2018 (Consolidated)) [2021] KEHC 464 (KLR), where the High Court declared the creation of the position of Chief Administrative Secretaries (CAS) unconstitutional, inter alia, for violating the principle of fair competition and merit. While the CAS positions were later regularized through a different process, the reasoning on this point remains potent. The court noted that the appointments were made without any competitive process and were clearly intended to reward political cronies. The parallels to the present case are stark. The hand-picking of individuals, many of whom are prominent political figures or allies, for lucrative advisory roles, without any open, competitive and merit-based selection, bears the hallmarks of patronage.

46. The 3rd Respondent's reliance on Nyamu v Ministry of Water, Sanitation and Irrigation & 2 Others (supra) is distinguishable. That case concerned the termination of an advisor's contract upon the exit of the Cabinet Secretary who requested him. It did not adjudicate on the constitutionality of the initial appointment process itself vis-à-vis Article 232.

47. Consequently, 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.

Whether the Impugned Offices are "State Offices"

48. Article 260 of the *Constitution* defines a state office as an office specified in that Article and any other office established and designated as a state office by national legislation. The Petitioner argues that offices like the National Security Advisor, with a mandate to co-ordinate the work of the National Security Council and Custodian of National Security Policy, possess the character and functions of a State Office. Their high remuneration further suggests a stature comparable to established State officers.

49. The 3rd Respondent argued that these advisory offices are merely advisory, confidential support roles within the President of the Republic personal office, with no executive or supervisory authority. They are not established and designated as a state office by national legislation and therefore fall outside the definition.

50. The designation of an office as a state office carries significant constitutional consequences, including stricter ethical requirements under Chapter Six and a specific removal process. Parliament's role in creating such offices is a key democratic check on the expansion of the executive arm.

51. Examining the documentary evidence, particularly the letter regarding the National Security Advisor (NSA), the mandate described is substantial. It includes advising the President on national security, serving as Secretary to the National Security Council, custodian of National Security Policy and Strategy, and head of the Joint Security Secretariat. These are not trivial, internal advisory functions; they are core, high-level government coordination roles that interface directly with established State organs like the National Security Council.

52. While the NSA may not have a statutory foundation like the Inspector-General of Police, the functions described place the office-holder at the very apex of national security policy formulation and coordination. This blurs the line between a personal advisor and a de facto high State functionary. A similar argument can be made for the Senior Advisor, Constitutional Affairs, whose role arguably overlaps with the advisory functions of the Attorney General under Article 156.

53. However, the strict textual reading of Article 260 is compelling. For an office to be a state office, it must either be listed in Article 260 or designated as such by an Act of Parliament. None of the impugned offices meet either criterion. The court must be cautious not to judicially legislate by expanding the definition based on perceived function or remuneration alone. The more appropriate remedy for offices that assume state-like functions without a legal basis is not to re-classify them, but to question the legality of their creation and existence altogether, which is what the Petitioner has done under other issues.

54. Therefore, I find that the impugned advisory offices, as currently constituted, do not strictly qualify as "State Offices" under the closed definition in Article 260 of the *Constitution*. Their creation did not, for that specific reason, require an Act of Parliament. However, their expansive mandates, as evidenced in the correspondence, highlight why their creation through an internal administrative process, devoid

of legislative scrutiny, is problematic and may offend other constitutional principles like the separation of powers and public accountability.

Violation of Public Participation under Article 10

55. Article 10(2)(a) of the *Constitution* lists public participation as a national value and principle of governance. The Petitioner contends that the creation of multiple high-level advisory posts with significant budgetary implications required public involvement.

56. The 3rd Respondent argues that this was an internal staffing matter not requiring public participation and that public participation was subsumed in the process of making the Public Service Commission Regulations, 2020.

57. The scope of the public participation doctrine has been elaborated in numerous decisions. In Kenya Human Rights Commission v Attorney General; Law Society of Kenya (Interested Party) (Constitutional Petition 87 of 2017) [2018] KEHC 9656 (KLR), here the court noted that public participation is an essential national value and principle that must be observed by all persons; state organs and public officers in the exercise of their responsibilities. In this regard, the Court stated that: -

> " Public participation is one of the national values and principles in our constitution which must be observed by all persons; state organs and public officers in the exercise of their responsibilities. Article 10 (1) of the *Constitution* states that the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the *Constitution*;(b) enacts, applies or interprets any law; or makes or implements public policy decisions. And according to Article 10 (2), the national values and principles of governance include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and "participation of the people.".

58. The creation of over twenty (21) senior advisory positions, with cumulative annual salaries running into tens of millions of shillings from the public coffers, and with mandates that touch on core government policy areas, is not a mundane internal staffing issue. 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.

59. 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."

60. 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.

61. Cabinet Secretaries and Principal Secretaries, and High Commissioners and Ambassadors, are all officers of our Republic who advise the President of the Republic. There 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.

62. The complete opacity of the process where there was no public notification, no call for views on the necessity or design of these offices, no transparency in the selection of individuals is averse to the constitutional values of open governance demanded by Article 10. I therefore find that the establishment of the offices of Advisors to the President without any form of public participation violated Article 10 of the *Constitution*.

Prudent and Responsible Use of Public Funds under Article 201(d)

63. Article 201(d) mandates that public money shall be used in a prudent and responsible way. Prudence implies careful, economical, and non-wasteful use. The Petitioner's case on this issue is two-fold: (i) the appointments duplicate existing functions within the Cabinet and civil service, and (ii) the expenditure on these parallel advisors is wasteful. The 3rd Respondent argued that there is no duplication of roles and asserts the appointments are within budgetary provisions.

64. The Supreme Court, in Institute for Social Accountability & another v National Assembly & 5 others [2022] KESC 39 (KLR) provided authoritative guidance on Article 201. It underscored as follows: -

> " 102. We take the view that article 201 expresses the idea of responsible governance. It envisages that the two levels of government will manage fiscal resources prudently by putting in systems that ensures that the implementation of projects aimed at delivering a public good and service is cost-effective. It also embodies the desire for fiscal efficiency which speaks to the need to eliminate wastages in service delivery and provision of public good and service. It means that where it is a policy objective of the government to deliver a particular public good or service then the system for delivery of that policy objective should be designed in a manner that ensures that public funds are not wasted or abused.
>
> 103. The implication of the principle of prudent and responsible management of public money for questions of inter-governmental relations is that there should be clarity in the allocation and assignment of tasks to avoid duplication in the deployment of resources. This will avoid the problem of the two levels of the government ending up directing and spending resources on the same project...."

65. 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.

66. On the contrary, it creates a clear risk of duplication with 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.

67. 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 3rd Respondents in the establishment and appointments processes with respect to the Interested Parties.

Failure of the Public Service Commission in its Constitutional Duty

68. The Petitioner argued that the PSC disregarded its duty under Articles 232, 234, and 249 for facilitating unconstitutional appointments. The PSC's primary constitutional duty under Article 234 is to manage the public service, including establishing offices and making appointments, while upholding the values in Article 232. Under Article 249, it must protect the sovereignty of the people, secure the observance of democratic values, and promote constitutionalism.

69. The record shows that the PSC was an active participant in the process. It processed the requests, issued appointment letters, and set the terms. However, in doing so, it applied Regulation 27 in a manner that led to the violations of Article 232(1)(g) of the *Constitution*. A constitutional commission must not apply its regulations mechanistically; it must ensure that their application conforms to superior constitutional principles. The PSC's failure to insist on a process that incorporated the principle of fair competition, or to critically evaluate whether the President of the Republic requests truly represented a "recommendation" on establishment of advisory offices constituted a failure to fully discharge its duty as the guardian of a values-based public service.

70. The PSC is not a mere registry for executive staffing decisions. It is an independent commission tasked with insulating the public service from patronage and ensuring efficiency and fairness. By allowing a process that resulted in the hand-picked appointment of numerous advisors without competition, the Commission, perhaps inadvertently, eroded its own constitutional role.

71. I therefore find that the 3rd Respondent failed in its duty to ensure strict adherence to the values and principles of public service, particularly fair competition and merit, during the appointments in question.

72. Another key issue that the Petitioner has raised which calls to this court's attention is on whether Interested Parties herein should pay back the salaries they earned and all the benefits paid to them during their tenure. This issue revolves around a basic issue of fairness and public policy: when the state establishes a public office in good faith but later the office is declared unconstitutional, who should bear the financial consequences? For a constitutional flaw they did not cause or could not have known about, the staff members who held that position and carried out their responsibilities with diligence and integrity cannot be held personally accountable.

73. Since the Interested Parties executed their duties in good faith based on a presumed law, they cannot be compelled to repay the salaries and benefits they earned during their period of employment. Requiring restitution would unfairly benefit the government while penalizing innocent individuals who completed legitimate work that the state fully reaped rewards from. The de facto officer doctrine, which protects the actions of individuals acting under the appearance of law to ensure stability in

public service, further supports this position. Imposing this loss on the employees would create a significant chilling effect, deterring capable individuals from pursuing public service due to fears of personal financial liability. Consequently, the employer, being the State, that created the flawed office holds complete legal and financial accountability for the constitutional issue.

74. Therefore, the obligation to repay for services rendered is separate from a later judgment regarding the office's validity. A structural mistake, which was not caused by the Interested Parties does not invalidate their legitimate claim to the compensation they have earned. Demanding the return of salaries that have already been disbursed would be clearly unjust, create administrative disorder, and go against the principles of stability in government functioning.

75. The legal structure therefore favors equity and the seamless operation of government rather than retroactive punishment. Reimbursement demands would lead to instability within administrative operations and undermine public confidence in government employment. Due to their dedicated service and the contributions they made, the Interested Parties' entitlement to their earned wages cannot be questioned. Therefore, rather than invalidating finished work and its compensation retroactively, the declaration of unconstitutionality operates prospectively to address the structural defect. This finality is essential for both justice and the orderly conduct of public affairs.

76. From the foregoing, I find that the 21 Interested Parties herein rightfully earned their salaries and benefits during their tenure and compelling them to repay the same would be unjust.

Conclusion

77. 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 ommissions in the process exhibit multiple and severe breaches of the *Constitution* and Statute of a fatal and incurable nature.

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

    iii. Being conducted in secret, without public participation, in violation of Article 10.

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

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

79. 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.

80. However, in crafting relief, the court must be mindful of practicality, the potential disruption to government operations, and the fact that some appointees may have been acting in good faith. A blanket order for the refund of all salaries paid, while sought by the Petitioner, would be excessively punitive without individual culpability being examined. The primary fault lies with the design and authorization of the process.

81. Furthermore, the need for the President to have confidential advisors is not in itself unconstitutional. The flaw is in the process of selecting them. The appropriate remedy is to invalidate the current appointments and provide a pathway for a regularized process, should the Executive deem such offices necessary.

82. 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 right
>
> 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."

83. 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."

84. In view of the foregoing, I allow the Petition 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 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 3rd 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 Regulation 27 of the Public Service Commission Regulations, 2020, specifically the failure of the Public Service Commission to determine the number of advisors needed;

iii. Being undertaken without public participation in violation of Article 10 of the *Constitution*;

iv. Violating the values and principles of public service under Article 232 of the *Constitution*, particularly transparency, fair competition, and merit; and

v. Constituting an imprudent use of public funds contrary to Article 201(d) of the *Constitution*;

b. 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 3rd 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, edict, 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.

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

BAHATI MWAMUYE MBS

JUDGE

In the presence of: -

Counsel for the Petitioner –Mr. Lempaa Suyianka

Counsel for the 1st and 2nd Respondents - Mr. Thande Kuria

Counsel for the 3rd Respondent – Mr. Odukenya

Counsel for the Interested Parties – No appearance

Court Assistant – Ms. Lwambia