Ngutari & 5 others v Okello. & 5 others (Civil Appeal E081 & E165 of 2021 (Consolidated)) [2025] KECA 505 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 505 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E081 & E165 OF 2021 (CONSOLIDATED)

F TUIYOTT, AO MUCHELULE & GV ODUNGA, JJA

MARCH 21, 2025

BETWEEN

CYPRIAN MUGAMBI NGUTARI .... 1ST APPELLANT

PATRICIA MAY CHEPKIRUI .... 2ND APPELLANT

ANDREW MUMA .... 3RD APPELLANT

CHEGE CHARLES GAKUHI .... 4TH APPELLANT

THE CABINET SECRETARY, INDUSTRIALISATION, TRADE AND ENTERPRISE DEVELOPMENT...........5TH APPELLANT ATTORNEY GENERAL .... 5TH APPELLANT

ATTORNEY GENERAL .... 6TH APPELLANT

AND

BERNARD ODERO OKELLO .... 1ST RESPONDENT

THE KENYA INVESTORS ASSOCIATION .... 2ND RESPONDENT

LSK NAIROBI BRANCH .... 3RD RESPONDENT

JUDICIAL SERVICE COMMISSION .... 4TH RESPONDENT

KATIBA INSTITUTE .... 5TH RESPONDENT

KYALO MBOBU .... 6TH RESPONDENT

(An Appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Nairobi (M. Onyango, J) delivered on the 30th October 2020 in ELRC Petition No. 100 of 2020 Consolidated with Petition 99 of 2020)

JUDGMENT

1. The 1st and 2nd respondents filed a petition in the Employment and Labour Relations Court being Nairobi ELRC Petition Nos. Nai Civil Appeal No E081 and E165 of 2021 Page 1 of 57, 99 and 100 of 2020 respectively which petitions were consolidated. In the said petitions, it was contended:

   > that following the lapse of the tenure of the immediate past chairman of the Business Premises Rent Tribunal (the Tribunal), the 5th appellant, the Cabinet Secretary, Industrialisation, Trade and Enterprise Development (the Cabinet Secretary), by Gazette Notice No. 4244 published in the special issue of the Kenya Gazette on 26th June 2020, appointed the 1st to 4th appellants together with the 6th respondent as chairman, vice-chairman and members respectively of the Tribunal; that the said appointments were made in excess and/or without power contrary to section 11(1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301 (the Act) as read with regulations 2 and 21(1), (2) and (3) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) (Tribunal) (Forms and Procedures) Regulations, 1966 (the Regulations) which do not create and/or permit the appointments of persons as vice chairpersons/members to the Tribunal; that the appointments, without specifying the roles was erroneous, illegal and wrong and was in excess and/or without power and therefore illegal and a nullity ab initio and contrary to sections 4 and 5 of the Fair Administrative Actions *Act, No. 4 of 2015*; that the appointments were not subjected to fair competition and merit as the basis of appointment and there was no adequate and equal opportunity afforded at all levels of the public service hence was irregular; that the appointments were discriminative contrary to Article 27(4) of *the Constitution* in that there was only one woman out of the five appointees; and that it is a requirement that any vacancy arising in public service be notified to the public and that the public be afforded an opportunity to apply for the same.

2. It was further averred: that the said appointments was done without an open, fair and competitive process and was in total disregard of *the Constitution* on advertisement and public participation; that members of the Tribunal being judicial officers under *the Constitution*, the only body empowered to appoint them is the 4th respondent, the Judicial Service Commission (the Commission) and not the 5th appellant hence the appointment violated the principles of separation of powers and checks and balances; that the impugned appointments were made contrary to critical values and principles that govern and regulate appointments to public service in Kenya contrary to Articles 10 and 232 of *the Constitution*; that the appointments were opaque, unilateral, exclusive, illegal, unconstitutional and shrouded in mystery to the extent that they were based on irrelevant considerations and therefore contrary to public interest and legitimate expectations; and that the composition of the Tribunal threatened and violated the public's right to access justice as enshrined in Article 48 of *the Constitution*.

3. It was therefore sought that the decision be declared to be illegal and unconstitutional; that an order of certiorari be issued to quash the said Gazette Notice; that an order of mandamus be issued directing the respondents in the petition to, properly and in accordance with the law, invite public participation and applications from the public, interview and then appoint the chairperson of the Tribunal; and that the costs of the petition be awarded to the 1st and 2nd respondents.

4. The petition was supported by the 5th respondent, Katiba Institute, which described itself as a non-profit and non- governmental organisation dedicated to the faithful implementation of *the*

Constitution. Its case was: that the impugned appointments usurped the mandate of the Commission, violates the doctrine of separation of powers, the national values and principles of governance, the right to a fair hearing and fair administrative action before an independent tribunal, impugns the Judiciary's independence and the 4th respondent's obligation to appoint judicial officers to secure independence of the Judiciary and violates the two thirds gender rule. It urged the court: to find that *the Constitution* requires an appointment process that is open, transparent, non-discriminatory and which respects and upholds the rule of law; to recognise the importance of separation of powers, the independence of judicial authority and independent offices and to find that the 4th respondent is the one with the mandate to appoint members of the Tribunal; and to promote the realisation of the two thirds gender rule and to find that the chairperson and members of the Tribunal were unlawfully and unconstitutionally appointed.

