



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 235 OF 2019

IN THE MATTER OF ARTICLES 3(1), 22, 23, 48, 50(1), 162(2) (a), 165 (5), 258, AND 259 (1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ALLEGED VIOLATION OF ARTICLES 1, 2, 3, 4(2), 10, 19, 20, 21, 22, 24, 27, 41(1) 47, 73, 75, 93(2), 94(4), 129, 153 (4) (a), 228(2), 249(1) and (2), 250(3), 232, 234(3) (a), AND 259(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE CONSTITUTIONAL VALIDITY OF SECTION 4 OF THE CONTROLLER OF BUDGET ACT NO.26 OF 2016, AND OF THE COMMITTEE CONVENED BY THE PUBLIC SERVICE COMMISSION THEREUNDER FOR RECRUITING THE CONTROLLER OF BUDGET

IN THE MATTER OF THE INELIGIBILITY OF MS. MARGARET NYANGÁTE NYAKANGÓ FOR APPOINTMENT AS CONTROLLER OF BUDGET GIVEN SHE DOES NOT HOLD THE MINIMUM QUALIFICATIONS SET OUT UNDER ARTICLES 73(2) (a), 228(2) AND 250 (3) OF THE CONSTITUTION AND SECTION 3(1) (B) OF THE CONTROLLER OF BUDGET ACT 2016

IN THE MATTER OF THE ALLEGED ABUSE OF POWER BY THE CHIEF JUSTICE AND APPARENT COLLUSION IN THE RUSHED SWEARING IN OF MS. MARGARET NYANGÁTE NYAKANGÓ AS THE CONTROLLER OF BUDGET IMMEDIATELY AFTER APPROVAL BY THE NATIONAL ASSEMBLY ON 4TH DECEMBER 2019

IN THE MATTER OF THE CONSTITUTIONAL VALIDITY OF SECTION 7 OF THE CONTROLLER OF BUDGET ACT, 2016 WHICH ESTABLISHES THE OFFICE OF THE ACTING CONTROLLER OF BUDGET

IN THE MATTER OF THE DOCTRINE OF CLOSE ENOUGH IS NOT GOOD ENOUGH IN CONSTITUTIONAL THRESHOLDS

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION

-BETWEEN-

OKIYA OMTATAH OKOITI.....PETITIONER

-VERSUS-

THE NATIONAL EXECUTIVE OF THE

REPUBLIC OF KENYA.....1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

THE CHIEF JUSTICE OF KENYA.....4TH RESPONDENT

THE NATIONAL ASSEMBLY.....5TH RESPONDENT

MS. MARGARET NYANGÁTE NYAKANGÓ6TH RESPONDENT

-AND-

THE KATIBA INSTITUTE (KI).....1ST INTERESTED PARTY

THE CONSUMERS FEDERATION OF

KENYA (COFEK).....2ND INTERED PARTY

THE LAW SOCIETY OF KENYA.....3RD INTERESTED PARTY

CONTROLLER OF BUDGET.....4TH INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 3rd July, 2020)

JUDGMENT

The petitioner is Okiya Omtatah Okiiti who describes himself as a resident of Nairobi City County, a law abiding citizen of Kenya, a public spirited individual and a human rights defender. The other parties have not disputed that description. He filed the petition in person on 06.12.2019. The petitioner prayed for declarations and orders as follows:

- a) A declaration that section 4(2) of the Controller of Budget Act, 2016 pursuant to which Ms. Margaret Nyakangó was appointed to office was and is wholly inapplicable as it applies only to cases where the previous occupant of the office has resigned in writing to the President, has been removed for violating the Constitution or is dead which was not the case at the material time.
- b) A declaration be and is hereby issued that sections 4 and 7 of the Controller of Budget Act, 2016 are unconstitutional and, therefore, invalid, null and void.
- c) A declaration that the composition of the committee convened by the Public Service Commission under sections 4(5) and (6) and 7 of the Controller of Budget Act, 2016 was constitutionally inadequate for purposes of recruiting the Controller of Budget.
- d) A declaration that the Constitution does not anticipate the office of the Acting Controller of Budget and Parliament does not have the capacity in law to create the position of an Acting Controller of Budget.
- e) A declaration that whatever both the Public Service Commission and the Committee it convened under sections 4 of the Controller of Budget Act, 2016 did in relation to the purported recruitment of the second Controller of Budget of Kenya was unconstitutional and therefore, invalid, null and void ab initio.
- f) A declaration that Ms. Margaret Nyangáte Nyakangó is ineligible for appointment as Controller of Budget for failing to meet, at the time of her swearing in by the 4th respondent herein, the mandatory minimum qualifications required of holders of the office of Controller of Budget set out under Articles 73(2) (a), 228(2) and 250 (3) of the Constitution and section 3(1) (b) of the Controller of Budget Act, 2016.
- g) A declaration that the decision by the National Assembly to rubberstamp the nomination of Ms. Nyakangó for appointment as the Controller of Budget when she was clearly not qualified for the position pursuant to Articles 228(2) and 250(3) of the Constitution, violated Articles 10, 93(2) and 94(4) of the Constitution and section 7 of the Public Appointments (Parliamentary Approval) Act No.33 of 2011.
- h) A declaration that the impugned recruitment, nomination, vetting, appointment, and swearing of Ms. Margaret Nyangáte Nyakangó as the Controller of Budget was unconstitutional and therefore invalid, null and void ab initio.
- i) A declaration that by the Chief Justice to hurriedly swear in the Controller of Budget, moments after she had been approved by the National Assembly and gazetted points to collusion of the Chief Justice in mischief and in subverting the rule of law, contrary to the express responsibilities of leadership and the conduct of state officers respectively, under Articles 73 and 75 of the Constitution, and that he thereby failed to defend the constitution and he is bound to respect, uphold and defend.
- j) The Honourable Court do issue and hereby issues an order quashing sections 4 and 7 of the Controller of Budget Act, 2016.
- k) The Honourable Court do issue and hereby issues an order quashing the recruitment, nomination, vetting, appointment and swearing in of Ms. Margaret Nyangáte Nyakangó as the Controller of Budget.
- l) The honourable Court do issue and hereby issues an order compelling the 1st to 5th respondents to competitively recruit and appoint a new Controller of Budget strictly in accordance with the Constitution and the law.
- m) The Honourable Court be pleased to issue and hereby issues an order ordering the respondents to jointly and severally bear the costs of the petition.
- n) Consequent to the grant of the prayers above the Honourable Court be pleased to issue any other or further remedy (directions and orders) that the Honourable Court shall deem fit and necessary to give effect to the foregoing orders and favour the cause of justice.

The petition is based on the annexed supporting affidavit of the petitioner and the petitioner's supplementary affidavits sworn on 18.12.2019 and 18.02.2020 respectively.

The petitioner's case as pleaded in the petition is as follows. The petition is about recruitment in the office of Controller of Budget. It concerns the constitutional and legal framework underpinning the qualification and appointment including identification, selection, nomination, approval, appointment and swearing in of a competent and suitable person as Controller of Budget. The petition also seeks a determination whether it is constitutional under the Constitution of Kenya 2010 to have Acting Controller of Budget given the mandatory provisions of the Constitution in relation to qualifications for the holder of and process of nomination, approval and appointment to that office. The petition focusses on Articles 228(2) and 73(2) as read with Articles 228(1) and 250(2) of the Constitution and sections 3, 4, 5, and 7 of the Controller of Budget Act, 2016 in view of the overarching constitutional values and principles of governance and related constitutionally enshrined imperatives of interpretation and application.

The petitioner is aggrieved that section 4(2) of the Controller of Budget Act, 2016 pursuant to which Ms. Margaret Nyangáte Nyakangó was appointed to office was and is wholly inapplicable as it applies only to cases where the previous occupant of the office has resigned in writing to the President, has been removed for violating the Constitution or is dead which was not the case at the material time. The section and Act does not provide for commencement of appointment of new office holders when the term of office ends due to operation of law like lapsing of the term of the holder of the office as it happened in the instant case.

The petitioner's further case is that the committee convened by the Public Service Commission under section 4(5) and (6) of the Controller of Budget Act for purposes of considering job applications and shortlisting three persons for appointment as the Controller of Budget was unconstitutional. In particular, the petitioner says that whereas the Controller of Budget is an independent constitutional office, the committee is composed of only government officials who can hardly satisfy the requirements of autonomy from government. Further in comparison to office of Controller of Budget, the specific individuals appointed to the selection panel are relatively very junior officers who cannot be tasked with the burden of recruiting their senior – a person who by dint of Article 249(2) of the Constitution is subject only to the constitution and the law and is independent and not subject to direction or control by any person or authority. The petitioner also questions the constitutionality of section 7 of the Controller of Budget Act, 2016 which he says purports to empower the Public Service Commission to identify and recommend the senior most officer in the office of the Controller of Budget to the President for designation as acting Controller of Budget and for that person to have and exercise all the powers of the Controller of Budget for a period of not more than 90 days. The petitioner's case is that the section is unconstitutional because it creates a mechanism for a third party to assume and discharge the functions of the constitutional office without being subjected to the rigorous process set out in the constitution for ascending to said office. The petitioner therefore prays for orders to quash sections 4(5) and 7 of the Controller of Budget Act, 2016.

The petitioner is further concerned that the National Assembly shambolically and shoddily approved the nomination of Ms. Margaret Nyangáte Nyakangó for appointment as the new Controller of Budget yet she does not meet the mandatory minimum qualifications set in the Constitution for appointment to the office and in doing so the National Assembly failed in its duty and obligation under the Constitution to abide by the mandatory provisions of the Constitution as regards the said qualifications which are binding on the National Assembly and in failing to uphold, protect and observe the Constitution and the national principles of governance in Article 10 of the Constitution which apply when they enacted the Controller of Budget in its present and impugned form. Thus the recruitment by the Committee, nomination by President, approval by National Assembly, appointment by the President and the swearing into office by the Chief Justice of the said Ms. Margaret Nyangáte Nyakangó was unconstitutional, invalid, null and void ab initio. The petitioner further alleges that the Chief Justice and the said Ms. Margaret Nyangáte Nyakangó hail from the same area and he reasonably suspects that the impugned actions of swearing into office of the said Ms. Margaret Nyangáte Nyakangó immediately after her approval by the National Assembly and appointment by the President on 04.12.2019 without notice to the public amounted to violation of Articles 2(1) and (2), 3(1), 10 and 73 (1) and 73(2) (b), (c), (i), (d) and (e) of the Constitution.

