REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. E016 & E017 OF 2025 (CONSOLIDATED)

—BETWEEN—

PARLIAMENT OF KENYA..1ST APPELLANT

THE HON. ATTORNEY GENERAL................................2ND APPELLANT

—AND—

OKIYA OMTATAH OKOITI...1ST RESPONDENT

THE JUDICIAL SERVICE COMMISSION...................2ND RESPONDENT

KATIBA INSTITUTE..3RD RESPONDENT

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*(Being an appeal from the Judgment of the Court of Appeal at Nairobi (**Tuiyott, Muchelule & Odunga, JJ. A**) delivered on 21st February, 2025 in Civil Appeal No. E416 of 2021)*

Representation:

Mr. Awadh Mbarak for the 1st Appellant (*Mbarak Awadh Ahmed, Advocate*)

Mr. Emmanuel Bitta for the 2nd Appellant (*Attorney General's Chambers*)

Mr. Okiya Omtatah the 1st Respondent *(In person)*

Mrs. Sharon Maina for the 2nd Respondent (*Issa & Co. Advocates*)

Mr. Malidzo Nyawa and Mr. Ray Odanga for the 3rd Respondent (*Katiba Institute*)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] On 23rd May 2025, this Court directed consolidation of **SC Petition No. E016 of 2025** and **SC Petition No. E017 of 2025,** filed by Parliament and the Attorney General, the 1st and 2nd appellants, respectively. Both appeals challenge the judgment of the Court of Appeal (*Tuiyott, Muchelule & Odunga, JJ.A.*) dated 21st February, 2025 in **Civil Appeal E416 of 2021**. The consolidated appeal revolves around the nature, composition and regulation of local tribunals, envisioned under Article 169(1)(d) of the Constitution, which are part and parcel of subordinate courts. Concomitantly, this Court has been called upon to consider whether the 1st appellant violated the provisions of Article 169(2) of the Constitution by failing to enact a specific legislation that confers jurisdiction, powers and or functions of the tribunals to give effect to the Constitution. Additionally, in the event the Court finds for the appellants, what remedies should issue in such circumstances.

B. BACKGROUND

(i) Factual History

[2] Chapter 10 of the Constitution of Kenya, 2010 provides a comprehensive framework for the Judiciary, beginning with recognition of the people of Kenya as the source of judicial authority. It affirms and safeguards the independence of the Judiciary, as it also outlines the hierarchy and structure of the court system. It establishes the Judicial Service Commission (JSC), the 2nd respondent herein, with the responsibility of promoting and facilitating not only the independence and accountability of the Judiciary but also the administration of justice. The aforementioned responsibility extends to appointment, discipline and removal of Judicial Officers and staff. Of relevance to this appeal is Article 169 of the Constitution which categorises subordinate courts and more

importantly, Article 169(1)(d) and 169(2) which read as follows:

"169

1) The subordinate courts are -

...

d) any other court or tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162(2).

2) Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1).”

[3] Prior to the promulgation of the Constitution on 27th August 2010, the appointment and removal of members of tribunals (some of which are quasi-judicial) as well as their regulation lay in the hands of the Executive or state agencies and institutions under which the relevant tribunal served. However, following the aforesaid classification of local tribunals as subordinate courts (See Article 169(1)(d) above), several tribunals have been transitioned to the Judiciary. As a result, JSC assumed the role of recruitment of the membership thereof through competitive processes. Be that as it may, this transition, which is yet to be completed, has not been without controversy. Questions persist regarding the precise character and scope of tribunals contemplated under Article 169(1)(d) of the Constitution; whether tribunals which existed prior to the Constitution should be transitioned to the Judiciary and, if so, how should they be transitioned? Compounding the foregoing issues, is the lack of legislation to regulate the transition and operations of local tribunals.

[4] It is the aforementioned state of affairs that instigated the 1st respondent to file a constitutional petition before the High Court against the appellants and JSC while naming the 3rd respondent (Katiba Institute) herein as an interested party.

(ii) Litigation History

(a) At the High Court

[5] The 1st respondent’s contention vide his amended petition, **HC**

Petition 197 of 2018, dated 18th December 2018 was that there are over 100 tribunals which, although established by different pieces of legislation, perform judicial functions in one way or another. As far as he was concerned, all tribunals by virtue of Article 169(1)(d) of the

Constitution ought to be firstly, transitioned to the Judiciary, and secondly, constituted and regulated by JSC. In that regard, the 1st respondent averred that, contrary to Article 169(1)(d) of the Constitution and the doctrine of separation of powers, a number of tribunals are still under the direct control of the Executive, which appoints and removes the members thereof. Moreover, the prevailing status runs afoul of the right to access to justice, and a fair trial enshrined under Articles 48 and 50 of the Constitution taking into account the Executive's involvement in disputes before such tribunals.

[6] The 1st respondent also asserted that there is lack of uniformity with respect to tribunals since members thereof are appointed by different authorities through different processes and with varied terms of service. Additionally, they operate under different rules of procedure with some applying formal procedure akin to courts and others operating under informal procedures. What is more, that some tribunals completely oust the right of appeal. In totality, the 1st respondent attributed the foregoing set of circumstances to the appellants and JSC's failure to transition all tribunals to the Judiciary, as well as the 1st appellant's omission or failure to enact legislation envisioned under Article 169(2) of the Constitution.

[7] Consequently, the 1st respondent sought the following orders:

(i) A declaration that:

a. Tribunals established pursuant to Article 169(1)(d) of the Constitution of Kenya, 2010 are not part of the Executive machinery, nor are they independent adjudicatory bodies, but are subordinate courts which are an integral part of the judiciary.

b. The 2nd respondent (JSC) is exclusively responsible for appointing and removing members of the tribunals established pursuant to Article 169(1)(d) of the

Constitution of Kenya 2010, for establishing their rules of procedure and for doing anything incidental thereto to ensure their smooth operations as courts of law.

c. *The doctrine of separation of powers under the Constitution of Kenya is an absolute bar to the Executive and its agencies, or any other entities who are not JSC, being mandated by the 1st appellant to appoint or remove any members of tribunals created under Article 169(1)(d) of the Constitution of Kenya, 2010.*

d. *Any law which vests in the Executive and its agencies, or in any other entities who are not JSC, the mandate to appoint or remove any members or tribunals created under Article 169(1)(d) of the Constitution of Kenya 2010 is unconstitutional and, therefore, invalid, null and void ab initio.*

e. *The budget of tribunals should be a line budget in the Judiciary.*

f. *The 1st appellant has failed to enact necessary legislation pursuant to Article 169(2) to give effect to Article 169(1)(d) within the time specified in the Fifth Schedule to the Constitution.*

(ii) An order:

a. *Annulling all appointments to tribunals created under Article 169(1)(d) of the Constitution which were not made by JSC through a competitive process.*

a1. *Compelling the appellants to enact legislation pursuant to Article 169(2) to give effect to Article 169(1)(d) of the Constitution within three months, and to report the progress to the Chief Justice.*

a2. *That if the 1st appellant fails to enact legislation pursuant to Article 169(1) to give effect to Article 169(1)(d) of the Constitution within three months, the Chief Justice shall advise the President to dissolve the 1st appellant and the President shall dissolve the 1st appellant.*

b. *Compelling JSC to immediately but not later than three months reconstitute all tribunals created under Article 169(1)(d) of the Constitution upon the 1st appellant enacting legislation pursuant to Article 169(1) to give effect to Article 169(1)(d).*

c. *Suspending order (a) above for a period of six months to allow for a smooth transition.*

d. *Compelling the respondent to bear the costs of the suit.*

(iii) *Any other relief the court may deem just to grant.*

[8] Katiba Institute supported the 1st respondent's petition. In doing so, it reiterated the 1st respondent's position that the framework for operating tribunals in Kenya is fragmented and inconsistent. However, it went on to classify tribunals into four categories namely; advisory tribunals, adjudicatory tribunals, constitutional tribunals, and local tribunals established under Article 169 (1)(d) of the Constitution. Katiba Institute argued that, while there was no specific time frame provided by the Constitution for the enactment of the legislation under Article 169(2), the same should have been enacted without unreasonable delay. According to it, the failure to do so eight years after the promulgation of the Constitution (as at the time the High Court petition was filed) amounted to unreasonable delay.

[9] On its part, JSC concurred with the 1st respondent to the extent that the local tribunals contemplated under Article 169(1)(d) of the Constitution are subordinate courts within the Judiciary. Nonetheless, it took the position that not all tribunals are subordinate courts, and it has no role whatsoever with respect to tribunals established under Articles 144(3) (removal of the President from 0ffice), 150(2) (removal of the Deputy President from office), 158(4) (removal of the Director of Public Prosecutions from office), 168(5)(a)(b) (removal of a Judge from office) and 251(4) (removal of a member of an independent Commission from office) of the Constitution. Equally, in JSC's view, the transition of local tribunals ought to be facilitated by the legislation contemplated under Article 169(2), whose enactment lay solely within the mandate of the 2nd appellant.

[10] The 1st appellant opposed the petition on four fronts. Firstly, it contended that there is no mandatory requirement to enact a specific legislation governing local tribunals under Article 169(2) of the Constitution. Moreover, that, even assuming there

is such a requirement, no timelines have been provided for such enactment. Secondly, that, in any event, the 1st respondent should have petitioned Parliament in line with Article 119 of the Constitution and the Petitions to Parliament (Procedure) Act, Cap. 7E before approaching the court. In failing to do so, the 1st respondent failed to exhaust the alternative process prescribed by the law. Further, that at the time the petition was filed, the 1st appellant was in the process of drafting and later debating the Tribunals Bill and there was no need for the court's supervision in doing so. As such, the 1st appellant contended that this dispute was not ripe for adjudication, did not disclose any constitutional violation, and was not justiciable. Thirdly, that contrary to the 1st respondent's allegations, JSC is bereft of the mandate to appoint members of all tribunals. In conclusion, the 1st appellant urged the trial court to dismiss the petition, and in the alternative, issue relevant structural interdicts should it find that the petition has merit.

[11] Partly opposing the petition, the 2nd appellant agreed with the 1st respondent that the local tribunals under Article 169(1)(d) of the Constitution are subordinate courts and should be transitioned to the Judiciary. Further, that such transition should be aided by the legislation envisaged under Article 169(2) of the Constitution. The 2nd appellant delineated the concerted efforts it had taken with JSC culminating in the Tribunals Bill 2017, which subsequently expired without being passed into law. Further, the 2nd appellant took issue with some of the remedies sought by the 1st respondent. For instance, in its view, a declaration of various statues which establish tribunals as unconstitutional would deprive persons serving thereunder the right to a fair hearing and administrative action. What was more, it deemed that the period of 6 months sought to transition all tribunals was neither practical nor realistic, as the implementation of the financial cycle was then midway, and such transition should have been budgeted for. In a nutshell, the 2nd

appellant urged the trial court to dismiss the 1st respondent's petition but added that should the High Court be minded to issue any declaration of unconstitutionality, it ought to instead suspend such declaration and issue structural interdicts granting a period of 2 years for enactment of the legislation in question.

[12] By a judgment delivered on 11th March 2021, the High Court (*Mrima, J.*) delineated five issues as arising for determination namely, *whether the petition was justiciable; the nature of the local tribunals under Article 169(1)(d) of the Constitution; whether the appointment and removal of members of the local tribunals under Article 169(1)(d) of the Constitution by the Executive violated the principle of separation of powers and the right to fair hearing under Article 50 of the Constitution; whether the local tribunals under Article 169(1)(d) of the Constitution should be transited to the Judiciary; and the remedies that should issue.*

[13] On the issue of justiciability, the trial court found that the 1st respondent's petition was justiciable. While appreciating that enactment of the legislation alluded to lay with Parliament, the High Court held that it could not shut its ears to a litigant who alleges infringement or a threat of infringement of its rights under the Constitution. More so, as in the matter at hand, where the 2nd appellant who is charged with the responsibility of enactment of laws takes the position that there is no prescribed time frame for enacting the legislation in issue despite the provisions of Article 216(1) of the Constitution (which provides for such an enactment within 5 years of the promulgation of the Constitution). In the circumstances, the High Court held that the 1st respondent's petition fell within the exception of the doctrine of exhaustion and raised serious constitutional issues that were ripe for determination by the court.

[14] On the nature of the local tribunals under Article 169(1)(d) of the Constitution, the learned Judge held that they possess certain qualities, *to wit*: they are courts of law; they are subordinate to superior courts; they are not advisory in nature; they are not administrative tribunals; they are not presided over by or include a judge of the superior courts in their membership; and they are established under an Act of Parliament. Therefore, the High Court pronounced that tribunals formed

under the Constitution; all administrative and advisory tribunals; all tribunals whose membership included a judge of the superior courts; and all other informal tribunals not formed under the Constitution or Act of Parliament are excluded from the category of local tribunals under Article 169(1)(d) of the Constitution.

[15] As to whether the appointment and removal of members of local tribunals by the Executive violated the principle of separation of powers and the right to a fair hearing, the trial court found in the affirmative. It held that the same infringes on the independence of the Judiciary since local tribunals are subordinate courts, and, therefore, should be under the oversight of JSC. Moreover, that it is common ground that the Executive is involved in disputes before such tribunals. The High Court went on to hold that having found that local tribunals are subordinate courts, it followed that they must be transitioned to the Judiciary. Besides, that such transition should be aided by the legislation stipulated under Article 169(2) of the Constitution.

[16] With respect to the remedies sought, the High Court declined to issue a declaration that any law that does not vest the duty of appointing and removing members of local tribunals to JSC is unconstitutional. In so doing, the court found that the prayer as crafted was omnibus in nature and had far reaching consequences. Likewise, the court did not annul any appointments to tribunals which had not been made by JSC since the affected persons had not participated in the petition. Ultimately, the trial court issued the following orders:

(a) The amended petition is justiciable and it had the jurisdiction to deal with the issues therein.

(b) The local tribunals created under Article 169(1)(d) of the Constitution are subordinate courts in Kenya.

(c) The appointment and removal of members of the local tribunals created under Article 169(1)(d) of the Constitution by the Executive violates the principle of separation of powers, contravenes the right to fair hearing under Article 50 of the Constitution and infringes on the independence of the Judiciary.

(d) The local tribunals under Article 169(1)(d) of the Constitution must be transited *(sic)* ***to the Judiciary and the***

appointment and removal of their members be undertaken by JSC.

(e) A declaration hereby issues that any new appointment or removal of a member of any of the tribunals under Article 169(1)(d) of the Constitution must be undertaken by JSC. For certainty, such local tribunals include: -

- ***i. Board of Review established under the Prisons Act.***
- ***ii. Business Premises Tribunal established under the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act.***
- ***iii. Provincial Land Control Appeals Board established under the Land Control Act.***
- ***iv. Central Land Control Appeals Board established under the Land Control Act.***
- ***v. Gold Mines Development Loans Board established the (sic) the Gold Mines Development Loans Act.***
- ***vi. Seed and Plants Tribunal established under the Seeds and Plant Varieties Act.***
- ***vii. Sugar Arbitration Tribunal established under the Sugar Act.***
- ***viii. Water Resources Management Authority established under the Water Act.***
- ***ix. Water Appeal Board established under the Water Act.***
- ***x. Water Service Board established under the Water Act.***
- ***xi. Wildlife Conservation and Management Services Appeals Tribunal established under***

the Wildlife Conservation and Management Act.

xii. Tourist Appeal Board established under the Tourist Industry Licensing Act.

xiii. Transport Licensing Appeal Tribunal established under the Transport Licensing Act.

xiv. State Corporations Appeals Tribunal established under the State Corporations Act.

xv. Value Added Tax Appeals Tribunal established under the Valued Added Tax Act.

xvi. Capital Markets Tribunal established under the Capital Markets Authority Act.

xvii. Insurance Appeals Tribunal established under the Insurance Act.

xviii. Cooperative Tribunal established under the Co-operatives Act.

xix. Hotels and Restaurants Appeals Tribunal established under the Hotels and Restaurants Act.

xx. Kenya Bureau of Standards established under the Standards Act.

xxi. Restrictive Trade Practices Tribunal established under the Restrictive Trade Practices, Monopolies and Price Controls Act.

xxii. Land Disputes Tribunals established under the Land Disputes Tribunal (sic).

xxiii. Land Disputes Appeal Committee established under the Land Disputes Tribunals Act.

xxiv. Non-Government Organizations Co-ordination Board established under the Non-Governmental Organizations Co-ordination Act.

(f) The appellants are hereby directed to take proactive

steps within their respective dockets towards propagating the

Tribunals Bill with a view of transiting *(sic)* ***the local tribunals under Article 169(1)(d) of the Constitution to the Judiciary. To that end, the appellants shall file affidavits within 6 months of this judgment detailing the steps taken.***

(g) Upon filing of the affidavits in (f) above, the Deputy Registrar of this Court shall schedule this matter for mention on the basis of priority.

(h) There shall be no order as to costs.

(b) At the Court of Appeal

[17] Aggrieved by the High Court's decision, the 2nd appellant filed an appeal at the Court of Appeal, **Civil Appeal E416 of 2021**, which was anchored on 14 grounds. The grounds can be summed up as, the learned Judge erred by -

i. *Finding that the 1st respondent's petition is justiciable;*
ii. *Exceeding the parameters of his jurisdiction by purporting to categorise tribunals which mandate lies with Parliament;*
iii. *Failing to appreciate that Article 169(1)(d) of the Constitution is prospective in nature and that the local tribunals thereunder do not include tribunals which have been established under various statutes prior to the 2010 Constitution;*
iv. *Imposing timelines for the enactment of the legislation contemplated under Article 169(2) of the Constitution;*
v. *Directing the appellants to file an affidavit in court within 6 months delineating the efforts made to transition local tribunals to the Judiciary; and*
vi. *Rendering a judgment that is inconsistent, and incapable of implementation.*

[18] Consequently, the 2nd appellant implored the appellate court to allow the appeal therein, set aside the High Court decision and substitute the same with an order dismissing the 1st respondent's petition.

[19] By a judgment dated 21st February 2025, the Court of Appeal (*Tuiyott, Muchelule & Odunga, JJ.A.*) observed that the 2nd appellant had on some issues departed from the position it had advanced at the High Court. To begin with, unlike at the trial court, the 2nd appellant claimed that the 1st respondent's petition was not justiciable as it amounted to intrusion by the Judiciary into the domain of the Legislature, which was in the process of carrying out its mandate as far as the legislation under Article 169(2) of the Constitution was concerned. Towards that end, the court upheld the trial court's finding that the 1st respondent's petition was justiciable on more or less similar grounds. Further, the appellate court noted that the 2nd appellant in contradiction to its earlier stance, claimed that the local tribunals envisaged under Article 169(1)(d) of the Constitution do not include tribunals that were in existence prior to the 2010 Constitution. This is because, according to the 2nd appellant, Article 169(1)(d) is futuristic. On this issue, the court clarified that the aforementioned article makes reference to both new and existing tribunals, all of which are required to be transitioned to the Judiciary.

[20] As for the issue of timelines for enactment of the legislation in question, the Court of Appeal opined that while Article 169(2) does not prescribe a definite timeline, the delay of over 10 years (as at the time the appeal was heard) was inordinate. Moreover, the learned Judges of Appeal could not fault the trial court for issuing the structural interdict directing the appellants to file affidavits setting out the efforts made to transition local tribunal to the Judiciary. In that regard, the court held that the said affidavits, were to be filed only for purposes of ensuring implementation of the High Court decision.