5. In response, the Cabinet Secretary through a replying affidavit sworn by Amb. Johnson Weru, the Principal Secretary of the State Department of Trade and Enterprise Development in the Ministry of Industrialisation, Trade and Enterprise Development stated: that the Cabinet Secretary's mandate included the appointment of the chairpersons and members of the Tribunal under section 11 of the Act; that upon the lapse of the terms of the immediate past chairman of the Tribunal, the Ministry appointed the 1st to 4th appellants and the 6th respondent in light of the volume of work in the Tribunal and due to the fact that the Tribunal sat in circuit in Nairobi, Mombasa, Kisumu, Nyeri, Nakuru, Embu, Eldoret, Kakamega and Kisii; that the appointment of the five members was meant to enhance efficiency and delivery of justice to the citizens of Kenya; that the Act read together with the Regulations envisages that the Tribunal will be constituted by more than one member; that the Act does not prescribe the minimum or maximum number of members of the Tribunal and does not provide for competitive recruitment of the chairperson or members; that the Act neither provides for qualifications of the members of the Tribunal nor that the members should be judicial officers; that in appointing the five members, the Ministry was guided by the tenets of Chapter Six of *the Constitution* and borrowed heavily from the qualifications highlighted under section 20 of the Tribunal Bill and that the five members met the set criteria; that the requirements for regional and gender balance were also taken into account; that the fact that the appointees were sworn in by the Chief Registrar of the Judiciary was proof that the Judiciary approved their appointments; that the 1st Respondent did not utilise the statutory mechanisms available to him under section 35 of the *Access to Information Act* to obtain the information needed from the Judiciary or the Cabinet Secretary before coming to court; that similarly, the 1st respondent did not utilise the statutory mechanisms under section 43 of the *National Cohesion and Integration Act* to file a complaint of the failure to adhere to the two thirds gender rule or other impropriety in the process of appointing the chairman and the members of the Tribunal; that the construction that the court should adopt should espouse the intention of the legislature until such a time that the law is amended to grant the Judiciary the mandate to appoint persons to the Tribunal; and that the court did not have jurisdiction to entertain the petition since the contracts given to the appointees did not have statutory underpinning so as to give rise to a breach actionable by a constitutional petition as opposed to an ordinary suit.

6. The case for the 1st to 4th appellants was that sometimes in June 2020, the Ministry called for their curricula vitae for consideration for appointment to serve as members of the Tribunal; that prior to and after that, the Cabinet Secretary consulted widely and carried out interviews and a competitive process before publishing their names in the Gazette Notice; that after taking the oath, they immediately begun executing their duties, clearing backlog of cases which were left by the former chairpersons; that they accrued both contractual and legal rights upon their appointment which should not be taken away without due process; that they had legitimate expectation that the court would recognise and protect their rights; that their qualifications and competence was not challenged in the petitions; that section

11 of the Act, under which they were appointed, does not specify the qualifications and competence of the chairman and the members; that numerous other legislation authorise the Executive to appoint chairpersons of tribunals; that most tribunals do not require members to be recruited by way of advertisements; that their appointments did not contravene the two thirds gender rule since the rule was progressive and should be considered in light of the composition of all courts and tribunals hearing land and environmental matters; that the establishment of a process through which members of the tribunal should be appointed is the preserve of Parliament under Article 94(3) of *the Constitution*; that the Cabinet Secretary ensured that there was public participation in the appointments; and that halting the proceedings of the Tribunal was against public interest in light of the backlog of cases.

7. The 4th respondent filed grounds of opposition while the 3rd and 6th respondents did not respond to the petition.

8. In the judgement, the learned Judge held: that the term "local tribunal" as used in Article 169(1)(d) of *the Constitution* is intended to distinguish it from an international tribunal; that Article 169 in general provides for subordinate courts and lumps local tribunals together with subordinate courts and requires Parliament to enact legislation to provide for jurisdiction, functions and powers of such local tribunals; that the legislation contemplated under section 169(2) with respect to local tribunals has never been enacted although the Tribunals Bill had been published; that until such legislation is enacted, the provisions of *the Constitution* and the Judicial Service Act would remain as the primary legislation in respect of the appointment of presiding officers of local tribunals; that *the Constitution* is clear that local tribunals are subordinate courts by virtue of Article 169(1)(d) and that persons presiding over such tribunals are judicial officers by virtue of the definition in Article 260 of *the Constitution*; that Article 172(1)(c) as read with section 32 of the *Judicial Service Act* are the relevant provisions with respect to appointment of presiding officers of local tribunals; that the appointment of the 1st to 4th appellants and the 6th respondent (the appointees) under section 11 of the Act violated the aforesaid provisions and was ultra vires; that the appointees were selected by the Cabinet Secretary without compliance with Articles 10 and 232 of *the Constitution*; that by picking the appointees for appointment to the Tribunal without advertisement and shortlisting of candidates the Cabinet Secretary sidestepped the principle of public participation; that appointments to public office must be through an open, merit based, inclusive and competitive process; that the nomination of the appointees was discriminatory and lacked transparency and openness necessary to uphold the rule of law and promote fair administrative action; that whereas the Act does not prescribe the procedure for appointment, the *Public Service (Values and Principles) Act* provide, in section 10, for competition and merit based appointments; that the appointments did not comply with Articles 10, 47 and 232 of *the Constitution* and section 10 of the *Public Service (Values and Principles) Act* and was therefore unconstitutional; that in view of the apparent conflict between section 7 of the Sixth Schedule to *the Constitution* and section 11 of the Act, *the Constitution* would prevail and whereas *the Constitution* recognises the existence of such legislation in the form in which they were enacted, their interpretation and application must be within the context of the provisions of *the Constitution* hence such legislation is not unconstitutional; that the Cabinet Secretary breached Articles 27 and 232(1)(i) of *the Constitution* by appointing only one woman out of the five appointees; and that the appointing authority has discretion on the number of members to appoint to the Tribunal since there is not prescribed number.

