



REPUBLIC OF KENYA



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Okoti & 3 others v Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 5 others (Petition 42 & 27 of 2014 (Consolidated)) [2021] KEELRC 2306 (KLR) (30 July 2021) (Judgment)

Okiya Omtatab Okoti & 3 others v Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 6 others [2021] eKLR

Neutral citation: [2021] KEELRC 2306 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 42 & 27 OF 2014 (CONSOLIDATED)

M MBARŪ, NJ ABUODHA & L NDOLO, JJ

JULY 30, 2021

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 12 (1) (A), 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 37, 40, 41, 43, 46, 47, 48, 50 (1), 73, 74, 75, 135, 152, 155, 159, 165, 201, 232, 233, 234, 236, 249, 252, 253, 258 AND 259 OF THE CONSTITUTION OF KENYA AND SECTIONS 7, 12 AND 31 OF THE SIXTH SCHEDULE TO THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 23 AND 24 OF THE FORMER CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED VIOLATION OF GENERAL PROVISIONS RELATING TO THE BILL OF RIGHTS IN THE ARTICLES 12 (1), 19, 20, 24 AND 25: THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 26, 27, 28, 29, 40, 41, 43, 46, 47 AND 50 AND THE ALLEGED VIOLATION OF CONSTITUTIONAL VALUES AND PRINCIPLES IN ARTICLES 1, 2, 3, 10, 73, 74 (AS READ WITH THE THIRD SCHEDULE) 75, 201, 232, 233, 234, 236, 249, 252, 253 AND 259 OF THE CONSTITUTION

AND

IN THE MATTER OF THE CONSTITUTIONAL VALIDITY OF THE POLICY ON THE DECENTRALISATION OF HUMAN RESOURCE MANAGEMENT IN THE CIVIL SERVICE TO WREST CONTROL OVER CIVIL SERVANTS FROM PRINCIPAL SECRETARIES AND TO VEST IT IN CABINET SECRETARIES

AND

IN THE MATTER OF ALLEGED GROSS VIOLATIONS BY CABINET SECRETARY ANNE WAIGURU ON THE NATIONAL GOVERNMENT COORDINATION ACT 2013, THE PUBLIC SERVICE COMMISSION ACT 2012, THE PUBLIC OFFICER ETHICS ACT 2003, THE LEADERSHIP AND INTEGRITY ACT 2012, THE NATIONAL YOUTH SERVICE ACT, THE STATE CORPORATION ACT AND THE YOUTH ENTERPRISE DEVELOPMENT FUND ORDER 2007,



AND

IN THE MATTER OF THE ALLEGED VIOLATION BY CABINET SECRETARY ANNE WAIGURU OF SCHEMES OF SERVICE IN THE PUBLIC SERVICE AND THE CONSTITUTIONAL VALIDITY OF THE REMOVAL FROM AND APPOINTMENTS INTO OFFICES IN THE PUBLIC SERVICE MADE BY THE CABINET SECRETARY

AND

IN THE MATTER OF THE CONSTITUTIONAL VALIDITY OF THE STATE HOUSE CHIEF OF STAFF AND HEAD OF PUBLIC SERVICE JOSEPH KINYUA USURPING THE FUNCTIONS OF THE PUBLIC SERVICE COMMISSION

AND

IN THE MATTER OF ALLEGED DERELICTION OF DUTY BY MARGARET KOBIA AND OF HER INCOMPETENCE AS THE CHAIRPERSON OF THE PUBLIC SERVICE COMMISSION AND THE ALLEGED DERELICTION OF DUTY BY PETER O. MANGITI AND HIS INCOMPETENCE AS THE PRINCIPAL SECRETARY STATE DEPARTMENT OF PLANNING

BETWEEN

OKIYA OMTATAH OKOITI 1ST PETITIONER

NYAKINA WYCLIFF GISEBE 2ND PETITIONER

AND

ANNE WAIGURU, THE CABINET SECRETARY, DEVOLUTION AND PLANNING 1ST RESPONDENT

JOSEPH KINYUA, THE STATE HOUSE CHIEF OF STAFF AND HEAD OF PUBLIC SERVICE 2ND RESPONDENT

PETER O. MANGITI, THE PRINCIPAL SECRETARY, DEVOLUTION AND PLANNING 3RD RESPONDENT

MARGARET KOBIA, CHAIRPERSON, THE PUBLIC SERVICE COMMISSION 4TH RESPONDENT

AS CONSOLIDATED WITH

PETITION 27 OF 2014

BETWEEN

EVANS MUCHAI MBURU 1ST PETITIONER

JOSEPH NJOROGE KIBATHI 2ND PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

CABINET SECRETARY OR DEVOLUTION AND PLANNING 2ND RESPONDENT



Policy on Decentralisation of Human Resource Management in the Civil Service (May 2014) formulated by the Public Service Commission is invalid for lack of public participation.

Reported by Chelimo Eunice

Civil Practice and Procedure - institution of suits - institution of suits based on violations of the Constitution - locus standi - locus standi in a claim alleging violation of the Constitution and breach of various statutory provisions - where the litigants instituted proceedings challenging, among others, the appointment, transfer and/or removal from office of various public officers - whether a litigant had locus standi to urge a private law claim under a constitutional petition and with regard to the named persons who had not given their authority and had not made any complaints - Constitution of Kenya 2010, articles 22, 23, and 258.

Jurisdiction - jurisdiction of the Employment and Labour Relations Court - nature of what would constitute an employment dispute - whether a claim challenging the validity of appointments made to the board of a State Corporation was an employment/labour dispute within the jurisdiction of the Employment and Labour Relations Court - whether the Employment and Labour Relations Court had the jurisdiction to determine a private law claim under a constitutional petition - Constituion of Kenya, 2010 article 162(2); Employment and Labour Relations Court Act (Act No. 20 of 2011) section 12.

Judicial Review - application for judicial review - purpose of judicial review - grounds for judicial review remedies - illegality, irrationality and procedural impropriety - when could an act be considered ultra vires

Constitution of Kenya 2010 - executive - Office of the President - functions and powers of the President - powers of the President to establish an office in the public service in accordance with the recommendations of the Public Service Commission - powers of the President to establish any office in his private office - whether the President acted ultra vires in establishing the office of the State House Chief of Staff and Head of Public Service - whether the designation of the office of State House Chief of Staff and Head of Public Service usurped the power of the chairperson of Public Service Commission - Constitution of Kenya 2010, article 132; National Government Coordination (Act, No. 1 of 2013) section 13.

Statutes - interpretation of statutes - State Corporations Act - interpretation of section 7(3) of the State Corporations Act on the powers of the President revoke the appointment of members of the boards - what was the import of section 7(3) of the State Corporations Act on the tenure of members of boards - what were the grounds upon which the President could revoke the appointment of a member of a State Corporation board - whether any other person other than the President had the power to revoke the appointment of a member of a State Corporation board - where it was claimed that there were no reasons given for revoking the appointment of the chairperson of a board of a State Corporation - whether in the circumstances, the revocation was unlawful - the condition that a revocation of the appointment of any board member could be with a nomination of another for the remainder of the period of office of that member - where a new board member was appointed for a longer period - whether such an appointment was invalid - Constitution of Kenya, 2010, article 47; State Corporations Act (Act No. 11 of 1986) section 7(3).

Employment Law - management of employees - transfer of employees - transfer of employees in civil service - law regulating transfer of employees in civil service - requirements for effective employee transfer - duties of the employer and employee during employee transfer - discretion of employer to transfer an employee - when would courts interfere with employer's discretion to transfer an employee - whether chairpersons and members of state corporations or boards of public bodies were bound by constitutional, statutory provisions, lawful policies and practices that governed public employment - whether upon reviewing performance, an employer was allowed to review terms and conditions of employment/service of a public officer - Constitution of Kenya , 2010, articles 73, 80(c) and 232; National Youth Service Act (Act No. 17 of 2018) section 7(1); Employment Act (Act No. 11 of 2017) sections 5(8)(c) and 13; Public Service Code of Regulations, 2006, section E.302.



Constitutional Law – public service - Public Service Commission – establishment of Public Service Commission – powers and functions of Public Service Commission – mandate of the Public Service Commission to delegate its powers and functions – whether delegation of function and power negated the power held by a principal – whether the Central Human Resource Management Postings Committee was valid vis-a-vis the PSC – the requirement for Public Service Commission in undertaking policy change(s), review(s) and reform(s) to conduct public participation - requirement for Public Service Commission to promote the values and principles referred to in articles 10 and 232 of the Constitution throughout the public service – where the Public Service Commission formulated Policy on Decentralisation of Human Resource Management in the Civil Service, May 2014 without conducting public participation – whether in such circumstances, the Policy on Decentralisation of Human Resource Management in the Civil Service, May 2014 was invalid – Constitution of Kenya, 2010, articles 10, 155, 233, 234 and 259; Public Service Act (Act No. 10 of 2017) sections 2, 11(c) and 58.

Brief facts

The petitioners alleged violation of the Constitution, breaches of the Public Service Commission Act (PSC Act), the National Youth Service Act (NYS Act), the State Corporations Act and the Youth Enterprise Development Fund (YEDF) Order, 2007. Their claims against the respondents related to the appointment, transfer and/or removal from office of various public officers, meddling in the affairs of the PSC, misleading the President, coming up with unconstitutional policies and allegedly acting *ultra vires* statute in addressing civil service. They argued that the PSC was the only body vested with the power to appoint and remove public officers and that the 1st and 2nd respondents acted irregularly in appointing, transferring and/or removing various public officers from office.

The petitioners challenged the appointment of the 2nd respondent as State House Chief of Staff and Head of Public Service by the President alleging that it was *ultra vires* the Constitution. They alleged that the position and responsibilities assigned to the 2nd respondent were equivalent to those of the Principal Secretaries and that such positions required parliamentary vetting and approval. They further questioned the validity of the *Policy on the Decentralisation of Human Resource Management in the Civil Service* (impugned policy), which matters concerned the terms and conditions of various persons in the civil service. They asserted that the impugned policy was done with the aim of taking control over civil service from Principal Secretaries and vesting it in Cabinet Secretaries.

The respondents opposed the petition contending, among others, that the petitioners lacked *locus standi* to urge private law claims under a constitutional petition with regard to the named persons who had not given their authority and had not made any complaints. The also averred that the petition did not fall under the jurisdiction of the court.

Issues

- i. Whether one could bring a private law claim under a constitutional petition and with regard to the named persons who had not given their authority and had not made any complaints.
- ii. What was the nature of what constituted an employment dispute?
- iii. Whether a claim challenging the validity of appointments made to the boards of a State Corporations was within the jurisdiction of the Employment and Labour Relations Court.
- iv. Whether the Employment and Labour Relations Court had the jurisdiction to determine constitutional petitions touching on employment and labour.
- v. What were the powers of the President when establishing offices in the public service?
- vi. Whether the President acted *ultra vires* in establishing the office of the State House Chief of Staff and Head of Public Service.
- vii. Whether the designation of the office of State House Chief of Staff and Head of Public Service usurped the power of the chairperson of the Public Service Commission.
- viii. What were the grounds upon which the President could revoke the appointment of a member of a board of a State Corporation?



- ix. Whether any other person other than the President had the power to revoke the appointment of a member of a State Corporation's board.
- x. Whether the revocation of the appointment of the chairperson of a board of a State Corporation without giving reasons was unlawful.
- xi. What were the requirements for effective employee transfer in civil service?
- xii. What were the duties of the employer and employee during employee transfer?
- xiii. When could courts interfere with an employer's discretion to transfer an employee?
- xiv. What were the mandate and powers of the Public Service Commission?
- xv. Whether the Central Human Resource Management Postings Committee was valid vis-à-vis the Public Service Commission.
- xvi. Whether the Policy on Decentralisation of Human Resource Management in the Civil Service, May 2014 formulated by the Public Service Commission was invalid for lack of public participation.

Relevant provisions of the Law

State Corporations Act;

Section 7(3);

7. Power to issue directions and to remove Board

(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.

