



**Gikenyi B & 2 others v Attorney General & 4 others; Mwangi & 225 others (Interested Parties) (Petition E202 of 2024) [2025] KEELRC 1575 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1575 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**PETITION E202 OF 2024**

**B ONGAYA, J**

**MAY 29, 2025**

**IN THE MATTER OF THE IRREGULAR, ILLEGAL, AND UNCONSTITUTIONAL PROMOTION AND APPOINTMENT OF SENIOR DEPUTY SOLICITOR GENERAL AND DEPUTY SOLICITOR GENERAL IN THE OFFICE OF THE ATTORNEY GENERAL AND JUSTICE DEPARTMENT**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLES 27, 41, AND 47 OF THE CONSTITUTION**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 10, 156 AND 232 & 236 OF THE CONSTITUTION IN THE MATTER OF ALLEGED BREACH OF THE PROVISIONS OF THE ATTORNEY GENERAL ACT, THE EMPLOYMENT ACT, THE FAIR ADMINISTRATIVE ACTIONS ACT, AND, THE PUBLIC SERVICE COMMISSION ACT**

**IN THE MATTER OF ARTICLES 1, 3, 3(1), 10, 19, 20, 21, 22, 23, 24, 25, 27, 28, 41, 43, 47, 159, 232, 236, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF RULE 4,10, 11, 13 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL FREEDOMS) HIGH COURT PRACTICE AND PROCEDURE RULES, 2013**

**IN THE MATTER OF DOCTRINES OF BILL OF RIGHTS, CONSTITUTIONALISM, RULE OF LAW AND LEGITIMATE EXPECTATIONS**

**BETWEEN**

**MAGARE GIKENYI B ..... 1<sup>ST</sup> PETITIONER**

**DISHON KEROTI MOGIRE ..... 2<sup>ND</sup> PETITIONER**

**PHILEMON ABUGA NYAKUNDI ..... 3<sup>RD</sup> PETITIONER**

**AND**



ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT  
ADVISORY BOARD TO THE OFFICE OF THE ATTORNEY  
GENERAL ..... 2<sup>ND</sup> RESPONDENT  
PUBLIC SERVICE COMMISSION ..... 3<sup>RD</sup> RESPONDENT  
SOLICITOR GENERAL ..... 4<sup>TH</sup> RESPONDENT  
NATIONAL ASSEMBLY ..... 5<sup>TH</sup> RESPONDENT

AND

WACHIRA NJERI MWANGI ..... INTERESTED PARTY  
NDIBA JANE WANJIRU ..... INTERESTED PARTY  
JORAM JANE NJERI ..... INTERESTED PARTY  
GATHAGU TERESIA WANJIKU ..... INTERESTED PARTY  
MURILA LINDA MUSILIVI ..... INTERESTED PARTY  
MUTARU MARY WANJIKU ..... INTERESTED PARTY  
OTIENO EMILY CHWEYA ..... INTERESTED PARTY  
MUGO LUCY WAMBUI ..... INTERESTED PARTY  
NYAKUNDI GEORGE ..... INTERESTED PARTY  
MUTINDA CHARLES MWANZIA ..... INTERESTED PARTY  
MCHARO PAULINE WAMBUI WARUINGE ..... INTERESTED PARTY  
MUIBUNDI JACQUELINE MBITHE ..... INTERESTED PARTY  
NGOCHO MARY MUTHONI WAIRAGU ..... INTERESTED PARTY  
NYALWIDHE DORCAS ANYANGO ..... INTERESTED PARTY  
NGUGI LAWRENCE MUIRURI ..... INTERESTED PARTY  
KANANA HUMPHREY NILLY ..... INTERESTED PARTY  
LANGAT WILLIAM KIBET ..... INTERESTED PARTY  
ODHIAMBO KENNEDY OWOUR ..... INTERESTED PARTY  
REGINA NDERITU WAMBUI ..... INTERESTED PARTY  
MATHIBU GEOGER MWANIKI ..... INTERESTED PARTY  
MARWANGA EVANS NYATIGO ..... INTERESTED PARTY  
KAMAU GABRIEL NJOROGE ..... INTERESTED PARTY  
MOGERE ENOCK ONSONGO ..... INTERESTED PARTY  
MUTSOLI ELIZABETH MUKONGO ..... INTERESTED PARTY  
KORIR NAOMI CHEROP ..... INTERESTED PARTY  
KITEGI MARY AWOUR ..... INTERESTED PARTY  
KANYORO MARTIN MACHARIA ..... INTERESTED PARTY



IRUNGU SHARO GATWIRI ..... INTERESTED PARTY  
 NGUMBI JOSEPH MWALYO ..... INTERESTED PARTY  
 OGOLLA JOANNE ACHIENG ..... INTERESTED PARTY  
 NDEDE TOM ..... INTERESTED PARTY  
 PESA FAITH TABU ..... INTERESTED PARTY  
 NGUMI PETER NOAH ..... INTERESTED PARTY  
 NYAMWEYA LILIAN MORAA ..... INTERESTED PARTY  
 MOEGI KEPHA MOTENDE ..... INTERESTED PARTY  
 ALIONGO SARAH AYOTI ..... INTERESTED PARTY  
 ODIEMA BRENDA AWOUR ..... INTERESTED PARTY  
 CHIRCHIR FAITH CHEPNGETICH ..... INTERESTED PARTY  
 KINUU JOYCE NKIROTE ..... INTERESTED PARTY  
 BAARAO MARGARET WANGU ..... INTERESTED PARTY  
 GICHOHI EAMNUEL KIARIE ..... INTERESTED PARTY  
 NG'ANG'A JENNIFER WANJIRU ..... INTERESTED PARTY  
 MUNENE MARTIN MURIUKI ..... INTERESTED PARTY  
 MUTOKA BRENDA AKWERA ..... INTERESTED PARTY  
 MBEDA EVE LORNA ..... INTERESTED PARTY  
 IRARI FAITH MERCY ..... INTERESTED PARTY  
 MWENDWA ALICE KALUMU ..... INTERESTED PARTY  
 KURIA PETER THANDE ..... INTERESTED PARTY  
 MBUGUA RACHAEL ..... INTERESTED PARTY  
 OMBASA NEVIS OBINO ..... INTERESTED PARTY  
 SIMIYU JOYCE ..... INTERESTED PARTY  
 OMONDI SARAH ANYANGO ..... INTERESTED PARTY  
 MATUNDA JEREMIAH MOTARI ..... INTERESTED PARTY  
 CHILAKA JOYCE LUMITI ..... INTERESTED PARTY  
 MAUNDU SAMSON DAVIES ..... INTERESTED PARTY  
 MUSILA DORCAS KAMENE ..... INTERESTED PARTY  
 KENDUIYWOH JAMES KIPRONO ..... INTERESTED PARTY  
 MASAKA CALLEN BOSIBORI ..... INTERESTED PARTY  
 KAMANDE ANNASTACIA MUGURE ..... INTERESTED PARTY  
 BETT JOYCE CHEPCHUMBA ..... INTERESTED PARTY  
 OYUGI CHRISTINE ATIENO ..... INTERESTED PARTY



OKINDA LEONARD ..... INTERESTED PARTY  
 ABUBAKAR MARIAM ADAM ..... INTERESTED PARTY  
 OTIENO STEPHEN TARRELL ..... INTERESTED PARTY  
 KAUMBA SAMUEL ODIWOUR ..... INTERESTED PARTY  
 RANJI HANNA SARAH ..... INTERESTED PARTY  
 NTHIGA KANINI K ..... INTERESTED PARTY  
 MAINA JOY WANJUGU ..... INTERESTED PARTY  
 NJOROGI ALLAN KAMAU ..... INTERESTED PARTY  
 OJWANG PAUL OCHIENG ..... INTERESTED PARTY  
 CHIMAU JUDITH AUMA ..... INTERESTED PARTY  
 WAMBUA PRISCA ..... INTERESTED PARTY  
 OCHAKO LYDIA MOGITI ..... INTERESTED PARTY  
 MAKORI EDNA KERUBO ..... INTERESTED PARTY  
 GATHOGA MWAIHAKI ..... INTERESTED PARTY  
 WABUYUBE VICTOR OKUTOYI ..... INTERESTED PARTY  
 BETT LEONARD CHERUIYOT ..... INTERESTED PARTY  
 MALUKU SCHOLASTICA KIDI ..... INTERESTED PARTY  
 MWANGI ANNE WANJIKU ..... INTERESTED PARTY  
 KITI MARYSALOME NIMWAKA ..... INTERESTED PARTY  
 NYAUMA STAFFORD OMWOYO ..... INTERESTED PARTY  
 MOHAMMED ADOW DEISS ..... INTERESTED PARTY  
 LEBO EDWARD KIPCHUMBA ..... INTERESTED PARTY  
 MUTHONI HELLEN WANGUI ..... INTERESTED PARTY  
 BUNEI LYNNETE CHEPTOO ..... INTERESTED PARTY  
 ROP JEMUTAI RUTH ..... INTERESTED PARTY  
 CHEPKWONY NANCY CHEPKORIR ..... INTERESTED PARTY  
 AKUNO BEATRICE ADHIAMBO ..... INTERESTED PARTY  
 SAMICH CHELAGAT LILY ..... INTERESTED PARTY  
 MUNGAI RACHAEL WAMBUI ..... INTERESTED PARTY  
 TOYWA ASHLEY SIMIYU ..... INTERESTED PARTY  
 NJUGUNA RODAH NDUTA ..... INTERESTED PARTY  
 OBANDA SSANE LUTTA ..... INTERESTED PARTY  
 SIMIYU OLIVIA NANJALA ..... INTERESTED PARTY  
 CHERUIYOT GILBERT TARUS ..... INTERESTED PARTY