9. In the end the learned Judge declared the appointments of the said appointees to have violated the law and quashed the Gazette Notice appointing them as well as any consequential actions arising therefrom.

10. Aggrieved by that decision, the 1st to 4th appellants filed Civil Appeal No. Nai E081 of 2021 while the 5th and 6th respondents filed Civil Appeal No. Nai E165 of 2021. By consent of the parties, the two appeals were, on 9th October 2024, consolidated with Civil Appeal No. E081 of 2021 being the lead file.

11. In their grounds of appeal, the 1st to 4th appellants challenged the said decision on the grounds that the learned Judge erred in law: by failing to distinguish independent tribunals and local tribunals as provided under Article 1(3)(c), 159 and 169 respectively and that tribunals under Article 159 are not tribunals under the Judiciary hence there was no basis to find that the Tribunal was under the Judiciary; when she failed to weigh practice and evidence of the Commission which was not responsible for all tribunals; when she held that the appointment of the 1st to 4th appellants as members of the Tribunal was not preceded by a competitive recruitment exercise notwithstanding the evidence on record of the names of considered persons and the criterion used in arriving at the decision that they were the most qualified persons to serve as members of the Tribunal; when she read "judicial officer" as defined under Article 260 of *the Constitution* to include the presiding officer of all tribunals notwithstanding the fact that Article 260 does not include presiding officers of all tribunals under the definition of judicial officers; when she held that the Commission is the appointing authority in respect of members of the Tribunal despite clear wording of section 11 of the Act that the Cabinet Secretary is responsible for such appointment; when she held that the *Judicial Service Act* and *the Constitution* are the primary governing laws governing the appointment of members of the Tribunal despite such appointments being provided for under section 11 of the Act; when she held that members of the Tribunal should be appointed by the Commission despite clear wording in various statutes that appointment of members of various tribunals be done by Cabinet Secretaries responsible for the various tribunals under their supervision; when she held that the Cabinet Secretary's appointment of the 1st to 4th appellants as members of the Tribunal was ultra vires when in fact such authority reposes in the Cabinet Secretary; when she held that the membership of the Tribunal was unlawful on account of the two thirds gender rule despite the principle of progressive application of the gender principle adopted by various superior courts in Kenya; when she issued certiorari quashing the Gazette Notice appointing the 1st to 4th appellants as members of the Tribunal; when she held that the Commission did not file a response to the petitions when in fact the Commission filed grounds of opposition dated 18th August 2020; when she held that the Commission was the appointing authority of members of the Tribunal without invalidating section 11 of the Act which recognises the Cabinet Secretary as the appointing authority; by taking into account irrelevant factors thus arriving at wrong determination contrary to the law and the evidence on record; and in disregarding all points of law captured in the authorities cited by the appellants.

12. It was sought that the appeal be allowed with costs, that the judgement be set aside, that the consolidated petitions be dismissed and the decision of the trial court be reversed. The appellants prayed that the decision of the learned Judge be substituted with the holding that the Cabinet Secretary's office is the office responsible for appointing members of the Tribunal and that the 1st to 4th appellants were properly appointed to serve as members of the Tribunal. Further, that Judicial Service Commission is only responsible for the appointment of members of Tribunals whose establishing statutes provides for such appointment by the Commission.

13. When the appeal was called out for hearing on the Court's virtual platform on 9th October 2024, learned senior counsel, Mr Charles Kanjama, appeared with Mr Bildad Khatete for the 1st to 4th appellants, learned counsel, Mr Odukenya, appeared for the 4th and 5th appellants, learned counsel, Mr Owiti appeared for Mr Wamasa for the 4th respondent, while learned counsel, Mr Odanga, appeared with Mr Nyawa for the 5th respondent. The other parties were not represented despite due service of

the hearing notice. The 3rd respondent had however, filed written submissions. Learned counsel relied on their respective written submissions which they highlighted briefly.

14. From the submissions filed by the parties, it is clear that the appellants' appeal is supported by the 4th respondent but was opposed by the 5th respondent. The 3rd respondent seems to have not taken sides in the appeal. We shall consider the position taken by the appellants as well as that of the 4th respondent as one position while treating the 5th respondent's case separately.

15. Before delving into the matter, it was urged by the appellants that since the 4th respondent, the Judicial Service Commission, which the petitioners contended ought to be the appointing authority when it comes to the members of tribunals established under Article 169(1)(d) of *the Constitution*, took a different position from that agitated by the petitioners before the trial court, the learned Judge ought not to have made the decision she did. With due respect to that submission, constitutional interpretation is not on the same plane as a consideration of normal civil suits. In the latter, the dispute is usually between the protagonists before the court and take the form of in personam proceedings hence non-parties to the proceedings are usually not affected or bound by such proceedings. See Ernest Orwa Mwai v Abdul S Hashid & Another Civil Appeal No. 39 of 1995, Kotis Sandis v Ignacio Jose Macario Pedro De Silva Civil Appeal No. 38 of 1950 [1950] 1 EACA 95, The Town Council of Ol'kalou v Ng'ang'a General Store Civil Appeal No. 269 of 1997 and *Sakina Sote Kaitany and Anor. v Mary Wamaitha Civil Appeal No. 108 of 1995*.

16. In matters of constitutional interpretation, the proceedings more often than not take the in rem form. In rem proceedings give rise to in rem judgements which is a judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from a particular interest in it of a party to the litigation). Such a judgement is said to be conclusive as against all the world in whatever it settles as to the status of a person or property, or as to the right or title to the property and as to whatever disposition it makes of the property itself, or of the proceeds of its sale. All persons regardless whether or not they are parties to any legal proceedings are bound by a judgment in rem and as such are estopped from averring that the status of persons or things, or the right or title to property is other than what the Court has by its judgment declared or made it to be. On the other hand, in personam judgement determines the rights of the parties to an action and those who are privy to them in regard to the subject matter in dispute. See Halsbury Laws of England, 4th edition Volume 16 paragraph 1525 and Hoffmann and Zeffertt: "The South African Law of Evidence" 4th edition, at 339-340 and Lazarus-Barlow v Regent Estates Co Ltd [1949] 2 KB 465 at 475, [1949] 2 All ER 118 at 122.

17. Therefore, where a court is asked to hand down an in rem judgement, care must be taken so that those who are not before the court are not unduly prejudiced by the same when their position is not the same as those of the parties before the court. In constitutional interpretation, therefore the court is not bound, in reaching its decision, by the positions taken by the parties before it in deciding the case or granting a relief. In other words, in such proceedings, the parties cannot, by merely taking particular positions, urge the court to decide in a particular way. While consents may be recorded in such proceedings, the court is not bound to adopt such consents when they are clearly not in tandem with the law and *the Constitution*. Conversely, the mere fact that a party adopts a position which might be deemed to be prejudicial to its interests does not preclude the court from setting the law as it is. Therefore, the mere fact that the 4th respondent took a position at the hearing that it was not mandated to appoint members of the tribunals does not, ipso facto, bind the court if the legal position is to the contrary. One cannot evade the constitutional obligation imposed upon it by merely abdicating its mandate and posturing that the mandate or obligation does not belong to it. Accordingly, the trial court was not bound by the position taken by the 4th respondent.

18. According to the appellants, *the Constitution* separately provides for independent tribunals, the tribunals provided for under Articles 1(3)(c), 159 and 169(1)(d) of *the Constitution* respectively hence the reason why they are designated specific names. It was argued that the learned Judge failed to make any distinction between the three distinct manifestations of tribunals as spelt out in the said provisions and made an unsupported inference that the only distinction that was intended by the use of the words "local tribunal" was as between international tribunals and local tribunals and therefore erred in her finding that all tribunals within the limits of the domestic law are tribunals provided for under Article 169(1)(d). In their view, by determining that the Business Premises Rent Tribunal was a local tribunal under Article 169(2)(d) without any legal backing, the trial court's interpretation had the effect of rendering the provisions on distinction of tribunals superfluous.

19. It was further submitted that Parliament in enacting the Act empowered the Cabinet Secretary to appoint members of the Tribunal and yet the learned Judge held that the appointive powers fell upon the Commission on the ground that members of the Tribunal are judicial officers yet *the Constitution* does not explicitly state that all members of the tribunals are judicial officers and *the Constitution* does not explicitly state that all judicial officers have to be appointed by the Commission; that based on the provisions of Article 259(3)(a) of *the Constitution*, even though Article 172 empowers Judicial Service Commission to appoint judicial officers, it is not a blanket provision that the Commission is responsible for appointing members of all tribunals in the land since Article 260 of *the Constitution*, which captures presiding officers of courts, deliberately omits presiding officers of local tribunals from definition of judicial officers; that since Article 172(c) specifies that the appointment of judicial officers be as prescribed by an Act of Parliament, and the Act prescribes the manner of appointment of members of the Tribunal, the court is bound to restrict itself to that manner of appointment; that the architecture of *the Constitution* bears an intention to vest decision-making authority to administrative bodies and tribunals in addition to the courts as confirmed by the doctrine of exhaustion; that Article 169(1)(d) lists subordinate courts in the country while Article 172 lists appointment of magistrates and judicial officers among the roles of the Commission and section 32 of the *Judicial Service Act* provides for the appointment, discipline and removal of judicial offices and staff; that the interpretation of what 'local tribunals' mean, the decision amounted to usurpation of the role of Parliament in Articles 162(4) and 169(1)(d) and (2) of *the Constitution* and thus violated the principle of separation of powers which is emphasised in the cases of Trusted Society of Human Rights v Attorney General and Others [2012] eKLR, Jayne Mati & Another v Attorney General and Another Nairobi High Court Petition No. 108 of 2011 and Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another [2017] eKLR;; that while courts are fully under the Judiciary, tribunals are either partially or completely external from the Judiciary; that the effect of the decision by the Employment and Labour Relations Court is that the members of the Tribunals are irregularly in the office a fact whose domino effect would be administrative chaos in all the other Tribunals.

20. It was further submitted: that the decision of the learned Judge disregarded the doctrine of separation of powers by making an inference that the judicial arm of government through the Commission could detract the appointive powers of the Cabinet Secretary when there is no law that approbates that power on the Commission; that by the Commission's own admission in the grounds of opposition, it does not have such powers.

21. According to the appellants, on the authority of the cases of Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] KLR and Federation of Women Lawyers & Others v Attorney General Nairobi High Court Petition No. 102 of 2011, Article 169(1)(d) and (2) of *the Constitution* is prospective in nature and does not require transitioning the Tribunal as presently constituted but speak of establishment of other local tribunals in the category of status of

Magistrates Courts, Kadhis courts and Courts Martial that will be under the ambit of the Commission; that the wording of the text of Article 169(1)(d) of *the Constitution* contemplates that local tribunals may be established connoting the possibility in intention that they may not be established; that the decision was contrary to the provisions of section 11 of the Tribunals Bill as well as regulation 20 of the Regulations regarding the powers of the appointments of the members of the Tribunal.

22. The 4th respondent, the Commission, while supporting the appeal submitted: that the authority to appoint members of the Tribunal is by law bestowed upon the 5th appellant and hence the appointment of the 1st to 4th appellants was in accordance with the law; and that whereas section 32 of the *Judicial Service Act* provides for the appointment, discipline and removal of judicial officers and staff, the same does not specifically provide for the appointment of the chairpersons and members of the Tribunal which is provided for under the Act until Parliament enacts the Tribunals Bill pending before it into law.

23. The 5th respondent, Katiba Institute, in opposing the above grounds submitted: that *the Constitution* explicitly provides that tribunals fall under the Judiciary and not the executive; that by arrogating to itself the powers conferred upon the Judiciary, the Cabinet Secretary breached the principle of separation of powers as appreciated in Mumo Matemu Case (supra) and In the Matter of Interim Independent Electoral Commission [2011] eKLR; that subordinate courts are established under Article 169 of *the Constitution* and fall under the Judiciary and they include any court or local tribunal as may be established by an Act of Parliament; that a tribunal is therefore body created through legislation performing both judicial and quasi-judicial functions such as the Tribunal; that a reading of Article 169(1)(d) of *the Constitution* and section 2 of the *Judicial Service Act* reveals that *the Constitution* and the said Act are the main legislation with regards to the appointment of officers of local tribunals and since the tribunals are considered subordinate courts by virtue of Article 169(1)(d) of *the Constitution*, their presiding officers are considered as judicial officers pursuant to Article 260 of *the Constitution*; that the doctrine of separation of powers plays a critical role under *the Constitution* and bars the Executive and its agencies or entities who are not the Judicial Service Commission from appointing or removing any members of tribunals created under Article 169(1)(d) of *the Constitution*.

24. We have considered the above rivalling submissions. Article 1(3)(c) of *the Constitution* provides that:

> Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution–
>
> ....
>
> ....
>
> (c) the Judiciary and independent tribunals.

25. It is true that the above Article creates a distinction between the Judiciary and independent tribunals. Independent tribunals are however not defined in *the Constitution*. In determining what independent tribunals are, the court must therefore consider other provisions of *the Constitution*. This was the position adopted by 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 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."

26. This Court in Equity Bank Limited v West Link Mbo Limited [2013] eKLR cited Philip Tormey v Ireland and in which the 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."

27. Article 159 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.

28. A reading of Articles 1(3) and 159 of *the Constitution* reveals that there is a distinction between the courts on one hand and the independent tribunals and tribunals established by or under *the Constitution*. Such tribunals are clearly not considered as and must not be treated as courts. Article 162 provides for systems of courts in the following terms:

    1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

    2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

        a. employment and labour relations; and

        b. the environment and the use and occupation of, and title to, land.

    3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

4. The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

29. Therefore, the courts system in this country comprises of the superior courts and subordinate courts. The superior courts are clearly defined in Article 162(1). The subordinate courts are defined in Article 169(1) of *the Constitution* which provides that:

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).

30. So that apart from superior courts, independent tribunals or tribunals established by or under *the Constitution*, any other court or local tribunal established by an Act of Parliament falls under the definition of subordinate court. *The Constitution* clearly does not distinguish between tribunals existing at the time of its promulgation and those to be established after. Therefore, in line with the principle of holistic interpretation of *the Constitution*, section 7 of the Sixth Schedule to *the Constitution* comes into play. That section provides that:

    1. All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

    2. If, with respect to any particular matter—

        a. a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and

        b. a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.

31. Two issues are addressed by this Article. First is the status of the laws existing immediately before the effective date which continue in force but are to be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution. In other words, existing laws are not rendered unconstitutional but in construing them, the court must do so in a manner that aligns them to the provisions of *the Constitution*. This provision takes care of the submission that since the learned Judge did not declare section 11 of the Act unconstitutional, she erred in interpreting it in a manner that altered its effect. Clearly the learned Judge had the power and was obliged to interpret that section in a manner that aligned it to the constitutional provisions and cannot be faulted for doing so.

32. The second issue arising from the said provision is that where the existing law assigns responsibility to a particular State organ or public officer, including the Cabinet Secretaries, and a provision of *the Constitution* assigns the same responsibility to a different State organ or public officer, the provisions of *the Constitution* prevail to the extent of the conflict.

33. 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.

34. It was submitted that even though Article 172 of *the Constitution* empowers Judicial Service Commission to appoint judicial officers, it is not a blanket provision that the Commission is responsible for appointing members of all tribunals in the land since Article 260 of *the Constitution*, which captures presiding officers of courts, deliberately omits presiding officers of local tribunals from definition of judicial officers. Article 260 of *the Constitution* provides that:

> " judicial officer" means a registrar, deputy registrar, magistrate, Kadhi or the presiding officer of a court established under Article 169 (1) (d)."

35. Having found that the Business Premises Rent Tribunal is a local tribunal pursuant to Article 169(1)(d) of *the Constitution* and therefore a subordinate court, it follows that the presiding officers of the said Tribunal are judicial officer under Article 260 of *the Constitution*.

36. That leads us to the issue of which entity is empowered to appoint officers of the subordinate courts. Article 172(1)(c) provides that the Judicial Service Commission shall:

> " appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament."

37. Having found that the local tribunals are part of the subordinate courts, the members of such tribunals, and in line with the ejusdem generis rule, fall within the category of 'other judicial officers' under article 172(1)(c) of *the Constitution* and must, hence, be appointed by the Judicial Service Commission.

38. Article 169(2) of *the Constitution* provides that:

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

39. It is true that Parliament has not enacted the legislation contemplated under Article 169(2) of *the Constitution* although, although it is in the process of enacting the Tribunals Bill, 2017. It is instructive that section 3 of the Bill provides as follows:

> The purpose of this Act is to provide a legislative framework to
>
> a. Rationalize and regulate Tribunals;
>
> b. Streamline the governance and operations of Tribunals;
>
> c. Provide for a reasonable standard for establishment of Tribunals;
>
> d. Set appropriate qualifications for chairpersons and members of Tribunals;
>
> e. Bring all Tribunals under a single administrative regime and coordinate the functions of Tribunals;
>
> f. Enhance access to justice; and
>
> g. Improve quality of service delivery by Tribunals.

40. The Bill contemplates transition of the tribunals since at section 20 it provides for the appointment of the chairpersons and members of the tribunals by the Judicial Service Commission.

41. As we await for the Bill to be enacted into law, the court cannot sit back, twiddle its thumbs and fold its arms when the delay in doing so threatens the constitutional principles of access to justice and fair

hearing. In his separation of powers theory, Montesquieu had sought to address the eternal mischief of abuse of power by those to whom it is entrusted. He observed in The Spirit of the Laws (1948)] that:

> "When the legislative and Executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; there is no liberty if the power of judging is not separated from the legislative and Executive; there would be an end to everything, if the same man or the same body were to exercise those three powers."

42. Although we do not have a specific provision dealing with separation of powers the principle is clearly reflected in the body of *the Constitution*. Article 1(3) of *the Constitution* provides that:

> Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution–
>
> a. Parliament and the legislative assemblies in the county governments;
>
> b. the national executive and the executive structures in the county governments; and
>
> c. the Judiciary and independent tribunals.

43. This Court in Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012; eKLR [2012] observed, in relation to the separation doctrine that:

> "...However, separation of power does not only proscribe organs of Government from interfering with the other's functions. It also entails empowering each organ of Government with countervailing powers which provide checks and balances on actions taken by other organs of Government. Such powers are, however, not a licence to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function."

44. In this case, it is clear 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*. It also infringes upon the independence of the judiciary. The preamble to the *Judicial Service Act* states that it is:

> An Act of Parliament to make provision for judicial services and administration of the Judiciary; to make further provision with respect to the membership and structure of the Judicial Service Commission; the appointment and removal of judges and the discipline of other judicial officers and staff; to provide for the regulation of the Judiciary Fund and the establishment, powers and functions of the National Council on Administration of Justice, and for connected purposes.

45. Notwithstanding whether the Tribunals Bill will be enacted into an Act of Parliament, we return the verdict that it is the Judicial Service Commission that is empowered to appoint the members of the Tribunal.

46. It was the 1st to 4th appellants' view: that although the Act does not outline the process of recruiting members of the Tribunal, the Office of the Cabinet Secretary formulated its own recruitment process internally and appointed members of the Tribunal in line with authority donated by section 11 of the Act; that in making the appointments, the Cabinet Secretary did nothing more than fulfil the statutory obligation of constituting the Tribunal and the fulfilment of a statutory obligation cannot amount to

an illegality so as to warrant interference by the courts; that since the Act and the Regulations do not prescribe public advertisements, public participation or any other requirements in the appointment of members of the Tribunal, the learned Judge erred in faulting the process of the appointments of the members of the Tribunal; and that on the authority of the case of Katiba Institute v The Attorney General & 9 Others [2020] eKLR an appointing authority is permitted to use an internal mechanism for appointment where the appointment section of a statute is silent on the parameters of such appointment.

47. According to the 4th and 5th appellants, that the appointments were made after the review and consideration of numerous resumes and profiles of the applicants' in the Ministry's database.

48. These submissions were countered by the 4th respondent on the grounds: that the *Fair Administrative Action Act* and the *Public Service (Values and Principles) Act* were enacted in order to give effect to Articles 47 and 232 of *the Constitution* which provide for the manner of performance of administrative action and the appointment and promotion of public servants respectively as held in the case of Community Advocacy Awareness Trust and 8 Others v Attorney General Petition No. 243 of 2011; that on the authority of the case of David Kariuki Muigua v Attorney General & Another [2012] eKLR, the arbitrary appointments of the 1st to 4th appellants and the 6th respondent was contrary to Articles 10, 47(1) and 232 of *the Constitution*, sections 3-5 of the *Fair Administrative Action Act* and section 10 of the *Public Service (Values and Principles) Act*; that the significance of conducting public participation when making public appointments was articulated in the case of Confederation of Kenya (COFEK) v Attorney General & 2 Others Nairobi High Court Petition No. 8 of 2011 which emphasised that public appointment should be done through a competitive, merit based and inclusive process; that as held in Trusted Society of Human Rights Alliance case (supra) cited in Andrew Okiya Omtatah Okoiti v Attorney General & 2 Others Petition No. 2 of 2011, shortlisting stage is a very critical stage in the recruitment process and the highest degree of transparency ought to be exhibited.

49. Article 10 of *the Constitution* provides that:

> The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them–
>
> a. applies or interprets this Constitution;
>
> b. enacts, applies or interprets any law; or
>
> c. makes or implements public policy decisions.
>
> 2. The national values and principles of governance include––
>
>   a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
>
>   b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
>
>   c. good governance, integrity, transparency and accountability; and
>
>   d. sustainable development.

50. Article 232 of *the Constitution* on the other hand provides as follows:

1. The values and principles of public service include—

a. high standards of professional ethics;

b. efficient, effective and economic use of resources;

c. responsive, prompt, effective, impartial and equitable provision of services;

d. involvement of the people in the process of policy making;

e. accountability for administrative acts;

f. transparency and provision to the public of timely, accurate information;

g. subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;

h. representation of Kenya's diverse communities; and

i. affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of–

    i. men and women;

    ii. the members of all ethnic groups; and

    iii. persons with disabilities.

2. The values and principles of public service apply to public service in—

    a. all State organs in both levels of government; and

    b. all State corporations.

3. Parliament shall enact legislation to give full effect to this Article.

51. Pursuant to the said Article, Parliament enacted the *Public Service (Values and Principles) Act* which provides in section 10(1) that:

> The public service, a public institution or an authorised officer shall ensure that public officers are appointed and promoted on the basis of fair competition and merit.

52. In the case before us the manner in which the recruitment of the 1st to 4th appellants was done was explained in the affidavit sworn by Amb. Johnson Weru, on 8th September 2020 in which he deposed:

> That in conducting the recruitment the Ministry considered numerous curricula vitae and profiles of numerous people. These curricula vitae and profiles were obtained from the Ministry's database of past applications as well as those supplied by numerous candidates we considered qualifies to serve as members of the Tribunal.

53. In our view the mode of recruitment adopted by the 5th appellant fell short of what is provided in the above constitutional and statutory provisions. By relying on its on data of past applicants or those supplied by candidates considered qualified, the 5th respondents clearly denied those who, for one reason or another, may not have been interested or qualified during the previous recruitment process but have since qualified or developed an interest. The process adopted by the 5th respondent failed to

meet the threshold of fair competition. We agree with the views of Mumbi Ngugi, J (as she then was) as expressed in David Kariuki Muigua v Attorney-General & another [2012] eKLR at paras11-12 that:

> "...it would be expected that the Minister, in making the appointments to the Tribunal, would be guided by the national values and principles set out in Article 10 of *the Constitution*, participation of the people, equity, good governance, integrity, transparency and accountability. Section 7(1) of Schedule 6 provides that 'All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution. There is no evidence that there was a competitive process that would enable public participation in the process and show the transparency and accountability required under *the Constitution*, thereby giving legitimacy to the appointment of the petitioner. Like his successor, the petitioner was appointed on the basis of a Gazette Notice; the basis of the appointment, the criteria followed in appointing him and the other members of the Tribunal was, from all appearances and regrettably so, more in keeping with the pre-new Constitution days when public officers were appointed at the whim of the Minister or President."

54. Further submissions were to the effect: that the learned Judge erred by failing to consider the argument that the composition of the Tribunal should be viewed against the entire composition of Courts and Tribunals hearing land and environment matters, and if so assessed, the court ought to have found that the composition met the two-third gender rule; that the court erred in not appreciating, as was held in the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR, together with section 7 of the Sixth Schedule to *the Constitution* and Article 2(f) of CEDAW that realisation of the rule is meant to be progressive; that on the authority of the case of Marilyn Muthoni Kamuru & 2 Others v Attorney General & Another [2016] eKLR, the court should have fashioned an appropriate relief that would have served to promote good governance giving appropriate directions that the 6th respondent, who did not take up the appointment, be replaced by a member of the female gender; and that since only two female applicants showed interest in the appointments and both were from the same community, in the spirit of Kenya's diverse communities pursuant to Article 232(1)(g) and (h) both could not be appointed.

55. The arguments in opposition were: that by appointing only one female out of five appointees as a member of the Tribunal, the Cabinet Secretary failed to meet the constitutional threshold prescribed in Article 27(8) and 232 of *the Constitution* as read with Article 3 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Article 2 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women (Maputo Protocol); that on the basis of the decision in Marilyn Muthoni Kamuru & 2 others v Attorney General & another [2016] eKLR, the principle set out in Article 27(8) should be realised immediately in appointive positions.

56. Although the appellants contend that the learned Judge erred by failing to consider the argument that the composition of the Tribunal should be viewed against the entire composition of courts and Tribunals hearing land and environment matters, and if so assessed, the court ought to have found that the composition met the two-third gender rule, no evidence was placed before the learned Judge on the basis of which the court could have arrived at such a factual finding. Since it was the appellants who were alleging that the composition of courts and Tribunals hearing land and environment matters met the two-third gender rule it was upon them to adduce that evidence. In addition, this submission flies in the face of the appellants' position that the Tribunal is not a court and therefore not part of the Judiciary.

57. In our view, whereas the principle of progressive realisation may be invoked in elective positions, there is no justification for invoking it in appointive positions. Onguto, J in Marilyn Muthoni Kamuru & 2 others v Attorney General & another (supra) expressed himself on the issue when he agreed:

> “that Article 27(8), especially as far as the appointive positions are concerned, should be realized immediately in contrary to the submissions of Mr. Njoroge. In any event ensuring that not more than two-thirds of the same gender is the bare minimum. It has been over six years since the promulgation of *the Constitution*. It is loathsome that over six years later, the State still claims to realize some of these rights progressively. The moratorium ought to come to an end especially with regard to appointive positions.”

58. We agree with the learned Judge and since it is not contended that there were no qualified persons from the female gender to take up the positions, the issue of progressive realisation does not arise in the circumstances of this case. To our mind, it is no excuse to fill up positions with one gender on the pretext that the female applicants came from the same community.

59. In determining a dispute brought under Article 27(8) of *the Constitution* one must be alive to the Purposive approach as explained by the Supreme Court of Canada in the case of R v Big M Drug Mart Limited [1985] 1 SCR 295 where the Court stated;

> “The proper approach to the definition of rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect...[T]his analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore...be placed in its proper linguistic, philosophic and historical contexts.”

60. Applying the purposive test to the said Article, the Supreme Court in In the Matter of The Principle of Gender Representation in The National Assembly and The Senate Advisory Opinion Application No. 2 of 2012 [2012] eKLR (SCK), opined that:

> “The Court is fully cognizant of the distinct social imperfection which led to the adoption of Articles 27(8) and 81(b) of *the Constitution*, that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices or gender – indifferent laws, policies and regulations.”

61. In interpreting the provisions of *the Constitution*, we agree with the opinion of Mohamed A J in the Namibian case of S. vs Acheson, 1991 (2) S.A. 805 (at p.813) to the effect that:

> “ *The Constitution* of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a ‘mirror reflecting the national soul’; the identification of ideals and...aspirations of a nation; the

articulation of the values bonding its people and disciplining its government. The spirit and the tenor of *the Constitution* must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion."

62. Therefore, in determining a dispute arising from the application of Article 27(8) of *the Constitution* we must adopt an interpretation that gives life to the said Article rather than one that suppresses its growth and development.

63. It was contended that that the effect of the decision by the High Court is that the members of the Tribunals are irregularly in the office a fact whose domino effect would be administrative chaos in all the other Tribunals.

64. The 3rd respondent, LSK Nairobi Branch, on its part, submitted that it was concerned more with ensuring that the constitutional right of access to justice is protected; that should the Court find no merit in the appeal, it should issue appropriate orders to ensure that the judgement does not result in chaos and violation of Articles 48 and 50 of *the Constitution* as appreciated by the Supreme Court in Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR; that in step with the decision in Okiya Omtatah Okoiti & Another v Public Service Commission & 73 Others; Law Society of Kenya & Another (Interested Parties) [2021] eKLR, in the event the Court should suspend the finding of quashing the appointments of the 1st to 4th appellants for a reasonable period of time to allow for proper appointments to be done in an environment free of chaos while ensuring that the rights under Articles 48 and 50 of *the Constitution* are not infringed upon; and that the public interest lies in ensuring continuity of the Tribunal but should the appeal be found to be unmerited, the Court should issue appropriate orders to avoid chaos.

65. We are cognisant of the fact that Article 23 of *the Constitution* empowers a court to grant appropriate relief, including a declaration of rights when confronted with rights violations. An 'appropriate relief', in our view, 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."

66. 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.

67. The Supreme Court gave the remedy a seal of approval in the case of Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others Petition 3 of 2018 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 Court sanctioned 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."

68. It is therefore clear that the Employment and Labour Relations Court had the jurisdiction to ensure that its decision was implemented by way of structural interdict. In the judgement, the learned Judge, inter alia, quashed "Gazette Notice No. 4244 dated 22nd June 2020 issued by the Cabinet Secretary for Industrialisation, Trade and Enterprise Development and any consequential actions arising therefrom." We are troubled by the manner in which the relief was granted. In our view, the relief did not satisfy the criteria of "appropriate relief" as envisaged in Article 23 of *the Constitution*. It is indubitable that by the time of the decision, the 1st to 4th appellants had been in the office and had made decisions affecting members of the public. The qualifications of the 1st to 4th appellants to hold office were not challenged. In these circumstances where quashing "consequential actions" arising from the impugned Gazette Notice had the potential of nullifying the decisions that had already been taken by the 1st to the 4th appellants, we are of the view that the decision, to that extent, had the effect of exposing the public to chaos. Instead of benefiting the public, as intended by the constitutional edict, the decision would instead expose the public to peril and the intended benefits of the decision would thereby be lost or negated.

69. While we therefore dismiss the appeal, we set aside the order quashing the decisions made by the 1st to the 4th appellants and direct the 5thand 6th appellants jointly with the 4th respondent (the Cabinet Secretary for Industrialisation, Trade and Enterprise Development or its successor, the Attorney General and the Judiciary Service Commission, do set in motion the process of transitioning the Business Premises Rent Tribunal, if it has not been transitioned, to the Judiciary. A report of the progress to be filed with the Employment and Labour Relations Court within 3 months which shall give further orders regarding the process and progress of that transition.

70. There will be no order as to the costs of this appeal.

71. Those are the orders of this Court.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2025.

F. TUIYOTT

....

JUDGE OF APPEAL

A. O. MUCHELULE

....

JUDGE OF APPEAL

F. V. ODUNGA

....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR