



Rukaria v Attorney General; Debasso & another (Interested Parties) (Petition 2 of 2023) [2023] KEELRC 2824 (KLR) (10 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2824 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
PETITION 2 OF 2023
B ONGAYA, J
NOVEMBER 10, 2023**

IN THE MATTER OF THE ENFORCEMENT OF ARTICLES 1,2,3,10,19, 20, 21, 22, 23, 24, 162(2)(A), 258(1) AND 259(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF VIOLATION AND INFRINGEMENT OF THE RIGHTS AND FREEDOMS UNDER ARTICLES 27,28,47,232 AND 236 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 6 AND 7 OF THE STATE CORPORATIONS ACT, CAP 446 OF LAWS OF KENYA

AND

IN THE MATTER OF CONTRAVENTION AND INFRINGEMENT OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTIONS ACT (NO. 4 OF 2015)

BETWEEN

CAPTAIN PAUL RUKARIA PETITIONER

AND

ATTORNEY GENERAL RESPONDENT

AND

HUSSEIN TENE DEBASSO INTERESTED PARTY

LAW SOCIETY OF KENYA INTERESTED PARTY



JUDGMENT

1. The petitioner filed the petition dated 17.02.2023 through M/S J.W.Frank Advocates LLP. The petitioner prayed for:
 - a. A declaration to issue from the Honourable Court that in appointing and revoking appointments of the Chairpersons of board of directors of State Corporations, the 1st respondent exercises sovereign power donated by the people of Kenya through the Constitution of Kenya and is thus bound like every other state officer by the national values and principles of governance which include good governance, transparency and accountability.
 - b. A declaration do issue from the Honourable Court that pursuant to article 47 of the Constitution of Kenya, section 4 of the Fair Administrative Action Act (no. 4 of 205) and section 7 of the State Corporations Act(cap 446 of the laws of Kenya), the 1st respondent herein is mandated to give prior and adequate notice accompanied with written reasons before the revocation of any appointment in the public service, including the chairperson of a board of directors.
 - c. A declaration do issue from the Honourable Court that the 1st respondent's action of publishing gazette notice no. 1383, Vol CXXV-No. 30 dated 6th February, 2023 purporting to revoke the petitioner's appointment as chairperson of the board of directors of Kenya National Trading Corporation Limited violated the petitioner's constitutional rights and the law as enshrined under Articles 28,47 and 236 of the Constitution of Kenya, section 4 of the Fair Administrative Action Act and section 7(3) of the State Corporations Act.
 - d. An order of certiorari to issue to bring into this court and quash the purported gazette notice no. 1383 Vol CXXV-No_30 dated 06.02.2023 published by the 1st respondent purporting to revoke the appointment of the petitioner as the chairperson of the board of directors of the Kenya National Trading Corporation Limited in violation of the law.
 - e. The Honourable Court be pleased to grant an order of permanent injunction restraining the respondents, their representatives, employees, servants and/or agents or anybody working under or for them from purporting to appoint any other person to replace the petitioner as the chairperson of the board of directors of the Kenya National Trading Corporation Limited, at least for the remainder of the petitioner's term.
 - f. General damages for violation of the petitioner's constitutional rights.
 - g. Any other or further relief that the Honourable Court may deem fit to grant.
 - h. That the costs of this petition be borne by the respondents.
2. The petition was based upon the petitioner's supporting affidavit and exhibits thereto filed together with the petition and further affidavit sworn on 27.04.2023. The petitioner's case is as follows:
 - a. He was appointed as the chairperson of the board of directors of the Kenya National Trading Corporation Limited, vide gazette notice no. 9291 dated 05.08.2022 for a period of three (3) years with effect from said date.
 - b. That subsequent to being appointed as the chairperson of the board of directors of the Kenya National Trading Corporation Limited, he received his appointment letter from the Head of



Public Service on the 08.08.2022 and signed his acceptance of the terms therein by executing the same letter on the same day.

- c. That in addition to executing the appointment letter, he also executed the accountability pledge where he pledged to at all times uphold personal and corporate integrity, accountability, transparency, honesty, responsiveness and servant leadership, as the core tenets at the heart of an effective anti-corruption strategy.
- d. It is the petitioner's case that he performed his duties with dedication and integrity, putting the interest of the state corporation first, for the public good.
- e. That vide [Gazette Notice No 1383, Vol CXXV-No. 30](#) dated 06.02.2023, the 1st respondent appointed the 1st interested party as chairperson of the board of directors of the Kenya National Trading Corporation Limited and in the same notice revoked the appointment of the petitioner with immediate effect.
- f. That in publishing the said gazette notice, the 1st respondent purported to exercise the pleasure doctrine, as the petitioner was neither informed nor given reasons for the said revocation of appointment.
- g. That it is trite law that post the [Constitution](#) of Kenya 2010, the pleasure doctrine no longer exists, and as such, all state officers are servants of the people and no one is any specific person's servant.
- h. That the revocation of his appointment was in utter infringement of his right as a person as follows:
 - i. He was not served with any notice of intention to revoke his appointment.
 - ii. No reasons whatsoever were issued on why his appointment was revoked.
 - iii. He was not invited to any hearing to establish his suitability to hold office of chairperson of the board of directors of the Kenya National Trading Corporation Limited
 - iv. He was not charged or suspected of committing any offence that would otherwise make him not suitable to hold office.
 - v. He was not cited to have failed in any way in the discharge of his duties as per the terms of the contract.
- i. That as per sections 6 and 7 of the [State Corporations Act](#), the President can only revoke the appointment of any member of the board after being satisfied with cogent reasons, that the said member has failed to carry out his or her functions in the national interest or if the said member ceases to hold office as prescribed, in addition to having consultations with the State Corporations Advisory Committee.
- j. That there is no evidence that the appointment of the 1st interested party was objective and impartial and not influenced by nepotism, favouritism and other improper motives of corrupt practices.
- k. The petitioner states that he is a retired Commissioned Officer of the Kenya Defence Forces, having been so Commissioned on 11.08.1989 by the then President and Commander-in-Chief of the Armed Forces, a privilege that carries with it the responsibility of discipline, integrity and fortitude.