YEGON CAROLYN ..... INTERESTED PARTY  
 WANDERA WINNIE NAMAHYA ..... INTERESTED PARTY  
 OGWOKA LORNA KERUBO ..... INTERESTED PARTY  
 MOHAMMED ODONGO WANZETSE ..... INTERESTED PARTY  
 WAWIRA MARY LINAH ..... INTERESTED PARTY  
 OLANDO MERCY MULWALE AFANDI ..... INTERESTED PARTY  
 OSICHO BEATRICE ACHIENG ..... INTERESTED PARTY  
 KIOKO ERNEST MUTINDA ..... INTERESTED PARTY  
 KURIA PETER ..... INTERESTED PARTY  
 WAITHAKA PAULINE WANJIKU ..... INTERESTED PARTY  
 KAMUNYA CHARLES ..... INTERESTED PARTY  
 KARURI SUSAN WANJIKU ..... INTERESTED PARTY  
 NYAGA CAROLINE KARIMI ..... INTERESTED PARTY  
 OKUMU KEVIN ODHIAMBO ..... INTERESTED PARTY  
 MAYAKA DOUGLAS NYANDIGISI ..... INTERESTED PARTY  
 KARIUKI CLARIES GATWIRI ..... INTERESTED PARTY  
 CHEPKIRUI JANET ..... INTERESTED PARTY  
 SIELEY JOAN CHELAGAT ..... INTERESTED PARTY  
 MWANIKI STEPHEN GITHINJI ..... INTERESTED PARTY  
 JUMA MARION CHEPTEPKENY ..... INTERESTED PARTY  
 MUTAI MESHACK KIPRUTO ..... INTERESTED PARTY  
 MABIL PATRICIA CHEPCHIRCHIR ..... INTERESTED PARTY  
 ODENDO MAUREEN AUMA ..... INTERESTED PARTY  
 MWANGO BRENDA KEMUNTO ..... INTERESTED PARTY  
 WANJUI HIRUM WANJIKU ..... INTERESTED PARTY  
 JEPTO AMELIA CHESIYNA ..... INTERESTED PARTY  
 SHIKOLI MAGARINAH APRINAH ..... INTERESTED PARTY  
 WANJOHI ROSE NYAWIRA ..... INTERESTED PARTY  
 NGELECHEI JOYCE JEROP ..... INTERESTED PARTY  
 CHEPTANUI HIEDY ..... INTERESTED PARTY  
 CHIDAGAYA HAMIDA NIMWENJERO ..... INTERESTED PARTY  
 MUMO DIAN NDUKU ..... INTERESTED PARTY  
 WANJOHI EDWIN MUNENE ..... INTERESTED PARTY  
 ROTICH TERRY CHELAGAT ..... INTERESTED PARTY



KIPROP JUDITH JEPCHIRCHIR ..... INTERESTED PARTY  
 OPIYO EVELINE AWOUR ..... INTERESTED PARTY  
 MBOJE DINAH KISHAGHA ..... INTERESTED PARTY  
 CHEMATOR JUDY KIPROP ..... INTERESTED PARTY  
 MBADU SHELDON BEGISEN ..... INTERESTED PARTY  
 ABDURAZAK FATMA ALI ..... INTERESTED PARTY  
 MAMMET SHEILA JEPKEMOI ..... INTERESTED PARTY  
 MAKUTO MELCHEZEDEK EMMANUEL ..... INTERESTED PARTY  
 CHERUIYOT CHARLES KIPKEMOI KOSKE ..... INTERESTED PARTY  
 KITHAKA BENJAMIN KIMATHI ..... INTERESTED PARTY  
 MWENDA SALOME KAREI ..... INTERESTED PARTY  
 MWATSUMA JAMES TAIB ..... INTERESTED PARTY  
 MUNGA MARTIN MWAROME ..... INTERESTED PARTY  
 ODUKENYA WYCLIFF MASANGIR ..... INTERESTED PARTY  
 LODIAN NELLY CHEYECH ..... INTERESTED PARTY  
 MGHANGA MARY MACHOCHO ..... INTERESTED PARTY  
 MBUNGU ERIC MUNENE ..... INTERESTED PARTY  
 WERE DEBORA OBURA ..... INTERESTED PARTY  
 CHIBOLE PATRICIA APONGA ..... INTERESTED PARTY  
 WAMWAI CAHRLES OWIYE ..... INTERESTED PARTY  
 NAKHANYA PAUL WEKESA ..... INTERESTED PARTY  
 ANYANGOONAM LARICA ANNE MARTINA ..... INTERESTED PARTY  
 NGUYU BARBARA WANGARE ..... INTERESTED PARTY  
 OTUNGU GEOFFREY MOMANYI ..... INTERESTED PARTY  
 WACHIRA MAGDALINE MWIHAKI ..... INTERESTED PARTY  
 MILLICENT WANGARE ..... INTERESTED PARTY  
 GISEMBA PAUL NYAMWEYA ..... INTERESTED PARTY  
 MUTHURA GLADYS WANGUI ..... INTERESTED PARTY  
 NDUNDU ANNE MWIHAKI ..... INTERESTED PARTY  
 NGEIGE MARY MURUGU ..... INTERESTED PARTY  
 PEER RUTH KERUBO ..... INTERESTED PARTY  
 MUNYU VICTORIA WANGECHI ..... INTERESTED PARTY  
 NDUNGU RACHAEL WANJIKU ..... INTERESTED PARTY  
 MUTTUKU CATHERINE SANITTA ..... INTERESTED PARTY



CAROLYNE KANINI ..... INTERESTED PARTY  
MULATYA CHRISTINE NZAMBI ..... INTERESTED PARTY  
MEEME LINAH GAKII ..... INTERESTED PARTY  
MUTISO KENNEDY NGYEM ..... INTERESTED PARTY  
AKWARE EMMAH ..... INTERESTED PARTY  
GITHAKA IAN LETEIPAN ..... INTERESTED PARTY  
MKOK JESSE MICHAEL ..... INTERESTED PARTY  
SOMEREN CATHERINE MUTHONI ..... INTERESTED PARTY  
KAIPOI MIRIAM KAKENYA ..... INTERESTED PARTY  
DAIDO NAGHEA HAGODANA ..... INTERESTED PARTY  
SHIUNDU CLARE NAMAROME ..... INTERESTED PARTY  
OPIYO ESTHER AKINYI ..... INTERESTED PARTY  
SHITUBI LORINE NEREA ..... INTERESTED PARTY  
LUVINZU DARLIVE MALESI ..... INTERESTED PARTY  
MARWA CHRISTOPHER WEISIKO ..... INTERESTED PARTY  
ROBI DEBORAH MWISE ..... INTERESTED PARTY  
SHIRIKA FRONICA ..... INTERESTED PARTY  
NYAKORA ANNETTE KERUBO ..... INTERESTED PARTY  
MAGETO EVA KEMUNTO ..... INTERESTED PARTY  
MWALOZI ELIZABETH MAGOMBE ..... INTERESTED PARTY  
KITSAO JOTHAM MWAIGAMBA ..... INTERESTED PARTY  
KABUCHORU JANET KARIMI ..... INTERESTED PARTY  
CHIRINGA MARIAM MEUCHI ..... INTERESTED PARTY  
KORIR STEPHEN KIBET ..... INTERESTED PARTY  
MBITHI BENJAMIN MUTUKU ..... INTERESTED PARTY  
LELEI BEVELYNE CHELAGAT ..... INTERESTED PARTY  
KOSGEI BEATRICE JEPKOECH ..... INTERESTED PARTY  
MUKUVI FELIX NDONYE ..... INTERESTED PARTY  
SANG DIANA CHEPTOO ..... INTERESTED PARTY  
KIKWAI KENNEDY KIPNGENOH ..... INTERESTED PARTY  
OREGE LORNA ATIENO ..... INTERESTED PARTY  
MASINDE ABIGAEI KHAKASA ..... INTERESTED PARTY  
MWASAO BETTY WANJIRU ..... INTERESTED PARTY  
MWANDEJE MARTIN MNG'ONG'O ..... INTERESTED PARTY



WAFULA MAUREEN LYAKA .....	INTERESTED PARTY
NJERU ALAN MUGAMBI .....	INTERESTED PARTY
MBUA ANTONY MUINDE .....	INTERESTED PARTY
EAMMAH GRACIE MUSEO MUTINDI .....	INTERESTED PARTY
NZIOKA DERRICK KIOKO .....	INTERESTED PARTY
KUBAI FREEDOM MWARI .....	INTERESTED PARTY
KOMU ZIPPORAH WANJEERI .....	INTERESTED PARTY
GACHANJA LYDIAHWINFRED GATHONI .....	INTERESTED PARTY
KANYI SILVIA WAMBUI .....	INTERESTED PARTY
MUTHAMI GEORGE NDIRITU .....	INTERESTED PARTY
KANYUGO NAOMI MUTHONI .....	INTERESTED PARTY
GITHU MARY WACUKA .....	INTERESTED PARTY
TOGOI EDNAH .....	INTERESTED PARTY
MACHESO DAN WECHÉ .....	INTERESTED PARTY
OKWACH IRENE ACHIENG .....	INTERESTED PARTY
NJOROGE DANIEL MWANIKI .....	INTERESTED PARTY
OCHIENG SYBIL AWINO .....	INTERESTED PARTY
KURIA BENARD KANYUMU .....	INTERESTED PARTY
MWAKIO MARIAM SHIGADI .....	INTERESTED PARTY
MUTEGI DENNIS MUTHOMI .....	INTERESTED PARTY
NJAGI DENNIS NJIRU .....	INTERESTED PARTY
KIRUGU PATRICIA KARWIRWA .....	INTERESTED PARTY
RUTO IMELDA CHEPKOGEI .....	INTERESTED PARTY
NJAGI BENSON KAMUNGE .....	INTERESTED PARTY
OTIENDE IBRAHIM EMALI .....	INTERESTED PARTY
MULAMA ANNE ALUCKY .....	INTERESTED PARTY
LETTING CLEOPHAS KIPCHIRCHIR .....	INTERESTED PARTY
SEKO BRENDA NANCY .....	INTERESTED PARTY
GODIA EZEKIEL MUDAVADI .....	INTERESTED PARTY