Held

1. Where there was a clear procedure for redress of any particular grievance prescribed by the Constitution or the Act of Parliament, that procedure had to be strictly followed.
2. The right to fair labour practices was part of the human rights secured by the Bill of Rights under article 19 of the Constitution. By article 21(4) of the Constitution, the State was required to enact and implement legislation to fulfill its international obligations in respect of Human Rights and Fundamental Freedoms. By article 22(1) as read with article 22(3) of the Constitution and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the Bill of Rights was enforced by filing a petition in the High Court and by article 23(3) of the Constitution, the court could grant appropriate relief including a declaration of invalidity of any law that violated the Bill of Rights.
3. One of the objects of the Employment Act was to declare and define the fundamental rights of employees. Section 3 provided that the Act applied to all employees employed by an employer under a contract of service except the classes of employees specified therein. The Employment and Labour Relations Court (ELRC) Act stipulated the procedure for the enforcement of employment rights. Under a memorandum of claim, a party was allowed to file a claim urging constitutional violations and apply rule 8 of the ELRC Procedure Rules, 2016 to frame the orders sought.
4. Courts had moved away from the strict interpretation of standing with regard to public law litigation and the constitutional dispensation that the court ought to interpret the rule relating to *locus standi* liberally so as not to lock out persons with genuine grievances from accessing the seat of justice.
5. The matters raised in the instant petition related to labour relations and connected purposes directly addressed under the ELRC Act, 2011 read together with the Employment Act, 2007 and articles 41 and 162(2) and (3) of the Constitution, which gave the court jurisdiction to hear and determine any disputes relating thereto. Thus, there was jurisdiction and the petitioners had the requisite standing to urge the instant petition.



6. An act was *ultra vires* when the decision making authority committed an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles rendered the decision made laced with illegality. In order to succeed in an application for judicial review, the applicant had to show that the decision or act complained of was tainted with illegality, irrationality and procedural impropriety.
7. The decision-maker had to understand correctly the law that regulated his decision-making and had to give effect to it. Judicial intervention was posited on the idea that the objective was to ensure that the agency of government functionary remained within the area assigned to it by Parliament. A decision, which fell outside that area, could therefore be described, interchangeably, as a decision to which no reasonable decision-maker could have come or a decision which was not reasonably open in the circumstances.
8. Article 132(3)(c) and 132(4)(a) of the Constitution, the President had the powers to direct and co-ordinate the functions of ministries and government departments and by a decision published in the gazette, assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any Act of Parliament. The President could perform any other executive function and establish an office in the public service in accordance with the recommendations of the PSC. The President was not stopped from establishing any office in his private office and the office of the State House Chief of Staff was in accordance with approval of the PSC.
9. Section 13 of the National Government Coordination Act further mandated the President to establish such committees of principal secretaries and such other committees as could be necessary for the effective coordination of the national government functions under the Constitution, the Act or any other written law.
10. The PSC in its advisory opinion approved the establishment of various posts including that of the Chief of Staff. The office of the President was an institution. It was not expected for the President to do everything. The Chief of Staff and Head of Public Service was responsible to the President for general efficiency of public service for coordination of the activities of public service and the overall organization of the machinery for the execution of government policies. The designation of the office that the 2nd respondent held as Head of Public Service did not usurp the power of the Chairperson of Public Service Commission.
11. The office of the Head of Public Service was duly established in accordance with article 132 (4) (a) of the Constitution and the holder of that office, was charged with the responsibility of aiding the President in undertaking the constitutional and statutory function of directing and coordinating the functions of ministries and government departments as per article 132 (3)(b) of the Constitution and sections 7 and 8 of the National Government Co-ordination Act, 2013. Accordingly, the 2nd respondent was properly appointed in accordance with the powers bestowed upon the Presidency under article 132(4) of the Constitution, read together with the functions outlined under the National Government Coordination Act read together with the functions of the PSC and its advisory opinion on various offices including that of the State House Chief of Staff and Head of Public Service. That was constitutional and lawful.
12. Gor Evans Semelang'o (Semelang'o) was appointed chairperson of the Youth Enterprise Development Fund (YEDF) vide Gazette Notice No.1828 of February 15, 2013 and pursuant to section 5 of the YEDF Order, 2007 in addition to the provisions of the State Corporations Act. The YEDF was established as a state corporation with a non-executive chairperson appointed by the President. That function was not undertaken by the office or person of the 1st or 2nd respondents save, the President in making such appointment had to do so in writing and bear the seal and signature of the President pursuant to article 135 of the Constitution. His appointment was subsequently revoked vide Gazette Notice No. 2339 of April 7, 2014.



13. Section 7(3) of the State Corporations Act gave the President power to revoke the appointment of any member of the Board and could himself nominate a new member for the remainder of the period of office of that member or he could constitute a new Board for such period as he deemed fit. The revocation of appointment was however subject to the provisions that if at any time it appeared to the President that a board had failed to carry out its functions in the national interest, and then the motions for revocation of any member of the board or the entire board could take effect and a new one appointed.
14. Once the members were appointed by a board, the tenure of individual members as appointed could be cut short by revocation only under section 7(3) of the State Corporations Act. By revoking the appointments of the petitioners and the 3rd to 5th interested parties, the 1st respondent acted *ultra vires* section 7(3) of the State Corporations Act and Gazette Notice No. 6599 dated July 1, 2019 was null and void.
15. Section 7(3) of the State Corporations Act was the legitimate and the specific manner of dealing with a situation where the tenure of a member of a board of State Corporation was to be revoked. Section 7(3) ensured that boards of State Corporations remained in place and a member's appointment thereto was revocable only by the President and within the confines of the provisional safeguards.
16. Where a board of a State Corporation was appointed, there was an expectation that it would undertake its mandate in the public interest. The counter-expectation under the same provisions of the law was that, to revoke the appointment, a reasonable cause had to exist that a board or member thereof had failed to carry out its/his functions in the national interest.
17. With regard to Semalang'o, the appointing authority was the Head of State and President and the same office revoked the appointment. Pursuant to section 7 of the State Corporations Act, the President had power to appoint and revoke the appointment of the chairperson of the board. Under article 135 of the Constitution, the decision of the President had to be in writing. That was effected through Gazette Notices as cited. Upon the publication of the changes through Kenya Gazette Notice, the President acted within the Constitution and the law.
18. Save, no reason(s) for the revocation were given/stated pursuant to section 7(3) of the State Corporations Act read together with article 47 of the Constitution, which required due process before an adverse decision was taken against a person. It was not sufficient that the person appointing could revoke and publish such decision. The statutory authority to appoint came with the duty to give reasons and in the instant case that there was failure on the part of the board member to carry out its/his functions in the national interest. For want of reason(s), there was breach of section 7(3) of the State Corporations Act. Semalang'o was removed from office unlawfully.
19. With the power to appoint and to revoke the appointment placed upon the President, section 7(3) of the State Corporations Act made it conditional that a revocation of the appointment of any board member could be with a nomination of another for the remainder of the period of office of that member or he could constitute a new board for such period as he could, in consultation with the committee, determine.
20. The appointment of Semalang'o was vide Gazette Notice No.1828 dated February 5, 2013 for a term of 3 years. That was revoked after a year. The appointment of Bruce Odhiambo as a member could have been for the remainder of the period of office of the tenure of Semalang'o as the chairperson of the board, YEDF as the entire board was not the subject of re-constitution. The appointment of Bruce Odhiambo was unlawful and contrary to the provisions of section 7(3) of the State Corporations Act.
21. Regarding the challenge on transfer of Japter Kiplimo Rugut (Rugut) from the position of director of the National Youth Service (NYS) and his replacement by Dr Nelson Githinji (Dr. Githinji), section 7(1) of the NYS Act allowed for the appointment of director. Being a civil servant, the NYS director was subject to rules and regulations governing civil service.



22. A transfer of employees was a generally accepted workplace best practice. To ensure a transfer in employment and in the civil service was regulated and non-discriminatory, an employer such as the PSC was required under section 5(8)(c) of the Employment Act to put in place an employment policy practice, policy, manual or a human resource document. The employer enjoyed the prerogative to re-organize due to business needs and changes were inevitable at the shop floor to ensure better productivity, good work performance and enhance service delivery in the civil service as reasonable measures requiring transfers, re-deployment or re-designation. The changes made had to be done in writing as required under section 13 of the Employment Act, 2007 as a best practice.
23. The employer's discretion to transfer an employee from one place to another could not be readily interfered with except for good cause, which would include unfounded allegations, victimisation and any action which disadvantaged the employee.
24. It was not in the choice of an employee to dictate where they wished to work, once work had been created, and if in the view of the employer they found that a particular employee was best placed in a certain location or work station, it was the employer's duty to inform the employee and the employee's role was to ensure their work performance in the allocated station. To otherwise contest work allocation in a set work station on the basis that the one had not properly allocated such a station was to challenge that prerogative of the employer.
25. The respondents applied the PSC Code of Regulations, 2006. Part E spelt out the terms and conditions of employment in the civil service and section E.30 allowed the transfer of officers from one ministry or department to another. They were reasonable and met the best practice. The regulations were within the constitutional and legal mandate of the PSC to formulate. The transfer of Rugut by the 3rd respondent by letter dated May 9, 2014 was lawful and in tandem with the definition assigned to a transfer under section 2 of the PSC Act.
26. Article 155(2) of the Constitution gave power to the 3rd respondent as the administrative head of the state department of planning responsible for human resource to issue letter on the transfer and posting of NYS director. The appointment of Dr. Githinji as the director was with inter-ministerial approval and pursuant to section 7 of the NYS Act and permissible.
27. The appointing authority of persons nominated by the National Youth Council (NYC) was the Minister. The appointment of Clement Ayungo (Ayungo) was published vide Gazette Notice No.3021 dated April 11, 2014. That was done in accordance with the constitutional mandate of the 1st respondent read together with section 5(2) (f) of the YEDF Order.
28. The NYC was established under the NYC Act, 2009; under section 5(1) (a) the NYC was allowed to nominate a chairperson who was then appointed by the Minister.
29. The NYC was non-executive with the secretary given mandate to run the daily affairs of the Council and under the First Schedule the meetings of the Council were regulated. On May 6, 2014 the 1st respondent and Minister for Devolution and Planning appointed Ayungo pursuant to section 5(2) (e) of the YEDF Order, 2007 to be member of the board of the YEDF for a period of three (3) years. The NYC and the YEDF were interlinked in objectives. They served the youth. One to ensure the youth were able to borrow money and the other creating a depository of the funds. Both were in sync.
30. Under the YEDF, the Board had a representative from the Permanent Secretary responsible for youth affairs, a Permanent Secretary in the Ministry of finance and seven other persons who had knowledge and experience on matters relating to finance, management, venture capital fund management and youth development. Singled out was a person nominated by the NYC and appointed by the Minister. Those comprised Board members separate from the chairperson. The Board of YEDF was non-executive and its meetings were regulated under the YEDF Act.
31. The PSC had formulated policy regulations on terms and conditions of service to ensure diversity at the shop floor through application of the PSC Code of Regulations, 2006, applicable at the time. The various persons listed and others similarly placed and situated in the public service, were public