- g. That the President acted within his constitutional discretion provided under Article 132 of the Constitution and section 51(1) of the Interpretation and General Provisions Act, in revoking the appointment of the petitioner as the chairperson of the Kenya National Trading Corporation Limited, which as legally required was effected through publication in a gazette notice.
 - h. That the removal in the case of the petitioner was not pursuant to section 7(3) of the State Corporations Act, as the same was not on the basis of failures observed on the part of the petitioner as claimed, but rather by virtue of a power of revocation, attendant to the power of appointment.
 - i. That the petitioner's appointment as chairperson of the board was for a period of three years, tenable at the discretion of the government, a provision encapsulated in paragraph 3 of page 20 of the petitioner's letter of appointment annexed to the petition. In signing and accepting the appointment on the terms encapsulated therein, the petitioner was aware of and acceded to the fact that the appointment was tenable at the discretion of the government.
 - j. That it is a general legal principle in statutory interpretation that the power conferred under a written law to make an appointment, presumes a similar power to revoke the appointment of and reappoint, as provided under section 51(1) of the Interpretation and General Provisions Act.
4. The respondent also filed the replying affidavit sworn on 02.05.2023 of Pamela Mutua, the Managing Director and CEO of Kenya National Trading Corporation. It was stated and urged as follows:
- a. That the petitioner was never an employee of the corporation.
 - b. That the petitioner did not earn any wages. To the contrary, he was being paid honoraria, airtime, sitting and accommodation allowances. The said payments were not subject to pay as you earn but a 5% withholding tax.
 - c. The documents exhibited by the petitioner in his further affidavit are not pay slips in the traditional and formal manner. The said documents are internal documents generated by the finance and accounts departments of the corporation for purposes of accountability and in order to notify board directors of breakdown of any given payment.
 - d. The word PAYE indicated at page 4 of annexure CPR 1 is erroneous because a computation will show that the sum of Kshs.6,000/= is not 30% of the gross pay of Kshs.93,000/=.
5. The 1st interested party filed the replying affidavit dated 26.06.2023 and sworn by Hussein Tene Dabasso, through the firm of E K Mutua & Co Advocates. It was stated and urged as follows:
- a. That the petitioner was never an employee of the corporation.
 - b. That the petitioner did not earn any wages. To the contrary, he was being paid honoraria, airtime, sitting and accommodation allowances. The said payments were not subject to pay as you earn but a 5% withholding tax.
 - c. The documents exhibited by the petitioner in his further affidavit are not pay slips in the traditional and formal manner. The said documents are internal documents generated by the finance and accounts departments of the corporation for purposes of accountability and in order to notify board directors of breakdown of any given payment.
 - d. The word PAYE indicated at page 4 of annexure CPR 1 is erroneous because a computation will show that the sum of Kshs.6,000/= is not 30% of the gross pay of Kshs.93,000/=.



6. Final submissions were filed for the petitioner, the respondent, and, the 1st interested party. The 2nd respondent, the Law Society of Kenya opted not to file submissions. The Court has considered all the material on record. The Court returns as follows.
7. The 1st issue for determination is whether the Court lacks jurisdiction to hear and determine the petition. It is submitted for the respondents that the Court lacks jurisdiction because there is no employer-employee relationship between the parties as envisaged in section 12 of the [Employment and Labour Relations Court Act](#) and Article 162 of the [Constitution](#) of Kenya 2010. It is submitted that section 12(1) of the [Act](#) provides that the Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the [Constitution](#) and provisions of the [Act](#) or any other written law which extends jurisdiction to the Court relating to employment and labour relations. Further, section 2 of the [Labour Relations Act](#) and section 2 of the [Employment Act](#) defines “employee” to mean a person employed for wages or a salary and includes an apprentice and indentured learner while “employer” has been defined as any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, form, corporation or company. It was submitted that the law is clear that an employee is a person employed for wages or a salary. It was submitted that remuneration which is whatever is payable by an employer to an employee as envisaged in sections 5(5) and 17 of the [Employment Act](#) means a reward or pay for services rendered. Further, it was submitted that the issue at hand is about revocation of appointment of a chairperson of a board of state corporation. That the petitioner had been appointed by gazette no.9291 dated 05.08.2022 as the chairperson of the Kenya National Trading Corporation Limited, a body corporate governed by the [State Corporations Act](#). Section 10 of the [State Corporations Act](#) states that the chairman and members of a board of a state corporation other than the chief executive shall be paid out of the funds of state corporation such sitting allowance or other remuneration as the board may, within the scales of remuneration specified from time to time by the State Corporations Advisory Committee, approve. Further, under the section, the board may, within the scales specified by the Committee, refund traveling and other expenses incurred by the chairman or members of the Board in the performance- of their duties. It was submitted for the respondents that the petitioner was issued with a letter of appointment dated 08.08.2022 indicating, on duration, that the appointment was for three years and was tenable at the discretion of the government. The payment to the chairperson included a taxable monthly honorarium at prescribed rates, and, allowances including sitting, accommodation, lunch, telephone, and travel. It was submitted that the petitioner was not entitled to a salary or wage. It was submitted that the payslips exhibited for the petitioner showing he was paid honorarium and airtime allowance in September 2022; sitting allowance, accommodation, mileage and lunch allowances for November 2022; and honorarium for October 2022 did not amount to a salary or wage and did not qualify him to be an employee. His role was policy formulation, directing and monitoring so that he was not an employee.
8. For the petitioner, it was submitted that per the payslips exhibited for the petitioner on his further affidavit dated 27.04.2023 issued by the Kenya National Trading Corporation Limited where honoraria and other allowances were payable and tax deductible from wages earned in execution of public duty, the petitioner was strictly not an employee for purposes of a salary but he was a public officer on account of his appointment by the gazette notice and the letter issued to him and signed by Head of Public Service. It was submitted that per the letter of appointment dated 08.08.2022 the petitioner was entitled to honorarium, allowances (including sitting, accommodation, lunch and telephone allowances, transport, accident insurance and medical cover. It was submitted that the petitioner occupied a public office and was by all means a servant of the people of the Republic of Kenya per Article 260 of the [Constitution](#) which states that “public office” means an office in the National



Government, a County Government Or Public Service, if remuneration and benefits of the office are payable directly from Consolidated Fund or directly out of the money provided by Parliament.