The petitioner in urging his case relies upon the following grounds:

a) The first holder of the office of the Controller of Budget was appointed in August 2011 for a term of 8 years which lapsed in August 2019. Upon recommendation of the Public Service Commission and as per section 7(1) of the Controller of Budget Act, 2016, the President appointed the Deputy Controller of Budget (one Stephen Masha) as an acting Controller of Budget to exercise all powers pertaining to that office for a period of 90 days effective 27.08.2019. The acting appointment was published in Gazette Notice No. 8005 of 27.08.2019. The petitioner urges that the Constitution does not provide for or envisage the office of Acting Controller of Budget. The petitioner urges that no person shall hold the office and perform duties of the Controller of Budget unless recruited and appointed in accordance with the constitutional provisions and in particular Article 228 and 252 of the Constitution. Article 234(3) takes away application of the powers of the Public Service Commission to establish and abolish offices in the independent offices and commissions, including the office of the Controller of Budget. The Office of Deputy Controller of Budget is an office established by the Controller of Budget per Article 252(1) (c) (as appointed by the Controller of Budget) and such a subordinate officer cannot undertake the powers and functions of the office of the Controller of Budget.

b) By Gazette Notice No. 8006 also of 27.08.2019 the Public Service Commission in exercise of the powers in section 4(2) of the Controller of Budget Act, 2016 invited applications from suitably qualified persons to be forwarded to the Commission within 14 days per section 4 (3) of the Act.

c) By Gazette Notice No. 9119 of 27.09.2019 the Commission published the list of all applicants and shortlisted candidates for the position of Controller of Budget per section 4(4) of the Controller of Budget Act, 2016. The interview schedule for shortlisted candidates was also published. There were 87 applicants and 15 were shortlisted. Interviews took place on 9th to 14th October, 2019. The names of the best three candidates were forwarded to the President to nominate one for approval by the National Assembly. The President nominated Ms. Margaret Nyangáte Nyakangó.

d) On 03.12.2019 the Finance and National Planning Committee of the National Assembly in its report stated that Ms. Margaret Nyangáte Nyakangó was suitable for appointment as the Controller of Budget. On 04.12.2019 the National Assembly approved her for appointment and the same day the Chief Justice swore her into office shortly thereafter, the two events taking place the same

day. The petitioner urges that the hurried approval and swearing in did not cure the lack of minimum qualifications as per the Constitution on the part of Ms. Margaret Nyangáte Nyakangó.

e) Articles 228 (1) and 250 (2) of the Constitution apply to the process of identifying, nominating, approving and appointing a holder of the office of Controller of Budget. To be appointed one must have extensive knowledge of public finance or at least ten years of experience in auditing public finance management per Article 228(2). Article 73(2) (a) on personal integrity, competence and suitability also applies. The said Ms. Margaret Nyangáte Nyakangó, according to the petitioner, does not meet the mandatory constitutional qualifications in Article 228(2), 250(3) and 73 (2) (a) of the Constitution for appointment to the office of Controller of Budget because she does not have extensive knowledge in public finance acquired through extensive training in public finance and practical experience in public finance management; she does not have extensive training in public finance including the aspects of public finance management, taxation and tax administration, expenditure and budgeting, deficit financing and debt management; and she does not have at least 10 years' experience in auditing public finance management of a whole government including possessing the minimum professional qualification requirements set out for the position of Auditor General under the National Audit Act. The petitioner states that her publicly posted profile at www.linkedin.com/in/cpa-dr-margaret-nyakang-o-b4aaa417 last accessed by the petitioner on 06.12.2019 confirms that she lacks the qualifications of extensive knowledge of public finance or at least ten years' experience in auditing public finance management. The fact that she worked for 10 years at the Kenya National Bureau of Statistics as Director Finance and Administration from November 2008 to October 2018 does not make the mark of at least ten years' experience in auditing public finance management and she is still disqualified under the doctrine of close enough is not good enough in constitutional thresholds. The petitioner urges that the said Ms. Margaret Nyangáte Nyakangó is not extensively trained and experienced in public finance but has training in general finance and ten years' experience in financial management of private sector businesses as Director of Finance at the Kenya National Bureau of Statistics, a quasi-public entity dealing with statistics compilation. Training of accounts and finance management is not the same as training public finance. Extensive knowledge in public finance relates the study of the role of government in the economy, or the study of government taxation, expenditure and deficit financing on resource allocation, distribution of income and macroeconomic stability for the welfare of the economy and households. It is a branch of economics that assesses the government revenue and government expenditure of the public authorities and the adjustment of one or other to achieve desirable effects and avoid undesirable effects. Public Finance Management, whose audit for at least ten years is a requirement means the set laws, rules, systems and processes used by sovereign nations and sub-national governments to mobilise revenue, allocate public funds, undertake public spending, account for funds and audit results. The petitioner urges that the said Ms. Margaret Nyangáte Nyakangó lacks such qualifications - she therefore lacks minimum qualifications per Articles 228(1) and 250(2) and lacks credibility criteria per Articles 73(2) (a) and 250(3) of the Constitution so that her actions as appointed are therefore inconsistent with the Constitution and to that extent null and void.

f) The Committee convened by the Public Service Commission under section 4(5) of the Controller of Budget Act, 2016 for recruiting the Controller of Budget is composed of one representative for each of following, namely, office of the President (Antony Gatumbi); ministry responsible for finance (Dulach Galgalo Barako); office of the Attorney General (Pauline Charo); and ministry responsible of public service (Mary Kimonye). The petitioner's case is that except for Antony Gatumbi, the other committee members as designated were relatively junior officers not expected to have capacity to recruit the Controller of Budget in terms of their competency and expertise necessary to adequately comprehend the qualifications required under the Constitution; skills and ability to frame objective and accountable shortlisting criteria; expertise and knowledge to develop responsive interview questions on key aspects of the qualification requirements of the subject matter; and experience in conducting accountable interview, objective scoring and ranking of qualified candidates. The petitioner urges that Antony Gitumbi like other committee members was not independent and impartial (all being appointees of the national government executive) but being a retired Controller and Auditor General, he had the requisite qualification and expertise in audit of public finance management to sit on the committee. Thus the petitioner states that section 4(6) of the Controller of Budget Act, 2016 subordinates the nomination of an independent office of Controller of Budget to a process fully under the control and direction of the state departments contrary to constitutional provisions in Articles 249 (2), 228(2), 250(3), 73(1) (a) (i) and 131 (2) (a) of the Constitution. The petitioner's case is that the process falls short of transparency in recruitment by failing to prescribe that applicants shall be interviewed by a selection panel and vetted by the public such as is provided for in section 11(5) of the Public Audit Act, 2015 on selection panel for Auditor General, another of the independent constitutional offices. To meet the constitutional threshold, the petitioner proposes that the Act should have provided for shortlisting of candidates for interview based on objective criteria, interview and scoring of candidates, shortlisting and ranking of top candidates, allowing limited public participation at interview proceedings as observers, and making recommendations to the President based on objective and accountable summing and averaging of scores by individual candidates. The petitioner's case is therefore that sections 4 and 7 of the Controller of Budget Act, 2016 insubordinate provisions of the Constitution and are therefore invalid and ineffective to the extent of the inconsistency.

g) The petitioner urges that the National Assembly did not vet the candidate and the procedure leading to her nomination and instead rubberstamped the nominee and the Chief Justice swore her into office without inquiring as to whether the Constitution had been upheld. Further, the National Assembly did not address the composition of the committee and the capacity of its members to recruit the Controller of Budget or whether the candidate as nominated met the minimum mandatory constitutional requirements. Section 7 of the Public Appointments (Parliamentary Approval) Act No.33 of 2011 provides that the issues for consideration by the relevant House of Parliament in relation to any nomination shall be the procedure used to arrive at the nominee; any constitutional or statutory requirements relating to the office in question; and the suitability of the nominee for the appointment proposed having regard to whether the nominee's abilities, experience and qualities meet the needs of the body to which nomination is being made. The petitioner's case is that the vetting process was a complete sham because the committee glossed over violations of the law and adverse facts that were fatal to the entire recruitment and nomination exercise.

h) The petitioner states that his legitimate expectation based on Articles 1(3), 2(1), 3(1), 10, 73(1) (a) (i), 73(2) (b), 94(4), 131 (2) (a), 250(4) of the Constitution was dashed when 87 applicants openly expressed interest in the office of the Controller of Budget and that the candidate with highest qualifications as per Articles 228(2), 250(3) and 73 (2) (a) of the Constitution was not recruited, nominated, approved for appointment, and appointed by the President.

Attorney General. The grounds of opposition were as follows:

- a) The appointment of the 6th respondent was not illegal, ultra-vires or in breach of constitutional principles and provisions as alleged by the petitioner.
- b) The petitioner herein has not adduced any evidence as alleged in his application any collusion between the 1st, 4th, and 5th respondents in the appointment of the 6th respondent into office of the 4th interested party.
- c) The President is empowered under section 4(12) of the Controller of Budget Act 26 of 2016 to appoint the 6th respondent herein as envisaged in section 43 of the Interpretation and General Provisions Act Cap. 2 laws of Kenya which stipulates that where a written law imposes a duty on the holder of an office as such, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed by the person for the time being holding that office.
- d) The Controller of Budget Act does not dictate that amongst the members of Committee for considering and shortlisting of applicants as envisaged under section 4(5) and (6) of the Controller of Budget Act for there to be a representative of the private sector nor does it prescribe the seniority of government officials to be appointed in the committee. The seniority of the representatives under the sections do not affect the results of the interviews as conducted by the committee per section 53 of the Interpretation and General Provisions Act, Cap. 2. The petitioner has not provided evidence to show that the committee was under control by any quarters in government as alleged in the instant petition and averments are based on misapprehension of fact and law.
- e) The 6th respondent herein was duly appointed after successful interview by the committee, nomination by the President and approval by the National Assembly, the 5th respondent, which manifests the diversity of the nation, represents the will of the people and exercises the sovereign will of the people per Article 94(2) of the Constitution of Kenya, 2010.
- f) The President is constitutionally bound under Article 131 (e) of the Constitution of Kenya to promote the rule of law and was by law bound to appoint the nominee approved by the National Assembly within 3 days upon approval as stipulated in section 10(a) of the Controller of Budget Act, 2016.
- g) The President made the appointment after having been satisfied that the 6th respondent had met the mandatory minimum constitutional qualifications set under Article 228(2) of the Constitution.