- officers despite their designation or position held in the service, they were all in public or state service and governed by specific applicable constitutional and statutory provisions and lawful policies and practices, so that the variance in positions held or designation did not render any of the public or state officers to escape their being servants of the people, employed by the people, within such applicable constitutional and statutory provisions, and, lawful policies and practices. That well resonated with articles 73, 232 and 234 of the Constitution with regard to civil service.
32. Upon performance review, an employer was allowed to review terms and conditions of employment/ service. That was constitutional and lawful and allowed under the PSC Code of Regulations, 2006.
 33. Under article 155 of the Constitution, the offices of Principal Secretaries were established in the public service to head each state department.
 34. Pursuant to article 234(5) of the Constitution, the PSC was allowed to delegate some of its functions. The allegations that the 4th respondent was incompetent for writing letter on implementation of the policy on decentralisation of human resource in the civil service was unfounded. It was part of the mandate to delegate. The PSC was allowed to delegate to any person or body as appropriate. The PSC as an independent commission was empowered under article 234(5) of the Constitution to delegate its functions and powers.
 35. Delegation of function and power did not negate the power held by a principal. Responsibility lay with the principal. Delegation did not imply parting with powers by the person who delegated but conferred authority to do things which otherwise the person delegating would have to do himself. A power to delegate further could only arise where it was within the scope of the primary delegate's authority.
 36. Delegation was the assignment of responsibility or authority to another person usually one's subordinate, or another officer of a lower rank. It was instructive, however, that the person delegating had to remain fully accountable for the outcome of the delegated work. One could delegate authority but not responsibility. If a person delegated both authority and responsibility, then that became abdication of duty or denudation of authority and it was not acceptable.
 37. Where delegation was underpinned in statute, and there was a requirement that the delegation be in writing, then such delegation had to be in writing. There had to be an instrument clearly defining the extent of the delegated authority and the duties involved. In such a case, if the person delegating power did so verbally contrary to the statute allowing him to delegate, then such delegation became null and void for all intents and purposes.
 38. The principal had to assign responsibility or authority to another person or body in writing and such person had to give account to the principal and right-holder who remained responsible overall. For the PSC, delegation of authority and responsibility was found both under article 234 (5) of the Constitution and under the PSC Act.
 39. There was stakeholder involvement of line ministries and the union of civil servants. Under the policy, principal secretaries would be authorized officers while cabinet secretaries would be responsible for steering strategic human resource plan for the ministries and as such, the mandate of the PSC pursuant to article 234(5) of the Constitution was not compromised.
 40. Article 233 of the Constitution established the PSC and article 234 of the Constitution provided the functions and powers of the PSC. Article 234(2) (c) of the Constitution directed the PSC to promote the values and principles referred to in articles 10 and 232 of the Constitution throughout the public service.
 41. To expound on its mandate, Parliament enacted the PSC Act and section 4 of the PSC Act provided that the PSC, ought to, in fulfilling its mandate, be guided by the national values and principles of governance in article 10 of the Constitution and the values and principles of public service in article 232 of the Constitution. In undertaking policy changes, reviews and reforms of any matter likely to affect the stakeholders, public participation was an imperative. Such public participation was so crucial and important that the PSC as an independent constitutional commission was enjoined to secure.



42. Section 58(2) and (3) of the PSC Act, further extrapolated the requirement to ensure public participation in the PSC development of the human resources in public service. The Constitution and the law enjoined the PSC to ensure public participation. The invitation of line ministries and the union of civil servants though with intention to have internal stakeholders give feedback on the policy document, such ought to be subjected to the wider public which the PSC Act under section 2 defined to mean to make known to the public, through the national, local media and other lawful means.
43. A best practice was envisaged in the sittings of Parliament under article 118(2) of the Constitution, 2010 that Parliament could not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant speaker had determined that there were justifiable reasons for the exclusion. Unless there was justifiable reason for exclusion of the public with regard to policy review, the PSC had to undertake the same in an open and transparent manner to ensure inclusion of as much a wider public as practically possible.
44. The policy on decentralisation of human resource management in the civil service, May 2014 was invalid for want of public participation in its formulation and formation contrary to article 10 of the Constitution and section 58 of the PSC Act.
45. The Central Human Resource Management Postings Committee was a structure that had been in place over the years and within the core functions of the PSC in engaging with various ministries and state departments to efficiently and effectively offer and expose public servants to diverse work environments and management of diversity. Such was lawful under section 11(c) of the PSC Act.

Petition partly allowed.

Orders

- i. *Declaration issued that the removal of Mr. Gor Evans Semelang'o as the Chairman of the Board of the Youth Enterprise Development Fund and the subsequent appointment of Mr. Bruce Odhiambo to replace him were unlawful.*
- ii. *Declaration issued that the appointment of Bruce Odhiambo was unlawful and contrary to the provisions of section 7(3) of the State Corporations Act.*
- iii. *An order issued quashing the Policy on the Decentralisation of Human Resource Management in the Civil Service, May, 2014 for want of public participation.*
- iv. *The Public Service Commission ordered to subject the Policy on Decentralisation of Human Resource Management in the Civil Service, May 2014 to public participation in its formulation and formation pursuant to article 10 of the Constitution and the Public Service Commission Act.*
- v. *Each party was to own costs.*

Citations

Cases

Kenya

1. *Attorney General & 2 others v Independent Policing Oversight Authority & another* Civil Appeal 324 of 2014; [2015] eKLR - (Explained)
2. *Banda, Moses v Cabinet Secretary for the National Treasury and Planning; Kenya Post Office Savings Bank (Postbank) (Interested Party)* Petition 237 of 2019; [2020] eKLR - (Explained)
3. *Hassan, Sumayya Athmani v Paul Masinde Simidi & another* Civil Appeal 195 of 2016; [2019] eKLR - (Explained)
4. *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others* Civil Appeal 224 of 2017; [2017] KECA 436 (KLR)- (Explained)
5. *Kanyua, Priscilla Nyokabi v Attorney General & Interim Independent Electoral Commission* Constitutional Petition 1 of 2010; [2010] eKLR - (Explained)
6. *Ochido, Henry v NGO Co-ordination Board* Petition 41 of 2015; [2015] eKLR - (Explained)



7. *Okoiti & another v Public Service Commission & 73 others; Law Society of Kenya & another (Interested Party)* Petitions 33 & 42 of 2018; [2021] KEHC 464 (KLR) (Consolidated) - (Explained)
8. *Okoiti, Okiya Omtatah v Attorney General & 2 others; Francis K Muthaura & 5 others (Interested Parties)* Petition 47 of 2018; [2019] eKLR - (Explained)
9. *Okoiti, Okiya Omtatah v Joseph Kinyua & 2 others* Petition 51 of 2018; [2019] eKLR - (Explained)
10. *Owuor, Richard & 2 others (suing on behalf of Busia Sugarcane Importers Association) v Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & Cooperatives & 7 others* Petition E263 of 2020 [2021] eKLR - (Explained)
11. *Republic v Cabinet Secretary, Ministry of Agricultures, Livestock & Fisheries; Cabinet Secretary, Ministry of Industry, Trade & Co-operatives (Interested Parties) Tanners Association of Kenya (Suing through its Chairman Robert Njoka ex parte applicant)* Miscellaneous Application 190 of 2018; [2018] eKLR - (Explained)
12. *Republic v Secretary of the Firearms Licensing Board & 2 others ex - parte Senator Johnson Muthama* Judicial Review Application 43 of 2018; [2018] eKLR - (Mentioned)
13. *Ronoh, Sitienei & 4 others v Pharmacy and Poisons Board & another; Attorney General & 4 others (Interested Parties)* Petition 137 of 2019; [2019] eKLR - (Explained)
14. *Sungu, Ken v Kenya Ports Authority* Petition 6 of 2017; [2020] eKLR - (Explained)

Statutes

Kenya

1. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya, 2010 Sub Leg) In general - (Cited)
2. Constitution of Kenya articles 10(2)(a); 21; 22; 23; 24; 27; 28; 35; 41; 47; 50; 58(2)(3); 73; 75; 80(c); 118(2); 132(2)(d)(f)(3)(b)(c)(4)(a); 135; 152(6)(a)(b); 154(1); 155(1)(2); 162(2)(3); 165(4); 201(a); 232(1)(c); 232(d)(f); 233; 234(2)(a)(c)(5); 236; 258(2)(a); 259(1)(a) - (Interpreted)
3. Employment Act, 2007 (Act No 11 of 2007) sections 5(8)(c); 13 - (Interpreted)
4. Employment and Labour Relations Court Act, 2011 (Act No 20 of 2011) section 12(4) - (Interpreted)
5. Leadership and Integrity Act, 2012 (Act No 19 of 2012) section 52(1) - (Interpreted)
6. National Government Coordination Act, 2013 (Act No 1 of 2013) sections 13, 18 - (Interpreted)
7. National Youth Service Act, 2018 (Act No 17 of 2018) section 7(1) - (Interpreted)
8. Public Service Commission Act, 2017 (Act No 10 of 2017) sections 11(c); 12, 58; part VIII - (Interpreted)
9. State Corporations Act (cap 446) section 7(3) - (Interpreted)

Advocates

None mentioned

JUDGMENT

1. On March 10, 2017 the Court of Appeal in Nairobi Civil Appeal No 4 of 2015 – Okiya Omtatah Okoiti & another v Anne Waiguru & others directed that ELRC Petition No 42 of 2014 consolidated with ELRC Petition No 27 of 2014 be placed before the Chief Justice for appointment of three Judges to hear and determine the Petitions.
2. By letter dated July 6, 2017 the Honourable Chief Justice constituted the Bench herein pursuant to the provisions of article 165(4) of the [Constitution, 2010](#).



The Petitioners are Seeking the Following;

- a) That a declaration is hereby issued that the purported removal of Mr Rugut as the Director of the National Youth Service and the subsequent appointment of Dr Nelson Githinji to replace him are inconsistent with the Constitution and the National Youth Service Act and, therefore, null and void, and of no consequence in law, to the extent of the inconsistency.
- b) That a declaration is hereby issued that the purported removal of Mr Gor Evans Semelang'o as the Chairman of the Board of the Youth Enterprise Development Fund and the subsequent appointment of Mr Bruce Odhiambo to replace him are inconsistent with the principles of natural justice, the Constitution, the Public Officer Ethics Act, and the State Corporations Act and, therefore, null and void, and of no consequence in law, to the extent of the inconsistency.
- c) That a declaration is hereby issued that the purported dismissal of Mr Samuel Chepkwony and subsequent appointment of Mr Clement Ayungo to the Youth Enterprise Development Board is contrary to order 5(f) of the Youth Enterprise Development Fund Order 2007, and the Constitution, and, therefore, null and void, and of no consequence in law, to the extent of the inconsistency.
- d) That a declaration is hereby issued that the purported transfer of civil servants contained in the 2nd respondent's letter dated February 18, 2014, is *ultra vires* the 2nd respondent's powers and therefore null and void and of no consequence in law.
- e) That a declaration is hereby issued that the 1st respondent is unfit to hold public office because she misled the President, grossly violated the Constitution and other laws, and is guilty of gross misconduct.
- f) That a declaration is hereby issued that the 3rd respondent acted incompetently by writing the letter dated May 9, 2014, on instructions of anonymous entities, purportedly posting Mr Japter Kiplimo Rugut to be Secretary, Sports
- g) That a declaration is hereby issued that the 4th respondent was incompetent to have allowed the 1st and 2nd respondents to usurp the mandate and functions of the Public Service Commission, and for allowing to be developed, and/or developing, an unconstitutional policy document dated May, 2014, titled, Policy on the Decentralisation of Human Resource Management in the Civil Service.
- h) That the honourable court be pleased to issue and hereby issues a mandatory order quashing the 3rd respondent's letter dated May 9, 2014, and titled, "posting?", purportedly removing Mr Japter Kiplimo Rugut from being the Director of the National Youth Service, and posting him to be Secretary, Sports.
- i) That the honourable court be pleased to issue and hereby issues a mandatory order restoring Mr Japter Kiplimo Rugut to his office for the remainder of his term as the Director of the National Youth Service.
- j) That the honourable court be pleased to issue and hereby issues a mandatory order quashing the Gazette Notice No 2339, dated February 27, 2014.