9. The Court has considered the rival submissions. The material on record show that by provisions of section 10 of the *State Corporations Act* and the payslips exhibited for the petitioner, the petitioner was paid a remuneration upon headings as submitted for the parties. The letter dated 08.08.2022 was addressed to the petitioner by the Head of Public Service Joseph K. Kinyua, EGH titled “Appointment as Chairperson of the Kenya National Trading Corporation” and conveyed the appointment per section 6(1) of the *State Corporations Act* for a duration of 3-years from 05.08.2022 and tenable at the discretion of the Government. He was to be a signatory to a performance contract between the corporation and the Government as well as between the corporation’s board and the chief executive. He was to be paid a taxable monthly honorarium and other payments by way of allowances and the medical cover applied as is not in dispute between the parties. The Court returns that it is obvious that the petitioner was remunerated out of public resources. He was a public officer as defined in the *Constitution* and an employee as envisaged in the definition under the *Employment Act* and the *Labour Relations Act*. The Court returns accordingly.
10. The Court of appeal considered the issue of the meaning of remuneration, gross salary or wage, basic salary or wage, and allowances in *The Postal Corporation of Kenya –versus- Andrew K. Tanui* [2019] eKLR (Waki, Musinga & Kiage JJ.A). The Court of appeal held, “.... So that, reference to 'wages', 'allowances', 'gross wages' or 'gross salary' are all separate elements of the remuneration of an employee.... In our view, his construction in the latter case that 'gross monthly wages' are inclusive of allowances resonates with common sense. In common parlance, basic salary is the base income of an individual, the fixed part of one's compensation package; while an allowance is the amount received by the employee for meeting service requirements. It is provided in addition to the basic salary and varies from employer to employer. Some employers may well offer allowances that are clearly predicated on actual performance of the contract but which do not form part of the gross salary of an employee. Good examples were given in the case of *Pravin Bowry v Ethics & Anti-Corruption Commission* [2013] eKLR, such as 'telephone allowance; provision of security guards; provision of fuel; cost of medical premium and annual insurance; amounts due for outpatient and medicines; amount in lieu of leave; proportionate AAR premiums for Claimant's wife; cost of AAR cover for the unspent term of contract'. The exclusion of such allowances was affirmed by this Court in the case of *Richard Erskine Leakey & 2 others v Samson Kipkoech Chemai* [2019] eKLR, which stated thus:

“55. In our view, there are certain allowances that are dependent on actual performance of the contract of employment. When calculating damages due to an employee in the event of unfair or wrongful termination, it is only the emoluments or gross salary of the employee that should be taken into account not allowances and privileges dependent on actual service and performance of the contract.

Gross salary would then be the amount calculated by adding up one's basic salary and allowances, before deduction of taxes and other deductions. Each case must be examined to identify the nature of the allowances given and whether they form part of the gross salary. We affirm the construction made by Ongaya, J. in the *Banking, Insurance & Finance Union case (supra)*. We are not persuaded by the appellant's argument that 'gross wages' or 'gross salary' does not include any allowances and that it is the same as the 'basic salary' or 'basic wages.” From the holding, the Court finds that the petitioner was paid a fixed monthly honorarium, the fixed part of petitioner’s compensation



package – the wage or salary. Further, section 10 of the [State Corporations Act](#) is clear that the chairman and members of a board of a state corporation other than the chief executive shall be paid out of the funds of state corporation such sitting allowance or other remuneration as the board may, within the scales of remuneration specified by the Committee, approve. The wording then makes the sitting allowance yet another remunerative package for the petitioner. The Court considers that the sitting allowance is payable per sitting in the nature of a wage as envisaged in section 18 (1) (b) of the [Employment Act](#) which states that where a contract of service entered into under which a task or piece work is to be performed by an employee, the employee shall be entitled, in case of piece work, to be paid by the employer at the end of each month in proportion to the amount of work which he has performed during the month, or on completion of the work, whichever date is the earlier. Thus, where sitting allowance is agreed upon, it is payable at the end of the meeting as an agreed piece rate payment. The Court considers such sitting allowance to constitute an agreed wage rate per sitting, the piece rate payment envisaged under section 18 (1) of the [Act](#). The Court therefore returns that the honorarium and other piece rate allowances amounted to a salary or a wage within the definition of an employee. The Court returns that the submission for want of employer-employee relationship will collapse. The Court considers that as per Article 260 of the [Constitution](#), the honorarium, allowances and other benefits amounted to remuneration and benefits of the office of chairman and were payable directly from Consolidated Fund or directly out of the money provided by Parliament.

11. The Court further returns that the petitioner was a public officer and a servant of the people and not merely a director in a company registered under the [Companies Act](#) as was the case in Nakuru Civil Appeal No. 61 of 2015 [Rift Valley Water Services Board & 2 Others –versus- Geoffrey Asanyo & 2 others](#) Civil Appeal No. 61 of 2015. The Court of Appeal held thus,

“...His functions as a director of the 2nd respondent’s governance body, and the terms on which he was appointed to represent the interests of the business community on the Board, were governed by the [Companies Act](#) and 2nd respondent’s Memorandum and Articles of Association. The [Employment Act](#) did not apply to that relationship so as to confer on the Industrial Court jurisdiction to determine any claim relating to appointment to the board. 20. We hasten to draw a clear distinction between an employee and a member of a board of directors of a corporate entity, such as the 1st appellant. That distinction lies in our answer to the question as to whether directors are employees of the company to whose board they are appointed. They are not. In *McMillan –versus- Guest* [1942] AC p. 561 it was held that a company director is an office-holder who is not, without more, an employee of the company. That is the position here. In the absence of a contract of service in terms of which a director is engaged as a full-time employee of the company (see *Parsons –v- Albert J. Parsons and Sons Ltd* [1979] ICR p.271)”

The Court has considered that binding holding. However, the holding related to a director being a member of a company registered under the [Companies Act](#) without more to it.



12. In *Narok County Government and Another–Versus- Richard Bwogo Birir and Another* (2015) 5JELR 104466 (CA) the Court of Appeal held

“39. It is upon consideration of those and other provisions that the trial court reached the following compelling conclusion:

“...all persons holding public or state office in Kenya in the executive, the legislature, the judiciary or any other public body and in national or county government are servants of the people of Kenya. The court holds that despite the level of rank of state or public office as may be held, no public or state officer is a servant of the other but all are servants of the people. Thus, the court holds that the idea of servants of the crown is substituted with the doctrine of servants of the people under the new Republic as nurtured in the *Constitution* of Kenya, 2010. The hierarchy of state and public officers can be complex, detailed and conceivably very long vertically and horizontally but despite the rank or position held, the court holds that they are each a servant of the people and not of each other as state or public officers. They are all servants of the people. The court holds that there are no masters and servants within the hierarchies of the ranks of state and public officers in our new Republic. The court further finds that the string that flows through the constitutional provisions is that removal from public or state office is constitutionally chained with due process of law. In the opinion of the court, at the heart of due process are the rules of natural justice. Thus, the court finds that the pleasure doctrine for removal from a state or public office has been replaced with the doctrine of due process of law. Article 236 is particularly clear on the demise of the pleasure doctrine in Kenya's public or state service... In the new Republic, the court holds that public service by public and state officers is guided by the doctrine of servants of the people and the doctrine of due process and not by the doctrines of the servants of the crown and the pleasure doctrine. In the opinion of the court, the demise of the pleasure doctrine and the demise of the doctrine of servants of the crown in the new Republic's constitutional framework constitute the very foundation of the Republic, namely, Kenya is a sovereign Republic and all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the *Constitution*.”