## JUDGMENT

1. The petitioners filed their amended petition dated 12.12.2024 in person and prayed for the following orders:



- a. That a declaration be and is hereby issued that actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents in respect of the impugned promotions of the interested parties were in violation of *inter alia* Articles 10, 27, 41, 47, 232, 234(2) of the [Constitution](#), Sections 36 and 37 of the [PSC Act](#), Regulations 16, 17, 18 and 20 of the [PSC Regulations](#), 2020.
- b. That a declaration be and is hereby issued that all appointments and promotions (other than for common establishment positions) in the Office of the Attorney General must be based on fair competition and merit, gender balance and must represent the face of Kenya through ethnic and regional balance.
- c. That a declaration be and is hereby issued that the exercise of human resource functions including the making of any appointments and promotions to any position in the office of the Attorney General must be based on the human resource management instruments that have been duly considered and approved by the Public Service Commission pursuant to Article 234(2) of the [Constitution](#).
- d. That a declaration be and is hereby issued that the 1<sup>st</sup> and 2<sup>nd</sup> respondents violated Articles 10, 27, 41, 232, 234(2) of the [Constitution](#), Sections 36 and 37 of the [PSC Act](#), regulations 16, 17, 18 and 20 of the [PSC Regulations](#), 2020 by undertaking promotion of State Counsel without considering fair competition and merit, gender balance, ethnic representation and regional balance.
- e. That a declaration be and is hereby issued that the advisory board established under section 20A of the [Office of the Attorney General Act](#) has no legal authority to appoint or promote any persons to the position of Senior Deputy Solicitor General (CSG 3); deputy solicitor General (CSG 4), chief state counsel (CSG-5), deputy chief state counsels (CSG6) and Principal State Counsels (CG7) and any other position.
- f. That a declaration be and is hereby issued that the Honourable Attorney General abdicated her statutory duty by conferring on the advisory board established under section 20A of the [Office of the Attorney General Act](#), the function of appointing and or promoting persons in the office of the Attorney General.
- g. That a declaration be and is hereby issued that the entire process resulting in the promotion of the all interested parties as communicated by the Solicitor General vide a memo dated 26.11.2024 is unconstitutional, irregular, null and void.
- h. That an judicial review order of Certiorari quashing the decision of the advisory board communicated vide the internal memo from the Solicitor General dated on or around 26.11.2024 or any other date which purported to promote various interested parties and other persons arising from the meeting of the advisory board (established under section 20A of the [Office of the Attorney General Act](#)) chaired by the Hon Attorney General on or around 17.11.2024.
- i. That a judicial review order of Prohibition be and is hereby issued prohibiting the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents whether by themselves, agents or anyone acting under their general or specific instructions from implementing or in any other manner giving effect to the decision of the advisory board communicated vide an internal memo from the Solicitor General dated 26.11.2024 which purported to promote the interested parties.
- j. A judicial review order of Certiorari be and is hereby issued quashing all letters of promotions issued to all interested parties consequent upon the decision of the advisory board (established



under section 20A of the [Office of the Attorney General Act](#) chaired by the Hon Attorney General on or around 17.10.2024 or any officer of the office of the Attorney General.

- k. That a judicial review order of Prohibition, prohibiting any recruitment or promotion of any person to any position without a competitive process.
  - l. That a judicial review order of mandamus compelling the respondents to undertake competitive, merit based promotion and/or appointments of any vacancies which may arise in the Office of Attorney General and/or any other office as envisaged in Articles 10,27,41,47,232,234(2) of the [Constitution](#), Sections 36 and 37 of the [PSC Act](#), Regulations 16,17,18 and 20 of the [PSC Regulations](#), 2020 and based on the human resource management instruments that have been duly approved by the Public Service Commission pursuant to Article 234(2) of the [Constitution](#).
  - m. The Public Service Commission be and is hereby directed, in the exercise of its powers under Article 234(2) and 252(1)(a)&(b) of the [Constitution](#), to investigate, monitor and evaluate the organisation, administration and personal practices in the Office of the Attorney General and report back to court its findings within three (3) months from the date of judgment of the court.
  - n. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents be and are hereby directed to conclude the development of the human resource management instruments for the Office of the Attorney General within a month from the date of this judgment and submit the same to the Public Service Commission for an expeditious consideration and approval.
  - o. The Court is pleased issue a judicial review order of mandamus compelling the 3<sup>rd</sup> respondent to assist in training the 1<sup>st</sup> respondent's staff on the process of recruitment and/or promotion of public servants in the office of the Attorney General.
  - p. The Court is pleased to revoke the approval letter dated on and around 18.03.2023 with ref no PSC/EMCS/19/(15).
  - q. Declaration be and is hereby issued that the amendment of the Office of Attorney General Act vide [Statute Law \(Miscellaneous Amendments\) Act 2024 Act No. 3 of 2024](#) which transferred some powers of the 3<sup>rd</sup> respondent (PSC) to Office of Attorney General is unconstitutional, null and void.
  - r. That any other order or modification of petitioner's prayers which the Honourable Court may deem fit so as to achieve object of justice for majority of Kenyans as a whole.
  - s. That this being a public interest petition filed in defence of the [Constitution](#) caused by actions and or omissions of the respondents, cost be borne by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
2. The petition was based upon the 1<sup>st</sup> petitioner's supporting affidavit and exhibits thereto filed together with the petition, sworn on 12.12.2024. The petitioner's case was as follows:
- a. That the positions of Deputy Solicitor General (CSG 3); Deputy Solicitor General (CSG 4), Chief State Counsel(CSG-5), Deputy Chief State Counsels(CSG6) and Principal State Counsels(CG7) have always been filled competitively by the Public Service Commission.
  - b. On 9<sup>th</sup> June, 2023, the Office of the Attorney-General advertised for various positions including that of Deputy Solicitor General (CSG 3); Deputy Solicitor General (CSG 4), Chief State Counsel(CSG-5), Deputy Chief State Counsels(CSG6) and Principal State Counsels(CG7).



- c. Subsequently the Public Service Commission on 27<sup>th</sup> February, 2024 advertised for various positions in the Office of the Attorney-General including vacancies for Deputy Solicitor General (CSG 3); Deputy Solicitor General (CSG 4), Chief State Counsel(CSG-5), Deputy Chief State Counsels(CSG6) and Principal State Counsels(CG7)
  - d. That vide a memo dated 26<sup>th</sup> November 2024, the Solicitor General wrote to all staff of the Office, bringing to their attention the decision of the Advisory Board of the Office of the Attorney-General made during their meeting of 17<sup>th</sup> October, 2024 to approve the promotion of staff including two (2) persons to the grade of Senior Deputy Solicitor General and thirteen (13) persons to the grade of Deputy Solicitor General and Chief State Counsel(CSG-5), Deputy Chief State Counsels(CSG6) and Principal State Counsels(CG7)
  - e. The promotions to the grade of Deputy Solicitor General (CSG 3); Deputy Solicitor General (CSG 4), Chief State Counsel(CSG-5), Deputy Chief State Counsels(CSG6) and Principal State Counsels(CG7) were done without a competitive process, there was no call for applications, no shortlisting, no interview and no evaluation process
  - f. Of the fifteen (15) persons promoted to the impugned Deputy Solicitor General (CSG 3) and Deputy Solicitor General (CSG 4) positions, twelve (12) are women speaking of gender bias.
  - g. Of the fifteen (15) persons promoted to the impugned positions of Deputy Solicitor General (CSG 3) and Deputy Solicitor General (CSG 4) nine (9) are from one ethnic community that is the Kikuyu Community which is contrary to the provisions of the Constitution.
  - h. That the only qualified legislative drafter in the list is fifty nine years old and that upon her retirement, which is imminent, her department will be left without a substantive technical head.
  - i. In the cases involving the housing levy, the Finance Act, the adani deals, the maisha card amongst others, a few private counsel were engaged to perform the work of state counsel, for reasons that the government is not confident as regards the competence of state counsel.
  - j. The petitioners state that it is contrary to fair labour practices to promote officers in the office of the Attorney General without an interview.
  - k. That the list of promotions or appointments does not adhere to ethnic, gender, persons with disability (PWD) and minority balances.
  - l. That the principles for promotion in the public service be adhered to for equity, professionalism and to entrench merit based promotions.
3. The 1<sup>st</sup>, 2<sup>nd</sup> & 4<sup>th</sup> respondents filed the replying affidavit of Silas Gitari Mugambi, the Director Human Resource Department in the Office of the Attorney General and Department of Justice, sworn on 07.03.2025 and filed through the Office of the Attorney General. Learned Chief State Counsel Mr. Oscar Eredi appeared in that behalf. The Court has observed that for the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> respondents, an earlier affidavit sworn by Hon. Shadrack J. Mose, Solicitor General, on 11.12.2024 had been filed to oppose the petitioners' application for conservatory orders. The affidavits as filed substantially address the issues in dispute in a like manner. It was stated and urged as follows:
- a. That under section 13 of the Attorney General Act the Attorney General may in consultation with the advisory board appoint such Deputy Solicitors General as the Attorney General may consider necessary for the proper and efficient discharge of the functions of the office.



- b. That section 20A of the *Act* establishes a board to be known as the Advisory Board to the office of the Attorney General.
- c. That under section 20B of the *Act* the functions of the advisory board shall be to advise the Attorney General on:
  - i. Recruitment and appointment of deputy solicitor general, state counsel and other members of staff of the office.
  - ii. Promotion of state counsel and other members of staff of the office.
  - iii. Discipline of the deputy solicitors general, state counsel and other members of staff of the office.
  - iv. Remuneration of deputy solicitors general, state counsel and other members of staff of the office in consultation with the salaries and remuneration commission, and
  - v. Matters that may be referred to the advisory board by the attorney general.
- d. Section 21(1) of the *Act* empowers the Attorney General in consultation with the advisory board to appoint such number of state counsel as may be necessary for the proper and efficient discharge of the functions of the office.
- e. That pursuant to the *Statute law (Miscellaneous Amendments) Act, 2024*, the office of the Attorney General was effectively delinked from the mainstream public service and the deputy solicitor general and state counsel were removed from the purview of the Public Service Commission.
- f. After delinking, the Attorney General and the advisory board undertook a review of the office and its practices including human resource function and established that many of its officers had stagnated in certain job groups and others had been serving in acting capacity for long periods of time.
- g. The review of the establishment revealed that there were vacancies in the grades of the senior deputy solicitor general as well as deputy solicitor general in comparison to the approved establishment. The review also revealed that several heads of department had been serving in acting capacities of more than the stipulated six months and some had served up to seven years while other senior officers who were eligible for this position had served in the same job group for more than 10 years.
- h. Several petitions were made to the Public Service Commission by officers in the office of the Attorney General seeking promotion and the Commission brought the issue to the Attorney General's attention vide a letter ref no. PSC/220/8/(8) dated 14.06.2023 and advised the office to process the promotion in accordance with the existing framework.
- i. The respondents maintain that the state of affairs was unfair and punitive to the concerned officers and was affecting their morale, reducing efficiency and effectiveness in delivery of the offices constitutional and statutory mandates.
- j. Guided by the staff establishment approved by the Public Service Commission vide a letter dated 31.08.2020 the advisory board held a meeting on 17.10.2024 where it was discussed and resolved that officers in various cadres be promoted as communicated in the internal memo dated 26.11.2024.



- k. Before undertaking the promotions the advisory board adopted a criteria guided by the human resource policies and procedures manual May 2016 and the Public Service Commission Regulations 2020. The criteria adopted was as follows;
- i. Existing vacancies.
  - ii. Merit.
  - iii. Date and the nature of current appointment.
  - iv. Date of first appointment.
  - v. Date of birth.
  - vi. Directives of the then Cabinet Secretary, Ministry of Public Service, Youth and Gender Affairs, vide circular ref no. MPSYG/DPSM/HRM/4/1/1 Vol III dated 17.07.2017.
- l. The decision of the advisory board has since been implemented and the letters issued to the promoted officers who are discharging their functions.
- m. It was imperative for the office to undertake succession management as compared to competitive promotions with a view to addressing the issue of succession management and stagnation in the office of the Attorney General.
- n. The Public Service Commission has also been conducting succession management for other cadres including clerical officers and human resource management and development officers who were not subjected to interviews and therefore the allegation made by the Commission that succession management ended is untrue.
- o. That the Office of the Attorney General applied the best practices based on the Commission's own policies and circulars with justifiable reasons.
- p. During the succession management, officers are often promoted one or two job groups ahead as is evidenced in the Commission letters Ref Non PSC/EMS/19/(15) dated 18.03.2021, MPSG/CS/2/3/2/VOL III(36) dated 19.08.2022 communicated vide letter Ref No PSC/EMCS/21/VOL I(13) and PSC/EMCS/21/VOLI/914) dated 31.05.2022 letter Ref No. MPSP&DM/2/3/2/VOL III dated 29.01.2024 communicated vide letter Ref No PSC/EMCS/6/(11) dated 06.12.2023.
- q. A further justification for the criteria used is that the office has historically been facing shortage of legal officers due to natural attrition which has affected provision of legal services both at the Office of the Attorney General and in the MDAs.
- r. The Ministry for Public Service, state Department for Public Service vide letter MPYG.CS/2/2 dated 01.11.2018 instructed all Ministries and State Departments to fast tract completion of succession management through undertaking a comprehensive data analysis of the technical cadres highlighting areas that may require waivers of the requirement of the schemes of service for purposes of promotion.
- s. In response the office of the Attorney General Submitted data analysis and indents to both the Public Service Commission and the state department for Public Service vide letter ref no AG/CONF/4/44/VOL XV/225 dated 09.11.2018.
- t. The Office of the Attorney General had previously sought for approval to fill the vacant posts as per letter Ref No AG/CONF/4/44 VOL. VI dated 06.08.2020 without success.



- u. The Office of the Attorney General vide letters ref no AG/CONF/4/44/VOL XVII (30) dated 02.04.2019 and AG/CONF/4/44/ VOL VI (242) dated 10.07.2019 requested for approval to fill the vacancies.
- v. The request was approved vide letter ref no PSC/23(19) dated 30.10.2019 and advertised on MyGov publication on 22.10.2019 and on the Commission’s website.
- w. The Commission scheduled the interviews for the advertised vacancies and requested the office of the Attorney General to nominate technical persons to assist in interviewing the candidates. Unfortunately the recruitment process was cancelled vide letter Ref No PSC/23 Vol I/(22) dated 27.08.2020.
- x. The Office of the Attorney General did not defy the Commission’s advice made vide letter dated 20.02.2024. That the director Human Resource was in the process of consolidating the indent for submission to the Commission, but, the *Statute Law (Miscellaneous Amendments) Act* No 3 of 2024 was enacted stalling the process awaiting further advice.
- y. Following the amendment to the Act, the office sought advice from the Principal Secretary, State Department for Public Service vide a letter ref no AG/HRM/01/02(83) dated 23.09.2024 on recruitment and appointment of Deputy Solicitors General, State Counsel and other members of staff of the Office.
- z. In a response made vide a letter ref no. MPSG&DM.2 dated 01.10.2024 the Principal Secretary State Department for Public Service advised that following the delinking of the Office of the Attorney General from the mainstream civil service, the advisory board shall advise the Attorney General on recruitment and appointment of deputy solicitors general, state counsel and other members of staff of the office.
- aa. Mr. Paul Fwamba Secretary/CEO representing the Chairman of the Public Service Commission on the advisory board attended the meeting of the advisory board dated 17.10.2014, proposed and endorsed the agenda of the day and was part and parcel of the decision to undertake the promotions.
- ab. The Commission by its letter dated 31.08.2020 reference number PSC/EMCS/19/(13) addressed to the office, approved the review of the organizational structure and staff establishment for the State Law Office and Department of Justice.
- ac. The promotions were undertaken in line with the approved organizational structure and staff establishment.
- ad. The office stated that contrary to the Commission’s allegation that use of age was discriminatory as per Article 27(4) of the *Constitution*, the Human Resource Policies and Procedures Manual section B.29(iii) states as follows:
 

“If any public officers who entered the same grade on the same day did so by appointment and not by promotion, then seniority relative to each other shall be determined by reference to their respective ages”
- ae. On the issue of ethnicity and gender compliance in the senior management positions the office stated that Article 232 of the *Constitution* recognizes both fair competition and merit as the basis for appointments and promotions.



- af. That the imbalance in ethnicity and gender is a historical issue which has been occasioned and exacerbated by the then appointing authority which is the Public Service Commission during the initial appointments of state counsel, a situation that the office has inherited upon delinking and the same can only be cured going forward in the subsequent recruitment as per article 232 of the [Constitution](#).
  - ag. That with regard to gender in the post of senior deputy solicitor general there were only two female officers who were qualified and were promoted to fill the two vacant posts available.
  - ah. The appointment of Brig. Alice Muringo Mate is *sub judice* Nairobi ELRC Petition No. E084 of 2024 [African Institute for Peace and Human Rights and Charles Maina Kariuki v Hon. Attorney General and Brigadier Alice Mate Muringo](#).
  - ai. The Honourable Court has no jurisdiction to determine the question regarding the enactment and legality of statutes, therefore it cannot determine the legality of the amendments to the [Office of the Attorney General Act](#) through the [Statute Law \(Miscellaneous Amendments\) Act](#) no 3 of 2024.
  - aj. The amended petition is fatally defective for relying on illegally obtained and very confidential public documents contrary to Article 31, 35 and 50(4) of the [Constitution](#), section 6 and 8 of the [Access to Information Act](#) and the [Data Production Act](#) as well as the [Evidence Act](#).
  - ak. The promotions were well founded, justified and followed clearly defined criteria.
4. The 5<sup>th</sup> respondent filed the Replying Affidavit of Samuel Njoroge CBS, the Clerk of the National Assembly of Kenya, sworn on 15.04.2025 through Michelle Omuom, Advocate. It was stated and argued as follows:
- a. The [Statute Law \(Miscellaneous Amendments\) \(No 2\) Bill](#), National Assembly Bill No. 68 of 2023 was published on 30.10.2023.
  - b. The Bill was read for a first time in the National Assembly on 15.11.2023 and pursuant to Standing Order 127(1) was committed to the relevant departmental committees of the National Assembly for consideration.
  - c. In compliance with Article 118(b) of the [Constitution](#) and Standing Order No 127 (3) the clerk of the National Assembly placed an advert in the print media on Wednesday 22.11.2023 inviting members of the public to submit written memoranda on the Bill.
  - d. In addition to the invitation to the members of the public to submit written statements on the bill, the committee extended invitations to various stakeholders to submit views and attend a public participation forum scheduled for 05.12.2023.
5. The 3<sup>rd</sup> respondent filed the replying affidavit of John Kimani Njorjo the Director Human Resource Management and Development (Board Secretariat) at the Public Service Commission, sworn on 10.02.2025 and drawn by the Public Service Commission. It was stated and urged thus:
- a. In exercise of its constitutional, statutory and regulatory mandate over the public service, the Commission has issued Human Resource Policies and Procedures Manual for the Public Service, 2016 to better guide the public service, including the Office of the Attorney General on the exercise of human resource functions.



- b. On 30.03.2023 the Office wrote to the Commission indicating that they intended to undertake recruitments within its establishment and that they had constituted a team to undertake the assignment and also requested for waivers.
- c. In response to the Office's letter of 30.03.2023, the Commission vide a letter dated 20.04.2023 informed the Office that it had waived the requirement of three years' service in the immediate lower grades in favour of cumulative years as well as the requirement for master's degree so that it be treated as an added advantage. The Commission also advised the Office to review and submit the relevant indents for advertisement.
- d. In what the Commission terms defiance, the Office proceeded to advertise for the positions on 09.06.2023.
- e. By a letter dated 14.06.2023 the Commission advised the office a second time to submit the relevant indents for competitive filing of the vacant posts.
- f. The Commission states that the Office vide a letter dated 07.09.2023 constituted an illegal interview panel to undertake the said recruitment.
- g. Vide a letter dated 21.09.2023 the Commission advised the office to terminate the said illegal recruitment process and directed that the Office submits the relevant indents for competitive filling of the vacant posts.
- h. By a letter dated 24.10.2023 the Office wrote to the Commission attempting to provide an advisory on the mandate of the Office of the Attorney General to undertake recruitment without the approval of the Commission. The Office requested for audience with the Commission in a meeting that was proposed to be held on 26.10.2023.
- i. The Attorney General escalated the matter to the President, as a result of which a meeting was convened at state house wherein the President directed the Attorney General to comply with instructions issued by the Commission.
- j. The Attorney General did not comply with the Commission's letter of 20.02.2024, instead the Office lobbied for the Amendment of the [Office of the Attorney General Act](#) leading to the enactment of the [Statute Law \(Miscellaneous Amendments\) Act](#), No. 3 of 2024.
- k. The Commission argued that the amendments aforesaid were unconstitutional.
- l. The promotions undertaken by the Office were not in line with Article 232 of the [Constitution](#) and Section 10(1) of the [Public Service \(Values and Principles\) Act](#), as follows:
  1. Fair competition and merit were not used as the basis for the said appointments and promotions, contrary to Article 232 of the [Constitution](#) as read with section 10(1) of the [Public Service \(Values and Principles\) Act](#).
  2. There was no advertisement for the promotions.
  3. There was no long listing for the interested applicants.
  4. There was no interview conducted for the candidates.
- m. The Commission states that it learnt that its Secretary/CEO who had just joined the Commission on a fresh appointment on 01.08.2024 was misled to believe that the recruitment process had been undertaken in strict compliance with the law and that what was being discussed and adopted was the report to that effect.



- n. As a result of the impugned promotions the Commission had deemed the participation of its Chairperson in the membership of the advisory board of the office of the Attorney General no longer tenable.
- o. In response to the Commission’s letter, the Office vide a letter dated 15.01.2025 requested the Commission to reconsider its position and advise on how it will undertake its oversight role.
- p. Vide a letter dated 06.02.2025 addressed to the office, the Commission reiterated its position as communicated in its letter 17.12.2024 and recommended to the office that the necessary legislative amendments be initiated to remove the Chairperson of the Commission in the advisory board of the office.
- q. The Commission contends that Mate Alice Murigo was unlawfully listed as having been appointed as state counsel to the rank of Senior Deputy Solicitor General in the Gazette Notice No. 3228 dated 11.03.2024 and published on 19.03.2024 in Vol CXXVI No 33.
- r. It was unlawful for her to be gazetted as having been appointed as state counsel in the Office of the Attorney General for reasons that:
  - i. no competitive recruitment exercise was conducted in respect of her purported appointment;
  - ii. there was no vacancy in the approved establishment in the Office of the Attorney General for the grade of Senior Deputy Solicitor General as the authorized establishment of one for that grade was already occupied at the time.
- s. The Commission maintains that it has a constitutional, statutory and regulatory obligation under inter articles 10, 232, 234(2), 249(1) and 252 of the Constitution, the Public Service Commission Act, the Public Service Commission Regulations, 2020 to not only protect the public interest and that state counsel in the Office of the Attorney General, but, also to ensure that the values and principles of the public service and the national values and principles of governance, the rule of law and constitutionalism are upheld in the public service which includes the office of the attorney general.
- t. It is the commission’s position that:
  - a. the petitioner has made out a case against the Office of the Attorney General;
  - b. the promotion of state counsel was done in violation of the Constitution, the Public Service Commission Act, the Public Service Commission Regulations, 2020, the Office of the Attorney General Act and the Human Resource Policies and Procedures Manual for the Public Service 2016.
  - c. the promotions for the top senior management positions did not meet the ethnic and gender compliance requirements contrary to Article 232 of the Constitution as read together with the Public Service (Values and Principles) Act;
  - d. compliance with the constitutional, statutory and regulatory requirements on appointments and promotions in the public service are not a matter of choice but mandatory obligations that must be observed and promoted in the public service by all public entities and state organs including the office of the Attorney General.
  - e. All public officers must be given an equal opportunity to compete for the available vacant promotional positions within their respective authorized establishments



otherwise public entities will develop and perpetuate a culture of impunity where appointments and promotions are not based on fair competition and merit but on preference and favouritism among other considerations.

- f. If the impugned promotions are not cancelled and quashed the provisions of articles 10 and 232 of the Constitution will be rendered superfluous and otiose.
6. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
7. The 1<sup>st</sup> issue for determination is whether the Court has jurisdiction to determine the petition. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents raise a “tired preliminary point” that the Court has no jurisdiction to determine the question regarding the enactment and legality of statutes, therefore it cannot determine the legality of the amendments to the Office of the Attorney General Act through the Statute Law (Miscellaneous Amendments) Act No. 3 of 2024. The Court has perused the final submissions filed for 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> respondents and that preliminary point appears to have been abandoned, and, correctly so. For avoidance of doubt and for completeness of record on issues as raised, the Court reiterates that it has jurisdiction to interpret the Constitution and constitutionality of statutes as relates to the subject matter of employment and labour relations. The Court has cited relevant authorities and recently stated in Kinyili & another v Government of Makueni County; Ethics and Anti - Corruption Commission (Interested Party) (Constitutional Petition E003 of 2025) [2025] KEELRC 750 (KLR) (13 March 2025) (Judgment) Neutral citation: [2025] KEELRC 750 (KLR) thus,

“22. The Court has stated more than enough to show that the parties are in employment relationship and, the Court has jurisdiction to enforce rights and freedoms in the Bill of Rights and to interpret the Constitution for disputes whose subject matter falls within its subject matter jurisdiction, namely, formulation, interpretation and implementation of contract of employment and work relationships irrespective the situ or formal instrument involved be it oral arrangements, constitutional provisions, statutory provisions, collective bargaining agreements, individual contracts of service, policies, and lawful usages or practices that may be in issue. It appears to the Court to be the essence of Article 165 (5) (b) on the negative jurisdiction of the High Court.”

And again further

“

“17. While finding that the Court has jurisdiction, the Court has considered and been guided by the judgment of the Supreme Court in Kenya Tea Growers Association and 2 others v The National Social Security Fund Board of Trustees and 7 others Petition E004 of 2023 as consolidated with Petition No. E002 of 2023 (Koome CJ & P; Mwilu DCJ & V-P; Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ) delivered on 21.02.2023. At paragraph 75 of the Judgment, the Supreme Court with reference to section 12(2) of the Employment and Labour Relations Court Act concluded thus,

“From the above provisions of the Constitution and the Act, it is clear that the jurisdiction of the ELRC is limited in terms of the types of disputes and the parties.”



Further,

“ [83] Can it be said that the parties herein are not among the disputants contemplated under Section 12(2) of the *ELRC Act*? Even where the Act stipulates that a complaint, application or suit may be lodged against the Cabinet Secretary for Labour or any office established by law for that purpose? Or that the nature of the dispute is not one that falls within the jurisdiction of the ELRC, even where, as in this case, both employers and employees, trade unions, and workers associations are decrying what they consider to be the adverse effect of a new law on their working conditions? We are in agreement with the Court of Appeal to the effect that this dispute did not arise strictly from an employer-employee relationship. But what about the other aspects of the dispute? What meaning is to be ascribed to the phrase “labour relations”?

Further,

“ [79] In our view, there is nothing in the *Constitution*, the *ELRC Act*, or indeed in our decision in the *Karisa Chengo Case* to suggest that in exercising its jurisdiction over disputes emanating from employment and labour relations, the ELRC Court is precluded from determining the constitutional validity of a statute. This is especially so if the statute in question lies at the centre of the dispute. What it cannot do, is to sit as if it were the High Court under Article 165 of the *Constitution*, and declare a statute unconstitutional in circumstances where the dispute in question has nothing or little to do with employment and labour relations within the context of the *ELRC Act*. But, if at the commencement or during the determination of a dispute falling within its jurisdiction, as reserved to it by Article 162 (2) (a) of the *Constitution*, a question arises regarding the constitutional validity of a statute or a provision thereof, there can be no reason to prevent the ELRC from disposing of that particular issue. Otherwise, how else would it comprehensively and with finality determine such a dispute? Stripping the Court of such authority would leave it jurisdictionally hum-strung; a consequence that could hardly have been envisaged by the framers of the *Constitution*, even as they precluded the High Court from exercising jurisdiction over matters employment and labour pursuant to Article 165 (5) (b). We are therefore in agreement with the appellants’ submissions regarding this issue as encapsulated in paragraph 69 of this Judgment.”

Accordingly, the Court has jurisdiction to hear and determine the dispute about the exercise of human resource functions with respect to employees of the Office of the Attorney General and as per impugned decisions in the instant petition including whether the statutory provisions under which the impugned appointments or promotions have been made is unconstitutional.

8. The 2<sup>nd</sup> issue for determination is whether the amendment of the *Office of Attorney General Act* vide *Statute Law (Miscellaneous Amendments) Act* 2024 Act No. 3 of 2024 which transferred some powers



of the 3<sup>rd</sup> respondent (PSC) to Office of Attorney General is unconstitutional, null and void. It is submitted by the petitioners as follows:

- a. The amendment was without public participation as provided in Articles 10, 113, and 201 of the Constitution.
- b. Statute Law Miscellaneous (Amendments) Act is meant to make minor amendments to the statute law. The impugned amendment was substantive not capable of being done through Statute Law Miscellaneous (Amendments) Act.
- c. That delegation of the powers and functions vested in the Public Service Commission did not envisage transfer or delegation of power through Statute Law (Miscellaneous Amendments) Act, 2024 and which was done without public participation.
- d. The impugned amendment introduced sections 20A, 20B, 20C, 20D, 28A, and 33a through Statute Law (Miscellaneous Amendments) Act, 2024 which was an omnibus Act, instead of a single amending Act for clarity purposes and there was no public participation in the said process.
- e. That the 1<sup>st</sup> respondent and Parliament forced the Public Service Commission to delegate its functions through the rushed impugned amendments and in the process went contrary to Article 234(5) of the Constitution thus,

“ 234(5). The Commission may delegate in writing, with or without conditions, any of its functions and powers under this Article to any one or more of its members, or to any officer, body or authority in the public service.”

It was urged that the impugned amendment went against Article 234(5) as read with Articles 248, 249 and 250 of the Constitution on independent commissions and offices. Article 248 lists the independent offices and commissions and they include the Public Service Commission but not the Attorney General. Article 249 provides for objects, authority and funding of the independent offices and commissions thus:

249.

- (1) The objects of the commissions and the independent offices are to—
  - (a) protect the sovereignty of the people;
  - (b) secure the observance by all State organs of democratic values and principles; and,
  - (c) promote constitutionalism.
- (2) The commissions and the holders of independent offices—
  - (a) are subject only to this Constitution and the law; and,
  - (b) are independent and not subject to direction or control by any person or authority.
- (3) Parliament shall allocate adequate funds to enable each commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote.”



Article 250 provides for safeguards and qualifications with respect to composition, appointment and terms of office of independent officers, chairperson, vice - chairperson and members of independent commissions.

- f. A look at the purpose and effect of the impugned amendments show investable conclusion of unconstitutionality in view of the holding by Magare J in *Umoja Rubber Products Limited v Kenya Power & Lighting Company Limited* (Civil Appeal 175 of 2019) [2023] KEHC 19751 (KLR) (5 July 2023) (Judgment) Neutral citation: [2023] KEHC 19751 (KLR) thus

“ 47. In the case of *Katiba Institute & 3 others v Attorney General & 2 others* [2018] eKLR, justice EC Mwita, stated as doth: -

“ 48. It was stated in *Ndyanabo v Attorney General of Tanzania* [2001] EA 495, that it is the duty of the person alleging constitutional invalidity of a statute or statutory provision to prove that invalidity.

49. Fifth, the Court must also consider the cause - effect in interpreting the *Constitution*. The purpose of enacting a statute and the effect of implementing the statute will also determine the constitutionality of a statute. In the case of *R v Big M Drug Mart Ltd* [1985]1 SCR 295, the Supreme Court of Canada observed;

“Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation’s object and thus the validity.” (See *Olum and another v Attorney General* [2002] 2 EA 508).”

- g. Further, in *Ng Ka Ling And Another v The Director Of Immigration* [1999] 1 HKLRD 315; (1999) 2 HKCFAR 4 the Court of Final Appeal of Hong Kong Special Administrative Region



held that it was generally accepted that in the interpretation of a constitution such as the Basic Law a purposive approach is to be applied. Further, the adoption of a purposive approach is necessary because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the *Constitution* and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument.

- h. The petitioners therefore submit that the impugned amendment was unconstitutional because there was no or adequate public participation when the serious amendment was introduced by way of a miscellaneous statute bill and the amendment was unconstitutional as undermining the 3<sup>rd</sup> respondent's constitutional functions and powers especially as an independent constitutional Commission and as submitted.
9. The 5<sup>th</sup> respondent, the National Assembly has made elaborate submissions on the constitutionality of the impugned amendment to to the *Office of Attorney General Act* via the *Statute Law (Miscellaneous Amendment) Act*, 2024. It was submitted for the 5<sup>th</sup> respondent acknowledging that Article 10 of the *Constitution of Kenya* 2010 provides public participation as a national value and principle. Further, Article 118 of the *Constitution* on public access and participation provides for public participation to be carried out by Parliament thus:

“ 118.

- (1) Parliament shall—
- (a) conduct its business in an open manner, and its sittings and those of its committees shall be in public; and,
- (b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees.
- (2) Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.”

10. The 5<sup>th</sup> respondent further submitted that Standing Order 127 of the National Assembly on committal of Bills to Committees and public participation provides as follows:

“ 127.

- (1) A Bill having been read a First Time shall stand committed to the relevant Departmental Committee without question put.
- (1A) Save for a Finance Bill, the Speaker may refer various provisions of a Bill proposing to amend more than one statute in its principal provisions to the relevant Departmental Committees in accordance with their mandates.



- (2) Notwithstanding paragraph (1), the Assembly may resolve to commit a Bill to a select committee established for that purpose.
- (3) The Departmental Committee to which a Bill is committed shall facilitate public participation on the Bill through an appropriate mechanism, including—
  - (a) inviting submission of memoranda;
  - (b) holding public hearings;
  - (c) consulting relevant stakeholders in a sector; and,
  - (d) consulting experts on technical subjects.
- (3A) The Departmental Committee shall take into account the views and recommendations of the public under paragraph (3) in its report to the House.
- (4) Subject to Standing Order 129 (Second Reading of a Bill to amend the *Constitution*) the Chairperson of the Departmental Committee to which a Bill is committed or a Member designated for that purpose by the Committee shall present the Committee's report to the House to inform debate within thirty calendar days of such committal and upon such presentation, or if the Committee's report is not presented when it becomes due, the Bill shall be ordered to be read a Second Time on such day as the House Business Committee shall, in consultation with the Member or the Committee in charge of the Bill, appoint.
- (4A) The Speaker may extend the period for public participation under paragraph (4) where various provisions of a Bill proposing to amend more than one statute in its principal provisions are referred to separate Departmental Committees under paragraph (1A).
- (4B) Paragraph (4) shall not apply to or in respect of—
  - (a) an Appropriation Bill, a Supplementary Appropriation Bill, a Finance Bill, a Consolidated Fund Bill, a County Allocation of Revenue Bill, a Division of Revenue Bill, an Equalization Fund Appropriation Bill and a County Governments Additional Allocations Bill; or,
  - (b) a Bill to amend the *Constitution* in respect of its Second and Third Reading.
- (5) If for any reason, at the commencement of the Second Reading the report of the Committee has not been presented, the Committee concerned shall report progress to the House and the failure to present the report shall be noted by the Liaison Committee for necessary action.



- (6) Despite paragraph (1)—
- (a) the Speaker may direct that a particular Bill be committed to such committee as the Speaker may determine.
  - (b) a Consolidated Fund Bill, an Appropriation Bill or a Supplementary Appropriation Bill shall be committed to the Budget and Appropriations Committee.”

11. It was further submitted for the 5<sup>th</sup> respondent that to determine whether the threshold for public participation was met in the passing of the impugned amendment there must be an objective examination of its alignment with guidelines for public participation as was held and established by the Supreme Court in *British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health and 2 Others* Petition No. 5 of 2017 (Coram: Maraga CJ& P; Mwilu DCJ& V.P, Ojwang, Wanjala & Njoki, SCJJ). The Court held as follows:

“(96) From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court’s mandate under Section 3 of the *Supreme Court Act*, we would like to delimit the following framework for public participation:

Guiding Principles for public participation

- i. As a constitutional principle under Article 10(2) of the *Constitution*, public participation applies to all aspects of governance.
- ii. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- iii. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
- iv. Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- v. Public participation is not an abstract notion; it must be purposive and meaningful.



- vi. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
- vii. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
- viii. Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
- ix. Components of meaningful public participation include the following:
  - a. clarity of the subject matter for the public to understand;
  - b. structures and processes (medium of engagement) of participation that are clear and simple;
  - c. opportunity for balanced influence from the public in general;
  - d. commitment to the process;
  - e. inclusive and effective representation;
  - f. integrity and transparency of the process;
  - g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.

12. The 5<sup>th</sup> respondent has further submitted as follows:

- a. Article 93 establishes Parliament to consist of the National Assembly and the Senate.
- b. Article 94 vests in Parliament the legislative authority at national level.
- c. Article 95 provides that Parliament shall conduct its business in an open manner and its sittings and those of its committees shall be open to the public; and, facilitate public participation and involvement in the legislative and other business of Parliament and its committees.
- d. Under Article 109 the Parliament shall exercise its legislative power through Bills passed by Parliament and assented by President, and, any Bill may originate in the National Assembly.
- e. Article 124 empowers the National Assembly to make Standing Orders. Standing Orders 127, 132 and 133 allow the consideration and passage of amendments to Bills by the National Assembly arising from public participation.
- f. [Statute Law \(Miscellaneous Amendments\) \(No.\) Bill](#) (National Assembly Bill No. 68 of 2024) was published on 30.10.2023. It proposed amendments to 17 statutes including the [Office of Attorney General Act, 2012](#) (No.49 of 2012).



- g. The Bill was read for the first time in the National Assembly on 15.11.2023 and per Standing Order 127 was committed to the Departmental Committee on Justice and Legal Affairs of the National Assembly for consideration.
- h. The Act sought to amend sections 13, 21, and 22 of the *Office of the Attorney – General Act*. Per Article 118(b) of the *Constitution* and Standing Order 127(3) the Clerk of the National Assembly published in the print media an advertisement on 22.11.2023 inviting members of the public to submit written memoranda on the Bill by 01.12.2023. further, by letter dated 30.11.2023 the Committee invited various stakeholders to make written presentations and to attend public participation forum on 05.12.2023. The Court observes that the Public Service Commission was not amongst those invited by the letter of 30.11.2023 to attend on. With respect to the impugned amendment, the Court observes that the letter stated thus:

“6. The *Office of Attorney General Act*, 2021 (No.49 of 2012)

The Bill proposes to amend the Office of Attorney-General Act, 2012 to remove inconsistencies in operational framework of the Office of the Attorney – General as an independent Office.”

However, a letter dated 01.12.2023 was addressed to the secretary of the Public Service Commission inviting in the Commission to submit memorandum and to attend on 05.12.2023.

- i. It is submitted that the Committee as of close of date for submissions had received 6 memorandum on the impugned amendments to the *Act*.
- j. The Committee in its report extensively considered the recommendations of the members of the public and stakeholders and drew its recommendations. The Court has reviewed the Committee’s report and it states, with respect to the impugned amendments:

“Committee Observation

43. The Committee agreed with the view of the Attorney General and the LSK on the exclusive power of the House to legislate, including on the manner in which the staff of the Office of the Attorney General may be recruited and the need to raise the status and profile of the State Law Office. The Committee also noted particular merit in the submission by the Public Service Commission that the power to recruit, appoint, promote and discipline public officers within the Office of the AG should not be left entirely to the Attorney General.

44. Consequently, the Committee was of the view that any powers given to the Attorney-General with regard to recruitment, appointment, promotion and discipline of staff would have to be subjected to an appropriate Advisory Board to ensure adherence to established human resource principles and standards required within the public service.”

- k. The Court notes that Committee’s Report states that the Public Service Commission opposed the amendments upon concerns to the following effect:
  - i. The amendments did not spell out the extent the involvement of the Commission in recruitment, appointment or promotion of staff in the office of the Attorney



General had presented inconsistencies in the operational framework of the office of the Attorney General as was indicated in the Memorandum of Objects and Reasons for the Bill.