- k) That the honourable court be pleased to issue and hereby issues a mandatory order restoring Mr Gor Evans Semelang'o to his office for the remainder of his unexpired term as the Chairman of the Board of the Youth Enterprise Development Fund.
- l) That the honourable court be pleased to issue and hereby issues a mandatory order quashing the Gazette Notice No 3021, dated April 11, 2014, to the extent that it appoints Clement Ayungo to the Board of the National Youth Enterprise Development Fund.
- m) That the honourable court be pleased to issue and hereby issues a mandatory order ordering the Cabinet Secretary, Devolution and Planning to appoint Mr Samuel Chepkwony, as the duly nominated appointee of the National Youth Council to the Youth Enterprise Development Board
- n) That the honourable court be pleased to issue and hereby issues a mandatory order quashing the 2nd respondent's letter dated February 18, 2014, and titled, Central Human Resource Management Postings.
- o) That the honourable court be pleased to issue and hereby issues a mandatory order quashing the document dated May, 2014, titled, Policy on the Decentralisation of Human Resource Management in the Civil Service.
- p) That the honourable court be pleased to issue and hereby issues a permanent order of Prohibition prohibiting the said Dr Nelson Githinji from continuing to act as the Director of the National Youth Service.
- q) That the honourable court be pleased to issue and hereby issues a permanent order of Prohibition prohibiting the said Bruce Odhiambo from continuing to act as the Chairman of the Youth Enterprise Fund.
- r) That the honourable court be pleased to issue and hereby issues a permanent order of Prohibition prohibiting the said Clement Ayungo from continuing to act as the representative of the National Youth Council on the Youth Enterprise Development Board.
- s) That the honourable court be pleased to issue and hereby issues a permanent order of Prohibition prohibiting the 2nd respondent from purporting to be and/or continuing to act as the Head of the Public (Civil) Service, and/or doing anything to interfere whatsoever with the mandate and functions of the Public Service Commission.
- t) That the honourable court be pleased to exercise its powers under article 23(3) of the Constitution, to issue any other appropriate relief, including an order for compensation for Mr Chepkwony, Mr Semelang'o, and Mr Rugut.
- u) That the honourable court be pleased to issue any other or further remedy that the honourable court shall deem fit to grant.
- v) An order that the respondents do pay the costs of this petition

The Parties

3. The petitioners are citizens of Kenya and public spirited individuals.



The 1st respondent was, at the material time, a State Officer holding the office of the Cabinet Secretary, Devolution and Planning pursuant to article 154(1) of the Constitution, 2010 (the Constitution) and was in charge of the Ministry of Devolution and Planning which was supposed to provide effective leadership and coordination in devolution, planning and policy formulation.

4. The 2nd respondent was the State House Chief of Staff and Head of Public Service.
5. The 3rd respondent was a State Officer holding the office of the Principal Secretary, Planning created under article 155(1) of the Constitution.
6. The 4th respondent was the Chairperson of the Public Service Commission, a Constitutional Commission and a body corporate established under article 233 of the Constitution.

The Petition

7. The petitioners' case is that the Public Service is the primary means at the disposal of the Government for translating policies into programmes and implementing projects for overall development. It is the duty of the Public Service Commission (PSC) to ensure there is a professionally managed and functional public service.
8. The PSC has appointed Principal Secretaries in State Departments as its authorised officers to assist in the discharge of the human resource function and the day to day management of the human resource.
9. The petitioners invite the honourable court to;
 - a. Intervene and determine the Constitutional and legal validity of the removal of persons employed by the PSC upon the subsequent appointment of others into office in the public service made by the 1st respondent assisted by the 2nd respondent.
 - b. Determine the constitutional validity of the 2nd respondent, who was the State House Chief of Staff and the Head of the Public Service, appointed by the President and not subjected to vetting by Parliament, taking it upon himself to superintend the public service, outside the President's private staff.
10. The petitioners' case is also that the 1st respondent, assisted by the 2nd respondent has committed acts of gross violation of the Constitution and of statutes which rendered her unsuitable to serve as a Cabinet Secretary pursuant to article 152(6)(a) & (b). The petitioners further accuse the 1st respondent of politicising the Office of the Cabinet Secretary, Devolution and Planning, contrary to article 152 of the Constitution.
11. It is also the petitioners' case that the 3rd respondent showed gross incompetence by allowing the 1st and 2nd respondents to interfere with and disrupt the smooth and professional running of the civil service.
12. The petitioners' further accuse the 4th respondent of gross incompetence by failing to protect the affected employees in the public service and their schemes of service from the wrong administrative decisions of the 1st and 2nd respondents, even endorsing the wrong policy on the Decentralization of Human Resource Management in the Civil service.
13. The petition is premised on the grounds that the 1st respondent violated the law in the manner she changed the Chairman of the Board of the Youth Enterprise Development Fund Youth Enterprise Development Fund (YEDF) and how she appointed the Director, National Youth Service.
14. The petitioners plead that on May 13, 2014 in disregard of section 7(1) of the National Youth Service Act and sections 7 and 31 of the Sixth Schedule to the Constitution and articles 10, 232, 234 and



- 236 of the Constitution, the 1st respondent removed Japter Kiplimo Rugut (Rugut) from the position of Director of the National Youth Service (NYS and unprocedurally replaced him with Dr Nelson Githinji (Dr Githinji) and the petitioners suspect this was with improper motive.
15. The Director of NYS who is responsible for the overall command and direction of the Service is supposed to be appointed under section 7(1) of the NYS Act which requires that the officer shall be appointed in the manner applicable to the appointment of other public officers. To be valid, the removal and appointment of the Director of the NYS must conform to the procedures under articles 10, 24, 27, 73, 75, 233, 234 and 259 of the Constitution read together with section 52(1) of the Leadership and Integrity Act and the scheme of service for national government administration officers as contained in section 18 of the National Government Coordination Act, section 12 of the Public Service Act (PSC Act) and section 7 of the NYS Act.
 16. By letter dated February 27, 2013 Rugut was appointed using the scheme of service but by letter dated May 9, 2014 the 3rd respondent posted him to be Secretary, Sports and then appointed Dr Githinji as Director NYS without the involvement of the PSC.
 17. The office of Director NYS is a public service office which has laid down procedures of filling and which ought to have been applied in the appointment of Dr Githinji pursuant to section 7 of the NYS Act which requires the position be filled in an open, competitive and merit-based manner.
 18. The petitioners state that the removal of Gor Evans Semelang'o (Semelang'o) from the position of Chairman of the Board of the YEDF and the appointment of Bruce Odhiambo to replace him was in violation of the Constitution}} and the law.
 19. On February 25, 2014 Semelang'o wrote a confidential letter to the 1st respondent demanding a written apology and protesting what he alleged had been embarrassing mistreatment at a meeting on that day. He accused the 1st respondent of convening a meeting without an agenda, which he learnt was to engineer his removal and added that on various occasions the 1st respondent had made veiled threats and allegations.
 20. Instead of action being taken on the allegations, through Gazette Notice No.2339 dated February 27, 2014 it was announced that Semelang'o had been dismissed as Chairman of NYDF and replaced with Bruce Odhiambo. Gazette Notice No 1828 of February 5, 2013 was thus revoked.
 21. Thepetitioners maintain that this action was irregular and unconstitutional on the grounds that Semelang'o could only be removed from office in accordance with section 6(2) of the State Corporations Act upon resignation, being absent without permission, being convicted of a criminal offence, incapacitated or for conduct inconsistent with membership of the Board.
 22. The petitioners point out that under article 135 of the Constitution, the President in the performance of his functions should make an appointment in writing and pursuant toarticle 47(2) the President should give reasons in writing this was not done with regard to Semelang'o. No reasons were given for his removal. The petitioners conclude that the appointment of Bruce Odhiambo was a nullity as all presidential appointees must get parliamentary approval before the President can appoint.
 23. The petition is also that there was irregular, unlawful and criminal dismissal of Samuel Chepkwony and the appointment of Clement Ayungo to the YEDF. On April 11, 2014 the 1st respondent vide Gazette Notice No 3021 appointed Clement Ayungo contrary to order 5(f) of the YEDF which requires the Council to nominate one person to the Board and Samuel Chepkwony had been dully nominated for appointment at a meeting held on March 31, 2014. The petitioners aver that the 1st respondent was in violation of the Constitution and order 5(f) of the YEDF.



24. The petitioners add that the 1st Respondent committed acts of irregularities in the management of the human resource in the public service. In July, 2013 Njoki Kahiga a civil servant was removed from office as Principal Administrative Secretary Job Group ‘S’ and replaced with Juster Nkoroi who was promoted from Job Group ‘R’ to ‘T’ a more senior grade outside the scheme of service for the Directorate of Personnel Management.
25. Further, in August, 2013 the 1st respondent demoted Protus Onyango a gender expert from heading the Directorate of Gender and replaced him with Catherine Muoki an economist effectively crippling the department.
26. The 1st and 2nd respondents are said to have worked together to effect irregular and unlawful postings and transfer of public officers, bypassing the PSC. By letter dated February 18, 2014 they moved various officers outside of the scheme of service.
27. Regarding the 2nd respondent, the petitioners state that he had not been vetted by Parliament and hence had no capacity to superintend Principal Secretaries as done vide letter dated 18th February, 2014.
28. With respect to the 4th respondent, the petitioners state that his letter of June 3, 2014 addressed to all Cabinet Secretaries under reference Implementation of the Policy on Decentralisation of Human Resource in the Civil Service giving them 10 days to give feedback, amounted to abdication of his mandate. The petitioners invite us to make a finding of incompetence against the 4th respondent and to declare the Human Resource Decentralisation Policy invalid.

The Response

The 1st Respondent

29. In response, the 1st respondent filed a replying affidavit and avers that the accusations made by the petitioners in regard to the appointment of persons serving in various capacities who have not made any claims or authorised the petitioners to act on their behalf.
30. The 1st respondent’s position is that the petitioners have no capacity to advance private law claims on behalf of persons who have not authorised them to do so under the guise of constitutional petitions. The 1st respondent takes the view that the persons on whose behalf the petitioners are acting are named and there is no evidence that they cannot act on their own behalf. The petitioners therefore lack the requisite *locus standi*.
31. The 1st respondent also avers that the petitioners have made unfounded allegations on breach of the Constitution and the law with regard to Semelang’o, Chepkwony and Rugut and have sought compensation but they have failed to establish the basis for such claims for persons who are not before the court. The 1st respondent maintains that under articles 22 and 258(2)(a) of the Constitution, the petitioners have a duty to show that the persons on whose behalf they are acting cannot act in their own name.
32. The 1st respondent goes on to state that the court process should not be used to humiliate any person as done by the petitioners who have used abusive language in the petition. She points out that various accusations have been made with demeaning and abusive language meant to injure and reflect the person of 1st respondent in bad light.
33. The core of the petition is that the office of 1st respondent is claimed to have interfered with appointment, transfer and removal from office of various persons and it is not correct that this is meddling with the affairs of the PSC.



34. With regard to Rugut, the 1st respondent states that there is no factual basis to the allegations made save for the fact that he was procedurally transferred in compliance with the civil service regulations and policy. The scheme of service applicable to his appointment was applied.
35. The 1st respondent avers that Rugut had joined the NYS through a transfer from the Provincial Administration and was then transferred to another department as provided under section E30 of the PSC Code of Regulations, 2006 which allows the transfer of officers from one Ministry to another. The officer had not made any complaint following the transfer.
36. With regard to Dr Githinji, the allegation that there was improper motive in his appointment and replacement of Rugut is denied. The response in this regard is that the NYS as a quasi-disciplined agency is regulated under statute and housed within the Ministry of Devolution and Planning and the Principal Secretary for Planning is the accounting officer, with its officers often transferred through the Central Human Resources Management Posting Committee framework. The posting of Dr Githinji from the Ministry of Industrialisation and Enterprise Development to the Ministry of Devolution and Planning as Director, NYS was an administrative transfer and did not contravene section 7 of the NYS Act as alleged.
37. With regard to Semelang'o, the response is that the allegations made are not supported by evidence and are only meant to show the 1st respondent in bad light. The 1st respondent denies receipt of letter dated February 25, 2014 seeking an apology because letter is said to have been used by the petitioners for an improper motive.
38. Vide Gazette Notice No 2339 the appointment of Semelang'o was revoked by the appointing authority unrelated to the 1st respondent. The subject is addressed in Petition No 198 of 2014 *Evans Murachi Mburu & another v AG & another* pending before the court.
39. With regard to the appointment of Bruce Odhiambo as Chairman of the Board, YEDF the response is that this was within the prerogative of the President and in accordance with the law and the requirements of article 132(2)(f) of the Constitution did not apply.
40. Pursuant to section 5(f) of the YEDF Order, the Minister does not directly appoint a representative to the National Youth Council (NYC) or to the Board but rather endorses the person nominated by the NYC.
41. With regard to Ayungo, the 1st respondent received the name of the NYC representative and proceeded to appoint as required under the YRDF Order.
42. The allegations with regard to the transfer of Protus Onyango and designation of Catherine Muoki in the Gender Directorate are said to be ill-informed and inaccurate. The department has officers with diverse professional backgrounds including economics.
43. The procedures applied in the transfer of Njoki Kahiga and designation of Juster Nkoroi as Head of Directorate of Public Service Management were in compliance with the transfer policy within civil service and the Public Code of Regulations, 2006.
44. The 1st respondent also avers that the role of the Central Posting Committee in transfers and postings of public service officers is per established Code of Regulations and the said transfers and postings are done in accordance with the policy on inter-ministerial transfer of staff in job Group 'P' and above. The Central Posting Committee is a coordinating framework of authorised officers engaged to efficiently transfer staff across ministries in the public service. The complaints by the Petitioners with regard to



transfers and postings are not genuine as the Respondents acted upon detailed reviews through the Committee.