13. Examining the two cited decisions by the Court of Appeal, it appears to the Court that the overriding consideration in State Corporations is that the board members are public officers, regulated by public service laws, policies and practices; rather than, any other instrument such as in directorships under the *Companies Act* and who are governed by the company's memorandum and articles of association with the *Companies Act* conferring jurisdiction to the High Court in event of disputes about appointment and removal of such company directors.

14. In making that finding the Court has as well considered the opinion in *Okiya Omtatab Okoiti –versus- The National Executive of the Republic and 6 Others* [2019] eKLR, thus,

“The Court has also held that in the public service under the *Constitution* of Kenya 2010, there are no masters and servants so that in public service in the new Republic, the test of master – servant does not obtain towards establishing existence of employment. In *Paul*



Nyadewo Onyango –Versus- Parliamentary Service Commission and Another [2018] eKLR
the Court stated,

“In the present case, the Court will not therefore place emphasis on the relationships between individual public or state officers. None was a servant or master of the other. What is paramount, in the opinion of the Court, is that the officers interrelate and work together within the lawful prescription of the standards of a good public service delivery. They have no private treaties binding one officer to the other but only the constitutional, statutory and lawful policies or practices that are applicable to the public service and incorporated in the individual officer’s contract of service.”

15. The Court has also reflected that the *State Corporations Act* is a law that was enacted under the former *Constitution* of Kenya and it has not been aligned to the prevailing Constitution of Kenya 2010. The *Public Service Commission Act*, 2017 is an Act of Parliament to make further provision as to the functions, powers and administration of the Public Service Commission established under Article 233 of the *Constitution*, to give effect to Article 234 of the *Constitution* and for connected purposes. Under section 3 the *Act* applies to all public bodies and persons holding office in the public service other than those subject to Articles 155(3)(a), 158(3), 234(2) (a), 234 (3) and 252(1) of the *Constitution* and section- 28 of the *Kenya Defence Forces Act*. Section 2 of the *Act* defines public body to include a corporation the whole or a controlling majority of shares which are owned by a person or entity that is a public body by virtue of that definition and, includes any statutory public body and further includes, “(a)- any corporation, council, board, committee or other body which has power to act under and for purposes of any written law relating to the undertakings of a public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law. The parties not being in dispute that the petitioner was a chairperson of a public body – a state corporation, it appears to the Court that the provisions of the *Public Service Commission Act*, 2017 will as far as possible apply to the petitioner as duly appointed Chairperson subject to the express provisions of the *Constitution* or other written law. In that consideration, the *Act* being regulatory of public service employment, it appears to apply to service by the petitioner in the position of chairperson as was appointed.
16. In any event, the Court considers that the relationship in issue in the instant case falls within “matters related to employment and labour relations”, as envisaged in Article 162(2) of the *Constitution* and sections 12 (1) and (2) of the *Employment and Labour Relations Court Act*. Further, Article 41 which is primarily implemented by the Court focuses on rights of workers. By that consideration disputes in transactions related to employment or to labour and relations or to work, workers, and work places and spaces, in the opinion of the Court, fall in the subject jurisdiction of the Court unless expressly removed from the jurisdiction by the *Constitution* or legislation. The Court considers that to be the constitutional distribution of jurisdiction and judicial workload to the Court.
17. The 2nd issue, is whether the petitioner’s case is justiciable. It was submitted for the 1st interested party that the case was not justiciable because it is trapped by the political question doctrine as was held in *Wanjiru Gikonyo & 2 Others -versus- National Assembly of Kenya & 4 Others* [2016] eKLR. The Court has considered whether the Court is the proper forum to consider the issue at hand or the issue is best left to a forum outside the Court. It is submitted that the President’s decision to revoke the petitioner’s appointment is a political issue within the President’s discretion and not a legal issue so that by the Court inquiring into the issue there would be breach of the doctrine of separation of powers. The revocation, it was submitted, was a political discretion by the President. The 1st respondent cited



Kenya Airports Authority -versus- Mitu-Bell Welfare Society & 2 Others [2016] eKLR where the Court of Appeal stated,

“It is our considered view that under the political question doctrine, a court has no jurisdiction to make orders relating to policy formulation or give guidelines on who should participate in formulation of government policy.”

Is the issue of the revocation of the petitioner’s appointment as chairman a political question in the sole President’s discretion? It is submitted for the 1st interested party that under section 7 (3) of the *State Corporations Act* provides that the President may, if at any time it appears to him that a Board has failed to carry out its functions in the national interest, revoke the appointment of any member of the Board and may himself nominate a new member for the remainder of the period of office of that member or he may constitute a new Board for such period as he shall, in consultation with the Committee, determine. Thus, in view of the provision, it is submitted that the President’s power to revoke an appointment of any member of a board of a state corporation is a broad discretionary power exercised in the national interest. A question is put for the 1st interested party thus, “Should Courts therefore stand in judgment of what is or is not in the national interest in the workings of the executive branch of government?” To deepen the point, it is submitted that section 4 of the Act provides, “The President shall assign ministerial responsibility for any state corporation and matters relating to the Vice-President and several Ministers as the President may by directions in writing determine.” Further section 7(1) of the Act states, “The President may give directions of a general or specific nature to a Board with regard to the better exercise and performance of the functions of the state corporation and the Board shall give effect to those directions.” It is submitted that the application of the political question doctrine depends on the nature of the act that is being impugned before the Court as not all decisions by the President would be protected by that doctrine. Thus, in *Marbury-versus- Madison*, 5 U.S. 137, Justice Marshall at paragraph 66 stated, “That there may be such cases is not to be questioned: but that every act of duty to be performed in any of the great departments of government constitutes such a case, is not to be admitted.” Further at paragraph 71 it was stated, “71. It follows then that the question, whether the legality of an act of head of department be examinable in a court of justice or not, must always depend on the nature of that act.” And further at paragraph 74 Justice Marshall identified situations in the U.S Constitution where the President was vested with certain important political powers exercise of which the President used his own discretion and was accountable only to his country in his political character and to his own conscience and such included the authority to appoint certain officers who act by his authority and in conformity with his orders – so that as per paragraph 75 of that cited case, the acts of such officers are acts of the President and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists and can exist no power to control that discretion. Thus, “The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.” It was submitted that in *Marbury -Versus- Madison*, the President had already exercised his discretion in making the appointment and the physical delivery of the commission by the President’s Secretary or Minister was a matter of custom not law and therefore amenable to a writ of mandamus. Further, it was submitted that in that case the appointment of a Justice of the Peace was a judicial office that enjoyed security of tenure and could not be revoked at the will of the President. However, in the instant case, the petitioner as chairman enjoyed no security of tenure but was at policy level and the contract provided that his appointment was for a period of three (3) years commencing 5th August 2022 and was tenable at the discretion of the Government. Thus, even in Kenya, like in *Marbury -Versus- Madison*, it was submitted that courts have treated appointments to judicial offices as justiciable such as in *Adrian Kamotho Njenga-versus- Attorney General & 3 Others (Interested Parties)* [2020] eKLR where the Court held that the President was constitutionally bound by the recommendation made by