The 1st, 2nd and 3rd respondents therefore opposed the petition accordingly.

The 4th respondent filed on 18.12.2019 a notice of appointment of learned counsel Mr. Issac J.M Wamaasa Advocate to act in the matter. The 4th respondent filed grounds of opposition on 15.01.2020 thus:

- a) The petition is fatally defective, bad in law and an abuse of the process of the Honourable Court.
- b) The petition lacks merit as the 4th respondent is *functus officio*.
- c) The petitioner has failed to prove that the 4th respondent by swearing in the 6th respondent violated any provision of the Constitution or statute.
- d) The 4th respondent was not involved in the recruitment of the 6th respondent and cannot be faulted for discharging his constitutional and statutory mandate of swearing in the 6th respondent.
- e) The petition does not raise any or any reasonable cause of action against the 4th respondent.

The 4th respondent prayed that the petition be dismissed with costs.

The 5th respondent was the National Assembly and it appointed learned counsel Mr. Mbarak Awadh Ahmed Advocate to act in the matter. On 17.12.2019 the 5th respondent filed a notice of preliminary objection upon the following grounds:

- a) The petition challenges the nomination, approval and appointment of the Controller of Budget. Nomination, approval and appointment of holders of independent constitutional offices is not an ordinary employer-employee relationship falling within the jurisdiction of the Court but falls squarely within the jurisdiction of the High Court of Kenya.
- b) The petitioner invites the Honourable Court to carry out a fresh vetting and approval process over the 6th respondent as the Controller of Budget, outside the laid down constitutional and statutory parameters.
- c) Under Article 228 (1) of the Constitution, sections 3 and 4 of the Controller of Budget Act and section 7 of the Public Appointments (Parliamentary Approval) Act, the National Assembly is the competent body for vetting and approving the 6th respondent as the Controller of Budget.

d) The issues raised in the petition should have been raised for the petitioner before the National Assembly during the public participation exercise carried out in the vetting and approval of the Controller of Budget under the Constitution of Kenya and the Standing Orders of the National Assembly.

e) Once the Controller of Budget has been nominated, approved, appointed and ultimately sworn into office, she enjoys security of tenure and can only be removed from office only on the grounds and through the procedure set out under Article 251 of the Constitution which involves petitioning the National Assembly for her removal and ultimately establishment of a tribunal to investigate her conduct.

The 5th respondent also filed on 24.12.2019 the replying affidavit of Michael Sialai, the Clerk of the National Assembly and stated as follows:

a) By letter dated 15.11.2019 the President communicated to the Speaker of the National Assembly the name of the 6th respondent for approval as Controller of Budget. The letter asked for further action in accordance with section 4(10) of the Controller of Budget Act, 2016. The President's letter was per Article 228(1) of the Constitution which provides that the President shall appoint the Controller of Budget on approval of the National Assembly. Per section 4 of the Public Appointments (Parliamentary Approval) Act, 2011 and Standing Order 42 the Speaker of the National Assembly, on 19.11.2019 communicated the President's message to the House and committed the 6th respondent's name together with her Curriculum Vitae to the National Assembly's Departmental Committee on Finance and National Planning to carry out a vetting exercise of the 6th Respondent together with extensive public participation as provided in Article 118 of the Constitution and report to the House on or before 03.12.2019.

b) Per section 6(1) of the Public Appointments (Parliamentary Approval) Act, 2011, by letter dated 20.11.2019 the Clerk of the National Assembly requested the 5th respondent to appear before the Committee on Thursday 28.11.2019 for vetting and approval pursuant to Article 228(1) of the Constitution and asked the 6th respondent to avail clearance certificates from KRA, HELB, EACC, ORPP (Office of Registrar of Political Parties) and DCI. On 21.11.2019 the Clerk notified members of the public as required under Article 118 of the Constitution, section 6(1) of the Public Appointments (Parliamentary Approval) Act, 2011 and the National Assembly Standing Order 45(3), by way advertisements in local dailies of the approval hearings and further required them to submit memoranda on suitability of the nominee. The deadline for submission of the memoranda lapsed on 5.00pm of 23.11.2019. As confirmed in the Committee's report, no memorandum was submitted contesting the nomination of the 6th respondent. Further the nominee was cleared by KRA, HELB, EACC, ORPP (Office of Registrar of Political Parties) and DCI.

c) Article 124(4) of the Constitution provides that when a House of Parliament considers any appointment which its approval is required under the Constitution or an Act of Parliament, the appointment shall be considered by a Committee of the relevant House; the Committee's recommendation shall be tabled in the House for approval; and the proceedings of the Committee and the House shall be public.

d) Under Articles 228(1) and Articles 250 (2) of the Constitution the Controller of Budget shall be appointed by the President on Approval of the National Assembly.

e) Section 4 of the Controller of Budget Act provides for the procedure for recruitment of the Controller of Budget.

f) Pursuant to paragraph 8(1) of the Public Appointments (Parliamentary Approval) Act, 2011 the National Assembly shall within 14 days of receipt of the name of the 6th respondent vet and consider her and decide on her suitability or otherwise and may approve or reject her nomination.

g) Under Section 6 of the Public Appointments (Parliamentary Approval) Act, 2011 the conduct of the approval hearings is provided thus, all committee proceedings on public appointments shall be open and transparent; the committee may on its own motion or on the application of a candidate or any other concerned person determine the whole or any part of its sittings shall be held in camera; an approval hearing shall focus on a candidate's academic credentials, professional training and experience, personal integrity and background; the criteria specified in the schedule shall be used by the committee during an approval hearing for the purpose of vetting a candidate; any person may, prior to the approval hearing and by written statement on oath provide the Clerk with evidence contesting the suitability of a candidate to hold the office to which the candidate has been nominated; and, a candidate may, at any time, by notice in writing addressed to the Clerk, withdraw from the approval process and the candidate's nomination shall thereupon lapse.

h) Under section 7 of the Public Appointments (Parliamentary Approval) Act, 2011 provides for the matters to be considered by the relevant House of Parliament in relation to any nomination thus, the procedure used to arrive at the nominee; constitutional or statutory requirements relating to the office in question; and the suitability of the nominee for appointment proposed having regard to whether the nominee's abilities, experience and qualities meet the needs of the body to which the nomination is made.

i) In the instant case the Committee hearing took place on 28.11.2019 and the 6th respondent was examined against gender compliance with Article 27(8) of the Constitution requiring the state to take measures to ensure that not more than two thirds of members of elective or appointive bodies shall be of same gender; age to ascertain representation of the youth per Article 55 of the Constitution; Article 78 of the Constitution requiring that all state officers must be Kenyan Citizens; education background, employment record, honours or awards given to the nominee and membership to professional bodies; public office and political affiliations held to ascertain that the nominee did not hold office in a political party per Article 77(2) of the Constitution; information on whether the nominee had been removed from office under Article 75 of the Constitution that prohibits a state officer who has been removed from office under the Article from holding other state office; external commitments that nominee intends to undertake while in office, if appointed, in view of Article 77(1) that prohibits a full time state officer from participating in any other gainful employment; nominee's finances, tax status and net worth; potential conflict of interest per Article 75(1) prohibiting state officers

from engagement or association that may give rise to conflict between official duties and personal interest; whether the nominee has been charged in a court of law in the past three years; and whether the nominee has been adversely mentioned in a report of Parliament or a Commission of inquiry in the past three years. The Committee also considered all the matters as per section 7 of the Public Appointments (Parliamentary Approval) Act, 2011.

j) The Committee found that the 6th respondent was a Kenyan; she met the academic and professional experience required; the interview panel ranked her in first position at 76%; no memorandum had been received to contest her appointment; and she satisfied the requirements of chapter 6 of the Constitution on Leadership and Integrity. The other candidates had been Stephen Masha Ngowa who scored 74.5% and Ms. Celestine Atieno Munda who scored 73.62%. The 6th respondent's qualifications included a PhD in Business Administration; a Masters of Business Administration in Strategic Management; a Bachelor of Commerce (Accounting); and Certified Public Accountant of Kenya – CPA-K.

k) The Committee recommended the 6th respondent for approval for appointment as Controller of Budget.

l) The Court can only review the approval process and not merits of the approval by the National Assembly of the 6th respondent for appointment.

The 5th respondent therefore prayed that the petition be dismissed with costs.

The 6th respondent was Dr. Margaret Nyangáte Nyakangó, the person who was first at the interviews, nominated by the President for appointment, approved by the National Assembly for appointment, and subsequently appointed by the President as Controller of Budget. She filed her replying affidavit on 24.12.2019 through Milimo, Muthomi & Company Advocates. The 6th respondent has stated her understanding of the petitioner's grounds challenging her appointment as Controller of Budget. She states that she meets the qualifications for appointment to the office of Controller of Budget as prescribed in Article 228(2) of the Constitution of Kenya. As regards extensive knowledge in public finance she holds Bachelor degree in Commerce (Accounting) conferred by the University of Nairobi in 1983 and one of the units studied was Taxation and Auditing. She enrolled and completed studies as a Certified Public Accountant of Kenya (CPA-K) (one of the units being Public Finance and Taxation) and is duly registered and licenced to practice by the Kenya Institute of Certified Public Accountants (ICPAK). Her registration No. is P1070. She holds Master of Business Management degree and she studied Finance Management both in public and private finance. She also holds a Doctorate Degree in Business Administration and her thesis was on Strategic Workforce Planning in Public Service. Under her continuous professional development programme, she continues to attend conferences on public finance. Her job experience includes between 1995 to 2000 as Financial Controller, State Corporation, at Lake Basin Development Authority; 2003 to 2006 Finance Manager and Deputy General Manager Finance and Strategy; 2008 to 2018 at Kenya National Bureau as Director of Finance and Administration; and November 2018 to date of appointment as Controller of Budget she was a part-time Lecturer at KCA University College teaching Public Sector Finance. Thus the 6th respondent states that she has extensive knowledge in Public Finance. As regards the alternate qualification of not less than 10 years' experience in auditing or public finance management, in 1983 to 1992 she served as Senior Auditor at the Office of the Controller and Auditor General; in 1993 to 1994 was Principal Auditor in the office of Auditor General (Corporations); in 2000 employed at Kenya Anti-Corruption Authority Nairobi as Principal Officer, Corruption Preventive Services; a partner at MDN Kenya LLP Certified Public Accountants of Kenya in audit functions in 2006 to 2007 and 2018 to 2019; in 2018 a member of Audit Committee of Kenya National Commission for Human Rights (KNCHR); and the 6th respondent says she accordingly has over 10 years' experience on auditing public finance management.

The 6th respondent's further case is that she was appointed the Controller of Budget in strict compliance with the relevant constitutional and statutory provisions. Further, she provided all documents showing that she was of impeccable good character and she had been trained in leadership and integrity. The 6th respondent further stated that the petitioner had failed to show by evidence the petitioner's allegation that her swearing in by the Chief Justice was filled with nepotism, malice, bias, conflict of interest and abuse of power. Further, the duty of the Chief Justice was only swearing the 6th respondent into office upon invitation of the 6th respondent for that purpose and prior to that, the 6th respondent had no other business in connexion to the Chief Justice. In that regard the 6th respondent says that the petitioner's allegations are unsubstantiated attacks akin to political statements, are scandalous, frivolous, made in bad taste and should be expunged from record. The 6th respondent further takes offence that the petitioner uses the prefix "**MS**" in reference to her whereas she is a duly married woman. Further the petitioner's case is devoid of merits and should be dismissed with costs.

The 4th respondent appointed the learned counsel, Rhoda Rutto Advocate, to Act in the matter. The 4th interested party, the office of the Controller of Budget, filed on 24.12.2019 the replying affidavit of Irene Arimi, the Chief Manager, Human Resource and Administration. The replying affidavit, inter alia, states as follows:

a) The office of Controller of Budget is established under Article 228 (1) of the Constitution and some of its functions are provided for in Articles 228 (4), 206, 207, 204, and 228(6) of the Constitution.

b) One Agnes Odhiambo was appointed Controller of Budget on 27.08.2011 for a non-renewable term of 8 years. Her term of service ended on 26.08.2019 and the office became vacant by operation of the law.

c) As per section 7 of the Controller of Budget Act, a Deputy Controller of Budget was appointed per section 7 of the Controller of Budget Act, 2016. An advertisement was published for qualified persons to apply to fill the vacancy.

d) The Controller of Budget is responsible for approval of withdrawal of funds from the Consolidated Fund, the County Revenue Fund, and the Equalization Fund without which there will be none performance of essential services; lack of funding to manage the disaster management operation; public debts cannot access funds as funds for payment of pension cannot be approved; and salaries for all state and public officers will remain unpaid. The functions are specific to the holder of the office and a vacancy in the office will result in both levels of government grinding to a halt and service delivery to the people will get suspended. Thus the office of

the Acting Controller of Budget is intended to ensure continuity of service delivery for a limited term of 90 days within which the substantive office holder is to be appointed as provided in the Constitution and the Act.

e) The President appointed Stephen Masha as Acting Controller of Budget effective 27.08.2019 for 90 days lapsing on or about 26.11.2019. Between 25.11.2019 and 04.12.2019 there was a vacancy both in the offices of the Acting Controller of Budget (the 90 days having lapsed) and the office of Controller of Budget (the substantive office holder not having been appointed). There were therefore no approvals for withdrawals as vested in the office.

f) On 04.12.2019 the National Assembly approved the nomination of the 6th respondent for appointment by the President as the Controller of Budget. The president appointed her per Gazette Notice No. 11375 of 2019 and the Chief Justice administered to her the oath of office as Controller of Budget. The 6th respondent presented her employment and academic and professional records to the 4th interested party's human resource office and which show that she was duly qualified for the appointment.

The petitioner opposed the 5th respondent's preliminary objection by filing his grounds of opposition dated 18.12.2019. The petitioner urged as follows:

a) By reason of Articles 162 and 165 (5) (b) of the Constitution the Court has the status of the High Court and has jurisdiction to hear and determine constitutional claims raised in the petition. Section 12 of the Employment and Labour Relations Court Act, 2011 as read with Articles 23, 162, 165(5) (b) and 259 (1) of the Constitution grants the court jurisdiction to hear the petition by the petitioner seeking to enforce Articles 3(1), 10, 27, 41(1), 73 and 232 of the Constitution as the relationship relate to employment of a person in public office.

b) The petitioner is not seeking a fresh vetting of the 6th respondent. The petitioner is seeking that the Court holds her qualifications against the mandatory minimum eligibility thresholds in the Constitution and statute to determine whether or not she was qualified for appointment as the Controller of Budget.

c) Having vetted the 6th respondent, the National Assembly's mandate has expired and it is *functus officio* in the instant dispute.

d) The jurisdiction of the Court is not ousted by the vetting and approval process in Parliament.

e) The plea of *fait accompli* is anathema to Article 2(4) of the Constitution as read with Article 165(3) and (5) (b) which vest the Court with the jurisdiction to determine the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with or in contravention of, the Constitution.

f) The preliminary objection lacks merit, is incompetent, is an abuse of Court process and is brought *malafides* and should be dismissed with costs.

Submissions were filed for the petitioner, the 1st, 2nd and 3rd respondents, the 5th respondent, the 6th respondent, the 3rd interested party, and the 4th interested party. The 3rd interested party appointed Omwanza & Areba Advocates to act in the matter and they filed submissions. The 1st interested party supported the petitioner's case but did not file an affidavit or submissions. The Court has considered all the material on record and makes findings as follows.

To answer the 1st issue for determination, the Court finds that it has jurisdiction to hear and determine the petition and the preliminary objection as raised for the 5th respondent in that regard will collapse. In particular, the Court finds that the dispute relates to employment of the Controller of Budget and the interpretation of the constitutional and statutory provisions relating to that employment and therefore falls squarely within the constitutional and statutory provisions of the Court. It was submitted for the 5th respondent that the Court lacks jurisdiction because appointment of the Controller of Budget is not ordinary employment because the office is constitutionally independent per Article 248(3) (b) of the Constitution of Kenya and that the Controller of Budget is independent and not subject to direction or control by any person or authority. Further the employment of the Controller of Budget does not fall within the powers and functions of the Public Service Commission and a special procedure applies for removal of the Controller of Budget from office.

The Court finds that while the 5th respondent admits that the case is about employment of the Controller of Budget, the 5th respondent introduces terms alien to the law thus “**ordinary employment**” and “**not ordinary employment**”. The meaning of the terms is not defined in the submissions as made for the 5th respondent and the Court finds that it was misconceived for the 5th respondent to admit the matter in issue to be employment of the Controller of Budget and the applicable constitutional and statutory law and then proceed to purport to deny the Court's jurisdiction. The Court has time and again found that public officers and state officers are all servants of the people under the Constitution of Kenya 2010 and their employment is governed by relevant constitutional, statutory, contractual and lawful policy provisions as well as lawful public or state service practices necessary and designed for a good public or state service delivery and that safeguard the interests of the individual public or state officers. The Court holds that the relevant constitutional, statutory, contractual and lawful policy provisions and lawful practices will vary from one to other public or state office but that variance does not diminish or distinguish the fact of such employment.

Thus the Court upholds the petitioner's submissions and its earlier holdings in the cases cited for the petitioner. The Court follows the opinion in its ruling delivered on 12.04.2019 in **Okiya Omtatah Okoiti –Versus- The National Executive of the Republic and 6 Others [2019]eKLR**, thus, “**The Court has also held that in the public service under the Constitution of Kenya 2010, there are no masters and servants so that in public service in the new Republic, the test of master – servant does not obtain towards establishing existence of employment. In Paul Nyadewo Onyango –Versus- Parliamentary Service Commission and Another [2018]eKLR the Court stated, “In the present case, the Court will not therefore place emphasis on the relationships between individual public or state officers.**

None was a servant or master of the other. What is paramount, in the opinion of the Court, is that the officers interrelate and work together within the lawful prescription of the standards of a good public service delivery. They have no private treaties binding one officer to the other but only the constitutional, statutory and lawful policies or practices that are applicable to the public service and incorporated in the individual officer's contract of service."

In Okiya Omtatah Okoiti & Another –Versus- Cabinet Secretary for Information, Communications and Technology & 2 Others; Mohmoud Mohamed Noor and 9 Others [2019]eKLR; and Okiya Omtatah Okoiti –Versus- Attorney General & 2 Others, Francis Muthaura (AMB) & 5 Others [2019]eKLR; the Court held that service by public or state officers was amenable to the Court's jurisdiction. The Court finds accordingly.

It was submitted for the 5th respondent that the Court lacked jurisdiction because the petitioner allegedly lacked *locus standi* to file the petition. The Court holds that while jurisdiction looks at whether the court enjoys the authority, competence and capacity to embark to hear and determine the dispute at hand, *locus standi* or simply standing looks at whether the party before the Court is a proper party to sue. As submitted for the 5th respondent, it is in Alfred Njau & 5 Others –Versus- City Council of Nairobi [1983] eKLR that the Court of Appeal stated thus, "**The term locus standi means a right to appear in Court, and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.**" Thus the Court finds that the two, jurisdiction and *locus standi*, are related in the sense that they may run into each other but are clearly separate concepts in law. As to whether the petitioner enjoyed the standing, the Court finds that his description as earlier stated in this judgment was not in dispute and the Court returns that the petitioner enjoyed the necessary standing to seek the enforcement of constitutional provisions as alleged in the petition and in particular under Article 258 (1) which provides that every person has the right to institute court proceedings claiming the Constitution has been contravened or is threatened with contravention.

For the 1st, 2nd and 3rd respondents it was submitted that the procedure for removal of a holder of the office of Controller of Budget is provided for in Article 251 (2) of the Constitution thus, "**A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.**" The 1st, 2nd and 3rd respondents urge that the 6th respondent having been appointed the Controller of Budget, the proper procedure is to invoke Article 251(2) of the Constitution. The Court has considered that submission against the petitioner's case in the petition and the supporting affidavit. The commonplace law is that a party is bound by own pleadings. The Court finds that nowhere has the petitioner urged, claimed and prayed for removal of the 6th respondent as the Controller of Budget on the basis of the matters set out in Article 251 (1) of the Constitution for which Article 251 (2) of the Constitution may be invoked. The petitioner's case is that the declaration of vacancy by the Public Service Commission and the interview panel or recruitment procedure was null and void and the approval by the National Assembly and the President was null and void or unconstitutional because the 6th respondent lacked the requisite qualifications. The Court returns that the petitioner's case is essentially about the judicial review of the procedure and merits on the part of the respondents in appointing the 6th respondent as the Controller of Budget and such proceeding obviously falls outside the provisions of Article 251 of the Constitution on removal of members of commissions and independent officers as envisaged under the Article. It could be that if the petitioner succeeds in his case the 6th respondent may vacate the office of the Controller of Budget but such vacation would obviously fall outside the matters and procedures envisaged in Article 251 of the Constitution. Thus, the Court finds that in view of the matters in dispute in the petition, Article 251 does not at all begin to emerge as to oust, diminish, adjourn or render premature the Court's jurisdiction to hear and determine the petition. Instead, the Court holds that the petition is a classical proceeding for the judicial review of legislative and executive action, on merits and procedure, as per the petitioner's claims and allegations set out in the petition.

The 2nd issue for determination is whether section 4(2) of the Controller of Budget Act, 2016 pursuant to which the 6th respondent was appointed to office was and is wholly inapplicable as it applies only to cases where the previous occupant of the office has resigned in writing to the President, has been removed for violating the constitution or is dead which was not the case at the material time or upon the facts and circumstances of the case. There is no dispute that the vacancy leading to the appointment of the 6th respondent to the office of Controller of Budget accrued by reason of the lapsing of the term of service of the immediate previous holder of the office. Thus a vacancy accrued because the previous office holder's tenure lapsed by effluxion of the prescribed tenure of 8 years. Section 4 (1) and (2) of the Act provides as follows:

“(1) The office of the Controller of Budget shall become vacant if the Controller of Budget:

- a) resigns in writing by a notice addressed to the President;**
- b) is removed from office under the provisions of Article 251 or Chapter six of the Constitution; or**
- c) dies**

(2) Where a vacancy occurs under subsection (1), the Public Service Commission shall within seven days by notice in the Gazette, at least two newspapers of national circulation and at least two television and radio stations declare the office vacant and invite applications.”

The petitioner urges and submits that Article 251 provides for removal of the Controller of Budget on account of serious violation of the Constitution or any other law including a contravention of Chapter Six; gross misconduct whether in the performance of his or her functions or otherwise; physical or mental incapacity to perform the functions of office; incompetence; or bankruptcy. The petitioner submits, and it is not in dispute, that the matters in Article 251 and the procedure for removal as prescribed thereunder did not take place in the instant case because there was nothing adverse alleged against the immediate previous holder of the office and whose term of service of 8 years simply lapsed. The petitioner submits that there is a lacuna in the Act to the extent that it does not provide for the procedure to be used to appoint a new office holder where the tenure of the incumbent expires due to effluxion of the tenure of 8 years' service. The petitioner says that declaration of a vacancy by the Commission under subsection 4(2) of the Act is limited to situations in subsection 4(1) of the Act. The petitioner therefore submits that the provisions of section 4 of the Act did not therefore apply to the vacancy in the office of the Controller of

Budget when the incumbent's 8 years of service successfully lapsed. Further the section offends Article 234(3) (a) of the Constitution which ousts the mandate of the Public Service Commission over State Officers. The petitioner further submits that the declaration and publication of the vacancy by the Public Service Commission was therefore null and void.

For the 1st and 2nd respondent it is submitted that they admit they invoked section 4(2) pursuant to which the 6th respondent was appointed to office. It was submitted that the President also relied upon Article 228 (1) of the Constitution which confers upon the President powers to nominate and appoint the Controller of Budget with approval of the National Assembly. Under Article 2(1) of the Constitution, it was submitted for the respondents that the Constitution was supreme and binds all persons and all state officers and as such, the shortcomings in section 4(2) of the Controller of Budget Act are superseded by the Provisions of the Constitution. It was further submitted that the doctrine of necessity applied as per Mitchell and Others –Versus- Director of Public Prosecutions and Another, 1985 (LRC) Const where the Supreme Court of Grenada adopted the words of Lord Mansfield that the doctrine of necessity demands that which is otherwise not lawful be made lawful by necessity. It was submitted that the functions of the office of the Controller of Budget under Article 228(4) to (6) and 252 of the Constitution of Kenya and section 5 of the Controller of Budget Act, 20016 were urgent and crucial and the invoking of section 4(2) must be seen to have been invoked as of necessity to fill the vacancy. In particular, it was submitted that the Controller of Budget oversees the implementation of the budgets of the national and county government by authorising withdrawals from public funds under Articles 204, 206 and 207; and the Controller of Budget shall not approve any withdrawal from a public fund unless satisfied that the withdrawal is authorised by law; every four months the Controller of Budget shall submit to each House of Parliament a report on the implementation of the budgets of the national and county governments. It was submitted that if the functions vested in the office were not carried out, the delivery of state, county and public services would crush. The 1st, 2nd, and 3rd respondents therefore submitted that the Court finds that the nomination, approval of appointment and subsequent appointment of the 6th respondent complied with the provisions of Articles 228(1) and 250 (2) of the Constitution, the Public Appointments (Parliamentary Approval) Act, 2011 and the Controller of Budget Act, 2016.

The 5th respondent does not make specific submissions to the petitioner's case that section 4(1) and (2) of the Controller of Budget did not apply in the instant case. For the 6th respondent it was submitted that the Controller of Budget Act, 2016 was enacted pursuant to Article 250 (2) (a) which provides that the Controller of Budget shall be identified and recommended for appointment in a manner prescribed by national legislation. However, the submissions filed for the 6th respondent do not specifically address applicability of sections 4(1) and (2) of the Act which were invoked in the process leading to identification, nomination, approval, and appointment of the 6th respondent. The Court has equally considered the submissions filed for the 3rd interested party and the issue of alleged inapplicability of section 4(1) and (2) of the Act has not been addressed. For the 4th interested party it was submitted that section 4 of the Act does not indeed provide for a vacancy flowing from lapse of the term of the holder of the office of Controller of Budget. The 4th interested party admitted the lacuna in the law and submitted that the section provides for a vacancy in the event of death, resignation or removal from office. Further it fails to make provision of the vacancy by operation of law where the term of a holder of the office ends as was the case in the instant case. The 4th interested party further submits that it is the case by the petitioner that in view of the lacuna, the petitioner's case was that section 37 of the Public Service Commission Act, 2017 applies as per the holding in Okiya Omtatah Okoiti –Versus- Attorney General & 2 Others, Francis Muthaura (AMB) & 5 Others [2019]eKLR where the Court stated that where there was no procedure to recruit the members of the KRA Board, the said section 37 applied. The 4th interested party urged the Court not to follow the petitioner's submission because Article 234 (3) clearly excludes the application of the powers and functions of the Public Service Commission and its procedures and processes to the appointment of state officers such as holders of independent offices. It was submitted that the cited case related to a state corporation and not a state officer or independent office under the Constitution and the Court should not follow the case. The Court has considered the submission by the 4th interested party on application of section 37 of the Public Service Commission Act, 2017 in the present case and upholds the 4th interested party's submission that the cited case is distinguishable as submitted and the Court shall not return to that point as the Act does not apply to the office of Controller of Budget.

The 4th interested party further submitted that it was only logical that a vacancy flowing from lapse of the term of the holder of the office like in the present case is treated like a vacancy due to resignation, removal from office or death because it was unreasonable to take the view that while limiting the term of service the law did not envisage a vacancy flowing from that lapse of term of service. Thus section 4 of the Act should be interpreted to include a vacancy flowing from lapsing of the term of 8 years' service prescribed in the law. It was submitted that it would also be unreasonable for the law to prescribe different recruitment procedures for the same vacancy in the office of the Controller of Budget. On that argument, the petitioner submitted that lapse of term of service was foreseeable unlike death, resignation, or removal under Article 251 of the Constitution and as such there ought to be a recruitment process in anticipation of a vacancy where the prescribed term of 8 years is to lapse and a successful candidate identified well in advance to be appointed to take over promptly upon lapsing of the term of the incumbent and without necessity of an acting appointment in view of the weighty constitutional and statutory roles of the office of Controller of Budget.

For the Law Society of Kenya, the 3rd interested party, it was submitted that despite the clear lacuna in the section, the procedure as provided is capable of being applied to fill a vacancy flowing from the lapsing of the prescribed 8 years of service for the holder of the office of Controller of Budget. However, there was no elaboration to support that proposition.

The Court has considered the submissions. There is a common ground that section 4 of the Act does not expressly provide for the vacancy accruing from lapsing of the prescribed term of 8 years for the holder of the office and which was the case in the instant dispute. Thus as urged for the petitioner, under the literal and golden rules of statutory interpretation, the section would not apply to the process of recruitment, identification, nomination, approval and appointment to the office of the Controller of Budget as the vacancy did not arise from any of the circumstances listed in the section.

The Court has examined the Act. The long title to the Act provides thus, "**AN ACT of Parliament to give effect to the provisions of Articles 225, 228, and 252 of the Constitution regarding the functions of the Office of the Controller of Budget and for connected purposes**" The marginal or head note for section 4 of the Act states, "**Vacancy and procedure for appointment of the Controller of Budget**". The Court reckons that it is trite law that a marginal note is not part of the enactment. However, the Court considers that the marginal note can be relied upon to provide or suggest the legislative intention of the enactment in issue. Looking at the long title to the Act and the marginal note to section 4 of the Act, the Court returns that the Parliament clearly intended that the Act applies to all matters relating to the office of the Controller of Budget including procedure for appointment to a vacancy in the office in terms of Article 228 of the

Constitution. As submitted for the petitioner, the 1st, 2nd and 3rd respondents, and, the 4th interested party, subsection 4(1) fails to provide for a vacancy if the Controller of Budget leaves office by reason of lapsing of the prescribed term of tenure. The Court has considered the apparent legislative intention, the crucial functions and authority vested in the holder of the office of the Controller of Budget, the evidence that as at appointment of the 6th respondent the tenure of the 90 days of the acting appointment had lapsed, and the serious consequences (being a crush in the public service delivery by national and county governments) of finding that the section could not be invoked in the manner it was invoked and returns that as a matter of the apparent legislative intention, the section was as of necessity genuinely invoked. The Court considers that if the section had not been invoked in the manner it was done a significant harm to public service delivery flowing from the failure to fill the office of Controller of Budget would not have been avoided; no adequate lawful means have been established by the petitioner or other parties that could have been invoked to escape the harm; and the harm avoided was greater than the one that would have resulted had the section not been so invoked. The Court returns that by the doctrine of necessity, section 4 of the Act was properly invoked in the circumstance that while Parliament intended to provide in the Act a procedure for filling a vacancy in the office of the Controller of Budget in any event, there appears a clear gap in the legislative drafting that failed to capture a vacancy flowing from the lapsing of the prescribed term of the office holder. However, as urged for the petitioner, nothing should stop the 1st, 2nd, 3rd, and 5th respondents from considering and taking action towards improving section 4 (1) of the Controller of Budget Act, 2016 (for clarity and avoidance of ambiguity) to provide for and include a vacancy if or where the Controller of Budget leaves office by reason of lapsing of the prescribed term of tenure; and as appropriate, where such lapsing of tenure being foreseeable, a procedure for timely identification, nomination, approval for appointment and appointment of the next holder of the office as at the time of the lapsing of the term of the incumbent. In that regard and to balance justice for the parties, the Court considers that a declaration will issue in those terms.

The Court has carefully considered the legislative drafting and interpretation issue at hand. Section 4 of the Act establishes a proposition or design that a vacancy occurs in the office of the Controller of Budget in event of resignation, removal under Article 251 of the Constitution, or death as stated therein. The section does not state that the three situations are the only situations under which the office may fall vacant – but states that the three situations will trigger invitation of applications to fill a vacancy if any of the three situations happen. The good legislative drafting principle is that the legislative draftsman avoids repetitions and amplifications of what is already provided for in the Constitution or other legislation. In the instant case, Article 228 (3) of the Constitution already provides that the Controller of Budget shall, subject to Article 251, hold office for a term of eight years and shall not be eligible for re-appointment. Article 251 of the Constitution then provides that the Controller of Budget (being an independent office under the Article) may be removed from office only for gross misconduct, whether in performance of functions or otherwise; physical or mental incapacity to perform the functions of office; incompetence; or bankruptcy. Thus the Court considers that the Constitution has provided for situations leading to a vacancy in the office of Controller of Budget namely lapsing of the term of 8 years of service and removal as provided for in Article 251. Now, section 4 of the Act purports to reproduce that Constitutional position but while leaving out the lapsing of 8 years of service and while introducing obvious triggers of a vacancy namely death and resignation – and being obvious, would not call for legislative intervention, the court considering that another rule of good legislative drafting being that the obvious should not be legislated unless there exist a clear mischief to be curtailed in that regard. Thus, to escape and avoid the gobbledygook that may result, it is the Court's view that unnecessary repetitions were better avoided (left out) in good legislative drafting. In the instant case, since lapsing of term of 8 years and removal under Article 251 were already provided for in the Constitution as leading to a vacancy and death and resignation are natural and obvious triggers of a vacancy subsection 4(1) of the Act may have been omitted and subsection 4(2) straightaway deal with advertisement of a vacancy for instance, **“Where a vacancy occurs in the office of the Controller of Budget, the Public Service Commission shall within seven days by notice in the Gazette, at least two newspapers of national circulation and at least two televisions and radio stations declare the office vacant and invite applications.”**

The Court considers that the Constitution having already envisaged a vacancy by reason of lapsing of the 8 years of service, it was not necessary for section 4 of the Act to repeat that constitutional position and the Court not being in doubt of the parliamentary intention of the Controller of Budget Act, 2016 as enacted to give effect to the relevant constitutional provisions, the Court adopts a purposive approach of interpretation so that in view of the general legislative intention of the Act, the Court will give effect to the constitutional context in which section 4(1) and (2) were enacted. The Court therefore returns that section 4 of the Act applied to the filling of a vacancy in the office of the Controller of Budget in the listed circumstances as well as a vacancy flowing from the lapsing of the 8 years of service by the incumbent as was the case in the instant case.

The 3rd issue for determination is whether sections 4 and 7 of the Controller of Budget Act, 2016 are unconstitutional and therefore invalid, null and void.

The parties have made submissions on the principles governing the interpretation of constitutionality of statutes. The Court is reminded as follows.

Article 2 (1) on the Supremacy of the Constitution provides that any law including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of the constitution is invalid. Article 259 (1) on construing the Constitution provides that the Constitution shall be interpreted in a manner that:

- a) promotes its purposes, values and principles;
- b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- c) permits the development of the law; and
- d) contributes to good governance.

Article 259 (3) provides that every provision of the Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and the criteria set therein applies.

As submitted for the 6th respondent in **Olum and Another –Versus- Attorney General** [2002] EA, the Court of Appeal of Uganda at Kampala held that in order to determine the constitutionality of a statute, the court had to consider the purpose and effect of the impugned statute or section thereof. If the purpose was not to infringe a right guaranteed by the Constitution, the court had to go further and examine the effect of its implementation. If either the purpose or the effect of its implementation infringed a right guaranteed by the Constitution, the statute or section in question would be declared unconstitutional. Again in **Kenya Human Rights Commission –Versus- Attorney General** [2018] eKLR the High Court held, “**Another key principle of determining constitutional validity of a statute is by examining its purpose or effect. The purpose of enacting a legislation or the effect of implementing the legislation so enacted may lead to nullification of the statute or its provision if found to be inconsistent with the Constitution.**” Again as submitted for the 6th respondent in **Ndyanabo –Versus- Attorney General** [2001]EA 495 the Court held that there was a general presumption that every Act is constitutional and the burden of proof thus lies on any person who alleges unconstitutionality. Further in **Pearlberg –Versus- Varty (1972)1 WLR534** it was stated, “**I would only emphasize that one should start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown....**”

The Court also follows its opinion in the judgment in **George Maina Kamau –Versus- The County Assembly of Murang’a and 2 Others** [2016]eKLR, thus, “**While addressing the 3rd issue for determination, the court is alert that in considering a case, a litigant may show that a provision of a statute as applied to that litigant is unconstitutional and if the court finds as much, the decision would apply to the parties to such litigation, such decision binds only the parties and the matter ends there. In the opinion of the court, in such cases, the statute does not thereby become unconstitutional generally and it remains good law to be applied constitutionally in future circumstances. However, if a statutory provision contains unconstitutional prescription or rule and the court finds as much, then the statute would not apply to any future circumstances as is a nullity as against every person. Such a statute or statutory provision would be incapable of ever being applied constitutionally. In such cases, where a statute is unconstitutional because it inherently contains a prescription or rule that is unconstitutional, it is the opinion of the court that the legislature should move with speed to repeal the statute so that the offensive provision does not remain on the statute book. In the opinion of the court, that is more so because by promptly repealing the unconstitutional statute or the offending unconstitutional provision, public officers and the general users of the statute or statutory provision would not be misled to apply it for the time it persists to exist on the statute book.**”

Further in **Narok County Government & Another –Versus- Richard Bwongo Birir & Another** [2015]eKLR (Waki JA, Nambuye JA and Kiage JA), in recognizing that section 40 of the County Governments Act was available and constitutional, the Court of Appeal in that case at paragraph 48 of the judgment stated that the County Governments Act, 2012 was enacted pursuant to Article 200 of the Constitution to give effect to Chapter 11 of the Constitution which provides for devolved Government. Thus in the **County Government of Mandera and Another –Versus- Attorney General and Another and Hussein Dayow Abdullahi and 3 Others** [2020] eKLR the Court stated thus, “**The Court is guided accordingly and holds that a statute that is enacted pursuant to or to give effect to a provision in the Constitution would in that regard be constitutional unless if it is established that the statutory enactment by its content inherently violates a constitutional provision or rule.**”

As relates to section 4 of the Controller of Budget Act, 2016, the petitioner urges as follows. Subsections 4 (5) and (6) of the Controller of Budget Act provide as follows:

“4(5) The Public Service Commission shall within seven days of expiry of the period prescribed under subsection (3) convene a committee for the purpose of considering the applications and shortlisting three persons for appointment as Controller of Budget.”

Subsection 4(6) of the Act provides that the Committee under subsection 4(5) shall consist of a representative for office of the President, ministry responsible for finance; office of Attorney General; and ministry of public service.

The petitioner’s case is that section 4(5) violates Article 228(1) of the Constitution which requires the President and not the Public Service Commission to nominate the candidate for appointment as the Controller of Budget and the convening of the Committee is part of the nomination process. Further the subsection violates Article 234(3) (a) of the Constitution which ousts the mandate of the Public Service Commission from matters concerning state officers and the Parliament acted unconstitutionally to take the role from the President. The petitioner submits that subsection 4 (13) of the Act provides that for avoidance of doubt the Public Service Commission shall only provide secretariat services for the committee convened under subsection 4 (5) and which contradicts the serious administrative function of convening the committee. Thus the petitioner submits that subsection 4(5) contravenes Articles 228(1) and 234(3) (a) of the Constitution and is null, invalid and void.

The petitioner further submits that subsection 4(6) of the Controller of Budget Act, 2016 is unconstitutional because under Article 249 (2) of the Constitution the Controller of Budget is subject only to the Constitution and the law; and is independent and not subject to the direction or control by any person or authority. The petitioner submits that the subsection does not meet the threshold envisaged in Article 249(2) of the Constitution as the committee is composed of purely executive’s representatives. The Committee as convened consists only of government officials implying that the executive enjoys the exclusive power to make the appointment. The petitioner submits that the committee is not as diverse in comparison with the one under section 11(5) of the Public Audit Act, 2015 for recruitment of the Auditor General which includes representatives of professional bodies. Thus the appointment of the Controller of Budget is an affair of the executive.

The Court has considered the submissions and finds that the Controller of Budget Act, 2016 was enacted to give effect to Article 228 and pursuant to Article 250 (2) (a) of the Constitution. The Court finds that Act gives effect to and is pursuant to the constitutional provisions. Second the Court finds that Article 234(2) (j) provides that the Public Service Commission shall perform functions and exercise any other powers conferred by national legislation. The Court therefore finds that the impugned subsections are enacted pursuant to that constitutional provision and the convening of the committee and provision of the secretariat services to the committee are clearly within the envisaged legislative powers of the Parliament. It is true that the functions of the Commission under Article 234 (2) of the Constitution do not apply to the independent office of the Controller of Budget as per Article 234 (3) (a) but the Court further finds that convening of the committee and provision of secretarial functions in issue do not constitute any of the Commission’s powers and functions under of the Constitution and which are said not to apply to the independent office of the Controller of Budget. The Court further considers that under Article 228(1) the President nominates the Controller of Budget and the design in subsection 4(6) on composition of the committee is not inconsistent with that

executive function as vested in the President. The Court considers that the petitioner is concerned with the ranks, capacity and competency of the committee's individual members to recruit the three suitable candidates and returns that the representation is capable of achieving such needed capacity and competency and in event of any failures in individual cases, such are matters that the National Assembly would be expected to consider and make a determination as may arise during the vetting process as per relevant statutory provisions on vetting a candidate for appointment as Controller of Budget.

The Court therefore returns that the two impugned subsections have not been established to have been unconstitutional because they were enacted pursuant to constitutional provisions, they have not been shown to inherently violate any constitutional provision or rule, and they are capable of being implemented in accordance with the constitutional provisions.

The petitioner urges that section 7 of the Controller of Budget Act, 2016 is unconstitutional because it purports to empower the Public Service Commission to identify and recommend the senior most officer in the office of the Controller of Budget to the President for designation as acting Controller of Budget and for that person to have and exercise all the powers of the Controller of Budget for a period of not more than 90 days. The petitioner's case is that the section is unconstitutional because it creates a mechanism for a third party to assume and discharge the functions of the constitutional office without being subjected to the rigorous process set out in the constitution for ascending to said office. The petitioner therefore prays for orders to quash sections 4(5) and 7 of the Controller of Budget Act, 2016. The court has considered the case as urged for the respondents and the 4th interested party that the constitutional and statutory functions, powers and duties of the office of the Controller of Budget are so crucial and it is therefore necessary to have temporary measure for 90 days during which a substantive holder is appointed and the temporary measure being necessary to prevent the crushing of the delivery of services by the national and county governments.

The Court finds that in the natural flow of things it is conceivable that the office of the Controller of Budget may fall vacant in unforeseeable circumstances such as death, resignation or removal as per the constitutional provisions. The Court has also considered the nature of the functions, powers and duties vested in the office and finds that they are in the nature of day to day roles that are necessary for continued running of state and public service operations. Essentially the Controller of Budget holds the key to the purse holding all government money and it is unnecessary to emphasise that a vacancy in the office means the key is unavailable. Thus the Court finds that the temporary acting appointment with the prescribed safeguards are not unconstitutional or even irrational but necessary towards dealing with the likely event that the office is vacant. The Court finds that the Constitution in Article 259 (3) (b) provides that any reference in the Constitution to a state or other public office or officer or person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time. The Court considers that the provision contemplates acting appointments and the enactment of appointment of the acting Controller of Budget within the safeguards of section 7 of the Controller of Budget Act, 2016 is found not to offend constitutional provisions. By reason of Article 259(3) (b), the Court returns the acting Controller of Budget is clearly bound by all constitutional provisions relating to the discharge of the duties, performance of functions and exercise of the powers of a substantive Controller of Budget so that any perceived mischief of an acting appointment should not arise. The safeguards are that the most senior officer in the office of the Controller of Budget is designated to act, the acting Controller of Budget shall serve for a period of not more than 90 days, the person appointed shall meet all the minimum qualifications for appointment of Controller of Budget, and the acting Controller of Budget shall have all the powers of the Controller of Budget. Thus the Court returns that section 7 of the Controller of Budget Act, 2016 is contemplated in the Constitution in so far as it enacts an acting Controller of Budget, it is enacted to cover for absence of a substantive Controller of Budget and within the stipulated safeguards, it is not shown to inherently contravene a constitutional provision or rule, and it is capable of being implemented constitutionally.

While making that finding, the Court has considered the submission for the Law Society of Kenya that in **Transparency International (TI-Kenya) –Versus the Attorney General [2018]eKLR** the Court held that there cannot be an Acting Auditor General appointed in accordance with Article 229(1) and any attempt to create a substantive position of Acting Auditor General by statute, appointing a person otherwise than as contemplated by the Constitution and allow him or her to exercise constitutional functions and powers of the Auditor General amounted to an unconstitutional office and unconstitutional exercise of functions and powers of the constitutional independent office. Further, **“Appointing an Acting Auditor General as proposed by section 12 violates Article 229 (1). For that reason, I find and hold that section 12 of the Act is inconsistent with Article 229 of the Constitution and is invalid.”** The Court has found that the Constitution by itself contemplates acting appointments and in view of the nature of the functions and powers of the Controller of Budget that are continuing and requiring day to day decisions to avoid crushing of the national and county governments' service delivery, the Court has returned that in the instant case the Parliament has not been shown to have acted irrationally, unreasonably or in violation of the Constitution by legislating designation of an acting Controller of Budget and within the cited statutory safeguards.

The Court has carefully reconsidered the arguments made about the constitutional validity of an acting Controller of Budget. The Court's opinion is that the impugned section 7 does not create or establish an office of Acting Controller of Budget parallel or separate from the constitutionally established office of Controller of Budget - and doing so would obviously offend the constitutional establishment of the office of Controller of Budget with the vested powers and functions and as an independent office under Chapter 15. The Court holds that all that the impugned section 7 does is to set safeguards for designation of a person styled as acting Controller of Budget to perform functions of the Controller of Budget and as contemplated in Article 259 (3) (b) of the Constitution. Thus the section does not state that there is established an office to be known as Acting Controller of Budget and which shall perform and exercise the constitutional functions and powers of the Controller of Budget. The section provides for the designation of an acting Controller of Budget to perform and exercise the constitutional functions and powers of the Controller of Budget while a substantive holder of the office is being recruited. Hence, the Court holds that when the President makes an acting designation, the understanding is that there is no appointment made in accordance with the constitutional provisions. The person designated as acting Controller of Budget only serves in an acting capacity to discharge the functions of Controller of Budget while a substantive holder is being recruited.

The Court has considered the petitioner's objection that the person designated to act as Controller of Budget is so designated or appointed without approval by the National Assembly in terms of Article 228 (1) of the Constitution. The petitioner therefore submits that the person so designated or appointed to act should not serve in that position even temporarily.

The Court has considered the submissions by the petitioner and returns that the arguments are misconceived about the proper interpretation of the Constitution as provided for in Article 259 of the Constitution. Article 259(1) is clear that the Constitution shall be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the

Bill of Rights; permits the development of the law; and contributes to good governance. Article 259 (3) provides that the Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, **“(a) a function or power conferred by this Constitution on an office may be performed or exercised as occasion requires, by the person holding the office.”** Article 93 (1) of the Constitution provides that there is established a Parliament of Kenya, which shall consist of the National Assembly and the Senate. Article 93(2) then provides that the National Assembly and the Senate shall perform their respective functions in accordance with the Constitution. Now it is under Article 228(1) that the President appoints the Controller of Budget with approval of National Assembly. The Court finds and holds that by enacting the impugned section 7, the Parliament and therefore the National Assembly has by itself, per Article 228(1), approved the person the President may designate to act as Controller of Budget. If the President designated a person to act as Controller of Budget without the legislative sanction as provided in the impugned section 7 of the Act, then the petitioner’s arguments as submitted would hold.

The Court’s opinion is that the better and sound view is that the Parliament which comprises the National Assembly and the Senate has by itself in enacting the impugned section 7 of the Controller of Budget Act, 2016 thereby granted approval for the person the President may designate or appoint as acting Controller of Budget. The Court further finds that section 7 was therefore enacted to satisfy the standards of Article 228 (1) of the Constitution and its enactment was consistent with provisions of Articles 259(3) (a) and 259 (1) (a) and (d) – so that it was in furtherance of good governance to foresee possibility of a vacancy in the office of Controller of Budget that may require a person to act in the office, albeit temporarily, and for Parliament to (in advance) approve the person for appointment by the President by way of enactment of section 7 of the Act. Thus, it should be clear that an acting Controller of Budget is only temporarily discharging the functions of the office and such service though clothed with all requirements and standards expected of the substantive office holder as per the safeguards set out in section 7 of the Act, the acting person is not a substantive Controller of Budget or an office separate from the constitutionally established office of Controller of Budget.

To sum up on the issue, the Court returns that section 7 of the Controller of Budget Act, 2016 embraces true fidelity to the original constitutional provisions about the office of the Controller of Budget. The Court further considers that the section does not render itself as an avenue for the President to circumvent the original constitutional provisions on the office of the Controller of Budget.

To answer the **4th issue** for determination, the Court returns that it enjoys the jurisdiction for judicial review of the procedure for the recruitment, nomination, approval for appointment, appointment and the swearing into office of the Controller of Budget as undertaken by the 1st, 2nd, 4th, and 5th respondents. The Court further holds that it enjoys jurisdiction for judicial review on merits of the decisions made by the respondents in that regard such as on account of the doctrine of unreasonableness such as is envisaged in Article 47 of the Constitution, on account of the principle of illegality, on account of constitutionality and, on account of established manifest injustice.

Thus the Court upholds and follows its opinion in the ruling in **Abdikadir Suleiman –Versus- County Government of Isiolo [2015]eKLR** thus, **“The court says it in other words as follows. The Constitution or legislation may provide that a person or public body or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions or powers as vested in the person or authority or public body by the Constitution or legislation. The Constitution or legislation may also vest in a person or authority or public body the power or function to consider or entertain given disputes or matters as of first instance or on appeal and to render decisions in that regard in accordance with the prescribed procedures. In the opinion of this court, such constitutional and legislative provisions shall not be construed as precluding a court from exercising the relevant jurisdiction in relation to any question whether that person or authority or public body has exercised the powers or functions in accordance with the Constitution or any other law. The court holds that such provisions do not oust or extinguish or adjourn the court’s jurisdiction to hear and determine a dispute about the legality or the manner of the exercise of the constitutional or statutory powers and functions by the relevant person, public body or authority as may have been vested in the person, public body or authority under the Constitution or statute.**

The court is alert that under Article 159(2) (b) justice shall not be delayed and under Article 159 (2) (e) the court is guided that in exercise of judicial authority, the purpose and principles of the Constitution shall be protected and promoted. Under Article 159 (1) judicial authority is vested in the judiciary and it is the opinion of the court that issues of legality of actions or omissions is the immediate and proper primary or original province and jurisdiction of the court and is not the penultimate or initially ceded jurisdiction of persons, public bodies and authorities outside the judiciary. In the opinion of the court, it would amount to delayed justice to tell the claimant thus, “ The court knows your alleged case is that an illegality has taken place; you challenge the alleged illegality; on merits of the challenged decision you ought to appeal to the Commission; the Commission has no jurisdiction to consider issues of illegality as you have alleged in your case but it might consider it and may rule in your favour; and therefore, though this court has the primary jurisdiction to consider the issue of illegality as you have alleged, you ought to have gone to the Commission in the first instance just to see if the Commission might have considered the issue of illegality before you moved this court and your case is dismissed accordingly for failure to give the Commission chance to exercise the speculative and hopeful jurisdiction on that issue of alleged illegality.”

To answer the **6th issue** for determination the Court returns that in the instant case the petitioner has not established a case for judicial review on procedure or merits for the decisions of recruitment and identification, nomination, approval for appointment, appointment and the swearing into office of the 6th respondent as the Controller of Budget as undertaken by the 1st, 2nd, 4th, and 5th respondents and in terms or view of the allegations, claims and prayers by the petitioner. In particular, and as urged and submitted for the respondents and the 3rd and 4th interested parties the petitioner has not established by evidence that the 4th respondent by swearing in the 6th respondent violated any provision of the Constitution or statute as was alleged for the petitioner. Further, the petitioner has failed to establish by evidence his allegation that the 6th respondent’s swearing in by the Chief Justice was filled with nepotism, malice, bias, conflict of interest and abuse of power. The Court has considered the evidence on record and as at the time of appointment and swearing of the 6th respondent into office, the prescribed acting tenure of 90 days had already lapsed and it therefore appears to the Court that there existed genuine urgency for appointment by President and swearing in by the Chief Justice of the 6th respondent on the same date the National Assembly had granted the approval. Thus, the Court returns that the petitioner’s allegations in that regard were empty and not established at all.

The parties have taken considerable opportunity to urge the issue whether the 6th respondent held the minimum constitutional requirements and qualifications prescribed for the office of Controller of Budget and more specifically as provided for in Article 228 (2) thus, to be

qualified to be Controller of Budget, a person shall have extensive knowledge of public finance or at least ten years of experience in auditing public finance management. The Court has found that it enjoys jurisdiction to hear and determine the merits of the 6th respondent's qualifications on account of the doctrines of reasonableness, legality, constitutionality or manifest injustice.

However, in Trade Union Congress of Kenya (TUK-Ke) –Versus – Dr. Joseph Kinyua, Head of Public Service and Another, and National Assembly and 2 Others [2020]eKLR, the Court held that the the Public Appointments (Parliamentary Approval) Act No. 33 of 2011 provided for such an elaborate statutory procedure which offered the petitioner the proper forum but it was never utilized or invoked by the petitioner. The Court further held that where there was such alternative avenue for resolving the petitioner's grievances with respect to the 3rd interested party's nomination, vetting and subsequent appointment, the Court found that the petitioner had failed to meet the threshold for the exercise of the Court's rare jurisdiction to intervene in the performance of the human resource functions by the relevant person or authority as was held in Geoffrey Mworira-Versus- Water Resources Management Authority and 2 others [2015]eKLR thus, "The principles are clear.

The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."

Further, in Trade Union Congress of Kenya (TUK-Ke) –Versus – Dr. Joseph Kinyua, Head of Public Service and Another, and National Assembly and 2 Others [2020]eKLR, the Court proceeded to hold thus, "In the present petition the Court finds that the grievances subject of the petition could and were to be resolved by the National Assembly in the procedure prescribed in the Public Appointments (Parliamentary Approval) Act No. 33 of 2011 but which the petitioner failed to invoke. In so far as the petitioner failed to move the National Assembly as was expected and required and the record of the Assembly on vetting the 3rd interested party having been not exhibited, the Court finds that it is outside its jurisdiction on account of the doctrine of justiciability to delve into the procedure and merits of the nomination, vetting and the subsequent appointment of the 3rd respondent as a member to the SRC...."

In the instant petition, the Committee of the National Assembly that vetted the 6th respondent for approval as the Controller of Budget returned that it received no memorandum or statement on oath as prescribed in the relevant statute challenging the nomination and subsequent approval of the 6th respondent for appointment. The petitioner has not challenged the evidence that the Clerk of the National Assembly published in the daily newspapers notices inviting the members of the public to make any representations challenging the nomination and approval for appointment of the 6th respondent as Controller of Budget.

The Court finds that the petitioner's concerns about the suitability of the persons who sat in the interview committee and whether the 6th respondent had all or any of the minimum requirements for appointment as Controller of Budget were all matters within consideration and determination by the Committee of the National Assembly that vetted the 6th respondent as provided for in the Public Appointments (Parliamentary Approval) Act No. 33 of 2011. The Court finds that the Committee was the proper forum and that forum not having been moved accordingly, the respondents have thereby established a bar to this Court's jurisdiction to intervene. Had the petitioner exhausted that forum, then he would have properly established the Court's jurisdiction as the proper forum to review the Committee's decisions on merits as appropriate.

The Court follows its opinion in Lucy Njoki Waithaka v Tribunal appointed to investigate the conduct of Lucy Njoki Waithaka & another; Kenya Magistrates and Judges Association (Interested Party) [2019] eKLR thus "The Court considers that justiciability is the concept in law that concerns itself with whether the Court is the most appropriate organ of the state or government (government in the wider sense including the three arms of government and other public agencies or bodies) to deal with the dispute. The Black's Law Dictionary 10th Edition at page 996 defines "justiciability" as the quality, state, or condition of being appropriate or suitable for adjudication by a court. The case may not be suitable for adjudication by the court due to a number of reasons such as under mootness doctrine where the real dispute has ceased to exist. The dictionary lists elements of the doctrine of justiciability such as advisory opinions, feigned and collusive cases; standing, ripeness, political questions and administrative questions. The Court considers that the application of the doctrine of justiciability is highly modified by the provisions of the Constitution of Kenya 2010 and which provisions have tended to admit than deny the forum in courts of law more readily and often so than not. The Court considers that a sound development and application of the doctrine of justiciability should lead to rules related to availability of alternative and more convenient remedies. Thus as was held in Secretary, County Public Service Board & Another –Versus- Hulbhai Gedi Abdille [2017]eKLR by the Court of Appeal , an alternative and more convenient remedy in some other tribunal or forum should, in the Court's opinion be a good ground for the Court to decline to act. The Court considers that a sound application of the doctrine of justiciability should be one of the better mechanisms for keeping courts within what actually is or is perceived to be their proper constitutional sphere of activity."

The Court therefore finds that the forum before the committee of the National Assembly that vetted the 6th respondent having been available but not invoked at all, the Court will decline to delve into considerations of the merits as to whether the 6th respondent had the minimum constitutionally prescribed qualifications for appointment as Controller of Budget and whether the members of the committee the Public Service Commission convened had the necessary individual capacity and competency to recruit and undertake interviews for nomination of three suitable candidates for forwarding to the President for nomination. The Court further returns that on the material before the Court the recruitment, nomination, approval for appointment and swearing into office of the 6th respondent as the Controller of Budget was substantially undertaken in accordance with the relevant provisions of the Constitution, the Controller of Budget Act, 2016; and the Public Appointments (Parliamentary Approval) Act No. 33 of 2011 so that there is no justifiable reason to grant the orders as prayed for by the petitioner.

To answer the 7th **issue** for determination the Court has considered the parties' margins of success, the nature of the dispute, the emerging growth of jurisprudence towards implementation of the Constitution of Kenya, 2010 and the Court returns that the 1st, 2nd, 3rd, and 5th respondents will jointly or severally pay the petitioner's 50% of the costs of the petition and all other parties shall bear own costs of the proceedings.

In conclusion judgment is hereby entered for the parties and the petition herein is determined with orders:

1) The declaration that the 1st, 2nd, 3rd, and 5th respondents to forthwith consider an enactment to improve and fill the apparent and established lacuna in section 4 (1) of the Controller of Budget Act, 2016 so as to expressly provide for and include a vacancy if or where the Controller of Budget leaves office by reason of lapsing of the prescribed term of tenure of 8 years per Article 228 (3) of the Constitution; and, as may be appropriate, such lapsing of tenure being foreseeable, a procedure for timely transparent and competitive interviews, identification, nomination, approval for appointment, appointment and swearing into office of the next holder of the office of Controller of Budget as at or by the time of the lapsing of the tenure of the incumbent and whose term is foreseeably due to lapse by operation of Article 228(3) of the Constitution.

2) The 1st, 2nd, 3rd, and 5th respondents to jointly or severally pay the petitioner's 50% of the costs of the petition and all other parties shall bear own costs of the proceedings.

Signed, dated and delivered in court at **Nairobi** this **Friday, 3rd July, 2020**.

BYRAM ONGAYA

JUDGE