45. According to the 1st respondent, the alleged gross violation of the Constitution and the law has no basis; the petition is supported by illegally obtained documents or fabricated records and should be dismissed with costs.

The 2nd, 3rd and 4th Respondent

46. In reply to the petition the 2nd, 3rd and 4th respondents filed a replying affidavit sworn by the 4th respondent who avers that the petitioners, under the guise of a petition, are seeking to advance private law claims, on behalf of persons named in the petition whose rights are alleged to have been violated but have not authorised the petitioners to act on their behalf and hence lack locus standi to file the petition.
47. The 4th respondent also avers that the petition does not fall under the jurisdiction of the court as provided by article 162(2) of the Constitution and section 12 of the *Employment and Labour Relations Court Act*.
48. The 4th respondent accuses the petitioners of using contemptuous, disrespectful and abusive language, in the supporting affidavit, against the respondents. Based on this, the 4th respondent states that the petitioners do not deserve of the reliefs sought.
49. The 4th respondent avers that the petition does not disclose any constitutional violations and is deplete with alleged appointments, transfers and removals within public service all of which are matters regulated by private law.
50. With regard to Rugut, the 4th respondent states that the government routinely moves its staff members to different positions and locations with a view to enhancing service delivery to citizens. The Code of Regulations deals with various aspects of civil service employment and makes provisions for job groups in public service. Section E.30 of the Code of Regulations on Transfer from one Ministry to another provides for the transfer of officers from one Ministry or Department to another which may be made by the authorised officers provided the post carries a salary in the Job Group 'L' and below. Transfer of officers in Job Group 'P' and above should be sanctioned by the Central Postings Committee and recommendations for transfer of officers to posts within the purview of the PSC should be submitted to the Commission and reported by the authorised officer of the transferring Ministry/department in the form of Last Pay Certificate.
51. Rugut is said to have been appointed as Director General, NYS through a process of internal transfer and posting on February 27, 2013. Initially, he was a Provincial Commissioner within the Ministry of Interior and Co-ordination of National Government. He had not been dismissed from service. The 4th respondent takes the positions that allegations in the Petition to the effect that a public servant cannot be transferred amount to questioning the fundamental purpose of public service. The appointment of Rugut as Secretary for Sports did not countermand the scheme of service or the ability to deliver on the Ministry objectives. The transfer was done by the Central Human Resource Management Posting Committee which has been operating in civil service for many years. Rugut had not made any complaint about the transfer.
52. The 4th respondent goes on to state that the appointment of Dr Githinji as Director General, NYS was by the authorised officer and a transfer within Ministries.
53. The designation of Juster Nkoroi as Head of the Directorate of Public Service Management was effected by the PSC following reviews.



54. Regarding the validity of the Central Human Resource Management Postings Committee the 4th respondent states that the Committee had been in existence to ensure the efficient running of core functions of ministries and departments and to expose senior officers to diverse work and management experiences. The Committee served as a coordinating framework of authorised officers to effectively transfer staff across different ministries in the public service. Its membership comprises the Head of Public Service, Directorate of Public Service Management, PSC and Ministry Heads. The PSC had not ceded its mandate to the Committee and had limited it to oversight and appeals. Section 11(c) of the PSC Act empowers the Commission to do all such other things as may be necessary for the effective discharge of its functions. The Committee offers administrative and technical assistance as envisioned in the Constitution and PSC Act.
55. The 4th respondent adds that the allegations made by the petitioners, regarding the 2nd respondent's appointment are speculative, a fishing expedition and cannot form a basis of a constitutional petition. The appointment of the 2nd respondent is by the President pursuant to article 132(2) (d) of the Constitution and reinforced by section 13 of the National Government Coordination Act which mandates the President to establish such committees of Principal Secretaries and such other committees or mechanisms as may be necessary for the effective coordination of the national government functions under the Constitution and the law.
56. Article 132(4)(a) of the *Constitution* provides that the President may perform any other executive function and establish an office in the public service in accordance with the recommendations of the PSC. The President is not stopped from establishing any office in his private office and the office of the State House Chief of Staff was in accordance with approval of the PSC on appointment of the 2nd respondent.
57. The 4th respondent also counters the allegations by the petitioners that the Policy on Decentralisation of Human Resource Management in the Civil Service is unconstitutional, an imposition on the PSC and contrary to article 155(2) and 234 of the *Constitution*. It states that the Policy was developed by the PSC in consultation with the Ministry of Devolution and Planning. It involved stakeholder participation with a draft sent to all ministries before finalisation vide letter dated April 25, 2014. The draft was discussed with the Secretary General of the Union of Civil Servants at a meeting with the PSC and Principal Administrative Secretary, Ministry of Devolution and Planning. At the launch of the Policy at the Kenya School of Government all stakeholders were involved, including the Union of Civil Servants. The Policy had not removed the constitutional mandate of the PSC as alleged and the authorised officers would carry out the role of administration of the human resource management which power is only delegated pursuant to article 234(5) of the *Constitution* which allows the PSC to delegate any of its powers to any person or body. There is nothing unconstitutional in delegation.

Determination

58. The issues which emerge for determination in both petitions can be summarised as follows;
- a) Whether the petitioners have locus standi to institute this Petition seeking to enforce private law claims;
 - b) Whether the Central Human Resource Management Postings Committee is valid vis-a-vis the PSC;
 - c) Whether the appointment of the 2nd respondent as State House Chief of Staff and Head of Public Service by the President is ultra vires the *Constitution*;



- d) Whether there is constitutional and legal basis to remove persons employed by the PSC from office and appointment of others into office in the public service as effected by the 1st respondent assisted by the 2nd respondent;
- e) Whether the Policy on Decentralisation of Human Resource Management in the Civil Service is unconstitutional, an imposition on the PSC and contrary to articles 155(2) and 234 of the Constitution;
- f) Whether the Court should exercise its powers under article 23(3) of the Constitution, to issue any other appropriate relief, including an order for compensation for Mr Chepkwony, Mr Semelang'o, and Mr Rugut; and
- g) Who should bear costs.

Locus Standi and Jurisdiction

- 59. Because of the centrality of the questions of the petitioners' locus standi and the jurisdiction of the court, we will address these first.
- 60. The petition is under various provisions of the Constitution, 2010 in particular, articles 22, 23 and 258. The respondents contended that the petitioners lack the standing envisaged under article 162(2) of the Constitution read together with section 12(2) of the Employment and Labour Relations Court Act to urge private law claims under a constitutional petition, with regard to the named persons who have not given their authority and have not made any complaints.
- 61. We will address the question of standing together with the issue of the jurisdiction of the court to hear the petition.
- 62. The petitioners define themselves as public spirited individuals, human rights defenders and strong believers in the rule of law and constitutionalism and urge the petition under the provisions of articles 22 and 258 of the Constitution.
- 63. Article 258 of the Constitution provides as follows:
 - (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
 - (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - (a) A person acting on behalf of another person who cannot act in their own name;
 - (b) A person acting as a member of, or in the interest of, a group or class of persons;
 - (c) A person acting in the public interest; or
 - (d) An association acting in the interest of one or more of its members.
- 64. In the case of Priscilla Nyokabi Kanyua v Attorney General & Interim Independent Electoral Commission [2010] eKLR it was held as follows:

...it would be a grave lacuna in the system of public law if a pressure group or even a single spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The strict rule of locus standi applicable to private litigation is relaxed



and a broad rule is evolved which gives locus standi to any member of public acting *bona fide* and having sufficient interest in instituting an action for redress of public wrong or public injury by a person who is not a mere busybody or a meddling interloper; since the dominant object of Public Interest Litigation is to ensure observation of the provision of the constitution or the law which can be best achieved to advance the cause of the Community or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration, but acting, *bona fide* and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion like action popularis of Roman Law whereby any citizen could bring such an action in respect of public delict. Standing will be granted on the basis of public interest litigation where the petition is *bona fide* and evidently for the public good and where the court can provide an effective remedy. ...

In Kenya the court has emphatically stated that what gives *locus standi* is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population. The court equally has recognised that organisations have rights similar to that of individual private member of the public. A new dawn was then ushered in and the dominion of Private Law and its restrictive approach was dealt a final blow. A new window of opportunity emerged in the area of Public Law and shackles of inhibition in the name of locus standi were broken and the law was liberalised and a purposeful approach took the driving seat in the area of Public Law. In human rights cases, public interest litigation, including lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the preconditions of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed at the altar of technicality. The court has vast powers under section 60 of the [Constitution of Kenya](#), to do justice without technical restrictions and restraints; and procedures and reliefs have to be moulded according to the facts and circumstances of each case and each situation. It is the fitness of things and in the interest of justice and the public good that litigation on constitutionality, entrenched fundamental rights, and broad public interest protection, has to be viewed. Narrow pure legalism for the sake of legalism will not do. We cannot uphold technicality only to allow a clandestine activity through the net of judicial vigilance in the garb of legality. Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated. As part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right to access to justice entails a liberal approach to the question of locus standi. Accordingly in constitutional questions, human right cases, public interest litigation and class actions, the ordinary rules of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In these types of cases, any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused or to a defined class of persons represented, or for a contravention of the Constitution, or injury to the nation. In such cases the court will not assist such a public-spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception...



65. The question whether to file a petition or a memorandum of claim is further addressed by the Court of Appeal in the case of *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR that; where legislation has provided a remedy and prescribed a clear procedure for address of a particular grievance, a litigant can invoke the provisions of the Constitution for redress of such grievance. ... [and in] the case of *Speaker of the National Assembly v Karume* [2008] KLR 425 for the principle that: "Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or the Act of Parliament, that procedure should be strictly followed".

The right to fair labour practices is part of the human rights secured by the Bill of Rights under article 19 of the *Constitution*. By article 21(4) of the *Constitution*, the State is required to enact and implement legislation to fulfill its international obligations in respect of Human Rights and Fundamental Freedoms.

By article 22(1) as read with article 22(3) and the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* - Legal Notice No 117 of 2013, the Bill of Rights is enforced by filing a petition in the High Court and by article 23(3), the court may grant appropriate relief including a declaration of invalidity of any law that violates the Bill of Rights. The Employment Act, 2007 as revised in 2012 – after the coming into operation of the current Constitution, indicates in the preamble that one of its objects is to “declare and define the fundamental rights of employees”. Section 3 thereof provides that the Act applies to all employees employed by an employer under a contract of service except the classes of employees specified therein.

The employment and Labour Relations Court Act stipulates the procedure for the enforcement of employment rights.

66. Under a memorandum of claim, a party is allowed to file a claim urging constitutional violations and apply rule 8 of the Employment and Labour Relations Court Procedure Rules, 2016 to frame the orders sought.
67. The petitioners have outlined the various constitutional violations alleged to have been violated by the respondents with precision, the challenge to the validity of various policy and decisions of the respondents’ *vis-a-vis* the offices held.
68. Courts have since moved away from the strict interpretation of standing with regard to public law litigation and the current constitutional dispensation that the court ought to interpret the rule relating to locus standi liberally so as not to lock out persons with genuine grievances from accessing the seat of justice.
69. The core of the petition is the alleged violation of the Constitution, breaches of the Civil Service Commission Act, the National Youth Service Act, the State Corporations Act and the Youth Enterprise Development Fund Order, 2007. The the petitioners’ claims against the Respondents relate to the appointment, transfer and/or removal from office of various persons, meddling in the affairs of the Public Service Commission; misleading the President and coming up with unconstitutional policies and allegedly acting *ultra vires* statute in addressing civil service. The Petitioners question the validity of the policy on the decentralization of human resource management in civil service, which matters concern the terms and conditions of various persons in the civil service. These are matters relating to labour relations and for connected purposes directly addressed under the Employment and Labour Relations Court Act, 2011 read together with the Employment Act, 2007 and article 41 and 162(2) and (3) of the Constitution, 2007 which give this court jurisdiction to hear and determine any disputes relating thereto.
70. There is jurisdiction and the petitioners have the requisite standing to urge the instant petition.



State House Chief of Staff and Head of Public Service

71. The second issue is with regard to the appointment of the 2nd respondent as State House Chief of Staff and Head of Public Service by the President which is alleged to be ultra vires the Constitution. The Petitioners' case is that the President coordinates functions of Government Ministries through offices established under the Constitution to perform various functions and that the position and responsibilities assigned to the 2nd respondent are equivalent to those of the Principal Secretaries and that such positions require parliamentary vetting and approval. The petitioners urge that the Constitution transferred all roles and powers previously vested in the position under the former Constitution to the Public Service Commission, which in turn delegated them to Principal Secretaries within their respective jurisdictions. The Petitioners further urge that the President violated the Constitution by appointing the Head of Public Service without reference to the PSC and National Assembly.
72. An act is ultra vires when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles renders the decision made laced with illegality. See *Republic v Secretary of the Firearms Licensing Board & 2 others ex -parte: Senator Johnson Muthama* [2018] eKLR. In the case of *Pastoli v Kabale District Local Government Council & others*, (2008) 2 EA 300 the court held that;
- In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.
73. And in the case of *Republic v Cabinet Secretary, Ministry of Agricultures, Livestock & Fisheries; Cabinet Secretary, Ministry of Industry, Trade & Co-operatives (Interested Party) Tanners Association of Kenya(Suing through its Chairman Robert Njoka Ex Parte Applicant* [2019] eKLR the court in addressing the question of whether the decision made was ultra vires held that;the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it... Judicial intervention is posited on the idea that the objective is to ensure that the agency of government functionary remains within the area assigned to it by Parliament. A decision, which falls outside that area, can therefore be described, interchangeably, as a decision to which no reasonable decision-maker could have come; or a decision, which was not reasonably open in the circumstances.
74. Under article 132(3)(c) of the *Constitution*, the President is given powers to;
- (3) The President shall—
- (a) ...
- (b) Direct and co-ordinate the functions of ministries and government departments; and
- (c) By a decision published in the Gazette, assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any Act of Parliament.
75. Also under article 132(4)(a) the *Constitution* provides the functions of the President in the following terms;
- (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;
76. The President may perform any other executive function and establish an office in the public service in accordance with the recommendations of the PSC. The President is not stopped from establishing any office in his private office and the office of the State House Chief of Staff was in accordance with approval of the PSC.
77. Further to the above functions bestowed upon the Presidency under the constitution, section 13 of the [National Government Coordination Act](#) provides that;
- 13.
- (1) The President shall establish such committees of Principal Secretaries and such other committees or mechanisms as may be necessary for the effective coordination of the national government functions under the Constitution, this Act or any other written law.
 - (2) The President, through the Cabinet Secretary, may decentralize, to the extent necessary the mechanisms or committees referred to under subsection (1).
 - (3) The Cabinet Secretary may, with the approval of the President, make regulations to give effect to this section.
 - (4) The President may assign such functions, as he or she considers necessary to the committees established under this section.
 - (5) The committees established under this section shall have all the necessary powers for the proper performance of their functions under this Act or any other written law
78. The law mandates the President to establish such committees of principal secretaries and such other committees as may be necessary for the effective coordination of the national government functions under the Constitution, the Act or any other written law.
79. At its 2324th meeting, the PSC in its Advisory Opinion to the Government Variation of the Commission’s Decision: Establishment of Offices in the Executive Office of the President approved the establishment of various posts including that of the Chief of Staff.
80. This is the position occupied by the 2nd respondent.
81. In addressing a similar question, the court in ELRC Petition No. 24 of 2018 - [Okiya Omtatah v Joseph Kinyua & another](#) (2018) eKLR the Learned Judge, Abuodha, J. held that;
- The office of the President is an institution and one cannot reasonably expect the person occupying that office to do everything by himself or herself. The 1st respondent made reference to Presidential circular No. 1/2016 which stated that:
- “The chief of Staff and Head of Public Service is responsible to the President for general efficiency of public service for coordination of the activities of public service and the overall organization of the machinery for the execution of government policies”.



To this extent the court is not persuaded that the designation of the Office that the 1st respondent holds as Head of Public Service usurps the power of the Chairperson of Public Service Commission.

82. And in ELRC Petition No.51 of 2018 - *Okiya Omtatab Okoiti v Joseph Kinyua, Public Service Commission & Attorney General* the Learned Judge, Ongaya J held that;

... the court has already found that the office of the Head of Public Service is duly established in accordance with article 132(4)(a) of the Constitution and the holder of that office, the 1st respondent, is charged with the responsibility of aiding the President in undertaking the constitutional and statutory function of directing and coordinating the functions of ministries and government departments per article 132(3)(b) and sections 7 and 8 of the National Government Co-ordination Act, 2013. The court has already found that the matter was res judicata in view of the judgment in *Okiya Omtatab –Versus- Joseph Kinyua and the Public Service Commission* Petition 24 of 2018 at Nairobi (Abuodha J).

83. Accordingly, the 2nd respondent is properly appointed in accordance with the powers bestowed upon the Presidency under article 132(4) of the *Constitution*, read together with the functions outlined under the National Government Coordination Act read together with the functions of the PSC and its advisory opinion on various offices including that of the State House Chief of Staff and Head of Public Service. This is constitutional and lawful.

Removal and Appointment of Officers

84. On the third issue on the constitutional and legal validity of the removal of the persons employed by the PSC and subsequent appointment of others into offices in the public service made by the 1st respondent assisted by the 2nd respondent, the petitioners' case is that the removal and appointments into office of persons in the public service by the 1st and 2nd respondents is irregular, inconsistent with the Constitution and the law and therefore invalid. The petitioners maintain that the Constitution under article 232(1)(c).

vests the power to appoint and remove public officers on the PSC through an open, competitive merit-based and inclusive process. The petitioners aver that the 1st and 2nd respondents ignored the criteria for the appointment or removal of public officers and in the process usurped the powers given to the Public Service Commission vide article 234 of the *Constitution* and proceeded to remove Rugut, Semelang'o and Chepkwony and subsequently there was appointment of Dr Githinji, Bruce Odhiambo and Ayungo respectively, which is irregular.

85. The petition is that the de-gazettement of Semelang'o was manifestly unreasonable and not founded on law and facts. In removing Mr. Semelang'o from office, the 1st and 2nd respondents are said to have contravened the principle of audi alteram partem and articles 27, 28, 35, 47, 50 and 236 of the *Constitution*. The petitioners state that Semelang'o was not informed of any allegations of impropriety nor was he afforded an opportunity to defend himself.
86. Semelang'o was appointed Chairperson of the YEDF *vide* Gazette Notice No 1828 of February 15, 2013 and pursuant to section 5 of the Youth Enterprise Development Fund Order, 2007 in addition to the provisions of the State Corporations Act.
87. Section 5 of the YEDF order provides that;

5.



- (1) There is established a state corporation to be known as the Youth Enterprise Development Fund Board which shall be a body corporate in accordance with section 3 of the Act.
- (2) The Board shall consist of—
 - (a) A non-executive chairman appointed by the President; ...

88. The YEDF is hence established as a state corporation with a non-executive chairperson appointed by the President. This function is not undertaken by the office or person of the 1st or 2nd respondents save, the President in making such appointment must do so in writing and pursuant to article 135 of the Constitution;

135. A decision of the President in the performance of any function of the President under this Constitution shall be in writing and shall bear the seal and signature of the President.

89. The appointment of Semelang'o was subsequently revoked vide Gazette Notice No 2339 of April 7, 2014.

90. In this regard, section 7(3) of the *State Corporations Act* provides that;

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.

91. The President is given power under the law to 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. The revocation of appointment is however subject to the provisions that if at any time it appears to him [the President] that a Board has failed to carry out its functions in the national interest, and then the motions for revocation of any member of the Board or the entire Board can take effect and a new one appointed.

92. In the case of *Ronoh Sitienei & 4 others v Pharmacy & Poisons Board & another; Attorney General & 4 others (Interested Parties)* [2019] eKLR the court in addressing the application of section 7(3) of the *State Corporations Act* held that;

... once the members of the 2nd interested party were appointed by the 1st respondent, the tenure of individual members as appointed could be cut short by revocation only under section 7(3) of the *State Corporations Act*.

The court returns that by revoking the appointments of the petitioners and the 3rd to 5th interested parties, the 1st respondent acted *ultra vires* section 7(3) State Corporations Act and Gazette Notice No 6599 dated 01.07.2019 was clearly null and void.

93. In reference to the above cited case of *Ronoh Sitienei & 4 others*, cited above, the court in the case of *Moses Banda v Cabinet Secretary for the National Treasury and Planning; Kenya Post Office Savings Bank (Postbank) (Interested Party)* [2020] eKLR held that;

... Section 7(3) of the State Corporations Act is the legitimate and the specific manner of dealing with a situation where the tenure of a member of a board of State Corporation is to be revoked. In that matter [the Ronoh Case] the court further held that section 7(3) of the *State Corporations Act* is carefully drafted to ensure that Boards of State Corporations



remain in place and a member's appointment thereto is revocable only by the President and within the confines of the provisional safeguards.

94. Where a Board of a state corporation is therefore appointed, there is an expectation that it will undertake its mandate in the public interest. The counter-expectation under the same provisions of the law is that, to revoke the appointment, a reasonable cause must exist that a Board or member thereof has failed to carry out its/his functions in the national interest.
95. In the case of *Okiya Omtatah Okoiti v Attorney General & 2 others; Francis K. Muthaura (AMB) & 5 others (Interested Parties)* [2019] eKLR the court held that under section 7(3) of the *State Corporations Act*, the law allows the President to revoke appointment of a board member of State Corporation and to appoint another board member in that regard. The law has effectively transferred to the President and from the Public Service Commission the power to initiate appointment in that regard as envisaged in article 234(2)(a) of the *Constitution, 2010* that the Commission's function and power to appoint can be subject to legislation.
96. With regard to Semalang'o, the appointing authority was the Head of State and President and the same office revoked the appointment. Pursuant to section 7 of the *State Corporations Act*, the President has power to appoint and revoke the appointment of the chairperson of the Board. Under article 135 of the constitution, the decision of the President must be in writing. This was effected through Gazette Notices as cited above.
71. Upon the publication of the changes through Kenya Gazette Notice, the President acted within the Constitution and the law.
97. Save, no reason(s) for the revocation are given/stated pursuant to section 7(3) of the *State Corporations Act* read together with article 47 of the Constitution, which requires due process before an adverse decision is taken against a person. It is not sufficient that the person appointing should revoke and publish such decision. The statutory authority to appoint comes with the duty to give reasons and in this case that there is failure on the part of the Board member to carry out its/his functions in the national interest.
98. For want of reason(s), there was breach of section 7(3) of the *State Corporations Act*. Semalang'o was removed from office unlawfully.
99. The subsequent appointment of Bruce Odhiambo as chairperson, YEDF was vide Gazette Notice No 2339 of February 27, 2014 on the terms that;
- Appointment
- In exercise of the powers conferred by section 5(2)(a) of the Youth Enterprise Development Fund Order, 2007, I ... appoint -Bruce Odhiambo
- To be the Chairperson of the Board of the Youth Enterprise Development Fund, for a period of three (3) years, with effect from the March 1, 2013 and revokes the appointment of Gor Evans Semalang'o [GN 1828/2013] as the Chairman of the board of the Youth Enterprise Development Fund Dated February 27, 2014. ...
100. With the power to appoint and to revoke the appointment placed upon the President, section 7(3) of the *State Corporations Act* makes it conditional that a revocation of the appointment of any board member should be with a nomination of another 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.