the Judicial Service Commission per Article 166(1) as read with Article 172(1)(a) of the Constitution of Kenya, on persons to be appointed as Judges and, failure by the president to appoint the recommended persons violated the Constitution. It was submitted that the petitioner was not being appointed to a judicial office with security of tenure. The 1st interested party also cited Baker-versus-Carr, 369 U.S 186, 198-99 (1962) on tests to apply in determining political question not amenable to the Court's jurisdiction for want of a justiciability. Under the doctrine of justiciability, it was held that if any of the following are met, then the court may not hear and determine the case: (a) commitment of the issue to a branch of government other than judiciary; (b) lack of standards for resolving the issue; (c) impossibility of the judiciary to resolve the issue without first making a policy determination; (d) a judicial decision of that matter as a lack of respect for other branches of government; (e) a political decision has already been made; or (f) the potential for multiple pronouncements by various branches on one question. While enumerating the 6 factors enunciated in that case, there were no submissions made for the 1st interested party on how the factors would apply to the instant case. However, it was further submitted that if the Court is to look into the alleged violation of the petitioner's rights, then the Court must as well look at the other constitutional provisions and in particular, Article 134 of the Constitution.

18. It was submitted that the Court should not simply examine alleged violation of the petitioner's rights in the manner his appointment had been revoked but, that the Court must also examine the circumstances of his appointment measured against the intention and spirit of the constitutional imperatives surrounding the appointment. It was stated that the appointment of the petitioner was in the very last days of the out-going Uhuru Presidency and which was an affront to the spirit of Article 134 of the Constitution calculated to undermine the will of the people in the general elections that were held on 09.08.2022. Thus, the appointment was like a poisonous tree and the rights accruing from such a tree would be like poisonous fruits of a poisonous tree that cannot accrue or be enforced. Even if such poisonous fruits were justiciable rights, the Court ought to decline to grant the discretionary remedies prayed for as granting the orders would be a wink and a nod to an appointment that violated the spirit of Article 134.
19. In particular, Article 134(1) of the Constitution provides that a person who holds the office of President or who is authorised in terms of the Constitution to exercise the powers of the President during the period commencing on the date of the first vote in presidential election and ending when the newly elected President assumes office; or, while the President is absent or incapacitated, or at other times contemplated in Article 147(3), may not exercise the powers of the President specified in clause (2). Article 134(2)(b) thereof (read clause 134(2)(b)) provides for the nomination or appointment of any other public officer whom the Constitution or legislation requires the President to appoint. It was submitted that the appointment of the petitioner was done by the out-going President Uhuru on 05.08.2022, less than 5 days to the Presidential elections on 09.08.2022. Thus, it was urged that the appointment was in breach of Article 134 of the Constitution on the limited powers of appointment of a "lame-duck President" in the twilight of his presidency. It was submitted that it may appear that there was no breach from a reading of the strict letter of Article 134. However, from an appreciation of the spirit of Article 134 would clearly lead to a conclusion that the out-going President breached the spirit of Article 134 in making the appointment in question. It was conceded that excluded presidential authority to make an appointment by textual reading of the Article would mean that 05.08.2022 does not fall under the excluded period which strictly started to run on 09.08.2022 when the Kenyans started voting at the then presidential election. However, it was submitted that in interpreting the Constitution, the spirit was as important as the letter of the constitutional provision being interpreted. Further, the clear spirit of Article 134 was to avoid the very thing that President Uhuru did in appointing the petitioner in the twilight of his presidency. The mischief to be curbed under the Article 134 was to



- avoid an outgoing President from packing on his way out the top cadres of the administration with his “henchmen” and thereby hamstringing the policy operations of the in-coming President. It was submitted that the appointment at 4-days to the excluded period of exercising authority to appoint is thereby legal or legitimate would in effect undermine the very effect sought to be curtailed by Article 134. Thus, it was urged that to deny the in-coming President the prerogative to revoke such petitioner’s appointment and to proceed to appoint “men of his heart” would clearly fly in the face of the spirit of Article 134 - denying the newly elected President the chance to revoke the last-minute appointments of an out-going President would amount to undermining the will of the people who had elected the President and endorsed his policy initiatives at the freshly concluded presidential election.
20. For the respondent, it was submitted that the President has guaranteed constitutional prerogative under Article 132 of the Constitution to appoint certain office holders performing policy functions and as such appointments would purely be justified on the ground that they share the President’s policy aspirations. Article 132(2) of the Constitution of the presidential powers to appoint or dismiss states thus, “(2) The President shall nominate and, with the approval of the National Assembly, appoint, and may dismiss— (a) the Cabinet Secretaries, in accordance with Article 152; (b) the Attorney-General, in accordance with Article 156; (c) the Secretary to the Cabinet in accordance with Article 154; (d) Principal Secretaries in accordance with Article 155; (e) high commissioners, ambassadors and diplomatic and consular representatives; and, (f) in accordance with this Constitution, any other State or public officer whom this Constitution requires or empowers the President to appoint or dismiss.” Article 132 (4) (a) further provides, “(4) The President may— (a) perform any other executive function provided for in this Constitution or in national legislation and, except as otherwise provided for in this Constitution, may establish an office in the public service in accordance with the recommendation of the Public Service Commission.” It was submitted for the respondent that in Tom Luusa Munyasya & Another -versus- Governor, Makueni County & Another [2014] eKLR Rika J opined that in a presidential system of government there were categories of “special employment” within the public service that would not be deemed employment within the meaning of Employment Act. It was submitted that as was held in that case, Article 236 of the Constitution must be read not as imposing the obligation of due process on the President to dismiss Cabinet Secretaries and Principal Secretaries.
21. For the petitioners it was submitted as follows. That under Article 1 of the Constitution, all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution. Under Article, the Constitution is supreme law of the Republic and binds all persons and all State organs at both levels of Government. Further, Article 2(2) provides that no person may claim or exercise state authority except as authorised under the Constitution. Further, Article 2(4) states that any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. It was also submitted that in matters of appointment and dismissal in public or state service, Article 10 on the National Values and Principles of governance and Article 232 on the values and principles of public service applied. Further, Article 129 of the Constitution states that executive authority derives from the people of Kenya and shall be exercised in accordance with the Constitution, and, executive authority shall be exercised in a manner compatible with the principles of service to the people of Kenya and for their well being and benefit. It was submitted for the petitioner that the power exercised by the President in Articles 131 and 132 is delegated peoples’ sovereign power exercisable in accordance with the cited constitutional provisions.
22. The Court has considered the parties’ rival positions. The Court returns as follows.



23. First, the petitioner was appointed to a public off within the definition of Article 260 of the Constitution and as already found out by the Court. That the petitioner held a public office of chairman in a state corporation appears to be a mutual position by the parties.
24. Second, the Court finds that there is no cross-appeal challenging the appointment of the petitioner as chairperson by the out-going President and only 4 days to the presidential elections at the voting held on 09.08.2022. To that extent the Court returns that it appears extraneous to seek to justify the revocation of the petitioner’s appointment as chairman based on the likely manner the petitioner was appointed. The manner of appointment of the petitioner is undisputedly permissible within the express provisions of Article 134 of the Constitution. Article 259 provides that the Constitution shall be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and, contributes to good governance. By that constitutional guidance, it appears to the Court that the purported spirit of the Constitution in the manner the petitioner may have been appointed, and as submitted for the 1st interested party, cannot operate as to supersede the petitioner’s entitlement to allege violation and then enforcement of his human rights and fundamental freedoms. That line of submission, in the opinion of the Court, must collapse as coming in the way and blocking the express constitutional provision that the Constitution is interpreted in a manner that advances the rule of law, and, the human rights and fundamental freedoms in the Bill of Rights. Article 259 (3) (a) provides that a function or power conferred by the Constitution on an office may be performed or exercised as occasion requires, by the person holding the office. In view of that provision, the Court considers that the out-going President Uhuru would appear, in absence of any other material, to have acted in accordance with that provision in appointing the petitioner at 4 days to the voting date. As to the submission on it being a sun-set appointment, it appears to the Court that Article 259(5), (6), (7) and (8) provide for strict principles on computation of time and none of the provisions has been shown to have been violated. Article 259(8) states that if a particular time is not prescribed by the Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises. The computation of time being expressly provided in the Constitution, the Court returns that time shall be strictly reckoned in line with the strict constitutional provisions. Thus, invoking the spirit of the Constitution is found unjustified as it was suggested that the petitioner’s appointment being outside the excluded time, nevertheless, it was trapped by that time as submitted because the impact of the appointment defeated the alleged or purported mischief (per submissions) of an out-going President’s design of packing “the men of his heart” in public offices to undermine the in-coming President from packing the offices with “the men of his heart” towards realization of the will of the people conferred at the voting for the in-coming President to achieve his policies and priorities. The Court considers that it will become difficult to set boundaries on how far the spirit of the Constitution would fly based on the impact of the many decisions an out-going President may make outside the excluded period in Article 134, and yet, the decisions be defeated by being brought into same status as those made within the excluded period. Conceding to that proposition of the spirit of the Constitution in matters of the computation of time would spell absurd outcomes which the Court considers not to have been intended at all in construction of Article 134. The Court returns that the petitioner’s appointment cannot be defeated and used to justify the revocation of the appointment upon the submissions challenging the time of the appointment. In reflection about the issue, on the material on record, it is not urged for the respondent or the 1st interested party that the reason the petitioner’s appointment was revoked was because of the time or manner he was appointed - and failing which, the merits of the manner and time of the appointment does not fall for consideration in the instant petition.



25. Third, has the case passed the test of justiciability set in *Baker-versus- Carr*, 369 U.S 186, 198-99 (1962)? The Court proceeds to investigate the factors as follows:
- a. Has the issue of a disputed about removal of a chairman or member of a board of a state corporation been committed to a branch of government other than judiciary. There is no material before the Court or suggested for the respondent or 1st interested party that there exist alternative forum dedicated by the *Constitution* or Statute that another arm of government or agency or body should resolve the instant dispute. It is also not shown that by constitutional or statutory provision another arm of government has finality to a dispute like the instant one.
 - b. Is there a lack of standards for resolving the issue? The Court does not find so. In particular, the petitioner’s appointment as chairperson was revoked per *Gazette Notice No. 1383* of 10.02.2023 and parties have extensively submitted on application of provisions of the *Constitution*, the *State Corporations Act*, and, *Interpretation and General Provisions Act*. All such provisions constitute the yardstick with which the Court should resolve the dispute about the propriety of the revocation of the appointment in issue.
 - c. The Court finds that there is no established impossibility of the judiciary to resolve the issue without first making a policy determination. As already pointed out, the dispute about the revocation is extensively provided for in the *Constitution* and the relevant statutes as relied upon by the parties and there are no policy issues to be settled prior to deciding the dispute at hand. It has not been shown that there is want of a decision about choices with alignment to desired state goals prior to determining whether the revocation of appointment was lawful or unconstitutional.
 - d. It has not been shown that a judicial decision of the dispute will amount to a lack of respect for other branches of government. The petitioner’s case is that he seeks to enforce the *Constitution* and in particular, his human rights and fundamental freedoms.
 - e. Has it been shown that a political decision has already been made? The Court considers that a political decision-making process entails conversations where leaders and managers exchange differing views, consider alternatives and arrive at acceptable or workable harmonious decision. The individuals involved in the conversations have diverse interests, standards and goals so that once an agreed position is arrived at, the political question doctrine bars the Court from intervening. The material on record do not suggest that the revocation of the petitioner’s appointment was one such decision arrived at in a process of political decision making.
 - f. Is there a potential for multiple pronouncements by various branches on one question? It is not said that the revocation of appointment was by law or fact before the legislature or the executive for determination one way or the other.
26. From the foregoing analysis by the Court, it turns out that the case is justiciable as none of the six tests of unjusticiability on account of political question doctrine have been shown to exist. As submitted for the petitioner, the cited constitutional provisions would appear to chain the decision to revoke the petitioner’s appointment as chairman and in dispute in the instant case.
27. The 3rd issue is whether the pleasure doctrine applied as entitling the revocation of the petitioner’s appointment in exercise of unchained discretion. The plain answer is that under the *Constitution* of Kenya 2010, the pleasure doctrine suffered attrition, it withered, and the Courts have held that it no longer applies. The provisions of the *State Corporations Act* relied on and cited for the respondents suggesting unfettered discretion in appointment and revocation of appointment must be understood within the constitutional and statutory chains that apply to such appointments and revocations,



removals or dismissal from public office. In *Cecilia Wangechi Ndungu -versus- County Government of Nyeri and Another* Petition No. 1 of 2014 at Nyeri Judgment of 05.12.2024, the Court stated as follows,

“The court holds that elected and appointed leaders, state officers or public officers, do not hold individually generated goals that constitute political will and goals mysterious to the *Constitution*. The preamble to the *Constitution* is clear that the people of Kenya are committed to nurturing and protecting the well-being of the individual, the family, communities and the nation; and the aspirations of all Kenyans is for a government based on essential values of human rights, equality, freedom, democracy, social justice and the rule of law. the *Constitution* is replete with specific provisions that blend together towards the achievement of those provisions of the preamble. Article 1 vests all sovereign power in the people of Kenya to be exercised only in accordance with the *Constitution*. Article 10(1) provides that the principles of governance bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the *Constitution*; enacts, applies or interprets any law; or makes or implements public policy decisions. Article 73(2) (b) and (d) provides that the guiding principles of leadership and integrity include objectivity and impartiality in decision making, and ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corruption; and accountability to the public for decisions and actions. Article 129 provides that executive authority derives from the people of Kenya, is to be exercised in accordance with the *Constitution* and in a manner compatible with the principle of service to the people of Kenya and for their well-being. All these provisions, in the opinion of the court, are not attainable in absence of giving of reasons and due process as it happened in the present case.

The court therefore holds that any public authority must be exercised in accordance with the Constitutional tests including the power to remove a public or state officer from office like it was anticipated and legitimately expected by the petitioner in the present case. In making that holding, the court further holds that statutes or other written laws and policies need not repeat the cited constitutional tests whenever authority or power is vested or conferred upon a person or body. The cited constitutional provisions are of universal application and not mere flowers in the constitutional text that readily wither in our constitutional practices; in the opinion of the court, they are provisions that must bloom into seeds of vitality that enhance our constitutional practices and lifestyle.”

28. Again, finding that the pleasure doctrine did not apply under the *Constitution* of Kenya, 2010, in *County Government of Garissa & Another –versus – Idriss Aden Mukhtar & 2 Others* [2020] eKLR the Court of Appeal (W.Karanja, H. Okwengu & F. Sichale JJA) held thus,

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“50. In our view, the Governor misinterpreted his powers under Section 31(a) of the *CGA*, as giving him a free hand to dismiss the respondents at his pleasure, and therefore did not give them any hearing before termination of their employment. This was a clear breach of the respondent’s rights to fair labour practices under Article 41(2) of the *Constitution* and right to a fair administrative action under Article 47 of the *Constitution*. It was also a breach of natural justice and therefore, the respondents’ dismissal was unfair termination.”

Similarly, the Court of Appeal’s judgment in *Narok County Government & Another –versus- Richard Bwogo Birir & Another* [2015] eKLR (Waki, Nambuye, Kiage JJ.A) found and held



that the pleasure doctrine is not applicable in Kenya under the Constitution of Kenya, 2010. The Court considers that as the pleasure doctrine withered in our new Republic under the Constitution of Kenya, 2010, the Constitution nevertheless preserved the permanency of the public or civil service as inherited from the Crown's civil service. Thus Article 236 of the Constitution provides that a public officer shall not be victimised or discriminated against for having performed the functions of office in accordance with the Constitution or any other law; or dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law. While elaborate due procedure may not be prescribed in statutes as was envisaged by Rika J in Tom Luusa Munyasya & Another -Versus- Governor, Makeni County & Another [2014] eKLR, it is imperative that due reasons are given. That is the effect of Article 47 on the right to fair administrative action, Article 236 on protection of public officer, Article 10 on Values and Principles of National Governance, Chapter 6 on Leadership and Integrity, as well as Article 232 on Values and Principles of Public Service.

29. The Gazette Notice by which the applicant's appointment was revoked did not give the provisions under which the revocation was undertaken. As submitted for the respondent, section 51 (1) and (2) of the Interpretation and General Provisions Act one who holds the power to appoint will similarly enjoy the power to remove, suspend, dismiss or- revoke the appointment. The Court finds the section indeed confers the general power to appoint and revoke appointment or dismiss or remove but does not spell out how that power is to be exercised. Article 132(2) (f) provides that the President shall nominate, and, with the approval of the National Assembly, appoint, and may dismiss, in accordance with the Constitution, any other State or public officer whom the Constitution requires or empowers the President to appoint or dismiss. The provision appears to cover appointments or dismissals under the Constitutional provisions. The petitioner's appointment and then revocation of appointment was under the State Corporations Act. It was pursuant to legislation.
30. Article 234(2) (a) (ii) provides that subject to the Constitution and legislation the Public Service Commission shall appoint persons to hold or act in public offices and to confirm appointments. The Court considers that the State Corporations Act is one such Act that shifts appointment and revocation or dismissal authority or the power to exercise disciplinary control from the Commission to the President with respect to appointment of state corporation chairman and revocation of such appointment. The manner of exercising the appointment is as per section 51 (1) and (2) of the Interpretation and General Provisions Act and primarily, sections 6 and 7 of the State Corporations Act.
31. Section 7(3) of the State Corporations Act provides thus,

“7(3) Notwithstanding the provisions of any other written law or the articles of association establishing and governing a Board, the President may, if at any time it appears to him that a Board has failed to carry out its functions in the national interest, revoke the appointment of any member of the Board and may himself nominate a new member for the remainder of the period of office of that member or he may constitute a new Board for such period as he shall, in consultation with the Committee, determine.”

The Court considers that member under the section includes a chairman and, in absence of any other established provision, the revocation of the petitioner's appointment was under that section. While the section conferred the President the power to revoke the appointment, the exercise of the power to revoke was chained by the phrase thus, “..., if at any time it appears to him that a Board has failed to carry out its functions in the national interest...” That appears to be the threshold or standard in determining the instant case. But



that is not what is record. The Court has carefully examined the record. The petitioner was appointed by the President by gazette notice No. 9291 dated 05.08.2022. The appointment was in exercise of powers conferred under section 6(1)(a) of the *State Corporations Act* which confers the President the power to appoint a chairman of a board of a state corporation and who shall be non-executive unless the President otherwise directs. The petitioner also relies upon the contract or letter of appointment dated 08.08.2022 which on the duration clause stated, “Your appointment is for a period of three (3) years, commencing 5th August, 2022 and is tenable at the discretion of the Government.” The Court has carefully considered the duration clause. The replying affidavit by Pamela Mutua sworn on 02.05.2023 being the Chief Executive Officer of the Kenya National Trading Corporation, while asserting that the petitioner was not an employee, makes no reference to and the import of the letter of appointment dated 08.08.2022. At paragraph 5 of the supporting affidavit, the petitioner confirms that he signed the letter of appointment. The Court has also considered the replying affidavit sworn on 28.03.2023 by Felix K. Koskei, the Head of Public Service. He confirms at paragraph 19 that the removal was under Article 132 and section 51(1) of the *Interpretation and General Provisions Act*. Further, at paragraph 20 he states that the removal was not per section 7(3) of the *State Corporations Act* as it was not on the basis of the failures observed on the part of the petitioner but rather, by virtue of a power of revocation attendant to the power of appointment. Paragraph 21 of that replying affidavit states, “21. That the petitioners’ appointment as chairperson of the Board was for a period of three years, tenable at the discretion of the Government, a provision encapsulated in paragraph 3 of page 20 of the petitioner’s Letter of Appointment annexed to the petition. In signing and accepting the appointment on the terms encapsulated therein, the petitioner was aware of, and acceded to the fact that the appointment was tenable at the discretion of the Government (see page 20 of the Petitioner’s Letter of Appointment annexed to the petition).” At paragraph 25 it was stated, “25. That consequently, the petitioner is estopped from claiming victimization, as he acquiesced to the terms of engagement.” It is notable that the petitioner did not respond to rebut the stated assertions as set out in the replying affidavit for the respondent. The Court makes the following pertinent findings in that regard:

- a. The petitioner’s revocation was not on account of failure to carry out the functions of the office of chairman in the national interest as envisaged in section 7(3) of the *State Corporations Act*.
- b. The petitioner’s appointment was revoked because he had signed that the appointment was tenable at the discretion of government. As a result, the Court finds that per material on record, there was nothing adverse against the petitioner leading to revocation of his appointment as chairman. The Court finds that the material on record having clarified that the revocation of appointment was not under section 7(3) of the *State Corporations Act* and that it was not on account of wanting in discharge of the duties and functions of the office of chairman on the part of the petitioner, the issue of the petitioner’s reputation being at stake in view of the revocation is rested – the Court finds the petitioner’s reputation and integrity is as white a snow. The Court further returns that in that consideration, looking at the manner the petitioner was appointed, he voluntarily gave up his protection under section 7(3) of the *State Corporations Act*, expressly so, when he signed the letter of appointment. The Court holds that the doctrine of waiver applies. But for the waiver, the revocation could not have been valid except within the fettered exercise of revocation of the appointment under section 7(3) of the Act.
- c. The Court has already found that the appointments of chairpersons of state corporations and the revocation of their appointment is not such appointment or dismissal as is envisaged



under Article 132 generally and specifically, Sub-Article 132 (2) (f) which deals with any other State or public officer whom the Constitution requires or empowers the President to appoint or dismiss. There is no provision of the Constitution shown to the Court that requires or empowers the President to appoint or dismiss chairpersons or members of state corporation. Instead, the Court has found that the State Corporations Act with some of its muddled provisions, having been enacted in the former Republic prior to the Constitution of Kenya 2010, it is such legislation envisaged in Article 234 (2) (a) as read with Article 249(2) (a) providing that the Commission is subject only to the Constitution and the law, and, Article 132 (4) (a) which provides that the President may perform any other executive function provided for in the Constitution or the national legislation and, except as otherwise provided for in the Constitution, may establish an office in the public service in accordance with the recommendation of the Public Service Commission. Accordingly the Court holds that state corporations are institutions constitutionally falling under the Public Service Commission but subject to such statutory provisions that the Parliament may enact for the full realization of the purposes for which the state corporations are established to perform and achieve. To that extent, some of the legislative provisions that govern state corporations are to be found in the Public Service Commission Act, 2017 and the statutes establishing individual state corporations and generally, provisions of the State Corporations Act but which appear not to have been aligned to the Constitution of Kenya, 2010. In that regard, the respondent should prioritise review of the State Corporations Act and other statutes establishing state corporations prior to the Constitution of Kenya 2010 with a view of aligning them to the Constitution of Kenya 2010 and harmonising them with the Public Service Commission Act, 2017. A declaration will issue accordingly within the prayer for other or further relief that the Court may deem to grant.

32. The 4th issue is on remedies. The Court has found that the waiver doctrine applies in view of the duration clause in letter of appointment of the petitioner as the chairman of the Kenya National Trading Corporation dated 08.08. 2022. It is also established for the respondent that the petitioner's appointment was not revoked under section 7 (3) of the State Corporations Act on account of failure to perform duties in the national interest as his reputation is clean. Indeed, nothing adverse has been advanced by the respondent against the petitioner. It is not in dispute that the power to appoint or dismiss is exercisable in accordance with the Constitution as a delegated sovereign power of the people. In the circumstances of the case, the Court returns that the petitioner has failed to establish the violation of any of his rights as was alleged. The Court has considered the nature of the petition and the complex issues that emerged and returns that each party to bear own costs.

In conclusion, the petition is hereby determined and judgment entered for the parties for:

1. The declaration that the respondent to prioritise review of the State Corporations Act and other statutes establishing state corporations which were enacted prior to the Constitution of Kenya 2010 with a view of aligning them to the Constitution of Kenya 2010 and harmonising them with the Public Service Commission Act, 2017.
2. The declaration that the petitioner's appointment was not revoked under section 7 (3) of the State Corporations Act on account of failed to carry out his functions in the national interest or upon an adverse reason as his reputation and integrity is clean in that regard.
3. Each party to bear own costs of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 10TH NOVEMBER, 2023.

BYRAM ONGAYA



PRINCIPAL JUDGE