- ii. For the long time the Office of Attorney General had existed no complaint had been received by the Commission about the alleged inconsistencies in the operation of the Office of Attorney General on account of the Commission's performance of its mandate in that regard.
- iii. Article 156 of the *Constitution* did not establish the Office of the Attorney General as an independent office and the Office is not listed as one of the Chapter 15 of the *Constitution* independent offices and commissions. Thus the Memorandum of Objects and Reasons of the Bill was misleading and should not be used as a basis for amendment of the *Act*.
- iv. The Attorney General is a member of the Cabinet and his staff should be subjected to similar recruitment, appointment, and promotion by the Commission as undertaken for staff of Cabinet Secretaries. Removing them from the Commission's mandate would be unconstitutional. The Attorney General's Office is part of the Executive and cannot operate in isolation or be delinked and removed from the mandate of the Commission and the framework that regulates the public service.
- v. The amendments will weaken the safeguards for appointment of all persons in the public service enshrined in the *Constitution* by the people of Kenya. The amendments take away the Commission's powers in Article 234(2) (a) to appoint persons to hold office in the public service. The amendments may create a domino effect for other ministries and departments to seek legislation for powers to appoint and manage their staff as delinked from the Commission's constitutional mandate.
- vi. The constitutional intention is that state officers like the Attorney General will not recruit, appoint and promote their own staff and clause 13.6 of the *Final Report of the Constitution of Kenya Review Commission* expressly stated that  

“All public service employees should be appointed by the Public Service Commission.”
- vii. The amendments undermined the Commission's function and power in Article 234(2) (g) of the *Constitution* to review and make code of conduct and qualification of officers in the public service.
- viii. The constitutional powers and functions of the Commission cannot be removed or undermined by legislation.

13. The 5<sup>th</sup> respondent therefore submitted that public participation had been undertaken as required in the *Constitution* and the standing orders. Further, the impugned *Statute Law (Miscellaneous Amendment) Act* enjoyed a presumption of constitutionality which the petitioners had not rebutted. That the Court lacks jurisdiction to decide what is appropriate, wise or right legislative provisions as was held in *Nairobi Metropolitan PSV Sacco Union Ltd & 25 others v County of Nairobi Government* (2013) eKLR. Further, in *Poverty Alleviation Network & Others v President of the Republic of South Africa* (2008) ZACC it was held that a court cannot interfere with legislation simply because it may disagree with its purpose or believes that it should be achieved differently. Thus, the Court should exercise judicial restraint on the instant issue.



14. For the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> respondents it was submitted that Article 249(2) of the Constitution articulates the independence of the Public Service Commission but it does not prohibit the delegation or transfer of responsibilities to enhance administrative efficiency through legislation. Further, the Commission cannot claim monopoly over all appointments in public service even in instances where Parliament in its wisdom has vested such powers in other bodies as is the case with the Office of Attorney General Act aimed at effective governance in the Office. It was submitted that the impugned amendments were enacted in accordance with Article 94 of the Constitution.
15. For the 3<sup>rd</sup> respondent it was submitted as follows:
- a. While the exercise of human resource functions especially on recruitment, appointment and promotion of State Counsel and other staff in the Office of Attorney General have been delinked from the Commission, the Commission must retain its oversight constitutional roles under Article 234 of the Constitution including: all the human resource management instruments of the office (including the organisation structure, grading structure, staff establishment, career progression guidelines and the human resource policies and procedures manual) must be approved by the Commission before the same can be used; appeals arising from the exercise of human resource functions in the Office of the Attorney General will lie to the Commission; and, the Office of Attorney General must still report to the Commission on the extent to which it has complied with the values and principles referred to in Articles 10 and 232 of the Constitution. Such is the holding in Manyara Muchui Antony v Communications Authority of Kenya & 3 Others [2022]eKLR , Consumer Federation of Kenya (COFEK) v National Social Security Fund Board of Trustees & 2 others [2022]eKLR , Public Service Commission v Katiba Institute Civil Appeal No. E638 of 2014, and, John Githong'o & Another v State Corporations Advisory Committee and Others HC Petition No. EE303 of 2023.
  - b. It was further submitted that the inclusion of the Commission Chairperson or his or her designate as a member of the Advisory Board undermines the Constitutional mandate of the Commission under Articles 232, 249, and 250 of the Constitution, the Public Service Commission Act Cap 185, the Public Service Commission Regulations 2020, and Human Resource Policies and Procedures Manual for Public Service, 2016.
16. The Court has carefully considered the rival submissions of the parties on the constitutionality of the impugned amendments. Could the impugned amendments be introduced by way of a miscellaneous statutory amendment Bill? The issue was considered by Odunga J in Okiya Omtatah Okiiti v Communications Authority of Kenya & 21 others [2017] KEHC 8854 (KLR). The Court held that it was trite law that the procedure of legislation by way of Statute Law Miscellaneous legislation ought to avail only in cases of minor non-controversial amendments. The Court further stated as follows:

“132. That this [minor non-controversial amendments] is the norm is clearly discernible from the practice adopted in most jurisdictions, though the practice is not consistent. According to the Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 21, October 2007, pp. 5-6:

“An omnibus bill is an avenue for making general housekeeping amendments to legislation. It is designed to make only relatively minor, non-controversial amendments to various acts and to repeal acts that are no longer required. Omnibus bills assist in expediting the government’s legislative program and parliamentary business



by reducing the number of separate amendment bills that deal with relatively minor amendments and repeals. They also help to weed out spent or redundant legislation from the statute book. The Department of the Premier and Cabinet has overseen the preparation of the bill to try to ensure that amendments about which there is some contention or complexity, or that make some substantive change to the law, are not included”.

133. This position is similar to that adopted by the Canadian Legislature in regard to omnibus bills as expounded in Canadian Miscellaneous Statute Law Amendment Program that only minor, non-controversial amendments are allowed to be made to a number of federal statutes at once in one bill. According to the program, to qualify, a Bill must not be controversial, not involve the spending of public funds, not prejudicially affect the rights of persons, or create new offences or subject a new class of persons to an existing offence. However, the practice in the United States of America as stated by Louis Massicotte, Omnibus Bills in Theory and Practice, Canadian Parliamentary Review, Vol. 36 No. 1 2013, p. 14, is varied with some states permitting omnibus bills and other restricting bills to a single issue. This was the position in a 1901 American case of *Commonwealth v Barnett* (199 US. 161) where it is stated that:

“Bills, popularly called omnibus bills, became a crying evil, not only from the confusion and distraction of the legislative mind by the jumbling together of incongruous subjects, but still more by the facility they afforded to corrupt combinations of minorities with different interests to force the passage of bills with provisions which could never succeed if they stood on their separate merits”.

134. While there is no internationally accepted position on the legality of omnibus bills, the reality is that they are used in many jurisdictions and noted by *Louis Massicotte* (supra) that:

“From the point of view of the government, omnibus bills have plenty of advantages....First, they save time and shorten legislative proceedings by avoiding the preparation of dozens of distinct bills necessitating as many second reading debates. Second, omnibus bills generate embarrassment within opposition parties by diluting highly controversial moves within a complex package, some parts of which are quite popular with the public or even with opposition parties themselves. [On why omnibus bill are objectionable] The real question, however, beyond the convenience of the government or of the opposition parties, may well be: is the public interest well served by omnibus bills? Take for example the clause-by-clause study in committee. When a bill deals with topics as varied as fisheries, unemployment insurance and environment, it is unlikely to be examined properly if the whole bill goes to the Standing Committee on Finance. The opposition parties complain legitimately that their critics on many topics covered by an omnibus



bill have already been assigned to other committees. The public has every interest in a legislation being examined by the appropriate bodies.”

135. It is therefore clear that both on policy and good governance, which is one of the values and principles of governance in Article 10 of the Constitution, which values and principles form the foundation of our State and Nation as decreed in Article 4(2) of the Constitution, omnibus amendments in the form of Statute Law Miscellaneous legislations ought to be confined only to minor non-controversial and generally house-keeping amendments.
136. To determine the propriety of the procedure adopted in this instance one needs to examine the impact and the import of the amendments....”

17. Odunga J (now Judge of Appeal) in the cited case proceeded to conclude thus:

“142. In my view the amendments introduced to *Kenya Information and Communications Act* through the *Statute Law (Miscellaneous Amendments) Act* had an impact on Article 34(5) of the *Constitution*. In my view an amendment that has an impact on either the letter or the spirit of the *Constitution* however remotely cannot be termed as “minor non-controversial and generally house-keeping amendments.”

18. In the instant case, the impugned amendments introduced by the Statute Law (Miscellaneous Amendments) (No. 2) Bill (National Assembly No.68 of 2023) published on 30.10.2023 were highly controversial and were not for correction of minor errors or typographical errors in the Office of Attorney General Act. In making that finding the Court has considered the opposition that was raised for the Public Service Commission to the Committee the bill was committed to. It appears to the Court that the matter matters subject of the impugned amendments ought to have been committed to the relevant departmental committee responsible for public service and sufficient public participation allowed. The amendment undisputedly aimed at changing a long standing constitutional, statutory, public policy and practice that the staff of the Attorney General are part of Civil Service under the powers and functions of the Public service Commission. It is also not rebuttable that the amendments related to constitutional provisions that have been shown to have been seriously considered by the people during the work of the Constitution of Kenya Review Commission. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents have failed to rebut the evidence that the entire amendment was premised on a misleading preposition in the Memorandum of Objects and Reasons that the Attorney General was an independent office whereas it is not so listed in Chapter 15 of the Constitution and further the constitutional Articles of the Constitution constituting the Office of Attorney General did not declare the office as an independent within the constitutional design.
19. While making the findings, the Court has noted that the Committee appears not to have resolved, by making substantive recommendations and findings in view of the serious constitutional concerns raised by the Public Service Commission. It is also apparent that the Committee appears to have not allowed sufficient time for the public and in particular including the invited stakeholders to make adequate contributions. Thus, the Salaries and Remuneration Commission, a crucial independent Constitutional Commission wrote on 04.12.2023 (per page 117 of the 5<sup>th</sup> respondent’s replying



affidavit) in reference to the Committee's invitation dated 30.11.2023 to attend the stakeholder meeting of 05.12.2023, thus, that the invitation had been received on 04.12.2023 and further,

“Regrettably, due to the short notice and other ongoing Commission's pre-planned activities, SRC will not be in a position to attend the meeting as proposed. The Commission therefore, requests that for purposes of adequate preparation, the meeting be rescheduled to a later date next week.”

Nothing is said by the 5<sup>th</sup> respondent. In such circumstances, the Court returns that the petitioners have established that the purported public participation did not meet the tests set by the Supreme Court in *British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health and 2 Others* Petition No. 5 of 2017.

20. The Court returns that the impugned amendments were as well unconstitutional considered as against their purpose and effect. The Court particularly finds as follows:
- a. The amendments inherently breached the constitutional prescription on independent offices and commissions by suggesting and proceeding on a Memorandum of Reasons and Objects that the Office of the Attorney General was an independent office to be delinked from the constitutional mandate of the Public Service Commission whereas it was not such independent office.
  - b. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents have not rebutted the 3<sup>rd</sup> respondent's position that including the Chairperson or the Chairperson's nominee as a member of the Advisory Committee was inconsistent with the oversight functions and powers of the Public Service Commission under Article 232 of the *Constitution* and the Commission's independence and objects as per Articles 248, 249 and 250 of the *Constitution*.
  - c. In any event, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents appear to have completely disregarded the constitutional powers and functions of the Public Service Commission in the manner they proceeded to appoint or promote an officer in a non-existing post of Senior Deputy Solicitor General and promoted officers without due advertisement and meritorious competitive interviews as prescribed in the *Public Service Commission Act*, 2017, the regulations there under, and the standing public service policies and practices. The Court finds that the impugned promotions proceeded upon no or against current Commission's approved human resource instruments – such as organizational structures and as urged for the 3<sup>rd</sup> respondent.
21. The Court has as well considered the scope of the powers vested in the Advisory Committee in the impugned amendments and the Attorney General. Section 20A sets out members of the Advisory Board to include the Attorney General as the Chairperson and then at section 20B the Board shall advise the Attorney General on substantially matters reserved for the Public Service Commission under Article 232 of the *Constitution*. How then is the Attorney General the Chairperson of the Board and to be advised by the same Board? The impugned amendments do not state how the Attorney General, the Advisory Board, and in their exercise of the powers and functions of the Commission now vested in the Board and the Attorney General, will be chained or bound by the Commission's constitutional mandate. It appears to the Court that the impugned amendments completely undermined the Commission's constitutional mandate as urged and submitted for the petitioners and the 3<sup>rd</sup> respondent. It is that the role of the Advisory Board and the Attorney General appear not to have been delineated at all. The roles of the Advisory Board and Attorney General as vested by the impugned amendments are blurred and free from express regulatory or oversight authority. The blurred impact of the impugned amendments is manifested in the internal memo of



06.11.2024 communicating staff promotions, transfers and deployments by the Solicitor General. The letter stated that the Advisory Board approved the promotions and further

“The Human Resource Management Resource and Development Department will facilitate the immediate dispatch of the individual promotion letters in line with the advisory’s Board’s resolutions. Congratulations to the officers on the well-deserved promotions.

The Court finds as valid the petitioners’ lamentation that the Advisory Board had usurped the Attorney General’s statutory power to effect the impugned promotions in exercise of purported power to appoint in section 21 of the *Office of the Attorney General Act*.

22. The Court has reflected upon the concerns of the Attorney General that the Commission may not have been efficient and adequately responsive to the human resource needs of the staff serving with the Office of the Attorney General. While the Commission’s position (that no such grievances have been made in the past) has not been rebutted, the Court considers that the Commission should in exercise of its constitutional and statutory powers to delegate, and in consultation with the Attorney General and relevant stakeholders by way of public participation, issue appropriate instructions and regulations including specific institutional structure for exercise of Commission’s delegated powers towards more efficient and responsive exercise of human resource functions in the Office of the Attorney General, as necessary. It should be possible to do so by 31.12.2025. The Court also considers that the Commission should forthwith within six months resolve the issues surrounding the promotional plight of the affected officers at the Office of the Attorney General within the prevailing and relevant constitutional, statutory, regulatory and policy provisions.
23. The petitioners prayed for an order to compel the Commission to train the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents on best performance of human resource functions at the Office of the Attorney General. The Court considers that the petitioners have not shown that they demanded and the Commission declined or neglected to act. The compelling order which is in the nature of mandamus is declined.
24. The 3<sup>rd</sup> issue is on remedies. The Court has found that the impugned amendments were unconstitutional and the impugned promotions contrary to the law and constitution as urged for the petitioners. The reliefs as prayed for are substantially allowed and subject to earlier findings in this judgment. It was a public interest litigation and each party to bear own costs of the proceedings.

In conclusion the petition is hereby determined and judgment entered for the petitioners with orders as follows:

1. The declaration be and is hereby issued that actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents in respect of the impugned promotions of the interested parties were in violation of *inter alia* Articles 10, 27, 41, 47, 232, 234(2) of the *Constitution*, Sections 36 and 37 of the *Public Service Commission Act*, 2017 Regulations 16, 17, 18 and 20 of the *Public Service Commission Regulations*, 2020.
2. The declaration be and is hereby issued that all appointments and promotions (other than for common establishment positions) in the Office of the Attorney General must be based on fair competition and merit, gender balance and must represent the face of Kenya through ethnic and regional balance.
3. The declaration be and is hereby issued that the exercise of human resource functions including the making of any appointments and promotions to any position in the Office of the Attorney General must be based on the human resource management instruments that have been duly considered and approved by the Public Service Commission pursuant to Article 234(2) of the *Constitution*.



4. The declaration be and is hereby issued that the 1<sup>st</sup> and 2<sup>nd</sup> respondents violated Articles 10, 27, 41, 232, 234(2) of the Constitution, Sections 36 and 37 of the Public Service Commission Act, regulations 16, 17, 18 and 20 of the Public Service Commission Regulations, 2020 by undertaking promotion of State Counsel without considering fair competition and merit, gender balance, ethnic representation and regional balance.
5. The declaration be and is hereby issued that the advisory board established under section 20A of the Office of the Attorney General Act has no legal authority to appoint or promote any persons to the position of Senior Deputy Solicitor General (CSG 3); Deputy Solicitor General (CSG 4), Chief State Counsel (CSG-5), Deputy Chief State Counsels (CSG6) and Principal State Counsels (CG7) and any other position.
6. That a declaration be and is hereby issued that the Advisory Board established under section 20A of the Office of the Attorney General Act usurped the purported statutory function vested in the Attorney General of appointing and or promoting persons in the office of the Attorney General.
7. The declaration be and is hereby issued that the entire process resulting in the promotion of the all interested parties as communicated by the Solicitor General vide a memo dated 26.11.2024 is unconstitutional, irregular, null and void.
8. The judicial review order of Certiorari is hereby issued quashing the decision of the advisory board communicated vide the internal memo from the Solicitor General dated on or around 26.11.2024 or any other date which purported to promote various interested parties and other persons arising from the meeting of the advisory board (established under section 20A of the Office of the Attorney General Act) chaired by the Hon Attorney General on or around 17.11.2024.
9. The judicial review order of Prohibition be and is hereby issued prohibiting the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents whether by themselves, agents or anyone acting under their general or specific instructions from implementing or in any other manner giving effect to the decision of the advisory board communicated vide an internal memo from the Solicitor General dated 26.11.2024 which purported to promote the interested parties.
10. The judicial review order of Certiorari be and is hereby issued quashing all letters of promotions issued to all interested parties consequent upon the decision of the advisory board (established under section 20A of the Office of the Attorney General Act) chaired by the Hon. Attorney General on or around 17.10.2024 or any officer of the office of the Attorney General.
11. The declaration issued that the respondents shall undertake competitive, merit based promotion or appointments of any vacancies which may arise in the Office of Attorney General as envisaged in Articles 10,27,41,47,232,234(2) of the Constitution, Sections 36 and 37 of the PSC Act, Regulations 16,17,18 and 20 of the PSC Regulations, 2020 and based on the human resource management instruments that have been duly approved by the Public Service Commission pursuant to Article 234(2) of the Constitution.
12. The Public Service Commission be and is hereby directed, in the exercise of its powers and functions under Article 234(2) and 252(1)(a)&(b) of the Constitution, to investigate, monitor and evaluate the organisation, administration and personnel practices in the Office of the Attorney General and report back to court its findings by filing the report in Court by 31.12.2025.



13. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents be and are hereby directed to conclude recommendations on the development of the human resource management instruments for the Office of the Attorney General, if any as necessary, within a month from the date of this judgment and submit the same to the Public Service Commission for an expeditious consideration and approval.
14. The declaration be and is hereby issued that the amendment of the Office of Attorney General Act vide Statute Law (Miscellaneous Amendments) Act 2024 Act No. 3 of 2024 which transferred some powers of the 3<sup>rd</sup> respondent (PSC) to the Office of Attorney General is unconstitutional, null and void.
15. The declaration that the Commission in exercise of its constitutional and statutory powers to delegate, and in consultation with the Attorney General and relevant stakeholders by way of public participation, issue appropriate instructions and regulations including specific institutional structure for exercise of Commission's delegated powers towards more efficient and responsive exercise of human resource functions in the Office of the Attorney General, as necessary, and, may, propose appropriate statutory amendments for more efficient, fair, effective, ethical and responsive delivery of human resource functions in the best interests of the public officers serving at the Office of the Attorney General.
16. The declaration that Commission should forthwith, within three months from the date of this judgment, resolve the issues surrounding the promotional plight of the affected officers at the Office of the Attorney General within the prevailing and relevant constitutional, statutory, regulatory and policy provisions, especially the concerned state counsel being said to have stagnated in their grades for a long period of time.
17. Each party to bear own costs of the proceedings.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 29<sup>TH</sup> MAY, 2025**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