101. The appointment of Semalang'o was vide Gazette Notice No 1828 dated February 5, 2013 for a term of three (3) years. This was revoked after a year. The appointment of Bruce Odhiambo as a member should have been for the remainder of the period of office of the tenure of Semalang'o as the Chairperson of the Board, YEDF as the entire Board was not the subject of re-constitution.
102. The appointment of Bruce Odhiambo was unlawful and contrary to the provisions of section 7(3) of the State Corporations Act.

National Youth Service

103. The 4th issue in the petition is whether the 1st respondent violated the law in the manner in which she changed the Director, NYS. In this regard, the petitioners state that the 1st respondent's action was in violation of section 7(1) of the National Youth Service Act as well as articles 10, 232, 234 and 236 of the Constitution.
104. By letter dated February 27, 2013 Rugut was appointed Director, NYS and vide letter dated May 9, 2014 he was transferred from the NYS to the Ministry of Sports, Culture and the Arts to be the Secretary, Sports. Rugut was also directed to report to your new station by May 16, 2014 after a thorough and comprehensive handing over to the incoming Director NYS, Dr. Nelson Giithinji.
105. Section 7(1) of the NYS Act allowed for the appointment of Director, NYS. Being a civil servant, the Director, NYS was subject to rules and regulations governing civil service.
106. A transfer of employees is a generally accepted workplace best practice.
107. To ensure a transfer in employment and in the civil service is regulated and non-discriminatory, an employer such as the PSC is required under section 5(8)(c) of the Employment Act to put in place an employment policy practice, policy, manual or a human resource document;
 - (c) an "employment policy or practice" includes any policy or practice relating to recruitment procedures, advertising and selection criteria, appointments and the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion, transfer, demotion, termination of employment on disciplinary measures.
108. The rationale is that the employer enjoys the prerogative to reorganise due to business needs and changes are inevitable at the shop floor to ensure better productivity, good work performance and enhance service delivery in the civil service as reasonable measures requiring transfers, re-deployment or re-designation. The changes made must be done in writing as required under section 13 of the Employment Act, 2007 as a best practice.
109. The employer's discretion to transfer an employee from one place to another should not be readily interfered with except for good cause, which would include unfounded allegations, victimisation and any action which disadvantages the employee as held in the case of Ken T Sungu v Kenya Ports Authority [2020] eKLR.
110. In the case of Henry Ochido v NGO Co-ordination Board [2015] eKLR the court in addressing the import of a workplace transfer of an employee held that;
 - ... a transfer of an employee is one such prerogative of an employer subject to sufficient and reasonable notice to enable the subject employee report to the new station of transfer with the requisite facilitation. It is therefore not in the choice of an employee to dictate



where they wish to work, once work has been created, and in the view of the employer they find that a particular employee is best placed in a certain location or work station, the duty on the employer is to inform the employee and the employee's role is to ensure their work performance in the allocated station. To otherwise contest work allocation in a set work station on the basis that the Respondent has not properly allocated such a station is to challenge that prerogative of the employer. The basic standard as set out in the Severine Luyali case is that;

The respondents have the power to transfer the petitioner but the same must be exercised in a lawful manner and not be arbitrary. The petitioner's tour of duty had been granted and when this was varied, no reasons were given even when she expressed her reasons for seeking for such extension.

For the employer to thus enjoy this prerogative there is the duty not to act arbitrarily and ensure the employee is duly notified of the transfer and where the employee seeks a variation, such must be put into account in a manner that entails hearing what the employee has to say with regard to the transfer. This could be extension of time; facilitation; review of job requirement and any other reasonable terms that may arise. The employee also has the duty, once issued with a transfer in employment, where there may be an issue that requires to be addressed; such must be stated in clear terms and within a reasonable period to enable the employer address such and to ensure the smooth movement of labour from one office to the other. It cannot therefore be left to the employer to second-guess as to the intentions of the employee. Any requests for reviews, variations or rescission of the transfer must be clearly set out. The best practice in employment relations is to put such requests in writing. This is to enable the other party to respond with clear directions. This was the gist in the Severine Luyalicase, where the court held that sufficient and reasonable notice was a good labour practice to be ensured where the employer required the transfer of an employee. Equally the application for review by the employee required good consideration to ensure each party was aware of what was expected of them. Court held;

... It does not only require an employer to act in good faith, the employee is equally bound by the same rule, to act with outmost due diligence and in good faith toward the directives issued by the employer

111. And in the case of *Okiya Omtatah Okoiti v Attorney General & 2 others and Francis K Muthaura & 5 others* [2019] eKLR the court held that;

“... The court finds that the chairperson and the members of the Board of the KRA (just like the chairpersons and members of other state corporations or boards of other public bodies) are public officers bound by applicable constitutional and statutory provisions and lawful policies and practices that govern public employment. The court holds that in the constitutional framework under the Constitution of Kenya 2010, the public officers despite their designation or position held in the service, they are all in public or state service and governed by specific applicable constitutional and statutory provisions and lawful policies and practices – so that the variance in positions held or designation does not render any of the public or state officers to escape their being servants of the people, employed by the people, within such applicable constitutional and statutory provisions, and, lawful policies and practices. Thus the provisions of article 73 as read with article 80(c), and, article 232 apply accordingly. In view of that finding, the dispute in the present petition is about employment within the complex framework of public service or public sector employment.



The substantive law applicable to such employment ranging from declaration of vacancy, recruitment and selection procedures, appointment procedure, and termination procedure would be the applicable public service constitutional and statutory provisions and such other lawful policies and practices to the extent that they prescribe minimum or better terms and conditions of service than those envisaged in the Employment Act, 2007.”

112. Pursuant to the above analysis, the respondents applied the PSC Code of Regulations, 2006 and Part ‘E’ spelt out the terms and conditions of employment in the civil service. Section E 30 allows the transfer of officers from one Ministry to another;

Transfer from one ministry to another

E.30

- (1) Transfers of officers from one Ministry or Department to another may be made by arrangement between Authorized Officers provided that the posts carry a salary in the Job Group ‘L’ and below. In the case of posts in the clerical cadre or posts common to departments generally, transfers should be effected in consultation, where necessary, with the Permanent Secretary/Director of Personnel Management.
2. Transfer of officers in Job Group ‘P’ and above should be sanctioned by the Central Postings Committee.
3. Recommendations for transfer of officers to posts within the purview of the Public Service Commission of Kenya should be submitted to the Commission.
4. All transfers should be reported by the Authorized Officer of the transferring Ministry/Department to the Authorized Officer of the receiving Ministry/Department in the form of ‘Last Pay Certificate’.

113. These regulations weighed against the petition, the court finds they are reasonable and meet the best practice. The regulations are within the constitutional and legal mandate of the PSC to formulate.

The Transfer of Rugut by the 3rd respondent by letter dated May 9, 2014 was lawful and in tandem with the definition assigned to a transfer under section 2 of the *PSC Act*;

“Transfer” means the deployment of an officer from one ministry to another or from one duty station to another;

114. Article 155(2) of the *Constitution* gave power to the 3rd respondent as the administrative head of the state department of planning responsible for human resource to issue letter dated May 9, 2014 on the transfer and posting of Rugut;

155. (1) there is established the office of Principal Secretary, which is an office in the public service. (2) Each State department shall be under the administration of a Principal Secretary.

115. The appointment of Dr. Githinji was with inter-ministerial approval and pursuant to section 7 of the NYS Act and hence permissible.

116. With regard to the appointment of Ayungo and removal of Chepkwony from the NYC pursuant to section 5(f) of the YEDF Order.

2.



- (1) There is established a state corporation to be known as the Youth Enterprise Development Fund Board which shall be a body corporate in accordance with section 3 of the Act.
- (2) The Board shall consist of—
 - a) ...
 - f) One person nominated by the National Youth Council and appointed by the Minister.

117. The appointing authority of the person nominated by the NYC is the Minister.
118. The appointment of Ayungo was published vide Gazette Notice No 3021 dated April 11, 2014. This was done in accordance with the constitutional mandate of the 1st respondent read together with section 5(2) (f) of the YEDF Order.
119. The petition is also that Ayungo, was on April 11, 2014 appointed to the YEDF Board vide Gazette Notice No.3021 while holding the position of Chairperson of the National Youth Council upon appointment on 13th February, 2013 vide Gazette Notice No.2239 and hence holding two positions. The petitioners state that this was in violation of the Constitution and order 5(f) of the YEDF.
120. On February 22, 2013 the Minister for Youth Affairs and Sports appointed Ayungo under the provisions of section 5(1)(a) of the NYC Act as the Chairperson for a term of 3 years.
121. The NYC is established under the National Youth Council Act, 2009 and under section 5(1)(a) thereof, the NYC is allowed to nominate a chairperson who is then appointed by the Minister.

5. Composition of the Council

- (1) the Council shall consist of –
 - (a) A Chairperson nominated by the Council and appointed by the Minister.
 - (b) ...
122. There are also other members of the Council representing various stakeholders with various functions outlined under section 4 of the Act. The NYC is established as a body corporate pursuant to section 2 of the Act.
123. The NYC is non-executive with the Secretary given mandate to run the daily affairs of the Council and under the First Schedule the meetings of the Council are regulated.
124. On May 6, 2014 the 1st respondent and Minister for Devolution and Planning appointed Ayungo pursuant to section 5(2)(e) of the YEDF Order, 2007 to be member of the Board of the Youth Enterprise Development Fund, for a period of three (3) years.
125. Section 5(2)(e) of the YEDF order, 2007 provides that;
 5.
 - (1) There is established a state corporation to be known as the Youth Enterprise Development Fund Board which shall be a body corporate in accordance with section 3 of the Act.
 - (2) The Board shall consist of—



- (a) A non-executive chairman appointed by the President;
- (b) A chief executive of the Board who shall also be the secretary to the Board;
- (c) The Permanent Secretary in the Ministry for the time being responsible for youth affairs;
- (d) The Permanent Secretary in the Ministry for the time being responsible for finance;
- (e) Seven persons appointed by the Minister, of whom-
 - (i) Four shall be persons who are not public officers who shall, be appointed by virtue of their knowledge or experience in matters relating to financial management, venture capital fund management or youth development;
 - ii. Three shall be public officers;
- (f) One person nominated by the National Youth Council and appointed by the Minister.

126. The entire section 5 of the order is replicated above on purpose. The NYC and the YEDF are interlinked in objectives. They serve the youth. One to ensure the youth are able to borrow money and the other creating a depository of the funds. Both are in sync.
127. Under the YEDF the Board has a representative from the Permanent Secretary responsible for youth affairs, a Permanent Secretary in the Ministry of finance and seven other persons who have knowledge and experience on matters relating to finance, management, venture capital fund management and youth development. Singled out is a person nominated by the NYC and appointed by the Minister. These comprise Board members separate from the Chairperson.
128. The Board of YEDF is non-executive and its meetings are regulated under the Act.
129. The appointment to the YEDF Board of a person serving as Chairperson of the NYC is lawful and procedural and not in double employment as the holding of both positions is contemplated in law for stated objectives and reasons.
130. Ayungo was properly in office under the NYC Act and YEDF Act pursuant to the appointments made on April 11, 2014 *vide* Gazette Notice No 3021 and February 13, 2013 *vide* Gazette Notice No 2239
131. The petition is further that the 1st respondent committed acts of irregularities in the management of the human resource in the public service where in July, 2013 Njoki Kahiga a civil servant was removed from office as Principal Administrative Secretary Job Group ‘S’ and replaced with Juster Nkoroi who was promoted from Job Group ‘R’ to ‘T’ a more senior grade outside the scheme of service for the Directorate of Personnel Management. The petitioners add that in August, 2013 the 1st respondent demoted Protus Onyango a gender expert from heading the directorate of gender and replaced him with Catherine Muoki an economist effectively crippling the department.
132. As set out above, the PSC had formulated policy regulations on terms and conditions of service to ensure diversity at the shop floor through application of the PSC Code of Regulations, 2006, applicable at the time.

The persons of Njoki Kahiga, Juster Nkoroi, Protus Onyango and Catherine Muoki and others similarly placed and situate in the public service, were public officers despite their designation or position held in the service, they were all in public or state service and governed by specific applicable constitutional and statutory provisions and lawful policies and practices – so that the variance in



positions held or designation did not render any of the public or state officers to escape their being servants of the people, employed by the people, within such applicable constitutional and statutory provisions, and, lawful policies and practices. See *Okiya Omtatah Okoiti v Attorney General & 2 others and Francis K Muthaura & 5 others* [2019] eKLR, cited above.

133. This well resonates with articles 73, 232 and 234 of the *Constitution* with regard to civil service.
134. Upon performance review, an employer is allowed to review terms and conditions of employment/ service. This is constitutional and lawful and allowed under the PSC Code of Regulations, 2006.

Decentralisation Policy

135. The petitioners have also challenged the validity of the Policy on the Decentralisation of Human Resource Management in the Civil Service on the grounds that this was done with the aim of taking control over civil service from Principal Secretaries and vesting it in Cabinet Secretaries. The petitioners accuse the 4th respondent of incompetence for failing to protect the affected employees in the public service and their schemes of service from the wrong administrative decisions of the 1st and 2nd respondents, even endorsing the wrong policy on the decentralization of human resource management in the civil service.
136. Under article 155 of the *Constitution, 2010* the offices of Principal Secretaries are established in the public service to head each state department.
137. Pursuant to article 234(5) of the *Constitution, 2010* the PSC is allowed to delegate some of its functions. The allegations that the 4th respondent was incompetent for writing letter dated June 3, 2014 on Implementation of the Policy on Decentralisation of Human Resource in the Civil Service is part of the mandate to delegate. The PSC is allowed to delegate to any person or body as appropriate. The PSC as an independent Commission is empowered under article 234(5) of the *Constitution* to delegate its functions and powers;
 - (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
138. ‘Delegation’ of function and power does not negate the power held by a principal. Responsibility lies with the principal. Delegation does not imply parting with powers by the person who delegates but confers authority to do things which otherwise the person delegating would have to do himself. A power to delegate further can only arise where it is within the scope of the primary delegate’s authority.
139. The Court of Appeal in addressing the question what is delegation in the case of *Attorney General & 2 others v Independent Policing Oversight Authority & another* [2015] eKLR held that;

What then amounts to delegation?

Delegation is the assignment of responsibility or authority to another person usually one’s subordinate, or another officer of a lower rank. It is instructive however that the person delegating must remain fully accountable for the outcome of the delegated work. One can delegate authority but not responsibility. If a person delegates both authority and responsibility, then this becomes abdication of duty or denudation of authority and it is not acceptable.

Where delegation is underpinned in statute, and there is a requirement that the delegation be in writing, then such delegation must be in writing. There must be an instrument clearly defining the extent of the delegated authority and the duties involved. In such a case, if the person delegating power



does so verbally contrary to the statute allowing him to delegate, then such delegation becomes null and void for all intents and purposes.

140. The principal must assign responsibility or authority to another person or body in writing and such person must give account to the principal and right-holder who remains responsible overall.
141. For the PSC, delegation of authority and responsibility is found both under article 234(5) of the [Constitution](#) and under the PSC Act.
142. The petitioners' case is that the PSC implemented the Policy on the Decentralisation of Human Resource Management in the Civil Service in an arbitrary manner and without public participation and that the respondents violated articles 10(2)(a), 201(a) and 232(d) and (f) of the [Constitution, 2010](#).
143. The 4th respondent's case was that the Policy on Decentralisation of Human Resources in the Public Service is not an imposition on the PSC and was developed in conjunction with the Ministry of Devolution and Planning.

There was stakeholder involvement of line ministries and the Union of Civil Servants. Under the policy, Principal Secretaries would be authorised officers while Cabinet Secretaries would be responsible for steering strategic human resource plan for the ministries and as such the mandate of the PSC pursuant to article 234(5) of the [Constitution, 2010](#) was not compromised.

144. Article 10 of the [Constitution, 2010](#) provides for the national values and principles of governance which 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 any public policy decisions.
145. The Court of Appeal in [Independent Electoral and Boundaries Commission \(IEBC\) v National Super Alliance \(NASA\) Kenya & 6 Others](#), Civil Appeal No 224 of 2017; [2017] eKLR in addressing the provisions of article 10 held that;

... We find and hold that the values espoused in article 10(2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforced gradually.

Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by article 259(1)(a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.

146. In this regard, article 233 of the [Constitution](#) establishes the PSC and article 234 of the [Constitution](#) provide the functions and powers of the PSC as follows;
 - (1) The functions and powers of the Commission are as set out in this Article.
 - (2) The Commission shall—
 - (a) subject to this Constitution and legislation—
 - (i) Establish and abolish offices in the public service; and



- (ii) Appoint persons to hold or act in those offices, and to confirm appointments;
- (b) Exercise disciplinary control over and remove persons holding or acting in those offices;
- (c) Promote the values and principles referred to in articles 10 and 232 throughout the public service;
- (d) Investigate, monitor and evaluate the organisation, administration and personnel practices of the public service;
- (e) Ensure that the public service is efficient and effective;
- (f) Develop human resources in the public service;
- (g) Review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service;
- (h) Evaluate and report to the President and Parliament on the extent to which the values and principles referred to in articles 10 and 232 are complied with in the public service;
- (i) Hear and determine appeals in respect of county governments' public service; and
- (j) Perform any other functions and exercise any other powers conferred by national legislation. ...

147. Article 234(2)(c) directs the PSC to promote the values and principles referred to in articles 10 and 232 of the *Constitution* throughout the public service.

148. To expound on its mandate, Parliament enacted the PSC Act and section 4 of the Act provides that the PSC; shall in fulfilling its mandate, be guided by the national values and principles of governance in article 10 of the *Constitution* and the values and principles of public service in article 232 of the Constitution.

149. In the case of *Okuya Omtatab Okoiti & another v Public Service Commission & 73 others; Law Society of Kenya & another (Interested parties)* [2021] eKLR the High Court in addressing the principles and values upon which the PSC is bound in undertaking its mandate held that;

Due to the humongous nature of the functions of the PSC, the PSC Act was enacted in order to aid the PSC in discharging its duties. The preamble of the PSC Act states that it is a legislation to make further provision as to the functions, powers and the administration of the PSC established under article 233 of the constitution and to also give effect to article 234 of the Constitution and for connected purposes.

150. In undertaking policy change(s), review(s) and reform(s) of any matter likely to affect the stakeholders, public participation is an imperative.

151. Such public participation is so crucial and important that the PSC as an independent constitutional Commission is enjoined to secure. In *Richard Owuor & 2 others (suing on behalf of Busia Sugarcane Importers Association) v Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & Cooperatives & 7 others* [2021] eKLR the court in addressing the importance of securing public participation with regard to policy change likely to affect internal and external stakeholders held that;

The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. The Constitution in article 10 which binds all state



organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation, but does not define or say how it should be implemented. In article 196, it commands County Assemblies to, inter alia, facilitate public participation and involvement in the legislative and other business of the Assembly and its committees, but again does not say how.

The bottom line is that public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation on the legislation.

152. Part VIII of the [PSC Act](#) further extrapolates the requirement to ensure public participation in the PSC development of the human resources in public service. Section 58(2) and (3) of the [PSC Act](#) directs that;

- (2) The human resources in the public service shall be developed in order to —
 - (a) Continuously improve professional knowledge and skills needed for better performance of duties by public officers and public bodies;
 - (b) Bring about the right attitudinal orientation of public officers;
 - (c) Promote responsiveness to the prevailing socioeconomic and political environment in which the public bodies operate and scientific and technological developments;
 - (d) Enhance commitment to democratic values, partnership and participative decision making;
 - (e) Achieve a factual and scientific approach to decision making;
 - (f) Achieve high performance in every public body or public office;
 - (g) Promote and protect human rights and freedoms as provided for in the Constitution}}; and
 - (h) Promote an ethical environment for public service delivery in accordance with the national values and principles of governance and principles and values of public service as provided for in the Constitution.
- (3) The Commission and any other lawful authority shall take into account the objectives set out in subsection (2) when developing human resources in the public service.

153. The Constitution and the law enjoin the PSC to ensure public participation. The invitation of line Ministries and the Union of Civil Servants though with intention to have internal stakeholders give feedback on the Policy document, such should be subjected to the wider public which the PSC Act under section 2 defines to be;

“publicise”, in relation to a document, means to make known to the public, through the national, local media and other lawful means;

154. A best practice is envisaged in the sittings of Parliament under article 118(2) of the [Constitution, 2010](#) that;

- (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.



155. Unless there is justifiable reason for exclusion of the public with regard to policy review, the PSC should undertake the same in an open and transparent manner to ensure inclusion of as much a wider public as practically possible.

The Policy on Decentralisation of Human Resource Management in the Civil Service, May 2014 is hereby found invalid for want of public participation in its formulation and formation contrary to article 10 of the *Constitution* and section 58 of the PSC Act.

Transfers and Postings

156. The petition is also that the 1st and 2nd respondents worked together to effect irregular and unlawful postings and transfer of public officials instead of the PSC. By letter dated February 18, 2014 [GAP] moved various officers outside of the scheme of service. The petitioners submit that the 2nd respondent had not been vetted by Parliament and hence had no capacity to superintend Principal Secretaries as done vide letter dated February 18, 2014.

With the question of standing of the 2nd respondent addressed above, such shall suffice.

157. On the question of transfers and postings and the mandate of PSC above addressed, we find that the Central Human Resource Management Postings Committee is a structure that has been in place over the years and within the core functions of the PSC in engaging with various ministries and state departments to efficiently and effectively offer and expose public servants to diverse work environments and management of diversity. Such is lawful under section 11(c) of the PSC Act.

Reliefs

158. The petitioners are seeking compensation for Semelang'o, Rugut and Chepkwony under the provisions of article 23 of the *Constitution*.
159. The petitioners are acting in the public interest and under the protection of articles 22 and 258 of the *Constitution* as public spirited individuals keen to secure the rule of law, by urging the petition and the declaratory orders addressed, such shall suffice. The individuals identified, keen to urge individual rights, such shall be addressed as appropriate.
160. The last issue is the question of costs.
161. Section 12 (4) of the ELRC Act, 2011 makes it discretionary for the court to grant costs.
162. The petitioners are acting in the public interest. The petition addressed as above, it is only fair that each party should bear own costs.

Accordingly, on the analysis and findings above, the petition partially succeeds and judgement is entered in the following terms;

- (a) Declaration is hereby issued that the removal of Mr. Gor Evans Semelang'o as the Chairman of the Board of the Youth Enterprise Development Fund and the subsequent appointment of Mr. Bruce Odhiambo to replace him were unlawful;
- (b) Declaration is hereby issued that the appointment of Bruce Odhiambo was unlawful and contrary to the provisions of section 7(3) of the *State Corporations Act*.
- (c) An Order is hereby issued quashing the Policy on the Decentralisation of Human Resource Management in the Civil Service, May, 2014 for want of public participation;



(d) The Public Service Commission shall subject The Policy on Decentralisation of Human Resource Management in the Civil Service, May 2014 to public participation in its formulation and formation pursuant to article 10 of the Constitution and the Public Service Commission Act; and

(e) Each party shall bear own costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY 2021

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MONICA MBARU

JUDGE

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JORUM ABUODHA

JUDGE

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LINNET NDOLO

JUDGE

Appearance:

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