[21] In the end, the Court of Appeal upheld the High Court's decision and dismissed

the 2nd appeal with no orders as to costs.

(c) At the Supreme Court

[22] As stated in the opening paragraph of this judgment both appellants filed separate appeals challenging the Court of Appeal decision, which were subsequently consolidated. The consolidated appeal is premised on the grounds that the Court of Appeal erred by:

a. *Finding the 1st respondent's petition was justiciable.*
b. *Faulting the 1st appellant for delaying to enact the legislation in issue despite appreciating that Article 169(2) of the Constitution does not prescribe a timeframe for such enactment.*
c. *Failing to distinguish between administrative and judicial tribunals, thereby erroneously concluding that all local tribunals under Article 169(1)(d) of the Constitution fall under the Judiciary.*
d. *Upholding the structural interdict issued by the trial court which encroached on the 1st appellant's constitutional legislative mandate.*
e. *Upholding the High Court's finding that the appointment and removal of members of local tribunals established under Article 169(1)(d) of the Constitution by the Executive violated the principle of separation of powers, judicial independence and the right to a fair hearing.*
f. *Misapprehending the legal character and purport of a Bill pending before Parliament as a legislative proposal.*

[23] Cumulatively, the consolidated appeal seeks the following reliefs:

a. *The consolidated appeal be allowed.*
b. *The Judgment of the Court of Appeal delivered on 21st February, 2025 be set aside.*
c. *The High Court Petition No. 197 of 2018 be dismissed.*

d. *A declaration that the local tribunals under Article 169(1)(d) of the Constitution exclude tribunals formed under the Constitution,*

administrative and advisory tribunals, tribunals with superior court judges, and informal tribunals not established under the Constitution or an Act of Parliament.

e. *Parties to bear their own costs.*

C. PARTIES SUBMISSIONS

(i) The Appellants

[24] Beginning with the issue of justiciability, the appellants reiterate that the 1st respondent's petition prematurely challenged an ongoing legislative process, contrary to Article 94 of the Constitution. In their view, the 1st respondent should have waited for the conclusion of that process, and thereafter raise any grievances during the public participation phase provided under Article 118 of the Constitution. Consequently, the appellants fault the superior courts below for failing to exercise deference to the Legislature and allow the legislative process relating to the Tribunals Bill to conclude. To buttress their line of argument, ***Wanjiru Gikonyo & 2 Others Vs National Assembly of Kenya & 4 Others*** [2016] KEHC 5536 (KLR), is cited. In that regard, the appellants submit that a Bill is a legislative proposal that may either be assented to, amended or abandoned altogether. Therefore, in their view, the impugned judgment at best, amounted to an advisory opinion which the appellate court lacks jurisdiction to issue, and at worst, pre-empted the outcome of the consideration of the Tribunals Bill.

[25] Maintaining that there is no prescribed time frame for enacting the legislation envisioned under Article 169(2), the appellants argue that neither the said article nor Article 261(1) and the Fifth Schedule to the Constitution stipulate any time frame. According to them, the 1st appellant has constitutional discretion to enact the legislation and compelling it would amount to violating the doctrine of separation of powers. Consequently, they contend that the superior courts below improperly

issued the structural interdicts, and particularly, against the 2nd appellant, who holds no legislative mandate. In any event, the appellants posit that the 1st appellant's legislative process is governed by the Standing Orders of the respective Houses of Parliament which are formulated under Article 124(1) of the Constitution. Further, that, the said standing

orders regulate situations where no timeline for enacting legislation is prescribed, as in this case. Referring to ***Speaker of the Senate & Another Vs Attorney-General & Another; Law Society of Kenya & 2 Others (Amicus Curiae)*** [2013] KESC 7 (KLR) (***Speaker of the Senate Case***), they submit that Parliament's internal processes are not subject to judicial interference.

[26] The appellants also take issue with the superior courts' interpretation of Article 169(1)(d) of the Constitution. More specifically, they contend that the courts erroneously import the term "transition" into the said article contrary to the principles of interpretation under Article 259 of the Constitution. As far as the appellants are concerned, Article 169(1)(d) and (2) is prospective and imposes no transitional obligations. They add that the superior courts below misapprehended the import of the replying affidavit sworn by Joash Dache's on behalf of the 2nd appellant at the High Court. They argue, in that context, that the said affidavit merely admitted to the then ongoing legislative process with respect to tribunals, and in no way inferred that all tribunals that pre-existed the 2010 Constitution ought to be transitioned to the Judiciary. To that extent, the appellants position is that although some tribunals pre- existed the Constitution and exercised judicial functions, not all of them could be characterized as local tribunals.

[27] Furthermore, the appellants postulate that the superior courts below erroneously applied the *ejusdem generis* rule of interpretation to Article 169(1) of the Constitution, and as a result, miscategorised local tribunals. In that regard, they claim that the Court of Appeal failed to consider whether the tribunals set out in the High Court's judgment under limb (e) of the orders fall within the definition of local tribunals. For instance, the Advisory Board of Review established under Section 48(1) of the Prisons Act (Cap 90), the Water Resources Management Authority established

under the Water Act (Cap 372), and the Kenya Bureau of Standards established under Section 4 of the Standards Act (Cap 496) are neither judicial nor quasi-judicial in nature.

[28] While appreciating that Article 159 of the Constitution vests judicial authority in courts and tribunals, the appellants' assert that there is no corresponding article

prescribing that JSC is the only body that can appoint members of local tribunals. In conclusion, the appellants urge this Court to allow the consolidated appeal.

(ii) The 1st Respondent

[29] In opposing the appeal, the 1st respondent, reiterates his case before the superior courts below. In his view, to the extent that the 1st appellant had perpetually failed to enact the contemplated legislation rendered his petition at the High Court justiciable. Besides, argues the 1st respondent, the fact that the appellants had embarked on passing the contemplated legislation could not limit the jurisdiction of the superior courts below. He added, that as at the time of filing his submissions before this Court, the said legislation had not been passed.

[30] Rejecting the appellants' claim that the superior courts below failed to distinguish administrative tribunals from judicial tribunals, the 1st respondent maintains that all local tribunals established under Article 169(1)(d) of the Constitution to adjudicate disputes by applying the law are judicial in nature and as such, fall under the Judiciary. He conceded that independent tribunals established under Articles 1(3)(c), 144(3), 158(4), 168(5), and 251(4)(b) of the Constitution are excluded from the above category.

[31] Lastly, the 1st respondent suggests that the 1st appellant may amend the existing statutes establishing local tribunals to vest the power of appointment and removal of tribunal members in JSC. This in his opinion would align such statutes with Article 172(1)(c) of the Constitution, which bestows the aforementioned mandate on JSC.

(iii) JSC

[32] JSC in opposing the consolidated appeal echoes its position before the superior courts below. However, JSC submits that the appellants had

specifically urged the High Court to issue structural interdicts should it find the 1st respondent's petition meritorious. Therefore, in its view, the appellants cannot purport to change their positions at this juncture as they are bound by their pleadings.

(iv) Katiba Institute

[33] Similarly, Katiba Institute opposes the consolidated appeal on more or less similar grounds as the 1st respondent and JSC. It further argues that the existence of the Tribunals Bill as a pending legislative proposal neither suspends constitutional obligations nor cures an ongoing constitutional breach.

D. ANALYSIS

[34] Having considered the pleadings, the impugned judgment, and the parties' respective submissions, this Court finds the following issues arise for determination:

i. *Whether this Court has jurisdiction to hear and determine the consolidated appeal.*
ii. *Whether the 1st respondent's petition before the High Court was justiciable.*
iii. *Whether Article 169(2) of the Constitution prescribes a timeframe for the enactment of the Tribunals Bill.*
iv. *What is the proper interpretation of "local tribunal" under Article 169(1)(d) of the Constitution, and which categories of tribunals fall within that rubric for purposes of transition to the Judiciary?*
v. *Whether it was appropriate for the High Court to grant an order of structural interdict to supervise the enactment of the Tribunals Bill, when the process of enacting the Bill was actively underway.*

i. *Whether this Court has jurisdiction to hear and determine the consolidated appeal*

[35] Although there was no challenge to this Court's jurisdiction to entertain the consolidated appeal, it is well established, this Court always does independently satisfy itself that a matter placed before it, properly

invokes its appellate jurisdiction. In this regard, we note that the consolidated appeal was anchored on Article 163(4)(a) of the Constitution, which provides that an appeal shall lie from the Court of Appeal to this Court as of right in any case involving the interpretation or application of the Constitution. In ***Nduttu & 6000 others Vs Kenya Breweries Ltd & Another***

[2012] KESC 9 (KLR), this Court clarified the threshold to be met under Article 163(4)(a), stating:

> ***"The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of article 163(4)(a)."***

[36] It follows from the above that a bare assertion that an appeal is founded on constitutional interpretation or application is not sufficient to invoke this Court's jurisdiction under Article 163(4)(a) of the Constitution. The appellant must demonstrate that the constitutional issues were both raised and determined in the courts below. See ***Nicholus Vs Attorney General & 7 Others; National Environmental Complaints Committee & 5 Others (Interested Parties)*** [2023] KESC 113 (KLR) (***Nicholus Abidha Case***).

[37] Our review of the record, including the pleadings, submissions, and judgments of the superior courts below, confirms that the dispute turns mainly on the interpretation and application of Article 169 of the Constitution. That article was central to the reasoning and disposition by the courts below and remains the basis of the arguments advanced by the parties before this Court. In light of the foregoing, we are satisfied that this consolidated appeal meets the jurisdictional threshold under Article

163(4)(a) of the Constitution and is properly before this Court.

ii. Whether the amended petition before the High Court was justiciable

[38] In addressing this issue, the High Court observed that courts ordinarily refrain from adjudicating matters falling within the constitutional remit of the other arms of government. However, they are nonetheless duty-bound to intervene where there is an actual or threatened violation of the Constitution, including the Bill of Rights, or where constitutional obligations are alleged to have been breached in a manner that is not merely abstract or political.

[39] Noting that there was no contest that local tribunals established under Article 169(1)(d) of the Constitution are subordinate courts, and that Article 169(2) places an obligation on the 1st appellant to enact legislation conferring jurisdiction, functions and powers on such courts, the learned trial Judge took the position that the 1st respondent's petition alleged a contravention of the Constitution arising from the 1st appellant's failure to enact the contemplated legislation. On that basis, the High Court determined that the dispute raised serious constitutional issues and was, in the circumstances, justiciable.

[40] On appeal, the Court of Appeal upheld this finding. Relying on Article 2(4) of the Constitution, the appellate court held that courts are enjoined to determine whether an omission by a state organ to undertake a constitutionally required step violates the Constitution. Distinguishing merit from justiciability, the Court of Appeal concluded that whether the 1st appellant bore a constitutional obligation to pass the contemplated legislation was itself a justiciable issue.

[41] Before this Court, the appellants challenge those findings. The 1st appellant submits that since the enactment of the Tribunals Bill was under consideration during the pendency of the proceedings, the dispute as framed was not ripe for adjudication and that the superior courts below

ought to have deferred to Parliament in accordance with the doctrine of separation of powers. Similarly, the 2nd appellant urges that once a Bill has been introduced in Parliament, it cannot properly be the subject of judicial

adjudication, and entertaining the petition amounted to the delivery of an advisory opinion, a jurisdiction the superior courts below lacked.

[42] As for the respondents, they maintain that the gravamen of the dispute was the 1st appellant's failure to enact the contemplated legislation within constitutionally acceptable timelines. Moreover, they emphasize that the decade-long delay constituted a continuing violation of the Constitution, including the rights to fair hearing, exacerbated by the continued appointment of tribunal members by the Executive in disputes where the Executive itself was a party. The 1st respondent stressed that, even as at 2018 when he filed the suit, the legislative timelines for enacting the contemplated legislation had long lapsed, and by 2025, the Bill had not been passed into law. In their view, the pendency of a legislative process does not suspend constitutional obligations or cure the violations in contest. They further contend that the dispute fell squarely within the jurisdiction of the High Court under Article 165(3) of the Constitution, and that Article 119 of the Constitution provides a political, rather than an adequate or effective, remedy for the constitutional violations alleged.

[43] The appellants' contest as to justiciability turns on two interrelated issues: first, whether the pendency of the Tribunals Bill before Parliament required judicial deference to Parliament; and second, whether the 1st respondent's failure to petition the 1st appellant under Article 119 of the Constitution and the Petitions to Parliament (Procedure) Act rendered the dispute non-justiciable.

[44] Justiciability concerns a question of whether a matter is suitable for adjudication by a court. It operates to prevent courts from entangling themselves in abstract, hypothetical or academic disputes, and encompasses the doctrines of mootness and ripeness. In ***Attorney General & 2 Others Vs Ndii & 79 Others; Dixon & 7 Others (Amicus***

Curiae) [2022] KESC 8 (KLR) (***BBI Case***), this Court had occasion to render itself on this doctrine and several broad principles are discernible, key among them include:

i. The principle of justiciability prevents courts from entangling themselves in abstract disagreements over administrative policies.

ii. It prohibits courts from entertaining hypothetical or academic questions.

iii. Courts retain the discretion, based on the circumstances of the case, to decide whether such a matter is temporally amenable for adjudication.

iv. Courts should exercise restraint where a mandate given by the Constitution has not been exercised by the body so mandated.

v. The doctrine of justiciability encompasses the doctrines of mootness and ripeness, which prevent a court from deciding an issue when it is too late and not a live controversy, or when it is too early, respectively.

vi. The ripeness doctrine requires a court to evaluate, one, the fitness of the issues for judicial decision and two, the hardship to the parties of withholding court consideration.

vii. The ripeness principle highlights that the role of the court is retrospective, that is, it only handles issues that have crystallized.

viii. A ripe issue is one where the challenging party demonstrates that they were subject to prejudice, or the real threat of prejudice, as a result of the conduct challenged.

[45] Against this backdrop, the appellants' objection is to be examined in light of this Court's clarification as to when it is appropriate to challenge a legislative process. In ***Senate & 3 Others Vs Speaker of the National***

Assembly & 10 Others [2025] KESC 11 (KLR) we held that ordinarily, the constitutionality of a Bill ought not to be

challenged for substantive constitutionality. However, a challenge can be mounted for procedural irregularity or for legislative inaction. We held thus at para. 157:

> ***"A Bill and an Act are distinct legal instruments that require different causes of action because they exist at different stages of the legislative process and have different legal effects. A Bill is a proposed law that is still undergoing legislative scrutiny, subject to debate, amendments, and public participation before it can be enacted. <u>At this stage, challenges to a Bill often focus on procedural irregularities, such as lack of public participation, violation of legislative processes, or failure to meet constitutional requirements before enactment.</u> In contrast, an Act is a law that has been passed by Parliament and assented to by the President, making it legally binding and enforceable. Challenges to an Act typically focus on substantive constitutionality, questioning whether its provisions violate fundamental rights, exceed legislative authority, or contravene constitutional principles."*** [Emphasis added]

[46] Going back to the present matter therefore, the 1st respondent's petition did not concern the substantive content of the Tribunals Bill. Rather, it alleged that the Executive and Parliament had failed to perform a constitutionally required duty expressly imposed by Article 169(2) of the Constitution, that is, to enact legislation conferring jurisdiction, functions, and powers upon local tribunals. Article 2(4) of the Constitution provides that ***"…any act or <u>omission in contravention of the Constitution is invalid</u>***" [Emphasis added]. In effect, this provision declares invalid any act or omission inconsistent with the Constitution. The express inclusion

of ***omission*** constitutionalises judicial scrutiny of inaction by duty bearers, including legislative inaction. Moreover, Article 21(1) imposes a positive obligation on the State and all State organs to observe, respect, protect, promote, and fulfil the rights in the Bill of Rights. Since the alleged omission implicated the right of access to justice and fair

hearing under Articles 48 and 50, the dispute raised a direct constitutional question for judicial determination. The 1st respondent's petition further challenged the continued appointment of the members of local tribunals by the Executive claiming it violates various rights, including the right to access justice, the right to a fair hearing, impedes on the independence of the Judiciary and undermines the administration of justice. The High Court was therefore required to determine whether the relevant duty-bearers had complied with a binding constitutional obligation - an inquiry that is inherently justiciable.

[47] Turning to the interplay between the doctrine of separation of powers and the High Court's duty to interpret and apply the Constitution, the doctrine of separation of powers, though foundational to our constitutional order, does not shield any arm of government from judicial scrutiny. Legislative authority is vested in Parliament, but it must be exercised within the bounds of the Constitution. Courts, for their part, are constitutionally mandated to interpret and apply the Constitution, and to determine whether any law, act, or omission is inconsistent with it. See para. 64 of ***Speaker of the Senate Case.***

[48] Regarding the first issue, it is our view that the legislative process that was ongoing at the time the proceedings were commenced did not cure the alleged violations, nor did it render the dispute abstract or premature. The issue before the High Court was not merely the absence of legislation, but the reasonableness and constitutional permissibility of the delay in enacting it, coupled with the consequences of that delay. Whether Parliament was under a constitutional obligation to enact the legislation, and whether its prolonged inaction constituted a breach of that obligation, were questions properly amenable to judicial determination and could not be resolved solely by the pendency of the Bill. Accordingly, a pending Bill may be relevant to the fashioning of an appropriate remedy or timeline for

compliance, but it does not negate the justiciability of the claim or shield prolonged legislative inaction from judicial scrutiny.

[49] On the second sub-issue, the appellants further assert that the 1st respondent ought to have petitioned Parliament under Article 119 of the Constitution and the

Petitions to Parliament (Procedure) Act before approaching the High Court. Article 119 of the Constitution provides thus:

> *"119 Right to petition Parliament*
> 1) *Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation.*
> 2) *Parliament shall make provision for the procedure for the exercise of this right."*

To give effect to this provision and Article 37 of the Constitution, the Petitions to Parliament (Procedure) Act was enacted. The preamble to this Act states that it was enacted to enhance public participation in the parliamentary and legislative processes, and for connected purposes.

[50] We understand the appellants to plead the doctrine of exhaustion in the above context. In ***Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions) Vs Munyao & 148 others (Suing on their own behalf and on behalf of the plaintiffs and other members/beneficiaries of the Kenya Ports Authority Pensions Scheme)*** [2019] KESC 83 (KLR), this Court held that due deference must be exercised in favour of alternative dispute resolution mechanisms established by statute. However, this doctrine is not absolute, and in ***Benjamin Vs Attorney General & 55 Others*** [2026] KESC 5 (KLR), we clarified that the exhaustion doctrine ought not to be applied in a blanket manner. We also observed that the dispute in the ***Benjamin Case*** transcended the suitability of individual nominees and touched on broader constitutional questions regarding adherence to the two-thirds gender rule and, accordingly, fell within the jurisdictional ambit of the High Court.

[51] Likewise, in the ***Nicholus Abidha Case***, we took the position that firstly, the existence of an alternative remedy does not, by itself, preclude an individual from

seeking constitutional relief. Secondly, where the alternative reliefs are not adequate or effective, the court is not precluded from providing constitutional relief. Further, in ***Aluochier Vs Senate & 2 Others*** [2025] KESC 59 (KLR), this Court affirmed the High Court decision that Article 119 of the Constitution did not bar it from determining the constitutionality of any act done by the Senate. The Court went on to find that it equally has jurisdiction to interrogate allegations of constitutional violation, Article 119 notwithstanding.

[52] The High Court (*Lenaola, Ngugi & Odunga, JJ. (as they then were)*) in the ***Council of Governors & 3 Others Vs Senate & 2 Others; Speakers of the 47 Counties & 3 Others (Interested Parties); Katiba Institute (Amicus Curiae)*** (Consolidated)) [2015] KEHC 6965 (KLR), faced with a question on the propriety of deferring to Article 119 of the Constitution in the face of a contest on the constitutionality of an Act of Parliament (County Governments (Amendment) Act, 2014), had this to say:

> ***"74. It would therefore be, in our view, for the Court to abdicate its responsibility under the Constitution to hold that a party who considers that legislation enacted by Parliament in any way violates the Constitution is bound to first petition Parliament with respect to the said legislation. The constitutional mandate to consider the constitutionality of legislation is vested in the High Court, and <u>Articles 2(4) and</u> <u>165(3(d)(i) mandate this Court to invalidate any law, act or</u> <u>omission that is inconsistent with the Constitution</u>. This is in harmony with the mandate of the courts to be the final custodians of the Constitution."*** [Emphasis added]

[53] Applying the foregoing principles to the present matter, the issue is whether the 1st respondent was required to petition Parliament under

Article 119 of the Constitution and the Petitions to Parliament (Procedure) Act before approaching the High Court, and whether such a process provided an adequate remedy. In this regard, we have

established that the 1st respondent’s petition alleged constitutional violations. We are also alive to the appellants’ consistent submission that the 1st appellant is under no mandatory constitutional obligation to enact the contemplated legislation. In view of the foregoing, it is our view that both the Constitution and the Petition to Parliament (Procedure) Act do not offer relief for alleged constitutional violations. Once a litigant alleges an infringement or threatened infringement of the Constitution, the matter falls within the High Court’s jurisdiction. Indeed, in ***Nicholus Abidha Case***, we pronounced ourselves thus:

> ***“108. It was therefore sufficient that the appellant alleged that a right in the Constitution had been infringed or threatened with violation, making it clear that in light of the provisions of the Constitution and the ELC Act, the issues raised were within the original jurisdiction of the ELC.”***

[54] Besides, Article 261(5) of the Constitution authorizes the High Court to hear petitions challenging Parliament’s failure to enact a particular legislation. Additionally, sub-Article 6 thereof empowers the court to issue a raft of remedies, including, a declaration directing Parliament and the Attorney General to take steps to act in a particular manner. More specifically, Article 261(5) & (6) provide as follows:

“261

5) If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter.

6) The High Court in determining a petition under clause (5) may—

a) make a declaratory order on the matter; and

b) transmit an order directing Parliament and the Attorney-General to take steps to ensure that the required

legislation is enacted, within the period specified in the order, and to report the progress to the Chief Justice."

[55] Accordingly, we are in agreement with the superior courts below that the dispute is indeed justiciable. The pendency of the Tribunals Bill did not deprive the High Court of jurisdiction, or render the dispute non-justiciable.

iii. Whether Article 169(2) of the Constitution prescribes a timeframe for the enactment of the Tribunals Bill

[56] On this issue, the Court of Appeal held that although Article 169(2) of the Constitution does not prescribe timelines for the enactment of the contemplated legislation, Parliament's constitutional obligation to confer jurisdiction, functions, and powers on subordinate courts underscores the importance the Constitution attaches to such legislation. The appellate court observed that this legislation is directly linked to the realization of the right of access to justice under Article 48 of the Constitution and therefore warrants urgent attention. In the absence of express timelines, Article 259(8) applies, requiring that the obligation be fulfilled without unreasonable delay. The Court of Appeal concluded that a delay of over ten years in enacting legislation essential to the realization of a constitutional right was manifestly unreasonable and that the trial court was justified in compelling Parliament to discharge its constitutional duty.

[57] Before this Court, the 1st appellant submits that although the Court of Appeal correctly held that the Constitution does not prescribe a timeline within which Parliament must enact legislation to transition local tribunals under Article 169(1)(d) from the Executive to the Judiciary, it erred in invoking Article 259(8) to compel the timeous enactment of such legislation. The 1st appellant, in addition, argues that it is erroneous to construe Article 169(2) as imposing a mandatory duty on Parliament to enact legislation for the transition of tribunals, since Article 169(1)(d) merely grants Parliament discretionary authority to establish additional courts or tribunals to supplement existing subordinate courts, without

imposing any timeline. The 1st appellant further contends that the Fifth Schedule to the Constitution relates to legislation on the system of courts under Article 162, as opposed to local tribunals under Article 169(1)(d); and that Articles 169(1)(d) and 172 must be read harmoniously, with Parliament retaining discretion to establish tribunals and determine their composition,

functions, and powers in light of the specialized nature of the disputes they are designed to resolve.

[58] The 2nd appellant, on its part, contends that Chapter Ten of the Constitution establishes the Judiciary, and under Article 169(1), defines subordinate courts to include Magistrates' courts, Kadhis' courts, Courts Martial, and such other courts or local tribunals as Parliament may establish by statute. It also requires Parliament pursuant to Article 169(2) to confer jurisdiction, functions, and powers on such courts without prescribing any timeline for doing so. The 1st appellant argues that Article 261(1) and the Fifth Schedule to the Constitution do not impose any timelines on Parliament in relation to legislation under Article 169, and that the Constitution neither compels the Attorney General nor Parliament to enact legislation establishing tribunals. Accordingly, since Article 169(1)(d) vests Parliament with discretion to establish tribunals on a needs basis, Parliament cannot be compelled to exercise that discretion in a particular manner or within a judicially imposed timeframe without violating the doctrine of separation of powers. This is so especially given the 2nd appellant's view that the constitutional text contemplates the possibility, rather than the inevitability, of the creation of local tribunals.

[59] The 1st respondent submits that the Constitution obliges Parliament to enact legislation establishing and transitioning local tribunals within constitutionally prescribed or implied timelines. He further argues that Article 261(1), read together with the Fifth Schedule to the Constitution, requires Parliament to enact all legislation necessary to give effect to the Constitution within specified periods, and that where no specific timeline is provided, Article 259(8) mandates performance without unreasonable delay, failing which the sanctions under Article 261(5) to (9) apply. JSC submits that the transition of tribunals from the Executive to the Judiciary is not self- executing and requires legislative intervention under Article

169(2), and that although the Fifth Schedule does not prescribe a specific timeframe for legislation on tribunals, a holistic reading of the Constitution, guided by Article 259(8), requires Parliament to undertake that legislative task within a reasonable time.

[60] Katiba Institute on its part, submits that the Court of Appeal correctly applied Article 259(8) of the Constitution to ensure that Parliament's mandatory obligation under Article 169(2) was performed without unreasonable delay. According to it, a contrary interpretation would render that provision hollow, permit indefinite legislative inaction, and entrench ongoing constitutional violations. It argues that the use of the term "shall" in Article 169(2) imposes a binding duty on Parliament to enact legislation conferring jurisdiction, functions, and powers on subordinate courts, including local tribunals contemplated under Article 169(1)(d), which are envisaged as part of the judicial system rather than discretionary administrative bodies. It therefore maintains that the Court of Appeal was right to hold that a prolonged delay in transitioning tribunals was unreasonable and unconstitutional, and that any interpretation permitting indefinite delay would undermine the practical realization of the rights to fair hearing, equality, and access to justice.

[61] Having considered the parties' submissions, the issue for determination has two limbs: first, whether Parliament is under a mandatory or discretionary constitutional obligation to enact legislation providing for the jurisdiction, functions, and powers of local tribunals; and second, whether there exists a timeframe within which Parliament is required to enact such legislation.

[62] On the first limb, it is necessary to distinguish between Parliament's discretionary power under Article 169(1)(d) of the Constitution to establish ***"any other court or local tribunal"*** and its duty under Article 169(2) to enact legislation conferring jurisdiction, functions, and powers on the subordinate courts established under Article 169(1). The text of Article 169(2) is couched in mandatory terms through the use of the word ***"shall,"*** signifying a binding constitutional obligation rather than a matter of legislative discretion. This obligation is central to the effectiveness of

local tribunals, as the envisaged legislation provides the legal framework through which such tribunals may properly exercise judicial authority.

[63] Article 169(2) also performs a rights-enabling function, as it is directly linked to the realization of the right of access to justice under Article 48 of the Constitution. As

this Court has repeatedly emphasised, the Constitution must be interpreted holistically and contextually in order to give effect to its design, values, and internal coherence. see ***In the Matter of Kenya National Commission on Human Rights*** (2014] KESC 33 (KLR*)*. Article 169 of the Constitution should therefore not be read in isolation, but as forming part of the constitutional architecture intended to facilitate access to justice, particularly through subordinate courts and local tribunals that often provide specialized justice. These provisions must accordingly be read together.

[64] Given the importance of "local tribunals" in the realization of the right to access to justice, Article 21(1) of the Constitution imposes an obligation on all State organs, including Parliament, to observe, respect, protect, promote, and fulfil the rights and fundamental freedoms in the Bill of Rights. In the absence of an appropriate legislative framework, the State's ability to discharge its obligation to fulfil the right of access to justice is undermined. When the constitutional scheme is considered as a whole, it imposes a clear duty on the State to establish concrete and effective mechanisms for the realization of access to justice, including through properly constituted local tribunals. To fulfil this obligation, Parliament must take positive steps, including the enactment of legislation, to give practical effect to the right to access to justice through local tribunals. Therefore, failure to enact enabling legislation amounts to a failure of the duty to fulfil, and legislative inaction would therefore constitute a violation of constitutional obligations. See the decision of the African Commission on Human and Peoples' Rights **in *Social and Economic Rights Action Center (SERAC) and Another v Nigeria***, *Communication No. 155/96 (2001), (2001) AHRLR 60 (ACHPR 2001).*

[65] In light of the foregoing, we affirm the finding of the two superior courts below that Parliament is under a mandatory obligation to enact

legislation conferring jurisdiction, functions, and powers on the local tribunals as contemplated under Article 169(2) of the Constitution.

[66] Turning to the second limb of this issue, it is clearly evident that there is no constitutionally prescribed timeline for the enactment of legislation under Article 169(2). Unlike Article 261 and the Fifth Schedule to the Constitution, which expressly

provide timelines and enforcement mechanisms, Article 169(2) is silent on the period within which Parliament must act. In such circumstances, Article 259(8) applies and requires that constitutional obligations be performed ***"without unreasonable delay***." Parliament is therefore under a duty to enact the required legislation within a reasonable time.

[67] The standard of "unreasonable delay" is inherently contextual and must be assessed with reference to the importance of the constitutional obligation, its impact on the enjoyment of rights, particularly the right of access to justice under Article 48, and the constitutional expectation of timely implementation of the Constitution. As we held in ***In the Matter of Council of Governors & 47 Others*** [2020] KESC 65 (KLR) (Advisory Opinion)) at para. 94:

> ***"… the Constitution does not set a specific timeline within which the National Government must transfer the funds to Counties. Yet in their submissions, the Applicants contend that without a specific timeline, the National Government has largely disregarded this Constitutional edict. In our view, it all depends on what in this context, constitutes "undue delay". In this regard, unless there are set timelines in the Constitution or the law, a Court has to consider each case on its own merits to determine whether there has been undue delay in the performance of an act by the concerned entity."***

[68] In the present circumstances, this Court, like the two superior courts below, comes to the conclusion that a delay in enacting the constitutionally contemplated legislation under Article 169(2) for over eight years, as at the time of filing of the 1st respondent's petition at the High Court, amounted to unreasonable delay and a breach of the constitutional obligation arising from Articles 48 and 169(2) of the

Constitution.

[69] We therefore dismiss this limb of the Appeal.

iv. ***What is the proper interpretation of "local tribunal" under Article 169(1)(d) of the Constitution, and which categories of tribunals fall within that rubric for purposes of transition to the Judiciary***

[70] The High Court held that the meaning of the term *"local tribunal"* in Article 169(1)(d) of the Constitution must be understood through the *ejusdem generis* rule of interpretation. Under this principle, where general words follow specific ones, the general words are construed to include only things of the same kind as those specifically listed. Article 169(1) enumerates Magistrates' courts, Kadhis' courts, Courts Martial, and other courts before referring to local tribunals. However, the High Court found that this interpretation excludes constitutional tribunals, administrative or advisory tribunals, tribunals whose membership includes superior court judges, and informal bodies not established by statute. The trial court therefore concluded that local tribunals under Article 169(1)(d) are subordinate courts, distinct from advisory or administrative bodies, and must be established through statute.

[71] On appeal, the Court of Appeal did not go into a detailed discussion or interpretation of what is meant by the phrase "local tribunal". Rather, the appellate court endorsed the High Court's use of the *ejusdem generis* rule in constitutional interpretation. It proceeded to conclude thus-

> "***We therefore hold that the ejusdem generis rule applies to both statutory interpretation as well as constitutional interpretation. Consequently, local tribunals in article 169(1)(d) of the Constitution must be treated in the same manner as the courts set out under Article 169(1) of the Constitution.***"

[72] The 1st appellant faults the Court of Appeal for failing to interpret the

term "local tribunal" in contrast to a decision of the same bench of the appellate court in ***Ngutari & 5 Others Vs Okello & 5 Others*** [2025] KECA 505 (KLR) where it was held at para. 33 that:

> ***"To our mind the tribunals contemplated in Article 169(1)(d) are those that are established under an Act of Parliament and which exercise judicial or quasi-judicial powers and are subordinate to the superior courts. They therefore do not encompass international tribunals, the tribunals established by or under the Constitution, those tribunals that are purely advisory or administrative in nature and those tribunals that are presided over by or include a Judge of the superior courts in their membership. The Business Premises Rent Tribunal is one such tribunal that meets the qualities of a local tribunal under Article 169(1)(d). Being a subordinate court, it must be transited to the judiciary."***

Moreover, the 1st appellant takes issue with the Court of Appeal for failing to set aside limb (e) of the High Court's order. In its view, the same had the effect of transiting all tribunals from the Executive to the Judiciary without first determining whether each body qualified as a local tribunal within the meaning of Article 169(1)(d) of the Constitution.

[73] The 2nd appellant argues that although tribunals are not defined in the Constitution, they are created both by the Constitution and statute to perform diverse administrative, regulatory, and quasi-judicial functions, and have evolved in Kenya without uniform characteristics. The statutory landscape therefore reveals significant variation in nomenclature, structure, and mandate, with bodies described as tribunals, commissions, authorities, bureaus, committees or councils exercising markedly different powers, ranging from purely advisory or regulatory functions to dispute resolution, professional discipline, and licensing. In these circumstances, it goes on to submit, the absence of a constitutional definition of a "local tribunal" and the acknowledged reality that not all pre-2010 tribunals

exercised judicial functions, the 2nd appellant asserts that the superior courts ought to have exercised deference to Parliament to guide on which bodies ought to transit from the Executive to the

Judiciary. Additionally, the 2nd appellant posits that the superior courts below were under a duty to interrogate, on a tribunal-by-tribunal basis, whether each body listed under limb (e) of the High Court's order properly fell within the meaning of a local tribunal under Article 169(1)(d) of the Constitution.

[74] The 1st respondent, on its part, claims that the term "local tribunals" refers to standing subordinate courts established under Kenyan law and forming part of the Judiciary, and is intended to distinguish such bodies from international tribunals and *ad hoc*, constitutionally established independent tribunals, which are quasi-judicial, temporary, and external to the Judiciary. The 2nd respondent submits on the said issue that the High Court and the Court of Appeal properly applied the *ejusdem generis* rule to confine "local tribunals" to adjudicative bodies analogous to Magistrates' Courts, Kadhis' Courts, and Courts Martial, and that limb (e) of the High Court's order did not extend to independent tribunals whose composition and appointment are constitutionally prescribed and lie outside the mandate of JSC. As far as Katiba Institute is concerned, the appellants have mischaracterized the decisions of the two superior courts below, arguing that the two courts clearly defined and limited the category of tribunals subject to transition by excluding non-adjudicative bodies from the scope of Article 169(1)(d) of the Constitution.

[75] Our understanding of the appellants' case is that they challenge the Court of Appeal's decision on two grounds: first, that the appellate court failed to distinguish between advisory and adjudicative tribunals in its interpretation of the term "local tribunal"; and second, that it did not examine whether each of the tribunals listed in limb (e) of the High Court's order qualified as a local tribunal within the meaning of Article 169(1)(d) of the Constitution.

[76] On the first ground, we are of the view that the appellants

mischaracterize the Court of Appeal’s findings. While the appellate court did not elaborately discuss the rubric of “local tribunal”, it explicitly endorsed the High Court’s use of *ejusdem generis* rule in interpreting Article 169(1)(d) of the Constitution.

[77] On our part, we do not see any fault in the use of the *ejusdem generis* rule, a general rule of legal interpretation, in construing the meaning of "local tribunal" as used in Article 169(1)(d) of the Constitution. We would add that Article 169(1) of the Constitution defines subordinate courts as including Magistrates' courts, Kadhis' courts, Courts Martial, and "***any other court or local tribunal as may be established by an Act of Parliament***", other than the courts contemplated under Article 162(2) of the Constitution. The inclusion of the phrase "local tribunal" within this enumeration is of central interpretive significance. Under the *ejusdem generis* rule of interpretation, where general words follow specific ones, the general words are confined to things of the same class as those previously enumerated. The heading of Article 169(1) refers expressly to "Subordinate courts". The entities specifically named - Magistrates' courts, Kadhis' courts and Courts Martial - are all courts of law, exercising judicial authority, subordinate to the superior courts, and operating within an adversarial framework for the binding resolution of disputes. The phrase "local tribunal", appearing at the end of this list, must therefore be understood as referring only to tribunals of the same constitutional genre: that is, tribunals which are, in substance and function, adjudicative in nature.

[78]Therefore, for a tribunal to fall under the scope of "local tribunal", such a tribunal must: exercise judicial, quasi-judicial, or adjudicative power as opposed to administrative, regulatory, or advisory power; it must be subordinate to the superior courts; it must resolve disputes through a structured, adversarial process culminating in binding determinations; it must be established by an Act of Parliament; and it must not be constituted by, or include in its membership, judges of the superior courts. This definition excludes constitutional tribunals established for specific purposes under the Constitution itself, administrative bodies exercising delegated executive authority, policy and licensing bodies, regulatory

authorities, and informal or sectoral mechanisms of dispute resolution whose primary function is governance rather than adjudication.

[79] Indeed, it is important to note that Hon. Anne Amadi, then Chief Registrar of the Judiciary and the then Secretary to JSC, in opposing the 1st respondent's petition before the High Court, swore a Replying Affidavit on 30th August 2018 on behalf of JSC. At paragraphs 16 and 17 of that affidavit, she deponed that one of the conclusions arising from the work of the Judiciary Working Committee on Transition and Restructuring of Tribunals (the JWCT-T) was that not all tribunals ought to be transited from the Executive to the Judiciary. She deponed that, under the Constitution, only those tribunals that are part of the Judiciary, vested with judicial authority, and falling within the category of subordinate courts are to be transited. Further, that Tribunals whose functions are purely advisory, as well as those dedicated exclusively to the enforcement of professional standards and ethics, were not envisaged to require transition into the Judiciary. On our part, we are persuaded by this position.

[80] In demarcating what is meant by tribunals exercising adjudicative power, we draw from Lon Fuller's classic exposition of adjudication as a distinctive mode of decision- making concerned with the settlement of disputes between opposing parties through an institutionally guaranteed process. (*See LL Fuller, '**The Forms and Limits of Adjudication'** (1978) 92 Harvard Law Review 353).* Fuller explains that adjudication is characterized by a structured opportunity for each affected party to present evidence and reasoned arguments before an impartial and neutral decision-maker, culminating in a binding and authoritative determination of their rights and obligations. The defining feature of adjudication is therefore not merely the existence of a hearing or procedural formality, but the centrality of a concrete dispute and the disciplined, reason-giving engagement according to the parties' competing positions. Adjudication is thus distinguished from administrative or policy decision-making by its adversarial participatory structure, its institutional purpose of dispute

settlement, and its commitment to neutrality, reasoned justification, and finality.

[81] We therefore dismiss the contention by the appellants that the Court of Appeal failed to distinguish between advisory and adjudicative tribunals in its interpretation of the term "local tribunal" as provided in of Article 169(1)(d) of the Constitution.

[82] On the second front of the appellants' contention, upon evaluation of the judgments by the two superior courts below, we find merit in the appellants' submission that both the High Court and the Court of Appeal did not examine whether each of the tribunals listed in limb (e) of the High Court's order qualified as a "local tribunal" within the meaning of Article 169(1)(d) of the Constitution. The impugned limb (e) reads:

> ***"A declaration hereby issues that any new appointment or removal of a member of any of the Tribunals under article 169(1)(d) of the Constitution must be undertaken by the Judicial Service Commission. For certainty, such local tribunals include: -***
>
> ***a) Board of Review established under the Prisons Act;***
> ***b) Business Premises Tribunal established under the Landlord and Tenant (Shops, Hotels & Catering Establishments Act);***
> ***c) Provincial Land Control Appeals Board established under the Land Control Act;***
> ***d) Central land Control Appeals Board established under the Land Control Act;***
> ***e) Mines Development Loans Act f) Seed and Plants Tribunal established under Seeds and Plant Varieties Act;***
> ***f) Sugar Arbitration Tribunal established under the Sugar Act;***
> ***g) Water Resources Management Authority established under the Water Act;***
> ***h) Water Appeal Board established under the Water Act;***
> ***i) Water Service Board established under the Water Act;***
> ***j) Wildlife Conservation and Management Services Appeals Tribunal established under the Wildlife***

Conservation and Management Act;

k) ***Tourist Appeal Board established under the Tourist Industry Licensing Act;***

l) Transport Licensing Appeal Tribunal established under Transport Licensing Act;

m) State Corporations Appeals Tribunal established under the State Corporations Act;

n) Value Added Tax Appeals Tribunal established under Value Added Tax Act;

o) Capital Markets Tribunal established under the Capital Markets Authority Act;

p) Insurance Appeals Tribunal established under the Insurance Act;

q) Co-operative Tribunal established under the Co-operatives Act;

r) Hotels and Restaurants Appeals Tribunal established under the Hotels and Restaurants Act;

s) Kenya Bureau of Standards established under the Standards Act;

t) Restrictive Trade Practices Tribunal established under the Restrictive Trade Practices, Monopolies and Price Controls Act;

u) Land Disputes Tribunals established under the Land Disputes Tribunal;

v) Land Disputes Appeal Committee established under the Land Disputes Tribunals Act; and

w) Non-Government Organizations Co-ordination Board established under the Non-Governmental Originations Co- ordination Act."

[83] A careful reading of both the High Court and the Court of Appeal judgments reveals that neither court undertook an analysis of whether each of the bodies listed in Limb (e) of the High Court's order properly fell

within the rubric of a “local tribunal” as

contemplated under Article 169(1)(d) of the Constitution. That omission, however, is not the only difficulty that arises with the findings by the two superior courts below.

[84] We have examined the 1st respondent's amended petition dated 18th December 2018 and note that the declaration which ultimately found expression in limb (e) of the High Court's order was not pleaded at all. It is now well settled that parties are bound by their pleadings, and that a court exceeds its jurisdiction when it grants reliefs that have not been pleaded or in respect of which the opposing parties were not afforded an opportunity to address the court through evidence and submissions.

[85] This Court has also consistently underscored the centrality of pleadings to the adjudication process. In ***Odinga & Another Vs Independent Electoral and Boundaries Commission & 2 Others*** [2017] KESC 31 (KLR)***,*** we stated that no party should be permitted to depart from its pleadings, as pleadings define the issues for determination, ensure that parties are fully apprised of the case they must meet, and provide a fair opportunity to place relevant evidence before the court. This Court further emphasized that issues arise only where a material proposition of fact or law is affirmed by one party and denied by the other, and that it is neither desirable nor permissible for a court to frame or determine issues that do not arise from the pleadings.

[86] In the present case, the declaration that crystallized into limb (e) of the High Court's order was not pleaded and therefore fell outside the scope of the issues properly before the superior courts below. In granting that relief, the High Court acted without a foundation in the pleadings and without affording the parties an opportunity to address the specific question of whether each of the listed statutory bodies qualified as a "local tribunal" under Article 169(1)(d) of the Constitution. On that basis, and

without expressing a view on the substantive merits of the classification of the individual statutory bodies listed in the impugned limb (e) of the High Court's order, we find that this limb of appeal has merit and ought to be allowed, we therefore set aside the impugned limb (e) of the High Court's order.

v. Whether it was appropriate for the High Court to grant an order of structural interdict to supervise the enactment of the Tribunals Bill, when the process of enacting the Bill was actively underway

[87] This question concerns the constitutional propriety of the High Court's issuance, as affirmed by the Court of Appeal, of a structural interdict compelling Parliament to enact the Tribunals Bill pursuant to Article 169(2) of the Constitution and to report progress thereof to the court. The question turns on whether the supervised interdict directed at the appellants by the superior courts below, constituted an appropriate exercise of judicial power under Article 23(3) of the Constitution, or whether that order transgressed the separation of powers by intruding into the legislative domain.

[88] The High Court found that Parliament had failed to enact legislation contemplated under Article 169(2) for an extended period and that this failure undermined access to justice under Article 48 of the Constitution. As a remedy, it issued a structural interdict requiring the appellants to take steps towards enacting the Tribunal Bill and to file affidavits in court reporting on progress. The impugned High Court's orders read:

"

f) The Hon. Attorney General and the Parliament, being the 2nd and 3rd respondents herein (the appellants before this Court), are hereby directed to take proactive steps within their respective dockets towards propagating the Tribunals Bill with a view of transiting the local tribunals under article 169(1)(d) of the Constitution to the Judiciary. To that end, the Hon. Attorney General and the Parliament shall file affidavits within 6 months of this judgment detailing the steps taken.

g) ***Upon filling of the affidavits in (f) above, the Deputy Registrar of this court shall schedule this matter for mention on the basis of priority.”***

[89] The Court of Appeal affirmed this remedial approach, holding that the issuance of a structural interdict was justified and consistent with Article 23(3), particularly in light

of prolonged legislative inaction. It is this finding by the Court of Appeal that has been challenged in the present consolidated appeal.

[90] The 1st appellant contends that where the Constitution or statute does not prescribe a specific timeframe for the enactment of legislation, the legislative process is governed by the Standing Orders of the Houses of Parliament made under Article 124(1) of the Constitution. It contends that Parliament's exclusive authority to regulate its internal processes, free from judicial interference, is a core aspect of parliamentary privilege grounded in the doctrine of separation of powers. On this basis, the 1st appellant argues that the Court of Appeal erred by affirming orders that intrude into Parliament's powers and privileges, and in doing so, breached the separation of powers by effectively supervising the legislative process on the enactment of the Tribunals Bill.

[91] The 2nd appellant submits that, at the time the matter was before the High Court, a Tribunals Bill was already pending before Parliament, and there was therefore no basis for issuing a structural interdict, particularly against the Attorney General, who is neither a Member of Parliament nor responsible for parliamentary proceedings. It further contends that this Court's established jurisprudence cautions against judicial intrusion into legislative functions, including prescribing timelines or procedures for the enactment of legislation. We are inclined at this juncture to correct this position and in this respect, we observe that before the High Court, both appellants made no mention of a pending Bill before Parliament. It was only at the Court of Appeal that the impugned Bill was first mentioned, to the effect that it was introduced in Parliament on 31st July 2024 and taken through the First Reading on 24th August 2024. Indeed, Mr. Joash Dache, on behalf of the 2nd appellant pleaded in his Replying Affidavit dated 7th November, 2018 before the High Court thus:

"THAT I am aware that the Bill is now under review, in the

[AG's] office' for purposes of being refined before it is finally submitted to the cabinet for approval."

[92] As for the 1st respondent, he posits that courts may issue structural interdicts (supervisory orders) to ensure compliance with constitutional obligations. Similarly, JSC contends that courts are empowered to intervene through structural interdicts where an imminent threat to the Constitution is established. They further argue that the superior courts did not violate the doctrine of separation of powers or usurp Parliament's authority, as the courts neither engaged in legislation nor purported to constitute or define the tribunals.

[93] Katiba Institute argues that the two superior courts acted within their constitutional mandate under Article 23(3) of the Constitution to issue structural interdicts since the Legislature had demonstrably failed to discharge its duties, noting that the Constitution expressly empowers courts to grant "appropriate relief" for the enforcement of rights. It contends that the structural interdict was not an unconstitutional intrusion into the legislative domain but a necessary safeguard to uphold constitutional supremacy and protect the public's right of access to justice under Article 48 of the Constitution. The structural interdict, it submits, is intended to prevent the perpetuation of constitutional violations arising from prolonged legislative inaction, and to reinforce, rather than undermine, the doctrine of separation of powers by ensuring that State organs act in compliance with their constitutional obligations.

[94] The framed issue invites this Court to examine the limits of structural interdicts within the context of the workings of the Houses of Parliament, particularly as they discharge their law-making mandate. This Court has previously recognized, notably in ***Mitu-Bell Welfare Society Vs Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*** [2021] KESC 34 (KLR), that Article 23(3) empowers courts to fashion innovative and effective remedies, including structural interdicts, to redress constitutional violations. However, this

Court in ***Mitu-Bell*** simultaneously cautioned that such remedies must be specific, realistic, proportionate, and restrained, and must avoid judicial overreach, particularly in matters implicating policy choices or the institutional competence of other arms of government. The Court held as follows at paragraph 122:

> *"**Interim reliefs, structural interdicts, supervisory orders or any other orders that may be issued by the courts, have to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other State Agency vested with a constitutional or statutory mandate to enforce the order. Most importantly, the court in issuing such orders, must be realistic, and avoid the temptation of judicial overreach, especially in matters policy. The orders should not be couched in general terms, nor should they be addressed to third parties who have no constitutional or statutory mandate to enforce them."*** [Emphasis added]

[95] The question in the present consolidated appeal is therefore not whether structural interdicts are available in principle for vindication of violation of rights or constitutional obligations, but whether their deployment in this case satisfied the constitutional threshold of appropriateness and institutional comity.

[96] A central concern arising from the impugned orders is that they did not merely declare Parliament's constitutional obligation under Article 169(2) of the Constitution, but proceeded to supervise the legislative process itself by requiring progress reports to the courts. This raises separation-of-powers concerns taking into account that Articles 94(1) and 124(1) of the Constitution vest legislative authority and procedural autonomy exclusively in the Houses of Parliament, including the power to regulate their internal proceedings through Standing Orders.

[97] This Court has consistently held, including in ***In the Speaker of the Senate Case*** and ***Mate & Another Vs Wambora & Another*** [2017] KESC 1 (KLR) (***Mate***), that, while courts retain authority to determine whether constitutional obligations have been met, they must exercise restraint and avoid directing other arms of government on how to perform

their constitutional mandate. In ***the Speaker of the Senate Case*** we expressly recognized the power of Houses of Parliament to establish and regulate their internal procedures without undue interference from the courts. We held thus at para. 61:

"…This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another."

[98] Subsequently, in ***Mate*** this Court at para. 63 laid down the following principles to guide courts in adjudication on matters that fall within the domain of other branches of government:

"

a) each arm of Government has an obligation to recognize the independence of other arms of Government;

b) each arm of Government is under duty to refrain from directing another organ on how to exercise its mandate;

c) the courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;

d) for the due functioning of constitutional governance, the courts are to be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;

e) in the performance of the respective functions, every arm of Government is subject to the law."

[99] This caution for judicial restraint is particularly necessary where Parliament is already engaged in correcting an identified constitutional breach. We find as persuasive, the position taken by *Jafta, J*. at the Constitutional Court of South Africa, in ***Mazibuko***

Vs Sisulu and Another (CCT 115/12) 2013 (6) SA 249 (CC) at para. 135 where he rendered himself thus:

> ***"When it comes to matters falling within the heartland of Parliament, our Constitution contemplates a restrained approach to intervention in those matters by the Courts. Such intervention is permissible if it is undertaken to uphold the Constitution because our courts are the ultimate guardians of the Constitution. <u>But where a competent authority has already taken steps to correct conduct inconsistent with the Constitution, it may not be necessary for the [courts] to take action,</u> particularly where action to be taken is limited to declaring a legal position already accepted by all parties concerned."*** [Emphasis added]

[100] The emerging lesson from the foregoing jurisprudence is that judicial intervention in legislative processes is justified only in the clearest of cases. Unwarranted intrusion risks undermining democratic governance and institutional autonomy. Courts exercising review jurisdiction must consequently observe restraint and avoid encroaching upon functions constitutionally reserved to the legislative arm of government.

[101] The respondents place considerable reliance on the proposition that structural interdicts are constitutionally recognized remedies and that prolonged legislative inaction undermines the right to access to justice. These submissions are not without force, particularly insofar as they underscore the centrality of constitutional compliance and the courts' remedial authority under Article 23(3) of the Constitution. However, they do not fully confront the more fundamental concern in this consolidated appeal, namely, whether the particular remedy adopted transgressed the

constitutional limits of judicial power.

[102] In their oft-cited study on the appropriateness of structural and supervisory relief, Kent Roach and Geoff Budlender argue that such remedies are justified only in narrowly defined circumstances, specifically where duty bearers have demonstrated incompetence, intransigence, or sustained inattentiveness in the discharge of constitutional obligations. See Kent Roach & Geoff Budlender, **"Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?",** (2005) 122 *South African Law Journal* 325. These preconditions serve as principled constraints, ensuring that supervisory remedies remain exceptional rather than routine. The critical question, therefore, is whether any of these conditions were established on the record in the present case. Absent a finding that Parliament was unwilling, incapable, or persistently indifferent to its constitutional duty, particularly where legislative processes were demonstrably underway, the justification for imposing a structural interdict supervising the legislative process becomes considerably attenuated. The availability of less intrusive remedies, such as declaratory relief affirming Parliament's obligation under Article 169(2), suggests that the issuance of a supervised interdict was not the least intrusive or most proportionate means of vindicating the Constitution in this case.

[103] Further, an additional concern by the 2nd appellant is that the structural interdict was directed in part at the 2nd appellant, an office-holder who does not control parliamentary scheduling, debate, or voting. This raises questions of enforceability and propriety, particularly in light of this Court's guidance in ***Mitu-Bell*** that remedial orders should be directed only at state actors with clear constitutional or statutory capacity to implement them. This is a merited complaint. Once it was a non-contested fact that by the time the appeal was filed before the Court of Appeal, the Tribunals Bill had been introduced in the National Assembly, it was an error on the part of the appellate court to grant an order directed

at the 2nd appellant, who is not a duty-bearer with regards to the progressing of the Bill through Parliament.

[104] Taking into account the special circumstances of this case therefore, we allow this limb of the appeal, on the narrow ground of setting aside the impugned structural

interdict, while leaving intact the declaration that Parliament is under a constitutional obligation to enact a law to facilitate the transition of the Tribunals from the Executive to the Judiciary within a reasonable timeline.

E. Summary of Findings

[105] Consequently, the following is a summary of our findings:

a. This Court has jurisdiction to hear and determine this consolidated petition of appeal.

b. The 1st respondent's Petition before the High Court was justiciable.

c. This Court affirms the concurrent findings of the two superior courts below that, firstly, Parliament bears a mandatory constitutional obligation under Article 169(2) of the Constitution to enact legislation conferring jurisdiction, functions, and powers upon local tribunals, an obligation that must be discharged within a reasonable time. Secondly, we find that Parliament's failure, for a period exceeding eight years as at the time of filing the amended petition before the High Court, to enact the contemplated legislation constituted an unreasonable delay, thereby breaching the constitutional duty imposed by Article 169(2) and undermining the right of access to justice guaranteed under Article 48 of the Constitution.

d. This Court finds that, for a statutory body to qualify as a "local tribunal" under Article 169(1)(d) of the Constitution, it must exercise judicial, quasi-judicial, or adjudicative power. Moreover, the declaration embodied in limb (e) of the High Court's order was not founded on the pleadings and therefore fell outside the issues properly before the superior courts. Accordingly, limb (e) as granted by the High Court is set aside.

e. This Court finds that the structural interdict issued in this case was not an appropriate remedy given that it was not shown that Parliament was unwilling or persistently indifferent to its

constitutional duty, particularly as the legislative process for the enactment of the Tribunals Bill was already underway as at the time of institution of the appeal before the Court of Appeal. In such a circumstance, a declaratory relief would have been a sufficient, proportionate, and less intrusive remedy. This Court therefore further finds that the structural interdict was improperly directed at the 2nd appellant, who lacked authority over the legislative process within Parliament. Accordingly, the structural interdict issued by the High Court and affirmed by the Court of Appeal is set aside.

F. COSTS

[106]Bearing in mind the circumstances of the matter at hand and the principles on the award of costs enunciated in ***Rai & 3 Others Vs Rai & 4 Others*** [2014] KESC 31 (KLR), we find that due to the public interest nature of this matter, each party should bear their own costs.

G. ORDERS

[107] In the premise, we issue the following orders:

1. ***The consolidated appeal partially succeeds to the following extent:***
    a. ***We hereby set aside the declaration as granted by the High Court under limb (e) of the its orders and affirmed by the Court of Appeal.***
    b. ***We hereby set aside the structural interdict as granted by the High Court and affirmed by the Court of Appeal***
2. ***We uphold the following findings by the Court of Appeal:***
    a. ***Parliament bears a mandatory constitutional obligation under Article 169(2) of the Constitution to***

enact legislation conferring jurisdiction, functions and powers upon local

tribunals, an obligation that must be discharged within a reasonable time.

b. ***For a statutory body to qualify as a "local tribunal" under Article 169(1)(d) of the Constitution, it must exercise judicial, quasi-judicial, or adjudicative power.***

3. ***Each Party will bear their costs of appeal.***
4. ***We hereby direct that the security for costs deposited in the consolidated appeal be refunded to the depositor(s).***

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **31st** day of **March**, 2026.

....

M. K. KOOME
CHIEF JUSTICE &
PRESIDENT OF THE
SUPREME COURT

....

S. C. WANJALA
JUSTICE OF THE SUPREME COURT

....

NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

....

I. LENAOLA
JUSTICE OF THE SUPREME COURT

....

W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA