



REPUBLIC OF KENYA



**KENYA LAW**  
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**Attorney General v Okioti & 3 others (Civil Appeal E416 of 2021)  
[2025] KECA 309 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 309 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E416 OF 2021  
F TUIYOTT, AO MUCHELULE & GV ODUNGA, JJA  
FEBRUARY 21, 2025**

**BETWEEN**

**THE HONOURABLE ATTORNEY GENERAL ..... APPELLANT**

**AND**

**OKIYA OMTATA OKOITI ..... 1<sup>ST</sup> RESPONDENT**

**JUDICIAL SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**THE PARLIAMENT OF KENYA ..... 3<sup>RD</sup> RESPONDENT**

**KATIBA INSTITUTE ..... 4<sup>TH</sup> RESPONDENT**

*(An appeal from the Judgment and Decree of the Constitutional and Human Rights Division Court of the High Court at Nairobi (Mrima J.) dated 11th March 2021 in High Court Petition No. 197 of 2018)*

**The local tribunals established under article 169(1)(d) of the Constitution are subordinate courts and ought to be under the Judiciary**

*The appeal was against the decision of the trial court which held that; the local tribunals established under article 169(1)(d) of the Constitution were subordinate courts and must be transited to the Judiciary. The court held that the ejusdem generis rule applied to both statutory interpretation as well as constitutional interpretation. The court further held that the tribunals contemplated in article 169(1)(d) ought to be under the Judiciary. The court also highlighted the elements of structural interdicts.*

Reported by Kakai Toili

**Constitutional Law** – interpretation of the Constitution - interpretation of article 169(1)(d) of the Constitution – where article 169(1)(d) provided that local tribunals as may be established by an Act of Parliament were subordinate courts - whether the tribunals contemplated in article 169(1)(d) of the Constitution ought to be under the Judiciary – Constitution of Kenya, article 169(1)(d).



**Constitutional Law** – justiciability – non-justiciable issues – distinction between lack of merit and non-justiciability - whether an issue was not justiciable if it had no merit - whether the issue about whether Parliament was enjoined to enact legislation to transit tribunals from the various Ministries and Government Departments to the Judiciary, was a justiciable issue.

**Statutes** – interpretation of statutes – ejusdem generis rule – nature and applicability – whether the ejusdem generis rule applied to both statutory interpretation as well as constitutional interpretation.

**Constitutional Law** – Parliament - legislative mandate of Parliament – delay in enactment of legislation to give effect to a constitutional right - whether a delay of more than 10 years in enacting a legislation geared towards the realization of a constitutional right was unreasonable - Constitution of Kenya, article 259(8).

**Constitutional Law** – constitutional reliefs – structural interdicts - what were the elements of structural interdicts - Constitution of Kenya, article 23.

### **Brief facts**

The petition at the trial court was based on the contentions: that although tribunals fell under article 169(1) (d) of the Constitution, many of them were under the direct control and regulation of the Executive and that infringed on the principle of separation of powers as, in most cases, the Executive was a party to the disputes before such tribunals. At the trial court, the 1<sup>st</sup> respondent sought for among other orders; a declaration that tribunals were subordinate courts; and that the Judicial Service Commission (the 2<sup>nd</sup> respondent) was exclusively responsible for appointing and removing members of the tribunals, for establishing their rules of procedure and for doing anything incidental thereto to ensure their smooth operations as courts of law.

The trial court allowed the petition and held that; the local tribunals were subordinate courts; the appointment and removal of members of the local tribunals by the Executive violated the principle of separation of powers, contravened the right to fair hearing and infringed on the independence of the Judiciary; the local tribunals must be transited to the Judiciary and the appointment and removal of their members be undertaken by the 2<sup>nd</sup> respondent; and directed the Attorney General and the Parliament to take proactive steps within their respective dockets towards propagating the Tribunals Bill with a view of transiting the local tribunals to the Judiciary and to file affidavits within 6 months of the judgment detailing the steps taken. Aggrieved, the appellants filed the instant appeal.

### **Issues**

- i. Whether the tribunals contemplated in article 169(1)(d) of the Constitution, which provided that local tribunals established by an Act of Parliament were subordinate courts, ought to be under the Judiciary.
- ii. Whether an issue before court could be justiciable if it was found to have no merit.
- iii. Whether the issue on whether Parliament was enjoined to enact legislation to transit tribunals from the various Ministries and Government Departments to the Judiciary, was a justiciable issue.
- iv. Whether a delay of more than 10 years in enacting a legislation geared towards the realization of a constitutional right was unreasonable.
- v. What were the elements of structural interdicts?
- vi. What was the nature and applicability of the *ejusdem generis* rule?
- vii. Whether the *ejusdem generis* rule applied to both statutory interpretation as well as constitutional interpretation.

### **Relevant provisions of the Law**

#### **Constitution of Kenya**

##### **Article 169 - Subordinate courts**

(1) *The subordinate courts are—*

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



## Held

1. A party to an appeal ought not to agitate a different case from the one taken before the trial court. An appellate court only interfered with the decision of the trial court where it was alleged that the trial court erred in arriving at findings contrary to the case as presented by the appellant at the trial court. Where the trial court made findings, which were in accord with the case as presented by the appellant, the appellant could not be heard to complain that the trial court erred. Form D of the First Schedule to the Court of Appeal Rules contemplated that the party giving the notice of appeal was one aggrieved by the decision either wholly or in part.
2. The rules of pleadings required parties to put forward to the court the entire case they intended the trial court to determine so as to give the court and the opposite side an opportunity of answering to the same. Where a party, before the trial court, did not contest an issue before the trial court, the opposite party was lulled into a false sense of security either that he did not have to deal with the same or deal with it as adequately or as vigorously as he could have done. That was the same as conducting proceedings by ambush.
3. While, in interpreting the Constitution, a court was not necessarily bound by the positions taken by the parties before it, it was disingenuous for a party who had taken a particular position before the trial court to make an about-turn on appeal and adopt a position diametrically opposed to the one taken before the trial court and the basis of which the dispute was determined.
4. While the doctrine of separation of powers was an important one in a constitutional democracy, it could not be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of the court to protect the Constitution were derived from the Constitution, and the instant court could not shirk from that duty. Article 2(4) of the Constitution enjoined the court to determine a question whether an omission to undertake a step contravened the Constitution.
5. Justiciability must be distinguished from merit. An issue was not justiciable merely because it had no merit. A justiciable issue may well turn out to be unmerited. However, that did not bar the court from interrogating its merit. In the case, the issue about whether Parliament was enjoined to enact legislation in order to transit tribunals from the various Ministries and Government Departments, a duty that the appellant itself acknowledged, contravened the letter and the spirit of the Constitution was a justiciable issue.
6. Article 169(1)(d) of the Constitution applied to all local tribunals contemplated thereunder whether new or existing. The trial court was alive to the difficulties raised by the appellant and the 3<sup>rd</sup> respondent if the tribunals were to be immediately transited to the Judiciary. Therefore, the trial court gave a six months window period for the process to be undertaken. The process that was to be undertaken was the enactment of the relevant law and the transitioning of the tribunals to the Judiciary. The period was sufficient to trigger the transition.
7. According to the *ejusdem generis* rule, where there were general words following particular and specific words the general words must be confined to things of the same kind as those specified. According to the rule when a series of particular words in a statute was followed by general words, the general words were confined by being read as the same scope of *genus* as (*ejusdem generis* with) the particular words. The specific words must apply not to different objects of a widely differing character but to something which could be called a class or kind of objects. Where that was lacking, the rule could not apply, but the mention of a single species did not constitute a *genus*.
8. While the widest construction possible, in its context, should be given according to the ordinary meaning of the words used, it was widely accepted that the principles which governed the construction of statutes also applied to the interpretation of constitutional provisions. Therefore, the *ejusdem generis* rule applied 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.



9. It was not by coincident that article 159(1) of the Constitution provided that judicial authority was derived from the people and vested in, and shall be exercised by, the courts and tribunals established by or under the Constitution. Article 160(1) of the Constitution provided that in the exercise of judicial authority, the Judiciary, as constituted by article 161, shall be subject only to the Constitution and the law and shall not be subject to the control or direction of any person or authority.
10. The entire Constitution had to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. That was the rule of harmony, rule of completeness and exhaustiveness and rule of paramountcy of the Constitution. The tribunals contemplated in article 169(1)(d) ought to be under the Judiciary.
11. Article 169(2) of the Constitution did not prescribe timelines within which legislation contemplated thereunder was to be enacted. However, the fact that the Constitution itself enjoined Parliament to enact a legislation conferring jurisdiction, functions and powers on subordinate courts established under article 169(1), was a clear manifestation of the seriousness with which the drafters of the Constitution treated such legislation. For the realisation of the constitutional right to access justice under article 48 of the Constitution, it was imperative that the enactment of an instrument conferring jurisdiction, functions and powers on subordinate courts be treated with urgency.
12. In interpreting a constitutional provision either containing a fundamental right or geared towards the realisation of a constitutional right such as article 169(2) of the Constitution, the court should adopt a dynamic, progressive and liberal or flexible approach keeping in view the ideals of the people and socio-economic and political-cultural values so as to extend the benefit of the same to the possible maximum.
13. In the absence of prescribed timelines for enacting legislation pursuant to article 169(2) of the Constitution, article 259(8) of the Constitution came into play to compel the enactment of the contemplated legislation to be undertaken. The drafters of the Constitution had in mind circumstances such as the one in hand when they inserted that article in the Constitution. More than 10 years delay in enacting a legislation geared towards the realisation of a constitutional right, in the instant case, the right of access to justice, was unreasonable and could not be countenanced and the trial court was justified in compelling the 3<sup>rd</sup> respondent to undertake its constitutional obligation.
14. In directing that affidavits be filed, the trial court was issuing structural interdict which strictly speaking, was not a remedy but a mode of the realization of a remedy or relief. Article 23 of the Constitution provided that a court may grant appropriate relief, including a declaration of rights when confronted with rights violations and an appropriate relief must mean an effective remedy for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution could not properly be upheld or enhanced.
15. One of the remedies which was recognized in jurisdictions with similar constitutional provisions as Kenya's article 23 of the Constitution was what was called structural interdict. In essence, structural interdicts (also known as supervised interdicts) required the violator to rectify the breach of fundamental rights under court supervision. Five elements common to structural interdicts had been isolated in that respect:-
  1. The court issued a declaration identifying how the Government had infringed an individual or group's constitutional rights or otherwise failed to comply with its constitutional obligations.
  2. The court mandated Government compliance with constitutional responsibilities.
  3. The Government was ordered to prepare and submit a comprehensive report, usually under oath, to the court on a pre-set date. That report, which was to explicate the Government's action plan for remedying the challenged violations, gave the responsible State agency the opportunity to choose the means of compliance with the constitutional rights in question, rather than the court itself developing or dictating a solution. The submitted plan was typically expected to be tied to a period within which it was to be implemented or a series of deadlines by which identified milestones had to be reached.



4. Once the required report was presented, the court evaluated whether the proposed plan in fact remedied the constitutional infringement and whether it brought the Government into compliance with its constitutional obligations. As a consequence, through the exercise of supervisory jurisdiction, a dynamic dialogue between the Judiciary and the other branches of Government in the intricacies of implementation may be initiated. That stage of a structural interdict may involve multiple Government presentations at several 'check in' hearings, depending on how the litigants respond to the proposed plan and, more significantly, whether the court found the plan to be constitutionally sound. Structural interdicts thus provided an important opportunity for litigants to return to court and follow up on declaratory or mandatory orders.
  5. After court approval, a final order (integrating the Government plan and any court ordered amendments) was issued. Following that fifth step, the Government's failure to adhere to its plan (or any associated requirements) essentially amounted to contempt of court. In essence, structural interdicts required the violator to rectify the breach of fundamental rights under court supervision.
16. The High Court had the jurisdiction to ensure that its decision was implemented by way of structural interdict.
  17. In light of the concession by the appellant as regards the manner in which the tribunal system was operating, it could not lie in the mouth of the appellants to posit that there was no evidence to that effect and that the trial court's decision was based on assumptions.
  18. The 3<sup>rd</sup> respondent could have resorted to rule 96(1) of the Court of Appeal Rules if it wanted to agitate the issues not placed before the trial court. That rule provided that a respondent who desired to contend on an appeal that the decision of the superior court should be affirmed on grounds other than or additional to those relied upon by that court shall give notice to that effect, specifying the grounds of the respondent's contention. The 3<sup>rd</sup> respondent never took advantage of the provision and could not submit on anything else apart from the appeal. In any case that provision was only beneficial where issues were raised before the trial court but were not addressed. It was not an avenue for a party to invent a totally new cause of action at an appellate level.

*Appeal dismissed.*

### **Orders**

*No order as to costs.*

### **Citations**

#### **Cases**

1. Commissioner for the Implementation of the Constitution v Attorney General, Independent Electoral and Boundaries Commission & Kenya Paraplegic Organisation (Civil Appeal 351 of 2012; [2013] KECA 8 (KLR)) — Explained
2. Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR)) — Explained
3. Equity Bank Limited v West Link Mbo Limited (Civil Application 78 of 2011; [2013] KECA 320 (KLR)) — Explained
4. Geoffrey Muthinja & Robert Banda Ngombe v Samuel Muguna Henry, John Jembe Mumba, John Maroo, John Columbus Gikunda M'mwanjah, Bernard Njiru Arozon, Samuel Chivatsi Munga, James Marangu M'muketha & 1750 others (Civil Appeal 10 of 2015; [2015] KECA 304 (KLR)) — Mentioned
5. Geonet Technologies Limited v Ministry of ICT, Innovation and Youth Affairs, State Department of ICT & Innovation, Attorney General & Huawei Technologies (Kenya) Company



- Limited; Com Twenty- One Limited (Interested Party) (Constitutional Petition E392 of 2021; [2022] KEHC 26978 (KLR)) — Explained
6. Independent Electoral and Boundaries Commission & another v Mule & 3 others (Civil Appeal 219 of 2013; [2014] KECA 890 (KLR)) — Explained
  7. Institute of Social Accountability & another v National Assembly & 4 others (Petition 71 of 2013; [2015] KEHC 6975 (KLR)) — Mentioned
  8. JAYNE MATI & Another v ATTORNEY GENERAL & 2 Others (Petition 108 of 2011; [2011] KEHC 4304 (KLR)) — Explained
  9. John Swaka v Director of Public Prosecutions, Attorney General & Minister of Justice, National Cohesion and Constitutional Affairs (Constitutional Petition 318 of 2011; [2013] KEHC 5422 (KLR)) — Mentioned
  10. Kenya Ports Authority v William Odhiambo Ramogi, Asha Mashaka Omar, Gerald Lewa Kiti, Attorney General, Cabinet Secretary, Ministry of Transport & Infrastructure, Kenya Railways Corporation, Muslims for Human Rights, Maina Kiai & County Government of Mombasa (Civil Appeal 166 of 2018; [2019] KECA 305 (KLR)) — Mentioned
  11. Kiriro Wa Ngugi & 19 others v Attorney General, Cabinet Secretary, Foreign Affairs & Kenya International Boundaries Office (Petition 254 of 2019; [2020] KEHC 8819 (KLR)) — Mentioned
  12. Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011; [2012] KESC 8 (KLR)) — Explained
  13. Mary Kitsao Ngowa & 36 Others v Krystalline Limited (Civil Appeal 21 of 2015; [2015] KECA 286 (KLR)) — Explained
  14. Mate & another v Wambora & another (Petition 32 of 2014; [2017] KESC 1 (KLR)) — Explained
  15. Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018; [2021] KESC 34 (KLR)) — Explained
  16. Moses Kipkolum Kogo v David Malakwen (Civil Appeal 74 of 1998; [1998] KECA 11 (KLR)) — Explained
  17. National Assembly of Kenya & another v Institute for Social Accountability & 8 others (Civil Appeal 92 & 97 of 2015 (Consolidated); [2017] KECA 170 (KLR)) — Mentioned
  18. Richard Kanyago, Express Kenya Limited & Peter Kanyago v David Mukii Mereka (Civil Appeal 94 of 2001; [2001] KECA 204 (KLR)) — Mentioned
  19. Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae) (Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR)) — Explained
  20. Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemtu (Interested Party); With Kenya Human Rights Commission & another (Amicus Curiae) (Petition 229 of 2012; [2012] KEHC 2480 (KLR)) — Explained
  21. Wanjiru Gikonyo, Paul Kemunche Masese & Edwin Mutemi Kiama v National Assembly of Kenya, Senate of the Republic of Kenya, Cabinet Secretary of the National Treasury, Attorney General & Affirmative Action Social Development Fund Board (Petition 453 of 2015; [2016] KEHC 5536 (KLR)) — Mentioned
  22. Kamurasi v Accord Properties Ltd ([2000] 1 EA 90 (SCU)) — Mentioned
  23. Kigula and Others v Attorney-General (Constitutional Petition No. 6 of 2003; [2005] UGCC 8; [2005] 1 EA 132) — Explained
  24. Tinyefuza v. Attorney General (Constitutional Petition No. 1 of 1996; [1997] UGCC 3) — Explained
  25. Affordable Medicines Trust and Others v Minister of Health and Others ((CCT27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (11 March 2005)) — Mentioned
  26. Doctors for Life International v Speaker of the National Assembly and Others ((CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006)) — Explained



27. Fose v Minister of Safety & Security ((CCT14/96) [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 (5 June 1997)) — Explained
28. Minister of Health and others v Treatment Action Campaign and others ((CCT8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (5 July 2002)) — Mentioned
29. Philip Tormey v Ireland And The in which Attorney General the Supreme Court of Ireland (1985 WJSC-SC 1565) — Explained
30. Republic v El Mann ([1969] EA 357) — Explained
31. R v Edmundson ([1859] 28 LJMC 213 at 215) — Explained

#### Statutes

1. Constitution of Kenya — article 1(3); 2(4); 20(1); 23(3); 44(3); 48; 50; 94; 119; 150(2); 158(4); 159(1); 159(2)(d); 160(1); 162(4); 168(5)(a); 168(5)(b); 169(1)(d); 169(2); 171; 172; 251(4); 259(1)(d); 259(8); 261 — Interpreted
2. Court of Appeal Rules, 2010 (Repealed) (cap 9 Sub Leg) — rule 74(3) — Cited
3. Court of Appeal Rules, 2022 (cap 9 Sub Leg) — rule 88 — Interpreted
4. Petitions to Parliament (Procedure) Act (cap 7E) — In general — Cited
5. Statutory Instruments Act (cap 2A) — In general — Cited
6. Tribunal Bill, 2017 — Cited

#### Texts

1. Garner, BA., (Ed) (2009), Black's Law Dictionary (St Paul Minnesota: West Group 9th Edn)
2. Jack Jacob Current Legal problems (1960), The present Importance of Pleadings (Current Legal Problems, at P 174)

#### International Instruments

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981 — article 7
2. The Human Rights Committee General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial — article 14

#### Advocates

None mentioned

## JUDGMENT

1. By an amended petition dated December 18, 2018, the 1<sup>st</sup> respondent, Okiya Omtata Okioti, the petitioner in the High Court Petition No 197 of 2018, 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 Judicial Service Commission is exclusively responsible for appointing and removing member 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 the Judicial Service Commission, being mandated by Parliament to appoint or remove any members of tribunals crated 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 the Judicial Service Commission, the mandate to appoint or remove any members of 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 for tribunals should be a line budget in the Judiciary.
  - f. Parliament 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 Fifty Schedule to the [Constitution](#).
- ii. An order
    - 1. Annulling all appointments to tribunals created under article 169(1)(d) of the [Constitution](#) which were not made by the Judicial Service Commission through a competitive process.
      - a1. Compelling Parliament and the Attorney-General 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 Parliament fails to enact legislation pursuant to article 169(2) to give effect to article 169(1)(d) of the [Constitution](#) within three months, the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament.
      - b. Compelling the Judicial Service Commission to immediately but not later than three months re-constitute all tribunals created under article 169(1)(d) of the [Constitution](#) upon Parliament enacting legislation pursuant to article 169(2) 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 this suit.
  - iii. Any other relief the court may deem just to grant.
- 2. The petition was based on the contentions: that although tribunals play a critical part in adjudication and resolution of disputes, in Kenya they are incapable of delivering quality administrative justice to the people; that the plethora of tribunals is confusing and compounding to both lawyers and ordinary Kenyans yet the justification of tribunal system is to enable citizens to access administrative justice easily, speedily, cheaply and fairly; that the tribunals are constituted and operate as part of the administration whose decisions are normally called into question without adequate mechanisms for accountability, leading to great variations in decision making; that there are more than 100 tribunals all established under different pieces of legislation, all discharging judicial functions in one form or another, and operating under various administrative structures; that tribunals in Kenya suffer lack of unanimity in many aspects; that although tribunals fall under article 169(1)(d) of the [Constitution](#), many of them are under the direct control and regulation of the Executive; that this infringes on the principle of separation of powers as, in most cases, the Executive is a party to the disputes before such tribunals; that the tribunals as constituted have varied terms of service and different rules of procedure and whereas some adopt formal procedure akin to that of courts, others are informal thus impacting negatively on access to justice and equal justice to all; that some of the tribunals do not provide for, and



- as such, violate a litigant's right of appeal to superior courts; and that the respondents in the petition, without any reasonable cause, had failed and/or refused to transition the tribunals from the Executive arm to the Judiciary in accordance to the Constitution.
3. In opposing the petition, the 2<sup>nd</sup> respondent's secretary and the Chief Registrar of the Judiciary, Anne Amadi, filed a replying affidavit sworn on August 30, 2018 in which it was deposed: that the 2<sup>nd</sup> respondent had no role to play in respect of constitutional tribunals created under articles 144(3), 150(2), 158(4), 168(5)(a) or (b) and article 251(4) of the Constitution; that in the case of local tribunals such as the ones created under article 169(1)(d) of the Constitution, the tribunals are indeed subordinate courts within the Judiciary by virtue of articles 1(3)(c), 20(4) & (5) 24(3), 50(1), 159(1) & 2 164(3)(b), 165, 169(1)(d), 171 and 172 of the Constitution hence subject to control by the 2<sup>nd</sup> respondent; that despite lack of transitional legislation on the local tribunals, the 2<sup>nd</sup> respondent had made efforts to ensure that 20 local tribunals are transitioned into the Judiciary from the Executive; and that it had not failed to put in place the necessary legislative measures to transit the tribunals since the legislative mandate is vested with the Parliament.
  4. The Attorney General, the appellant herein, who was sued as the 2<sup>nd</sup> respondent in the petition relied on the affidavit of Joash Dache, the Commission Secretary of the Kenya Law Reform Commission and Chairperson of the Committee on Review of the Rationale for the Establishment of tribunals in Kenya. In that affidavit, the appellant averred: that under article 169(1)(d) of the Constitution local tribunals are classified as subordinate courts and need to be transitioned to the Judiciary from the various Ministries and Government Departments; that, however, to attain this, an Act of Parliament pursuant to article 162(2) of the Constitution is to be enacted; that it had made concerted efforts with the 2<sup>nd</sup> respondent to come up with the *Tribunal Bill, 2017* (the Bill) which was about to be taken to the Cabinet for approval; that the declaration of unconstitutionality of the various statutes constituting the tribunals would deprive persons serving in those tribunals their right to fair administrative action and fair hearing; that the period of 6 months sought for the transition was too short since financial/ fiscal cycle was mid- way its implementation and that the financing of the transition of the tribunals must be budgeted for; that while the petition should be dismissed, in the event that the court were to issue a declaration of unconstitutionality as sought, the court should to consider structural interdicts instead and allow for a period of 2 years to fast-track the passage of the *Bill* into law. In this regard, reliance was placed on the decisions in *John Sakwa v Director of Public Prosecutions, Attorney General & 2 others* [2013] eKLR and *The Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR in urging the court to suspend any declaratory orders of unconstitutionality and instead give the parties time to regularize the transitional regime.
  5. The 3<sup>rd</sup> respondent, Parliament of Kenya, opposed the amended petition by way of grounds of opposition dated February 13, 2019 in which it asserted: that there is no mandatory requirement for Parliament to enact any specific or general law governing tribunals in Kenya and as such, the amended petition did not disclose any violation of the Constitution and ought to be dismissed; that article 261 of the Constitution that provides for the dissolution of Parliament for failure to enact laws does not apply to this case because all such laws required to govern the Judiciary under schedule five to the Constitution have so far been enacted; that if the petitioner is of the view that there should be a general codifying law regulating tribunals, then the right avenue would be, to first petition Parliament under article 119 of the Constitution and the *Petitions to Parliament Act, 2012* for the enactment of the said law; that there is no need of any court supervision as Parliament was in the process of dealing with the *Tribunals Bill* and that the petition was caught up by the doctrine of exhaustion and ripeness; that the 2<sup>nd</sup> respondent had no mandate to appoint all the members of all tribunals as alleged; and that while



the petition should be dismissed, in the event the it was sustained, then the court ought to consider issuance of structural interdicts.

6. After considering the petition, the responses thereto as well as the submissions, the learned Judge picked out the following issues for determination: 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 violate 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 what remedies to issue.
7. In his judgement, the learned Judge relied on: Nairobi High Court Constitutional Petition No 254 of 2019 - *Kiriro Wa Ngugi & 19 others v Attorney General & 2 others* [2020] eKLR for the position that courts should frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies; the case of *National Assembly of Kenya & another v The Institute for Social Accountability & 6 others* Nairobi Civil Appeal 92 of 2015 [2017] eKLR, emphasising that where the questions raised relate to inter-governmental relations and which should have been raised in the appropriate forum and resolved by the designated institutions through the prescribed mechanism, that should be done before the jurisdiction of the High Court can be invoked; *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* Nairobi Constitutional Petition No 453 of 2015 [2016] eKLR, highlighting that an issue before court must be ripe, through a factual matrix for determination; and *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that the exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts but also dealt with the exceptions to the doctrine of exhaustion.
8. The learned Judge determined: that in the instant case, the petitioners alleged violation of their fundamental rights which, according to the decision in Court of Appeal in Mombasa Civil Appeal No 166 of 2018 - *Kenya Ports Authority v William Odhiambo Ramogi & 8 others* [2019] eKLR can only be determined by the High Court; that whereas an invitation to the court to exercise its powers against the constitutional roles reserved for two organs of government is barred by the principle of non-justiciability and is also an affront to the doctrine of separation of powers, there are constitutionally permissible situations where the court may interfere; that this applies where there is actual or threatened violation of the rights and fundamental freedoms guaranteed under the *Constitution*, or in instances where it is demonstrated that there are violations of other provisions of the *Constitution* whose enforcement are not mere 'bootstraps' or merely framed in Bill of Rights language as a pretext to gain entry to the court; that the petition raised serious constitutional issues warranting being excepted from the principle of non-justiciability and exhaustion hence the court was vested with the requisite jurisdiction to deal with it; that the local tribunals referred to after the enumeration in article 169(1)(d) of the *Constitution* exclude the tribunals formed under the *Constitution*, all administrative and advisory tribunals, all tribunals whose membership includes a Judge of the superior courts and all other informal tribunals not formed under the *Constitution* or any Act of Parliament; that such excluded tribunals include a tribunal established under article 144(3) and 150(2) of Constitution for the removal of the President or Deputy President on grounds of incapacity, a tribunal created under article 158(4) of the *Constitution* for the removal of the Director of Public Prosecutions, a tribunal created under article 168(5)(a) or (b) of the *Constitution* for the removal of the Chief Justice or other Judges of the superior courts, a tribunal created under article 251(4) of the *Constitution* for the removal of commissioners or holders of independent offices and any administrative



or informal tribunal; and that the local tribunals created under article 169(1)(d) of the Constitution are subordinate courts and not advisory or administrative tribunals.

9. The learned Judge further found: that the local tribunals contemplated under article 169(1)(d) of the Constitution must be anchored in Acts of Parliament or statutes which ought to provide for, *inter alia*, their constitution, appointment, removal and the terms of their members; that there is a need for separation of powers between the Executive and the Judiciary in respect to the local tribunals; that in order for justice not only to be done but also be seen as done, the executive ought not to be the appointing authority of the members of the local tribunals and that the duty ought to be undertaken by an independent entity; that on the authority of the case of Affordable Medicines Trust and Others v Minister of Health and Others [2005] ZACC 3; 2006 (3) SA 247 (CC) at paras 49, 75 and 77 and Minister of Health and others v Treatment Action Campaign and others (2002) 5 LRC 216, 248, since the local tribunals are subordinate courts, their affairs, just like the other subordinate courts, ought to be managed by the Judiciary through the 2<sup>nd</sup> respondent; and that the appointment and removal of members of the local tribunals falling under article 169(1)(d) of the Constitution by the Executive contravenes the principle of separation of power and is contrary to article 50(1) of the Constitution and infringes on the independence of the Judiciary.
10. On the issue whether the local tribunals under article 169(1)(d) of the Constitution should be transited to the Judiciary, the learned Judge found: that the local tribunals are subordinate courts; that the members of such tribunals, in line with the *ejus dem generis* rule, fall within the category of ‘other judicial officers’ under article 172(1)(c) of the Constitution hence must be appointed by the 2<sup>nd</sup> respondent; that in order to enable such appointments to be undertaken as commanded by the Constitution, the local tribunals must be transited to the Judiciary; and that in accordance with article 169(2) of the Constitution, there is need for an Act of Parliament to aid in the transition.
11. In his disposition the learned Judge held: that the amended petition was justiciable and the court had the jurisdiction to deal with the issues therein; that the local tribunals created under article 169(1)(d) of the Constitution are subordinate courts in Kenya; that 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; that the local tribunals under article 169(1)(d) of the Constitution must be transited to the Judiciary and the appointment and removal of their members be undertaken by the Judicial Service Commission; that any new appointment or removal of a member of any of the specified tribunals under article 169(1)(d) of the Constitution must be undertaken by the 2<sup>nd</sup> respondent, the Judicial Service Commission; that the Attorney General and the Parliament, do 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 and file affidavits within 6 months of the judgment detailing the steps taken; and that upon filing of the said affidavits, the Deputy Registrar of the court to schedule the matter for mention on the basis of priority.
12. Dissatisfied with the said decision the appellants lodged the instant appeal which they urged us to allow on some 14 grounds. “Ground” 14 is, however, not a ground of appeal but a prayer for reliefs. Ground 11, on the other hand not only sets out the appellant’s grievance but proceeds to expound on the specific instances of the alleged internal inconsistencies. We have time without a number reminded counsel and parties to adhere to the edict of rule 88 of the Court of Appeal Rules, 2022 which enjoins appellants to

“... concisely set forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against”.



The practice of drafting argumentative and embellished grounds was deprecated by the Supreme Court of Uganda in *Kamurasi v Accord Properties Ltd* [2000] 1 EA 90 (SCU) in which the court reiterated that a memorandum of appeal should neither be argumentative nor narrative and the court went on to form a dim view of the way the grounds of appeal were framed and noted that such practice reveals the failure by parties to acquaint themselves with the rules applicable to appeals before the court. See also *Moses Kipkolum Kogo v David Malakwen* Civil Appeal No 74 of 1998. Parties who fail to adhere to our rules risk being penalized as a consequence.

13. Bereft of their argumentative components, the grounds of appeal are that the learned Judge: erred in finding that the petition was justiciable; exceeded his constitutional mandate in characterising and dichotomising tribunals, a power reserved for Parliament; erred in failing to appreciate and hold that article 169(1)(d) of the *Constitution* is prospective by imputing the term “transitioning” into article 169(1)(d) of the *Constitution* and applying it in interpreting the same, leading to the erroneous conclusion that that the tribunals as presently constituted are local tribunals, and should be moved to the judiciary; erred in making the order transitioning 24 tribunals to the 2<sup>nd</sup> respondent when the tribunals were established under various statutes, some enacted before the promulgation of the 2010 *Constitution* hence not contemplated by article 169(1)(d); erred by finding that article 169(1)(d) and (2) of the *Constitution* requires the appellant and the 3<sup>rd</sup> respondent to transition tribunals to the 2<sup>nd</sup> respondent when the said article does not contemplate the folding up, reconstituting and migrating/transitioning the statutory tribunals as presently constituted; erred in applying the *ejusdem generis* rule of interpretation to give meaning to the term “local tribunal” and in so doing usurped the role of Parliament and violated the principle of separation of powers; erred in invoking article 261(1) as read with the Fifth Schedule and finding that the legislation contemplated in article 169(1)(d) and (2) ought to be enacted by August 2015 when the contemplated tribunals may or may not be established and therefore there cannot be a timeline for their establishment; erred in attempting to define the nature of tribunals under article 169(1)(d) of the *Constitution* post the public participation exercise contrary to the established legislative processes and the provisions of the *Statutory Instruments Act*, 2013; erred in making a determination that the *Tribunals Bill*, 2017 is the contemplated legislation under Article 169 of the *Constitution*; that the judgement lacks internal consistence, is self-conflicting and defeating with the result that its implementation will be an absurdity; erred in directing that the appellant and the 3<sup>rd</sup> respondent file an affidavit in court within six (6) months detailing their efforts to transit the local tribunals without taking into account the active-efforts being currently made; and was speculative as regards his findings on the role of the Executive in the *Constitution* of the tribunals
14. We heard the appeal on the court’s virtual platform on October 9, 2024 when learned counsel, Mr Emmanuel Bitta, appeared with Mr Okore for the appellant, Mr Okiya Omtata Okoiti, the 1<sup>st</sup> respondent appeared in person, learned counsel, Mr Issa Mansur, appeared with Mrs Sharon Maina for the 2<sup>nd</sup> respondent, learned counsel, Mr Mbarak, appeared for the 3<sup>rd</sup> respondent and learned counsel, Mr Nyawa appeared with Mr Odongo for the 4<sup>th</sup> respondent.
15. The parties relied on their written submissions with brief highlights. Before delving into the issues raised by the parties, it is important to state that a party to an appeal ought not to agitate a different case from the one taken before the trial court. An appellate court only interferes with the decision of the trial court where it is alleged that the trial court erred in arriving at findings contrary to the case as presented by the appellant at the trial court. Where the trial court makes findings, which are in accord with the case as presented by the appellant, the appellant cannot be heard to complain that the trial Judge erred. Form D of the First Schedule to the *Court of Appeal Rules* contemplates that the party giving the notice of appeal is one aggrieved by the decision either wholly or in part. This court therefore held in *Richard Kanyago & 2 others v David Mukii Merka* Civil Appeal No 94 of 2001 that where a



consent was recorded on special damages it was not open to the appellants to indicate in their notice of appeal that they were dissatisfied with the amount of special damages the superior court awarded with their consent as it would have amounted to reviving an issue which the parties had agreed would not be the subject matter of adjudication by the trial court even if the agreed special damages were conditional on the appellants being found liable. Such a notice was found not to accord with rule 74(3) of the then Court of Appeal Rules which required in mandatory terms that the notice does specify whether the intended appeal is against the whole or part only of the decision and if part only, the part complained of, hence the notice of appeal was held to be defective.

16. The rules of pleadings require parties to put forward to the court the entire case they intend the trial court to determine so as to give the court and the opposite side an opportunity of answering to the same. Where a party, before the trial court, does not contest an issue before the trial court, the opposite party is lulled into a false sense of security either that he does not have to deal with the same or deal with it as adequately or as vigorously as he could have done. That is the same as conducting proceedings by ambush. As held by this court in in Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others [2014] eKLR which quoted with approval an excerpt from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" where it was stated:-

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

17. Before the trial court, the appellant’s case was hinged an affidavit sworn by Joash Dache on November 7, 2018. In that affidavit, it was deposed that:

- “3. That it is common ground that:
- a. Under article 169(1)(d) local tribunals are classified as subordinate court;
  - b. They need to be transited to the Judicial (*sic*) from the various Ministries and Government Departments through an Act of Parliament pursuant to article 162(2) of the Constitution;
  - c. Currently there exists more than sixty (60) tribunals established under various Acts of Parliament, dealing with the resolution



of various disputes arising between various parties concerning various sectors;

- d. That genuine effort has been made and continues to be made by the Respondents herein to ensure a smooth transition of the various tribunals to the Judiciary.
4. Specifically that the 2<sup>nd</sup> respondent did constitute a Working Committee in June 2014, under the auspices of the Kenya Law Reform Commission to undertake the transition process. Hereto attached and marked 'JD-1' is a letter constituting the Committee dated June 23, 2014.
7. That it can be discerned from the Report (JD-2) that the Tribunal System, as it exists today:-
  - a. lacks infrastructure, finance and human resource;
  - b. it lacks a formal legal system for its operations, including the appointment of its members;
  - c. it lacks accountability mechanism and standards of operation.
9. That I am aware that, similarly the judiciary constituted a Judiciary Working Committee on the Transition and Restructuring of the Tribunals Working Committee (JWCT-T) to undertake the exercise of ensuring a structured transition of the tribunals from the Executive to the Judiciary.
10. That the Judiciary Working Committee on the Transition and Restructuring of the Tribunals Working Committee (JWCT-T) established by the 1<sup>st</sup> respondent and the Working Committee established by the 2<sup>nd</sup> respondent worked in collaboration and eventually came up with a *Tribunals Bill*. The *Bill* is yet to become law.
16. That the 2<sup>nd</sup> respondent working with the stakeholders, including the 1<sup>st</sup> respondent, came up with a *Draft Tribunal Bill* in 2015 and the same was improved on and became the *Tribunals Bill, 2017*. It addresses the challenges noted by the committee and attempts to align the operations of Tribunals in Kenya with the *Constitution*. Hereto annexed and marked 'DJ-3' is a copy of the 2017 *Bill*.
16. That I am advised by my counsel on record, which advise I believe to be true, that – with respect – the period of six (6) months sought to allow the transitioning of the various tribunals established by statutes and domiciled in various Ministries and Government Departments is too short. This is partly informed by the fact that the financial/fiscal cycle is mid-way on its implementation and financing the transition must be budgeted for.”
18. We have set out, in extenso, the above paragraphs in order to bring out the gist of the appellant’s case before the trial court. It is clear that the appellant’s case before the trial court was: that under article 169(1)(d) local tribunals are classified as subordinate court; that there currently exists more than sixty (60) tribunals established under various Acts of Parliament, dealing with the resolution of various disputes arising between various parties concerning various sectors; that the Tribunal System, as it exists today lacks infrastructure, finance and human resource as well as a formal legal system for its operations,



- including the appointment of its members and accountability mechanism and standards of operation; that there is a need to transit the said tribunals to the Judiciary from the various Ministries and Government Departments through an Act of Parliament pursuant to article 162(2) of the Constitution; that That genuine effort has been made and continues to be made by the Respondents herein to ensure a smooth transition of the various tribunals to the Judiciary; that in order to align the operations of Tribunals in Kenya with the Constitution, the Tribunals Bill, 2017 was published; and that due to the fact that the financial/fiscal cycle was mid-way on its implementation and financing the transition must be budgeted for, the period of six (6) months sought to allow the transitioning of the various tribunals established by statutes and domiciled in various Ministries and Government Departments is too short.
19. While, in interpreting the Constitution, a court is not necessarily bound by the positions taken by the parties before it, it is disingenuous for a party who has taken a particular position before the trial court to make an about-turn on appeal and adopt a position diametrically opposed to the one taken before the trial court and the basis of which the dispute was determined.
20. Before us, the appellant relied on the cases of Trusted Society of Human Rights v Attorney General and Others [2012] eKLR, Jayne Mati & Another v Attorney General and Another Nairobi Petition No. 108 of 2011 and Justus Kariuki Mate & another v Martin Nyaga Wambora & Another [2017] eKLR, to stress on the doctrine of separation of powers. It was contended that the dispute before the court was not justiciable as it amounted to the intrusion by the Judiciary on the domain of the legislature which was in the process of carrying out its legislative mandate. According to the appellant, the adoption of the ejusdem generis rule in interpreting what “local tribunals” mean has the absurd consequential effect of usurping the role of Parliament and the legislation contemplated under article 162(4), 169(1)(d) and (2) of the Constitution by categorising and dichotomising tribunals contrary to the constitutional principle of separation of powers. Since there was an ongoing legislative process, it was contended that the petition, contrary to article 94 of the Constitution, offended the internal proceedings of Parliament.
21. The 4<sup>th</sup> respondent’s position, which was adopted by the 1<sup>st</sup> respondent, was that based on the decision of the Supreme Court in the case of Speaker of the Senate & another v Hon Attorney General & others [2013] eKLR, the High Court was empowered to intervene where it was shown that there was an imminent threat to the Constitution and hence the High Court did not violate the doctrine of separation of powers; that the High Court has within its powers to determine questions of interpretation of articles 169(1) and (2) of the Constitution and functions and appointment of the tribunals hence the petition was justiciable; that the Constitution mandates the courts to ensure that Parliament does not transgress the limits of its constitutional mandate and engage in illegal exercise of power as was held by this court in the case of In the Matter of the Speaker of the Senate and Another [2013] KLR at para 62; that the court cannot run away from the obligation to ensure that state organs act according to the Constitution; that on the authority of the Constitutional Court of South Africa in the case of Minister of Health and Others v Treatment Campaign and Others [2002] 5 LRC 216, 248, the appointment and removal of members of local tribunals falling under article 169(1)(d) of the Constitution by the Executive contravenes the principle of separation of power and is contrary to article 50(1) of the Constitution as it infringes on the independence of the Judiciary; that executive appointments to tribunals, particularly when the Executive is involve in disputes, violate the rights to fair administrative action and fair hearing under articles 47 and 50 of the Constitution as well as article 7 of the African Charter on Human and Peoples’ Rights and the Human Right’s Committee’s General Comment No 32, article 14: Right to equality before courts and tribunals and to fair trial, UN Doc. CCPR/C/GC/32 (2007); that as held by the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services and 5 Others [2014] eKLR, the right to fair hearing is also linked to the functional independence of a body.



22. In our view, the answer to the appellant’s position on this issue is reflected in the decision of the Constitutional Court of South Africa in *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC), a decision that resonates with our constitutional architecture, where the Court pronounced itself as follows:

“When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the *Constitution*, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the *Constitution* to say so. And insofar as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the *Constitution* itself. What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the *Constitution*. The right and the duty of this court to protect the *Constitution* are derived from the *Constitution*, and this court cannot shirk from that duty. As O’Regan J explained in a recent minority judgment, ‘the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.’ In order for the founding values that lie at the heart of our Constitution to be made concrete, it is particularly important for this court to afford a remedy, which is not only effective, but which should also be seen to be effective. The provisions of section 172(1) (a) are clear, and they admit of no ambiguity; ‘[w]hen deciding a constitutional matter within its power, a court...must declare that any law or conduct that is inconsistent with the *Constitution* is invalid’. This section gives expression to the supremacy of the *Constitution* and the rule of law, which is one of the founding values of our democratic state. It echoes the supremacy clause of the *Constitution*, which declares that the ‘Constitution is supreme...; law or conduct inconsistent with it is invalid’. It follows therefore that if a court finds that the law is inconsistent with the *Constitution*, it is obliged to declare it invalid...”.

23. Similarly, in *Minister of Health and Others v Treatment Campaign and Others* (*supra*) the same court pronounced that:

“The primary duty of courts is to the *Constitution* and the law, “which they must apply impartially and without fear, favour or prejudice”. the *Constitution* requires the state to “respect, protect, promote, and fulfil the rights in the Bill of Rights”. Where state policy is challenged as inconsistent with the *Constitution*, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the *Constitution* to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the *Constitution* itself.”

24. Article 2(4) of our *Constitution* provides as follows:

“Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”



25. Clearly article 2(4) enjoins the court to determine a question whether an omission to undertake a step contravenes the Constitution. We must point out that justiciability must be distinguished from merit. An issue is not justiciable merely because it has no merit. A justiciable issue may well turn out to be unmerited. However, that does not bar the court from interrogating its merit. In this case, it is our view and we hold that the issue whether Parliament was enjoined to enact legislation in order to transit tribunals from the various Ministries and Government Departments, a duty that the appellant itself acknowledged, contravened the letter and the spirit of the Constitution was clearly a justiciable issue and we dismiss this ground.
26. According to the appellant, since article 169(1)(d) of the Constitution states that tribunals are to be established by an Act of Parliament, the learned Judge failed to appreciate and hold that article 169(1) (d) and (2) of the Constitution are prospective in nature as guided by the Supreme Court decision in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR. In the appellant’s submission, the tribunals as presently constituted do not require transitioning. Instead they said provisions speak of establishments of other local tribunals in the category and status of Magistrate’s Courts, Kadhis Courts and Court Martial. It was contended that the imputation of the term “transitioning” into article 169(1)(d) of the Constitution and applying it to the interpretation of the same was contrary to the provisions of article 259(1)(d) of the Constitution and goes contrary to good governance as it seeks the removal of the appointment of members of the tribunals from the ambit of the 3<sup>rd</sup> respondent to the 2<sup>nd</sup> respondent without any requirement on the part of the appellant and the 3<sup>rd</sup> respondent to transit the tribunals as currently constituted to the 2<sup>nd</sup> respondent. It was submitted that the tribunals transited by the learned Judge were established under various statutes some of which were enacted before the promulgation of the Constitution of Kenya, 2010 and thus were not the tribunals contemplated by article 169(1)(d) of the Constitution.
27. On the other hand, the 4<sup>th</sup> respondent’s case, was that the argument that the current tribunals are preserved is a complete departure from the appellant’s case in the High Court where the appellant agreed that there was a need to transition the local tribunals to the judiciary from the various ministries; that based on the case of Mary Kitsao-Ngowa & 36 others v Krystalline Limited [2015] eKLR parties are bound by their pleadings; that since article 169(2) of the Constitution requires, in mandatory terms, legislative intervention to provide for the jurisdiction, functions and powers of the tribunals as subordinate courts, the transition was not an import by the learned Judge but had constitutional underpinning under article 162(4) of the Constitution.
28. The appellant’s submission on this point is that article 169(1)(d) of the Constitution should only apply to the existing tribunals. Article 169 of the Constitution provides as hereunder:
1. The subordinate courts are—
    - a. the Magistrates courts;
    - b. the Kadhis’ courts;
    - c. the Courts Martial; and
    - d. any other court or local 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).



29. As stated above, the appellant acknowledged that tribunals contemplated under article 169(1)(d) of the Constitution are subordinate courts and ought to be transited to the Judiciary. In this appeal, the appellant seems to be of the view that the phrase “as may be established by an Act of Parliament” is prospective and futuristic and does not apply to existing tribunals. However, before the trial court, the appellant expressly stated that the tribunals (in reference to article 169(1)(d)) need to be transited to the Judiciary from the various Ministries and Government Departments through an Act of Parliament pursuant to article 162(2) of the Constitution need to be transited to the Judicial (*sic*) from the various Ministries and Government Departments through an Act of Parliament pursuant to article 162(2) of the Constitution. In our view, by adopting the phase ‘transit’ the appellants acknowledged that the application of article 169(1)(d) was not restricted to new tribunals. It was in appreciation of the difficulties that were bound to be encountered in the existing tribunals transition from the Ministries and Government Departments housing them to the Judiciary that the appellant sought for more time rather than the six months proposed by the 1<sup>st</sup> respondent.
30. We are of the view and hold that article 169(1)(d) of the Constitution applies to all local tribunals contemplated thereunder whether new or existing. The learned Judge was alive to the difficulties raised by the appellant and the 3<sup>rd</sup> respondent if the tribunals were to be immediately transited to the Judiciary. Therefore, the learned Judge gave a 6 months window period for the process to be undertaken. The process that was to be undertaken was the enactment of the relevant law and the transitioning of the tribunal to the Judiciary. To our mind the period was sufficient to trigger the said transition.
31. According to the appellant, whereas ejusdem generis is a recognised rule of interpretation as defined by Black’s Law Dictionary, (Garner A. Bryan, 9<sup>th</sup> Ed. Thomson Reuters 2009 at page 594 as cited in the case of Geonet Technologies Limited v Ministry of ICT, Innovations and Youth Affairs, State Department of ICT & Innovation & 2Others, Com Twenty-One Limited (Interested Party) [2022] eKLR, the same ought to be used in tandem and in a manner that promotes the Constitution’s purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance as provided in article 259 of the Constitution.
32. On this point, it was submitted by the 4<sup>th</sup> respondent that the constitutional design of article 169(1)(d) is to place the local tribunals under the Judicial Service Commission so as to cure the appearance of partiality derived from the fact that the membership of majority of the local tribunals comprise of persons appointed by the Executive so as to preserve the doctrine of separation of powers; that based on the definition of ejusdem generis rule in Black’s Law Dictionary at page 594, the rule is an international principle that guides a court in reconciling any incompatibility between specific and general words and that on the authority of the decision of this court in Commissioner for the Implementation of the Constitution v Attorney General & 2 others [2013] eKLR, the rule is applicable in constitutional interpretation; that ejusdem generis rule is both a statutory and constitutional legal interpretative principle used to resolve conflicts between specific and general terms in a statute and serves as a guideline for courts to harmonise the meaning of general terms by limiting them to the same class or category as the specific terms that precede them.
33. According to the ejusdem generis rule, where there are general words following particular and specific words the general words must be confined to things of the same kind as those specified. According to the rule when a series of particular words in a statute is followed by general words, the general words are confined by being read as the same scope of genus as (*ejusdem generis* with) the particular words. The specific words must apply not to different objects of a widely differing character but to something which can be called a class or kind of objects. Where this is lacking, the rule cannot apply, but the



mention of a single species does not constitute a genus. See *R v Edmundson* [1859] 28 LJMC 213 at 215.

34. We adopt the position of the Constitutional Court of Uganda in *Kigula and Others v Attorney-General* [2005] 1 EA 132 in which the decision in *The Republic v El Mann* [1969] EA 357 was cited, that while the widest construction possible, in its context, should be given according to the ordinary meaning of the words used it is now widely accepted that the principles which govern the construction of statutes also apply to the interpretation of constitutional provisions. 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*.

35. It is not by coincident that article 159(1) of the *Constitution* provides that:

Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

36. Article 160(1) of the *Constitution* provides that:

In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.

37. One of the cardinal principles for constitutional interpretation was restated the Supreme Court in Advisory Opinion No 2 of 2013 - *The Speaker of The Senate & another v Honourable Attorney General & others* [2013] eKLR, in which the Honourable Chief Justice at paragraph 184 quoted the Ugandan Case of *Tinyefuza v Attorney General* Const Petition No 1 of 1996 (1997 UGCC3) where it was held that:

“the entire *Constitution* has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and rule of paramountcy of the written *Constitution*.”

38. This court in *Equity Bank Limited v West Link Mbo Limited* [2013] eKLR cited *Philip Tormey v Ireland* and the in which Attorney General the Supreme Court of Ireland held a view very similar to that of our Supreme Court when it expressed itself as follows:

“The rule of literal interpretation, which is generally applied in the absence of ambiguity or absurdity in the text, must here give way to the more fundamental rule of constitutional interpretation that the *Constitution* must be read as a whole and that its several provisions must not be looked at in isolation, but be treated as interlocking parts of the general constitutional scheme. This means that where two constructions of the provision are open in the light of the *Constitution* as a whole, despite the apparent unambiguity of the provision itself, the court should adopt the construction which will achieve the smooth and harmonious operation of the *Constitution*. A judicial attitude of strict construction should be avoided when it would allow the imperfection or inadequacy of the words used to defeat or pervert any of the fundamental purposes of the *Constitution*. It follows from such global approach that, save where the *Constitution* itself otherwise provides, all its provisions should be given due weight and effect and not be subordinated one to another. Thus, where there are two provisions in apparent conflict with one another, there should be adopted, if possible, an interpretation which will give due and harmonious effect to both provisions.



The true purpose and range of a *Constitution* would not be achieved if it were treated as no more than the sum of its parts.”

39. Our consideration of the above two provisions lead us to the conclusion that the tribunals contemplated in article 169(1)(d) ought to be under the Judiciary.
40. According to the appellant, the wording of the text in article 169(1)(d) of the *Constitution* contemplate that local tribunals may be established thus negating the trial court’s rationale that there is a timeline for the establishment of the need- based tribunals, that has not been adhered to. On the other hand, it was submitted by the 4<sup>th</sup> respondent that that the process of transiting the tribunals to the Judicial Service Commission is not self-executing but requires legislative intervention as provided under article 169(2) of the *Constitution*; that although the Fifth Schedule to the *Constitution* does not provide for a timeline within which the legislation is to be enacted by Parliament with respect to tribunals, article 158 of the *Constitution* provides in such cases, the act shall be done without unreasonable delay; that the delay of 11 years in enacting legislation giving effect to article 169(1) and (2) of the *Constitution* was unreasonable; that since article 169(1)(d) of the *Constitution* is not prospective, the 14 year delay in enactment of the Bill threatens the right to a fair hearing before independent and impartial tribunals as guarantee in article 50(1) of the Constitution; and that although article 169(1)(d) of the *Constitution* is not included in the Fifth Schedule that stipulated a five year limit for the passage of specific pieces of legislation required to implement the *Constitution*, Parliament’s failure to do so cannot be allowed to continue and that article 259(8) was applicable in the circumstances.
41. It is true that article 169(2) of the *Constitution* does not prescribe timelines within which legislation contemplated thereunder to be enacted. However, the fact that the *Constitution* itself enjoined Parliament to enact a legislation conferring jurisdiction, functions and powers on subordinate courts established under clause (1) of article 169, is a clear manifestation of the seriousness with which the drafters of the *Constitution* treated such legislation. It cannot be gainsaid that for the realisation of the constitutional right to access justice under Article 48 of the *Constitution*, it is imperative that the enactment of an instrument conferring jurisdiction, functions and powers on subordinate courts be treated with urgency. In our view, in interpreting a constitutional provision either containing a fundamental right or geared towards the realisation of a constitutional right such as article 169(2) of the *Constitution*, the court should adopt a dynamic, progressive and liberal or flexible approach keeping in view ideals of the people socio-economic and political-cultural values so as to extend the benefit of the same to the maximum possible. See *Kigula and others v Attorney-General* (*supra*).
42. We are therefore of the view that in the absence of prescribed timelines for enacting legislation pursuant to article 169(2) of the *Constitution*, article 259(8) of the *Constitution* comes into play to compel the enactment of the contemplated legislation to be undertaken. The said provision stipulates that:
- If a particular time is not prescribed by this *Constitution* for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises.
43. The drafters of the *Constitution*, in our view, had in mind circumstances such as the one in hand when they inserted this article in the *Constitution*. We agree that more than 10 years delay in enacting a legislation geared towards the realisation of a constitutional right, in this case, the right of access to justice, is unreasonable and cannot be countenanced and the trial court was justified in compelling the 3<sup>rd</sup> respondent to undertake its constitutional obligation.
44. According to the appellant, the learned Judge’s direction on the filing of affidavit detailing the appellant and 3<sup>rd</sup> respondent’s efforts to promulgate the *Tribunal Bill* amounted to the contemplated transitioning of the mandate to appoint or remove the members of the tribunals to the 2<sup>nd</sup> respondent



without the requisite constitutional and statutory foundation contrary to article 261(1) that requires Parliament to enact legislation to govern whatsoever transitions hence impossible to implement.

45. The appellant's position was supported by the 3<sup>rd</sup> respondent which argued: that not all local tribunals are established as part of the Judiciary; that the use of the words "as may be established" as opposed to simply "established" in article 169(1)(d) of the *Constitution* denotes that it is Parliament that can confer the status of a local tribunal as part of the judiciary or establish local tribunals within institutions of the executive including government ministries; that there are other provisions of the *Constitution* that imply or presume the existence of tribunals outside the *Constitution*; that Parliament can establish a local tribunal as an avenue of a fair administrative action within an institution and comply with article 47 without being reconstituted as subordinate courts under the judiciary; that the court failed to adequately consider the unique role of local tribunals in providing accessible, efficient and specialised dispute resolution mechanisms that are distinct from formal judicial system hence the decision limits Parliament's authority by implying that an Act of Parliament cannot establish a tribunal outside the judiciary; that article 152(2)(d) recognise that not all disputes need to be resolved within the rigid confines of the traditional judiciary since it acknowledges the need for flexible, specialised and sector specific approaches to dispute resolution that are often more efficient, accessible and cost-effective than conventional court processes; that by asserting that that all tribunals are part of the judiciary, the High Court's decision effectively narrows the scope of alternative dispute resolution, contradicting article 159(2)(d) and undermining the constitutional directive to promote them; that the High Court's ruling disregards the legislative discretion granted to Parliament under article 169(2) of the *Constitution* to determine the structure and operation of tribunals.
46. The 4<sup>th</sup> respondent's view was that article 23(3) of the *Constitution* empowers the court to grant appropriate relief in any proceedings seeking to enforce fundamental rights and freedoms as appreciated in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others* Petition 3 of 2018; and that the orders granted were proper in the circumstances.
47. In directing that affidavits be filed, the trial court was issuing structural interdict which strictly speaking, is not a remedy but a mode of the realization of a remedy or relief. Article 23 of the *Constitution* provides that a court "may grant appropriate relief, including a declaration of rights" when confronted with rights violations and an 'appropriate relief' must mean an effective remedy for without effective remedies for breach, the values underlying and the rights entrenched in the *Constitution* cannot properly be upheld or enhanced.

As was held by the Constitutional Court of South Africa in *Fose v Minister of Safety & Security* [1997] ZACC 6:

"Appropriate relief will in essence be relief that is required to protect and enforce the *Constitution*. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the *Constitution* are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights."

48. One of the remedies which is now recognized in jurisdictions with similar constitutional provisions as our article 23 is what is called structural interdict. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision. Five elements common to structural interdicts have been isolated in this respect. First the court issues a declaration identifying how the government has infringed an individual or group's constitutional rights or otherwise failed to comply with its constitutional obligations. Second, the



court mandates government compliance with constitutional responsibilities. Third, the government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a pre-set date. This report, which should explicate the government's action plan for remedying the challenged violations, gives the responsible state agency the opportunity to choose the means of compliance with the constitutional rights in question, rather than the court itself developing or dictating a solution. The submitted plan is typically expected to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached. Fourth, once the required report is presented, the court evaluates whether the proposed plan in fact remedies the constitutional infringement and whether it brings the government into compliance with its constitutional obligations. As a consequence, through the exercise of supervisory jurisdiction, a dynamic dialogue between the judiciary and the other branches of government in the intricacies of implementation may be initiated. This stage of structural interdict may involve multiple government presentations at several 'check in' hearings, depending on how the litigants respond to the proposed plan and, more significantly, whether the court finds the plan to be constitutionally sound. Structural interdicts thus provide an important opportunity for litigants to return to court and follow up on declaratory or mandatory orders. After court approval, a final order (integrating the government plan and any court ordered amendments) is issued. Following this fifth step, the government's failure to adhere to its plan (or any associated requirements) essentially amount[s] to contempt of court. In essence, structural interdicts require the violator to rectify the breach of fundamental rights under court supervision.

49. The Supreme Court in gave the remedy a seal of approval in the case of *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others* (*supra*) where it expressed itself as hereunder:

“(121) We are however, in agreement with the submissions of the appellant and *Amicus Curiae*, to the effect that article 23 (3) of the *Constitution* empowers the High Court to fashion appropriate reliefs, even of an interim nature, in specific cases, so as to redress the violation of a fundamental right. As this court has already made an authoritative pronouncement on this matter, we shall say no more. While we acknowledge the fact that the *functus-officio* doctrine retains its validity, even vitality, in the majority of cases, Petition No 3 of 2018 49 both criminal and civil, it is our view that in certain situations, this doctrine ought to give way, albeit on a case by case basis. To subject article 23 of the *Constitution* to the limitations of rule 21 of the *Civil Procedure Act*, would stifle the development of courtsanctioned enforcement of human rights as envisaged in the Bill of Rights. Where a court of law issues an order, whose objective is to enforce a right, or to redress the violation of such a right, it cannot be said to have abdicated its judicial function as long as the said orders are carefully and judicially crafted.

(122) Having stated thus, we hasten to add that, 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. Where necessary, a court of law may indicate that the orders



it is issuing, are interim in nature, and that the final judgment shall await the crystallization of certain actions.”

50. It is therefore clear that the High Court had the jurisdiction to ensure that its decision was implemented by way of structural interdict and we find no reason to fault it on that score.
51. It was submitted, on behalf of the appellant that the learned Judge made assumptions as to the manner in which the Executive constitutes the tribunals without any evidence or pleadings by the 1<sup>st</sup> respondent. As stated above, the appellant itself appreciated that Tribunal System, as it exists today lacks: infrastructure, finance and human resource; a formal legal system for its operations, including the appointment of its members; and accountability mechanism and standards of operation. These were the very issues that the 1<sup>st</sup> respondent raised in his petition. In light of the concession by the appellant as regards the manner in which the tribunal system was operating, it cannot lie in the mouth of the appellants to now posit that there was no evidence to that effect and that the learned Judge’s decision was based on assumptions.
52. On behalf of the 3<sup>rd</sup> respondent, it was submitted that since the statutes that govern the appointment of the impugned tribunals are yet to be repealed, the appointments are, as a matter of law, valid until new legislation contemplated under article 169(2) is passed; that the new appointments must, however, be undertaken in conformity with the *Constitution*; that the Judicial Service Commission should be involved and take charge of all new appointments pending enactment of the enabling legislation.
53. We have considered the submissions made by the 3<sup>rd</sup> respondent and in our view, most of those issues were not placed before the trial court. The 3<sup>rd</sup> respondent could have resorted to rule of the *Court of Appeal Rules* if it wanted to agitate the said issues. That rule provides that:
- A respondent who desires to contend on an appeal that the decision of the superior court should be affirmed on grounds other than or additional to those relied upon by that court shall give notice to that effect, specifying the grounds of the respondent’s contention.
54. The 3<sup>rd</sup> respondent never took advantage of the said provision and cannot submit on anything else apart from the appeal. In any case the said provision is only beneficial where issues were raised before the trial court but were not addressed. It is not an avenue for a party to invent a totally new cause of action at an appellate level.
55. We have on our own re-evaluated the evidence placed before the trial court and the submissions made and we find no reason to fault the learned Judge’s decision which was sound, both in law and in fact. Consequently, we find no merit in this appeal which we dismiss but with no order as to costs.
56. Those are the orders of this court.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2025.**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**A. O. MUCHELULE**

.....

**JUDGE OF APPEAL**

**G. V. ODUNGA**



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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

*signed*

**DEPUTY REGISTRAR**

