



Okello & another v Cabinet Secretary for Industrialization, Trade and Enterprise Development & another; Ngutari & 7 others (Interested Parties) (Petition 100 & 99 of 2020 (Consolidated)) [2020] KEELRC 289 (KLR) (30 October 2020) (Judgment)

Bernard Odera Okello & another v Cabinet Secretary for Industrialization, Trade and Enterprise Development & another; Cyprian Mugambi Ngutari & 7 others (Interested Parties) [2020] eKLR

Neutral citation: [2020] KEELRC 289 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 100 & 99 OF 2020 (CONSOLIDATED)

MA ONYANGO, J

OCTOBER 30, 2020

IN THE MATTER OF ARTICLES 10(1)(A), (B) AND (D), ARTICLE 232(1)(F) AND (G) OF THE CONSTITUTION OF KENYA AND SECTION 32 OF THE PUBLIC SERVICE ACT

AND

IN THE MATTER OF ARTICLE 27(3)(4) AND (8) OF THE CONSTITUTION OF KENYA AND ARTICLES 2 OF CEDAW AND ARTICLE 2 OF MAPUTO PROTOCOL

AND

IN THE MATTER OF THE APPOINTMENT OF MEMBERS OF THE BUSINESS PREMISES TRIBUNAL OF THE LANDLORDS AND TENANTS (SHOP AND CATERING ESTABLISHMENT) ACT (CAP 301)

AND

IN THE MATTER OF ALLEGED VIOLATION OF ARTICLES 169(1)(D) OF THE CONSTITUTION OF KENYA, 172(1) OF THE CONSTITUTION OF KENYA

BETWEEN

BERNARD ODERO OKELLO PETITIONER

AND

CABINET SECRETARY FOR INDUSTRIALIZATION, TRADE AND ENTERPRISE DEVELOPMENT 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

AND

CYPRIAN MUGAMBI NGUTARI INTERESTED PARTY



PATRICIA MAY CHEPKIRUI INTERESTED PARTY
KYALO MBOBU INTERESTED PARTY
ANDREW MUMA INTERESTED PARTY
CHEGE CHARLES GAKUHI INTERESTED PARTY
LAW SOCIETY OF KENYA INTERESTED PARTY
JUDICIAL SERVICE COMMISSION INTERESTED PARTY
KATIBA INSTITUTE INTERESTED PARTY

AS CONSOLIDATED WITH
PETITION 99 OF 2020

BETWEEN

THE KENYA INVESTORS ASSOCIATION PETITIONER

AND

CABINET SECRETARY FOR INDUSTRIALIZATION, TRADE AND
ENTERPRISE DEVELOPMENT 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

Appointments of the Chairperson and members to the Business Premises Rent Tribunal declared unconstitutional on grounds that the appointment process was not competitive and merit-based.

Reported by Beryl Ikamari

Constitutional Law - judiciary - definition of judicial officers - members of local tribunals - whether the chairperson and members of the Business Premises Rent Tribunal were judicial officers - Constitution of Kenya 2010, article 260; Judicial Service Act, (cap 185B), section 2.

Constitutional Law - judiciary - tribunals - appointment of the chairperson and members of a tribunal - role of the Judicial Service Commission - whether the Cabinet Secretary in the Ministry of Industrialization, Trade and Enterprise Development had powers to appoint the chairperson and members of the Business Premises Rent Tribunal - Constitution of Kenya 2010, article 172(1)(c); Judicial Service Act, (cap 185B), section 32; Landlord and Tenant (Shops, Hotels and Business Establishments) Act, (cap 301), section 11.

Constitutional Law - values and principles of public service - appointment to public office - equal opportunity for appointment, fair competition and merit as the basis for appointment - whether an appointment process where candidates were not informed of the vacancy, there were no applications, no shortlisting and no interviews conducted, was constitutional - Constitution of Kenya 2010, articles 10, 47 and 232; Public Service (Values and Principles) Act, No 1A of 2015, section 10.

Constitutional Law - fundamental rights and freedoms - equality and freedom from discrimination - two thirds gender principle - whether the appointment of only one woman and four men to Business Premises Rent Tribunal violated the two thirds gender principle - Constitution of Kenya 2010, article 27.

Constitutional Law - constitutionality of statutes - transitional and consequential provisions of the Constitution - establishment of tribunals by means of appointment by the relevant Minister under section 11 of the Landlord and Tenant (Shops, Hotels and Business Establishments) Act - role of the Judicial Service Commission in making such appointments under the Constitution - whether the assignment of the role of making such appointments to the



Minister under the Landlord and Tenant (Shops, Hotels and Business Establishments) Act was unconstitutional - Constitution of Kenya 2010, Sixth Schedule, section 7; Landlord and Tenant (Shops, Hotels and Business Establishments) Act, (cap 301), section 11.

Brief facts

Via Gazette Notice No. 4244 published in the special issue of the Kenya Gazette on June 26, 2020, the Cabinet Secretary in the Ministry of Industrialisation, Trade and Enterprise Development (the 1st Respondent) made appointments to the Business Premises Rent Tribunal (the Tribunal). The Chairperson and Vice-Chairpersons/members of the Tribunal were the 1st to 5th Interested Parties.

The petitioners challenged the appointments. They contended that the appointments were made in excess of power or without power and were contrary to section 11(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act as read with rules 2 and 21 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) (Tribunal) (Forms and Procedures) Regulations, 1966. They added that the appointments were not made through a process where there was fair competition and merit and that as such they were contrary to the Constitution. They said that they were also discriminatory as a fair opportunity to apply for the appointments was not afforded to all members of the public and only one woman was appointed. It was also contended by the petitioner that the members of the Tribunal were judicial officers and it was only the Judicial Service Commission that could appoint them. He argued that the principle of separation of powers was violated when powers of the Judicial Service Commission to appoint judicial officers was exercised by a Cabinet Secretary. Therefore, the Cabinet Secretary acted in excess of her powers when she made the appointments. It was further argued by the petitioner, that the appointments which had only one woman appointee out of five appointees discriminated against women.

Issues

1. Whether the Chairperson and members of the Business Premises Rent Tribunal were judicial officers.
2. Whether the Cabinet Secretary in the Ministry of Industrialisation, Trade and Enterprise Development had powers to appoint the chairperson and members of the Business Premises Rent Tribunal.
3. Whether appointments made to the Business Premises Rent Tribunal without following a process that was open and competitive, in that there were no applications made or interviews done, was constitutional.
4. Whether the appointment of one woman and four men to Business Premises Rent Tribunal violated the two thirds gender principle.
5. Whether section 11 of the Landlord and Tenant (Shops, Hotels and Business Establishments) Act, which provided for the establishment of tribunals by means of appointment by the relevant Minister, was unconstitutional.

Held

1. The term judicial officer was defined in article 260 of the Constitution to mean a registrar, deputy registrar, magistrate, Kadhi or the presiding officer of a court established under article 169(1)(d) of the Constitution. A further definition under section 2 of the Judicial Service Act provided that a judicial officer included a registrar, deputy registrar, magistrate, Kadhi or the presiding officer of any other court or local tribunal as may be established by an Act of Parliament, other than the courts established to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land.
2. The term "local tribunal" as utilised in article 169(1)(d) of the Constitution was intended to distinguish that term from the term "international tribunal." Under the Constitution, where the term "tribunal" was used, it referred to tribunals established under local legislation. Under the definition provided in article 260 of the Constitution, local tribunals were a form of subordinate courts and persons presiding in such local tribunals were judicial officers. The Chairperson and members of the Tribunal in question were therefore judicial officers.



3. The legislation contemplated under article 169(2) of the Constitution had not been enacted. The Tribunals Bill 2015 had not been enacted. In the absence of such legislation, the Judicial Service Act remained the primary legislation in respect of appointments to local tribunals.
4. Article 172(1)(c) of the Constitution as read with section 32 of the Judicial Service Act were the relevant provisions with respect to appointment of presiding officers of local tribunals. Therefore, the appointment of the 1st to 5th interested parties by the 1st respondent under section 11 of the Landlord and Tenant (Shops, Hotels and Business Establishments) Act was illegal.
5. Appointments to public office had to be done through a process that was open, merit-based, inclusive and competitive. The nomination of the 1st to 5th Interested Parties was discriminatory and lacked the transparency and openness necessary to uphold the rule of law and promote fair administrative action. Those appointed to the Business Premises Rent Tribunal did not apply, were not shortlisted, and were never interviewed for the positions.
6. The 1st to 5th interested parties contended that the challenge to the legality of their appointment would lead to administrative chaos which would not be in public interest. Public interest favoured respect for the Constitution and the law. Public interest could not be used to justify the violation of a statute or the Constitution.
7. The doctrine of separation of powers only applied within the confines of the Constitution and the law. The rule of law was supreme and no justification was valid if it offended the rule of law. Expediently, costs, convenience and legitimate expectation could never be valid justifications unless they were within the confines of the law.
8. Approval given for the impugned appointments by the Judicial Service Commission could not regularize that which was not legal.
9. Section 10 of the Public Service (Values and Principles) Act provided for competition and merit-based appointments. In making the appointments, the Cabinet Secretary did not comply with the requirements of the said section 10. Applications for appointment could not be made in abstract. There had to be an announcement of a vacancy and a statement on the minimum qualifications, followed by shortlisting and interviews.
10. Section 11 of the Landlord and Tenant (Shops, Hotels and Business Establishment) Act provided for the establishment of tribunals by means of appointment by the Minister. *Inter alia*, section 7 of the Sixth Schedule to the Constitution provided that where a constitutional provision assigned a responsibility to a different state organ or public officer, other than the one that would otherwise be responsible for it, the Constitution would prevail to the extent of the conflict. Therefore, in view of an apparent conflict between section 7 of the Sixth Schedule to the Constitution and section 11 of the Landlord and Tenant Act, the Constitution would prevail.
11. The solution to the constitutional non-conformity in section 11 of the Business Premises Rent Tribunal Act had been provided for under the Constitution and the legislation was not unconstitutional *per se*. The issue was not with the legislation but with its application and that application was addressed in section 7 of the Sixth Schedule to the Constitution.
12. Article 27 of the Constitution provided for equality and freedom from discrimination. It also provided for the gender rule to the effect that not more than two thirds of elective or appointive positions would be of the same gender. No valid reason had been given by the respondents for failure to appoint at least one third of women to the Tribunal. The legal fraternity was awash with women who met the qualifications that the respondents alleged they were looking for. All they needed to do was to advertise publicly for those qualified to apply.
13. The 1st respondent was in breach of not only article 27 of the Constitution but also article 232(1)(i) of the Constitution by selecting only one woman appointee out of five appointees.



14. Section 11(1) of the Landlord and Tenant (Shops, Hotels and Business Establishment) Act did not prescribe the minimum or maximum number of members of the Tribunal. Therefore, the appointing authority had discretion on the number of members to the Tribunal.

Petition allowed.

Orders

1. *A declaration that the appointment of the 1st to 5th interested parties was in violation of articles 2, 10, 27, 47, 169(1)(d), 172(1), 232(1)(f) & (g) and 259 of the Constitution of Kenya, article 2 of CEDAW, article 2 of Maputo Protocol, section 32 of the Judicial Service Act together with section 10 of the Public Service (Values and Principles) Act.*
2. *An order of certiorari quashing Gazette Notice No. 4244 dated June 22, 2020 issued by the Cabinet Secretary for Industrialization Trade and Enterprise Development and any consequential actions arising therefrom.*
3. *Each party was to bear their own costs in both petitions*

Citations

Statutes

None referred to

Advocates

None mentioned

JUDGMENT

1. The judgment herein is in respect of Petition No. 99 of 2020 as consolidated with Petition No. 100 of 2020. The two petitions were heard together under Petition No. 100 of 2020.
2. In Petition No. 99 of 2020, the Petitioner is the Kenya Property Investors Association and the petition is filed in public interest, more specifically the interests of its members.
3. The 1st Respondent is the Cabinet Secretary in the Ministry of Industrialisation, Trade and Enterprise Development established under Article 154 of the Constitution.
4. The 2nd Respondent the Hon. Attorney General, is a constitutional office created by Article 156 as the Chief Legal Advisor to the Government and is sued in that capacity.
5. The Petitioner avers that following the lapse of the tenure of the immediate past Chairman of the Business' Premises Rent Tribunal (the Tribunal), the 1st Respondent by Gazette Notice No. 4244 published in the special issue of the Kenya Gazette on 26th June 2020, appointed five (5) persons being Cyprian Mugambi Ngutari as Chairperson of the Tribunal and Patricia May Chepkirui, Kyalo Mbobu, Andrew Muma and Chege Charles Gakuhi as Vice Chairpersons/Members of the Tribunal for a period of 3 years effective the 22nd June, 2020. The Chairperson and Vice Chairpersons/members of the Tribunal are the 1st to 5th Interested Parties herein respectively.
6. The Petitioner contends that the said appointments were made in excess and/or without power contrary to Section 11(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 as read together with the Landlord and Tenant (Shops, Hotels and Catering Establishment) (Tribunal) (Forms and Procedures) Regulations, 1966 specifically Rule 2 and 21(1), (2) and (3) which do not create and/or permit the appointments of persons as vice chairpersons/members to the Tribunal.



7. Further, that the purported appointments of the Chairperson and the Vice Chairpersons/Members of the Business Premises Rent Tribunal without the definite roles of the latter being specified in such appointments is erroneous, illegal and wrong and was in excess and/or without power and therefore illegal and a nullity *ab initio* contrary to Section 4 and 5 of the Fair Administrative Actions Act, No. 4 of 2015.
8. The Petitioner further contends that the appointment of the Chairman and Vice Chairpersons/Members of the Business Premises Rent Tribunal was not subjected to fair competition and merit as the basis of appointment and affording adequate and equal opportunities for appointment at all levels of the public service and amounted to an irregularity. That the appointments were discriminative contrary to Article 27(4) of the Constitution of Kenya, 2010. That it is a requirement that a vacancy, if any, arising in public service, required to be notified to the public and that the public be afforded an opportunity to apply for the said appointment(s) and which resultant appointments to public office must abide the law. That the appointments of the 1st to 5th Interested Parties were contrary to Section 5 of the Administrative Action Act, No. 4 of 2010 and Article 41 of the Constitution of Kenya.
9. That the impugned appointments of the chairman and Vice chairpersons/members of the Business Premises Rent Tribunal were made contrary to the critical values and principles that govern and regulate appointment to public service in Kenya Contrary to Article 10 and Article 233 (sic) of the Constitution of Kenya, 2010 and are therefore illegal.
10. That the appointments are opaque, unilateral, exclusive, illegal, unconstitutional and shrouded in mystery to such an extent that the matters or factors that were considered in the appointments can only be said to constitute irrelevant considerations and therefore contrary to public interest and legitimate expectations. That the composition of the Tribunal is threatening and violating the public's right to access to justice as enshrined under Article 48 of the Constitution of Kenya, 2010.
11. The Petitioner relies on Article 3(1) of the Constitution which provides that it has a duty, like every Kenyan, natural or artificial, to respect, uphold and defend the Constitution. Further, that Article 22(1) and (2) of the Constitution empowers the Petitioner to institute court proceedings in public interest in defence of the rights and fundamental freedoms in the Bill of Rights that have been threatened, violated or infringed.
12. The Petitioner prays for the following reliefs –
 1. That the court be pleased to declare the decision of the Respondents of appointing the Chairperson and Vice-Chairpersons/members of the Business Premises Rent Tribunal illegal and improper against Section 11(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 read together with the landlord and Tenant (Shops, Hotels and Catering Establishment) Tribunal (Forms and Procedure) Regulations, 1966 specifically Rule 2 and 21(1), (2) and (3) and unconstitutional Article 2, 10, 27, 41, 43, 47, 233 and 259.
 2. That the court be pleased to issue an order of certiorari quashing the Gazette Notice No. 4244 dated 22nd June, 2020 on published on 26th June 2020 appointing the chairperson and Vice Chairperson/Members of the Business Premises Rent Tribunal (B.P.R.T.).
 3. That the court be pleased to issue an order of mandamus directed at the Respondents to properly and in accordance with the law invite public participation, invite applications from the public, interview and appoint the Chairperson of the Tribunal.
 4. That the Court be pleased to grant the Petitioner the cost of the Petition.



5. That the Court be pleased to make any further orders as it deems fit.
13. Petition 100 of 2020, the Petitioner Benard Odera Okelo describes himself as a patriotic Kenyan who has brought the petition in the discharge of his duty under Article 3 of the Constitution of Kenya which ordains that every Kenyan has a duty to defend the Constitution.
14. The 1st Respondent is the Cabinet Secretary in charge of Industrialization, Trade and Enterprise Development, a position established under Article 152(1)(d) of the Constitution and appointed by the President as per Article 132(2)(a) of the Constitution and Article 152(2) of the Constitution of Kenya.
15. The 2nd Respondent is an office established under Article 156(1) and (2) of the Constitution of Kenya.
16. The Petitioner states that the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act was assented into law on 4th June 1965 and commenced on 1st November, 1965 way before the 2010 Constitution.
17. That despite the advent of the 2010 Constitution, the Act has not been amended to bring it into conformity with the Constitution especially on the appointment procedure of members of the tribunal who are now judicial officers.
18. That Section 11 the Act establishes the Business Premises and Rent Tribunal (herein referred to as the Tribunal) to adjudicate on landlord-tenant matters covering shops, hotels and catering services and is thus part of the subordinate courts pursuant to Article 169 of the Constitution of Kenya.
19. That Section 11 of the Act provides that the Tribunal consists of a person or persons appointed by the Minister. The members of the Tribunal are public officers pursuant to Article 260 of the Constitution since the office of the member of a Tribunal is a public office.
20. That the term of the immediate former chairperson and the sole member of the Tribunal expired on 15th June, 2020, hence leaving the Tribunal with no member to exercise its powers.
21. That vide a gazette notice no. 4244 dated 22nd June, 2020 and signed by Kelly C. Mania, Cabinet Secretary for Industrialization, Trade and Enterprises Development, she appointed the following persons (the 1st to 5th interested parties) as members of the Tribunal for three (3) years with effect from the 22nd June, 2020:-
- i. Cyprian Mugambi Ngutari – Chairperson
 - ii. Patricia May Chepkirui – Vice Chair/ Member
 - iii. Kyalo Mbobu – Vice Chair/Member
 - iv. Andrew Muma – Vice Chair/ Member
 - v. Chege Charles Gakuhi – Vice Chair/ Member
22. That the appointment of the Interested Parties was without an open, fair and competitive process and in total disregard of the Constitution of Kenya on advertisement and public participation.
23. That members of a tribunal are judicial officers pursuant to the Constitution and the only body which has the power to appoint judicial officers is the Judicial Service Commission. Therefore, the Cabinet Secretary arrogated upon herself the powers she does not possess.
24. The Petitioner states that the legal basis for the petition is the violation of the Constitution, in particular the public service principles, national values, the leadership and integrity provisions



regarding the manner and process of appointment of Interested Parties. The Petitioner cites violation of Articles 1(1), 2(4), 3, 10(1) and (2), 19(1), 22(1) and (2) 27(3), (4) and (8), 41(1), 73, 159(1), 161(1), 169(1)(d), 172, 232, 258(1) and (2), 260, Schedule 6 Section 7(10 and (2)). The Petitioner further relies on Section 32 of Judicial Service Act, Section 36 of the Public Service Act, Article 2 of the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) and Article 2 of the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women (Maputo Protocol).

25. The Petitioner contends that the 1st Respondent violated the Constitution in the appointment of the Interested Parties by noncompliance with the requirements of transparent, competitive, merit based and public participation in the process. Further, that the appointments were without advertisement and interviews in an open manner as dictated by the Constitution. The Petitioner avers that the Interested Parties were handpicked in an opaque and covert manner. That the 1st Respondent does not have power to appoint public/state officers at will.
26. It is further the averment of the Petitioner that the appointment discriminated against women by appointing one woman out of five appointees.
27. It is further the averment of the Petitioner that he 1st Respondent violated Article 169(1)(d) by appointing judicial officers, in view of the fact that the Interested Parties exercise judicial authority under Article 159(1), 169 and 260 of the Constitution. That it is the Judicial Service Commission that is charged with the power of appointment of judicial officers under Article 172(1) of the Constitution. That this violates the principles of separation of powers and the principle of checks and balances.
28. It is the Petitioner's averment that Section 11 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act is unconstitutional.
29. The petitioner seeks the following remedies –
 - a. A declaration that the appointment of the Interested Parties is in violation of Articles 27(3) (4) and (8) of the Constitution of Kenya and Article 2 of CEDAW together with Article 2 of Maputo Protocol in that only one woman was appointed out of five appointees.
 - b. A declaration that the appointment of the Interested Parties together with Section U of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act is in violation of Article 169(1)(d) of the Constitution of Kenya and Article 172(1) of the Constitution of Kenya as read together with Article 10(1)(a), (b) and (c), Article 232(1)(f) and (g) of the Constitution of Kenya and Section 32 of the Judicial Service Act together with Section 36 of the Public Service Act
 - c. That an order of Certiorari be issued to remove into this Court and quash Gazette Notice No. 4244 dated 22nd June, 2020 issued by the Cabinet Secretary for Industrialization Trade and Enterprise Development and any consequential actions arising therein.
 - d. The cost of this petition be borne by the Respondents.
30. The 8th Interested Party, Katiba Institute is a non-profit and non-governmental organisation registered in Kenya dedicated to the faithful implementation of the Constitution of Kenya 2020.

The case of the 8th Interested Party, Katiba Institute

31. The 8th Interested Party supports the Petition. Its position is that the appointment of the 1st to 5th Interested Parties as Chairperson, Vice Chairperson/Member of the Tribunal did not comply with



requirements of fair competition, usurps the mandate of the Judicial Service Commission (JSC), violates the doctrine of separation of powers, the national values and principles of governance, the right to a fair hearing and fair administrative action before an independent tribunal, impugns the Judiciary's independence and the JSC obligation to appoint judicial officers to secure independence of the Judiciary, and lastly, that the appointments violate the gender rule.

32. The Interested Party urges the court to find that the Constitution of Kenya requires an appointment process that is open, transparent, non-discriminatory, and respects and upholds the rule of law which was not observed in the impugned appointments. It urges the Court to recognize the importance of separation of powers, the independence of judicial authority and independent offices, and arrive at a conclusion that JSC has the mandate to appoint members of this tribunal. Finally, Katiba Institute urges the Court to promote the realisation of the two-thirds gender rule in finding that the chairperson and members of the tribunal were unlawfully and unconstitutionally appointed.

The Respondents Case

33. The 1st Respondent filed a replying affidavit of Amb. Johnson Weru, a Principal Secretary of the State Department for Trade and Enterprise Development in the Ministry of Industrialisation, Trade and Enterprise Development.
34. He deposes that the 1st Respondent is in charge of the overall administration and management of the Ministry and is also responsible for implementation of policies under the mandate of the Ministry, which responsibilities include appointment of the Chairpersons and Members of the Tribunal under Section 11 of the Act.
35. That the immediate former past Chairman of the Tribunal Mr. Denis Silas Mbichi Mboroki was first appointed in 2013 vide Gazette Notice no. 714 of 8th July 2013 for a term of 3 years. The term was renewed on 15th June 2017 Vide Gazette Notice No. 6255. That the Ministry declined to renew his appointment for a third term opting instead to appoint the Interested Parties in light of the volume of work in the Tribunal and the fact that the Tribunal sat in circuit in Nairobi, Mombasa, Kisumu, Nyeri, Nakuru, Embu, Eldoret, Kakamega and Kisii. He deposes that the Landlord and Tenant Act read together with the Landlord and Tenant (Shops, Hotels and Catering Establishments) (Tribunal) (Forms and Procedure) Regulations, 1966 (Revised 2015) envisages that the Tribunal will be run by more than one person. That Section 11(1) of the Act provides as follows:

A Tribunal shall consist of a person or persons appointed as such by the Minister.”

36. That Rule 20 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) (Tribunal) (Forms and Procedure) Regulations, 1966 (Revised. 2015) state as follows;

Proceedings of the Tribunal shall be open to the public

- i. Where the Tribunal consists of more than one person,
- ii. the members present shall, if the chairman is absent, elect one of their members to act as chairman of the Tribunal.
- iii. Where the Tribunal consists of two members who arrive at different findings, the decision of the chairman or the acting chairman, as the case may be, shall be the decision of the tribunal.
- iv. Where the Tribunal consists of more than two persons, the decision of the Tribunal shall be the decision of the majority of the members present.



37. That these provisions envisage that the Tribunal would constitute of more than one member. That Section 11(1) of the Landlord and Tenant Act does not prescribe the minimum or maximum number of members of the Tribunal. That the Act does not provide for competitive recruitment of the members. That even in the appointment of the former Chairperson, there was no competitive recruitment.
38. That further, the Act does not provide for qualifications of the members of the Tribunal and neither does it prescribe that the members of the Tribunal should be judicial officers. That in the period between 2006-2009 the Tribunal was presided over by a Magistrate Hon. Diana K. Mochache and the appointment was through a mutual agreement between the Ministry of Trade and the Judiciary.
39. That in appointing the current five members, the Ministry was guided by the tenets of Chapter Six of the Constitution of Kenya, 2010 and also borrowed heavily from the qualifications highlighted under Section 20 of the Tribunal Bill, 2015 which stipulates the following qualifications;
- A person is qualified for appointment as the chairperson or a vice-chairperson of a Tribunal if that person —
- a. is a Kenyan citizen;
 - b. holds a degree in law from a university recognized in Kenya and is an advocate of the High Court of Kenya;
 - c. has not less than ten years post qualification experience; and
 - d. meets the requirements of Chapter Six of the Constitution.
40. That the five members appointed through Gazette Notice No. 4244 of 22nd June, 2020 meet the above criteria in that they all have more than 10 years post admission qualification, they have experience in commercial law practice which is critical to undertake the mandate of the Tribunal. The requirements for regional and gender balance were also taken into consideration.
41. That the appointment of the five members was conducted in light of the provisions of the Landlord and Tenant Act and the Constitution of Kenya 2010 to enhance efficiency and delivery of justice to the citizens of Kenya.
42. That the Interested Parties were sworn into office on 30th June, 2020 by the Chief Registrar of the Judiciary at the Supreme Court Building. That this is proof that the Judiciary approved the appointment of the Interested Parties.
43. That the Petitioner, who is also an advocate of the High Court of Kenya did not utilise the statutory mechanisms available to him under Article 35 of the Constitution and Section 5 of the Access to Information Act to obtain the information he needed from the Judiciary or the Office of the 1st Respondent before coming to court. Further, the petitioner did not utilise the statutory mechanism under Section 43 of the National Cohesion and Integration Act to file a complaint of failure to adhere with the two-thirds rule or other impropriety in the process of appointing the Interested Parties.
44. That the language of the provisions under which the appointment of the interested parties was made is plain and unambiguous. That the court therefore does not have jurisdiction to import or read into it meanings which would be contrary to the said provisions. That the construction that the court should adopt should espouse the intention of the legislature, until such a time that the law is amended to grant the judiciary the mandate to appoint persons to the Business Premises Rent Tribunal.



45. That this Court does not have Jurisdiction to entertain the present Petition since the contracts given to the interested parties do not have statutory underpinning as to render a breach thereof actionable by way of a constitutional petition rather than by way of an ordinary suit.

Case of the 1st to 5th Interested Parties

46. The 3rd Interested Party did not respond to the Petition. The 1st, 2nd, 4th and 5th Interested Parties (hereinafter the 1st to 5th Interested Parties) filed a replying affidavit of Cyprian Mugambi, the 1st Interested Party where he deposes that sometimes in June 2020, the Ministry of Industrialisation, Trade and Enterprise Development called for curricula vitae (CV) of each of the Interested Parties (read 1st to 5th Interested Parties) for consideration for appointment to serve as members of the Tribunal. That the Cabinet Secretary consulted widely both before and after calling for the CVs for the 1st to 5th Interested Parties and carried out reviews and competitive process before including further information and responses from various potential candidates. That their appointment was published vide Gazette Notice No. 4244 on 22nd June 2020 and they took their oath of office on 30th June 2020 with the exception of the 3rd Interested Party. That they immediately began executing their duties, clearing backlog of cases which were left by the former Chairpersons.
47. The Interested Parties aver that they accrued both contractual and legal rights upon their appointment which should not be taken away without due process. That they have legitimate expectation that the Court will recognise and protect their rights.
48. The affiant states that the qualifications and competence of the 1st to 5th Interested Parties has not been challenged in the petitions. That Section 11 of the Act under which they were appointed does not specify qualifications and competence of the 1st to 5th Interested Parties. Further, that Section 11 of the Act under which they were appointed has not been declared unconstitutional. That numerous other legislation give authority to the Executive to appoint Chairpersons of Tribunals, among them the Cooperative Tribunal, Mineral Rights Board, Anti-Money Laundering Advisory Board, Insurance Tribunal, Competition Tribunal, Capital Markets Tribunal, Scrap Metal Council, Special Economic Zones Authority, Industrial Property Tribunal, Engineers Board of Kenya, National Transport and Safety Authority, Kenya Yearbook Board, Micro and Small Enterprises Tribunal, Energy and Petroleum Tribunal. That the former Chairpersons of the Tribunal were appointed in similar manner.
49. It is further deponed that most tribunals do not require members to be recruited by way of public advertisements. That this was confirmed in the recent Court of Appeal decision in *Katiba Institute v The Attorney General & 9 others*; Nairobi Civil Appeal No. 99 of 2019 where the Court stated –
50. Similarly, as far as the nomination of the 5th Respondent was concerned, Article 171(2)g requires that he be nominated by the Public Service Commission. He was nominated as such. His nomination in our view did not call for public participation. The competitiveness and merit provided for under the relevant provisions of the Public Service Act is within the Public Service Commission itself. The commissioners are best placed to determine which one of them passes the test as to merit as opposed to members of public. The members of the Commission decided to nominate the 5th respondent having found him qualified for such nomination. They were best placed to make the said decision and not the courts or members of public.”
51. It is further the averment of the 1st to 5th Interested Parties that their appointment did not contravene the gender rule, relying on the Supreme Court decision in the advisory *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR (Supreme Court



Advisory Opinion Application 2 of 2012) where the Supreme Court stated that realisation of gender rule is progressive.

52. It is further deposed that the Gender Rule should be considered in light of the composition of all courts and tribunals hearing land and environmental matters. Further, that the establishment of a process through which members of the tribunal should be appointed is the preserve of Parliament under Article 94(3) of the Constitution.
53. It is averred that the Cabinet Secretary ensured there was public participation in their appointment.
54. It is submitted that halting proceedings of the Tribunal by this petition is against public interest in light of the backlog of cases as reflected in the Judiciary Report on Tribunals Case Census and Institutional Capacity Survey 2019, which reflected the Tribunal as having a backlog of 9,206 cases compared to some tribunals which had only 4.

6th and 7th Interested Parties Case

55. The 6th Interested Party, the Law Society of Kenya, Nairobi Branch and the 7th Interested Party, the Judicial Service Commission, did not file any reply to the petition. In their submissions they opposed the petition and adopted the position of the Respondents and 1st to 5th Interested Parties.

Determination

56. The issues for determination arising from the pleadings and submissions of the parties are the following –
 1. Whether the chair person and members of the Business Premises Rent Tribunal are judicial officers.
 2. Whether the appointment of the 1st to 5th Interested Parties was ultra vires.
 3. Whether the appointment of the 1st to 5th Interested Parties was unconstitutional.
 4. Whether the appointment of the 1st to 5th Interested Parties violated article 27 of the Constitution.SUBPARA 5. Whether Section 11 of the Landlord and Tenant (Shops, Hotels and Business Establishments) Act is unconstitutional.
 6. Whether the Petitioners are entitled to the reliefs sought.

Whether the Members of the Business Premises Rent Tribunal (BPRT) are judicial officers

57. Article 169 of the Constitution provides as follows –
 169. Subordinate courts.
 1. The subordinate courts are—
 - a. the Magistrates courts;
 - b. the Kadhis' courts;
 - c. the Courts Martial; and
 - d. any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162 (2).



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

58. It is the position of the Petitioners and 8th Interested Party that the Tribunal is a local tribunal anticipated under Article 169 and that therefore appointments to the Tribunal must be undertaken by the Judicial Service Commission (JSC) as the Chairman and Members of the Tribunal are judicial officers. That Article 172(1)(c) provides for appointment of Judicial Officers. The same provides:

- (c) appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament;

Judicial Officer is defined in Article 260 of the Constitution as –

a registrar, deputy registrar, magistrate, Kadhi or the presiding officer of a court established under Article 169 (1) (d);”

59. The term is further defined in Section 2 of the Judicial Service Act as –

“judicial officer” includes a registrar, deputy registrar, magistrate, Kadhi or the presiding officer of any other court or local tribunal as may be established by an Act of Parliament, other than the courts established to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land;”

60. Ms. Nyaberi appearing for the 8th Interested Party submitted that Tribunals feature very prominently in the Constitution in Articles 1, 20, 47, 40, 153, 165 and 159 of the Constitution as well as Section 7 of the Fair Administrative Action Act. That because the Business Premises Tribunal adjudicates disputes, its independence is guaranteed by the Constitution by requiring the presiding officer to be appointed by JSC and not the Executive. That appointment of presiding officers by the Executive would apart from compromising their independence, amount to a violation of the Doctrine of Separation of Powers.

61. The Respondents submit that even though the JSC is clothed with the power to appoint judicial officers, the power is exercised as established by an Act of Parliament which in this case is the Judicial Service Act. That the Act governing appointments to the Tribunal is not the JSC Act, therefore JSC cannot arrogate to itself such power.

62. It is submitted that the doctrine of separation of powers would militate against the JSC appointing the chairpersons and members of Administrative Tribunals which are in the domain of the Executive. They rely on the decision of the Supreme Court in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR; Nairobi Civil Appeal No. 290 of 2012 to the effect that –

- (49) It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other’s functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial,



legislative and executive deference to the repository of the function. We therefore agree with the High Court’s dicta in the petition the subject of this appeal that:

“[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent...”

- (60) ... This latter path, if untamed, amounts to transforming the courts into appellate forums on the opinion of the other branches for which they may not be equipped.”
63. Counsel for the 1st to 5th Interested Parties Mr. Kanjama submitted that a local tribunal is not defined in either the Constitution or legislation that govern courts. This notwithstanding, it is my view that it is not necessary that every word used in the constitution and legislation must be defined. Some words in legislation are determined by the context in which they are used. That is why there are rules of interpretation of statutes. Article 259 of the Constitution provides for interpretation of the Constitution in a manner that
259. Construing this Constitution.
1. This 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.
64. In my view the term “local tribunal” as used in Article 169 (1) (d) is intended to distinguish it from an international tribunal. Article 169 in general provides for subordinate courts, and lumps local tribunals together with subordinate courts. It requires Parliament to enact legislation to provide for jurisdiction, functions and powers of such local tribunals and subordinate courts. In the whole of the Constitution where the term ‘tribunal’ is used, it is clear from the context that the reference is to tribunals established under local legislation.
65. It has been alluded by the parties and it is common knowledge of which this court takes judicial notice, that the legislation contemplated under Section 169(2) with respect to local tribunals has never been enacted. The **Tribunals Bill 2015** is however published and as pointed out in the affidavit of Amb. Johnson Weru, was relied upon by the 1st Respondent in determining the qualifications of the 1st to 5th Interested Parties.
66. It is my view and therefore my finding that until such legislation is enacted, the provisions of the Constitution and the JSC Act will remain as the primary legislation in respect of appointment of presiding officers of local tribunals. The Constitution is clear that local tribunals are subordinate courts by virtue of Article 169(1)(d) and that persons presiding over such local tribunals are judicial officers by virtue of the definition at Article 260 of the Constitution. Article 172(1)(c) as read with Section 32 of the Judicial Service Act are thus the prevailing provisions with respect thereto.
67. My finding in respect of this issue is thus that the chairperson and members of the Business Premises Rent Tribunal are judicial officers.



Whether the appointment of the 1st to 5th Interested Parties was ultra vires.

68. Having found that the chairperson and members of the Business Premises Rent Tribunal are judicial officers by virtue of Article 169(1)(d) and that persons presiding over such local tribunals are judicial officers by virtue of the definition at Article 260 of the Constitution, having further found that Article 172(1)(c) as read with Section 32 of the Judicial Service Act are the relevant provisions with respect to appointment of presiding officers of local tribunals, it follows that the appointment of the 1st to 5th Interested Parties by the 1st Respondent under Section 11 of the Landlord and Tenant (Shops, Hotels and Business Establishments) Act in violation of the said provisions. For these reasons the appointment of the 1st to 5th Interested Parties is ultra vires. **Constitutionality of Appointment of 1st to 5th Interested Parties** Article 10 of the Constitution provides for national values and principles of governance as follows –

10. National values and principles of governance.
 2. The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
 - a. applies or interprets this Constitution;
 - b. enacts, applies or interprets any law; or
 - c. makes or implements public policy decisions.
 3. The national values and principles of governance include—
 - a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
 - b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
 - c. good governance, integrity, transparency and accountability; and
 - d. sustainable development.
69. Article 47 provides for fair administrative action. Further Article 232 provides for values and principles of public service as follows:-

232.

Values and principles of public service.

1. The values and principles of public service include—
 - a. high standards of professional ethics;
 - b. efficient, effective and economic use of resources;
 - c. responsive, prompt, effective, impartial and equitable provision of services;
 - d. involvement of the people in the process of policy making;
 - e. accountability for administrative acts;
 - f. transparency and provision to the public of timely, accurate information;
 - g. subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;



- h. representation of Kenya’s diverse communities; and
 - i. affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—
 - i. men and women;
 - ii. the members of all ethnic groups; and
 - iii. persons with disabilities.
2. The values and principles of public service apply to public service in—
 - a. all State organs in both levels of government; and
 - b. all State corporations.
 3. Parliament shall enact legislation to give full effect to this Article.
70. The Fair Administrative Action Act 2015 and the Public Service (Values and Principles) Act, 2015 were enacted to give full effect to Articles 10, 47 and 232 of the Constitution respectively.
71. At paragraph 4 of the replying affidavit of Cyprian Mugambi Nguthari (the 1st Interested Party) sworn on 27th August 2020, he states as follows –
4. That sometime in June, 2020 the Ministry of Industrialisation, Trade and Enterprise Development called for the curricula vitae of each of the Interested Parties herein for consideration for appointment to serve as members of the Business Premises Rent Tribunal (hereinafter the “Tribunal”). All the Interested Parties complied with the request and supplied their respective curricula vitae. I am aware that the Cabinet Secretary consulted widely both before and after calling for the curricula vitae and carried out internal reviews and competitive process including seeking further information and responses from various potential candidates.”
72. This means that they were selected by the Cabinet Secretary without compliance with Articles 10 and 232 of the Constitution.
73. Ngugi J. in *David Kariuki Muigua v Attorney General & Another* emphasized the need for fair competition and meritocracy in public appointments, holding that –
- ...it would be expected that the Minister, in making the appointments to the Tribunal, would be guided by the national values and principles set out in Article 10 of the Constitution, participation of the people, equity, good governance, integrity, transparency and accountability. Section 7(1) of Schedule 6 provides that ‘All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.
74. There is no evidence that there was a competitive process that would enable public participation in the process and show the transparency and accountability required under the Constitution, thereby giving legitimacy to the appointment of the petitioner. Like his successor, the petitioner was appointed on the basis of a Gazette Notice; the basis of the appointment, the criteria followed in appointing him and the other members of the Tribunal was, from all appearances and regrettably so, more in keeping



with the pre-new Constitution days when public officers were appointed at the whim of the Minister or President.”

75. In *Law Society of Kenya v Attorney General & another; Mohamed Abdulahi Warsame & Another (Interested Parties)*, which addressed a similar issue, the High Court cited Lord Bingham (*The Rule of Law*, 2010 Penguin London) and held that the rule of law requires that -

Ministers and public officials at all levels exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably”.

76. In *Republic v University of Nairobi Ex-Parte Lazarus Wakoli Kunani & 2 Others*, the Court held that statutory power can only be exercised validly if exercised reasonably. By picking the 1st to 5th Interested Parties to the Tribunal without advertisement and shortlisting of candidates, the 1st Respondent sidestepped the principle of public participation.

77. The importance of public participation in public appointments was emphasised in *Consumer Federation of Kenya (COFEK) v Attorney General & 2 others [2012] eKLR* at paragraph 57 and 58:

On one part, the public is entitled to know who has been shortlisted. The public participates by being able to send any reports or objections on any of the persons who have been selected. Those who have not been shortlisted are given an opportunity to make inquiries as to why they have not been shortlisted.

Finally, even the persons selected are still advertised giving an opportunity to participate in the process. It is by reason of the advertisement of the person so nominated, that Kenyans can also participate in the process by launching a challenge to the process of appointment.”

78. From the foregoing, it is a settled fact that appointments to public office must be through an open, merit-based, inclusive and competitive process. The nomination of the 1st – 5th Interested Parties was discriminatory and lacked the transparency and openness necessary to uphold the rule of law and promote fair administrative action. Those appointed to the Business Premises Rent Tribunal did not apply, were not shortlisted, and were never interviewed for the positions. In *Trusted Society of Human Rights Alliance (supra)* the Court cited with approval *Andrew Omtatah Okoiti v Attorney General & 2 Others [2011] eKLR* when Musinga, J. (as he then was) maintained that “the shortlisting stage is a very critical one in the recruitment process and the highest degree of transparency ought to be exhibited.”

79. The 1st to 5th Interested Parties have at paragraph 16 of the replying affidavit of Cyprian Mugambi listed various Tribunals including the Cooperative Tribunal, Insurance Tribunal, Industrial Property Tribunal, Micro and Small Enterprise Tribunal, Energy and Petroleum Tribunal, Capital Markets Tribunal, Competition Tribunal whose members are appointed by the Cabinet Secretaries’ from the various Ministries. That may be so. This is not entirely true as there have been contests of similar appointments. In **David Karuiki Muigua v Attorney General [2012] eKLR** the court dealt with appointment by the Minister for Industrialization of the Chairman of the Standards Tribunal without fair competition or merit. The court held:

To uphold the appointment of the petitioner would be to give a seal of approval to the old order, it is imperative that all public appointments are made in accordance with the constitutional values and principles.”



80. Be that as it may, the fact that there has been no challenge to the appointments of chairpersons and members of other tribunals is no justification and cannot legitimize the repeat of the same or justify the appointments impugned herein. Under Article 2(1) and (2) and Article (3)(1) of the Constitution, no state authority may be exercised except as authorised by the Constitution and every person has an obligation to respect, uphold and defend the Constitution. The Petitioners herein are only carrying out their civic duty in contesting the appointments.
81. The 1st to 5th Interested Parties have further submitted that in the instant case, an interpretation that takes away the appointing powers from the Cabinet Secretary would mean that the members of all the Tribunals are irregularly in office. That the effect of this would be administrative chaos in all the Tribunals as their composition would be susceptible to challenge on the basis of appointment by Cabinet Secretaries and not the Judicial Service Commission. They urge the Court to find that Section 11 of the Landlord and Tenant (Shops, Hotels and Catering establishments) Act is in accord with the Constitution.
82. Public interest favours respect of the constitution and the law. As was held in *Okiya Omtata Okioti & Another v National Transport and Safety Authority & 2 Others* [2017] eKLR,...contravention of the constitution or a statute cannot be justified on the plea of public interest as public interest is best served by enforcing the Constitution and Statute”.
83. Again, in *Republic v County Government of Mombasa Ex Parte Outdoor Advertising Association of Kenya* [2014] eKLR
84. There can never be public interest in breach of the law, and the decision of the Respondent is indefensible on public interest because public interest must accord to the constitution under Article 10 of the Constitution.”
85. The 1st to 5th Interested Parties submitted that if the Court were to review the appointment process of members of the Tribunal, it would disregard the doctrine of separation of powers which permeates the fabric of Kenya’s governance structure. That Apex courts in this country have in several decisions affirmed that Courts should not interfere with the workings of other state organs in the absence of an illegality. They rely on the decision in *Moses Kiprotich Langat v Kericho County Assembly Committee on Appointments & 2 Others* [2020] eKLR, Petition No. 28 of 2019, where the Supreme Court considered an appeal in which the Court of Appeal upheld the decision of the County Assembly of Kericho rejecting a County Executive nominee where the law was not complied with. The Supreme Court in upholding the Court of Appeal decision affirmed the principle of separation of powers in the following terms:
36. Having found that the Respondent’s decision to reject the Appellant’s appointment did not flout any Constitutional or Statutory provisions, we see no reason to interfere with the manner in which the County Assembly of Kericho exercised its powers on the issue. The effect of this is that the Appeal herein lacks merit and is therefore dismissed.”
86. The doctrine of separation of powers only applies within the confines of the Constitution and the law. The rule of law is supreme and no justification is valid if it offends the rule of law. Expediently, costs, convenience and legitimate expectation can never be valid justification unless they are within the confines of the law.
87. The 1st to 5th Interested Parties have further submitted that the further affidavits on record by Amb. Johnson Weru indicate that although the Landlord and Tenant (Shops, Hotels and Catering establishments) Act does not outline the process of recruiting members of the Tribunal, the Office of the Cabinet Secretary formulated its recruitment process internally. That the recruitment exercise



commenced with the decision to appoint 5 members with the minimum qualifications of being Advocates of over 10 years, being drawn from different geographical regions in Kenya and from different ethnic groups in Kenya. Thereafter meetings involving members drawn from the Ministry considered the curricula vitae and profiles from its database of past applications as well as those of persons who were considered qualified to serve as members of the Tribunal. It is through the foregoing process that the Cabinet Secretary eventually settled on the 1st to 5th Interested Parties as persons best suited to take up membership of the Tribunal. That in making the appointments, the Cabinet Secretary did nothing more than fulfil her statutory obligation of constituting the Tribunal.

88. Further, that the Cabinet Secretary acted within the confines of the law when she appointed vice-chairpersons to exercise similar powers as the Chairperson in respect of Tribunal matters.
89. They submit that jurisprudence from our apex courts demonstrates that appointing authorities should be permitted to establish an internal appointment mechanism where none is prescribed by statute or other law. That in *Katiba Institute v Attorney General & 6 others* [2018] eKLR; Nairobi High Court Petition No. 84 of 2018 the High Court considered a Constitutional Petition challenging the appointment of 3 Commissioners to the Judicial Service Commission done without public advertisements inviting applicants to apply for the said positions. In dismissing the said Petition, the High Court decreed that where a statute is silent on the mode of appointment the appointing authority is permitted to use its internal mechanism to arrive at an appointment: The court stated:-
165. As I have already stated elsewhere in this judgment, Article 171(2)(g) requires the Public Service Commission to nominate its representative to JSC but does not say how this should be done. Similarly, the Act is silent on the procedure for identifying the nominee. The word “nominate”, as seen earlier means to designate or appoint someone to a position. To designate would mean that the nominating body would be free to use its internal mechanism or process to arrive at its nominee.
166. It is true that Article 10 provides for transparency and accountability in public affairs as well as public participation in public appointments. However, it is not in every public appointment that there must be open recruitment. In the case of the Person contemplated under Article 171(2) (g), the Constitution gave the mandate to the Public Service Commission to nominate or designate a person to represent it in JSC. The Constitution leaves the discretion to the Public Service Commission to decide who to nominate. In my respectful view, the reading of Article 171(2) (g) and section 15 (2) of the Judicial Service Act, does not show any inconsistency in so far as nomination of its representative to JSC is concerned.”
90. They submit that the above High Court decision was affirmed by the Court of Appeal in *Katiba Institute v The Attorney General & 9 Others* [2020] eKLR; Nairobi Civil Appeal No. 99 of 2019. When the court stated: -
67. Similarly, as far as the nomination of the 5th Respondent was concerned, Article 171(2)g requires that he be nominated by the Public Service Commission. He was nominated as such. His nomination in our view did not call for public participation. The competitiveness and merit provided for under the relevant provisions of the Public Service Act is within the Public Service Commission itself. The commissioners are best placed to determine which one of them passes the test as to merit as opposed to members of public. The members of the Commission decided to nominate the 5th respondent having found him qualified for such nomination. They were best placed to make the said decision and not the courts or members of public.”
91. I do not agree with the Respondents and 1st to 5th Interested Parties. The issues in *Katiba Institute* are distinguishable from the instant petition. In that case what was contested was the nomination



by Public Service Commission of its representative to the JSC. The court found that Public Service Commission (PSC) did what it was mandated by the law. As stated by the Court of Appeal, the competitiveness and merit was provided for within the PSC itself. Further, PSC was to nominate a person who would thereafter be subjected to a vetting process through the National Assembly unlike the instant case where the appointment was final.

92. It is further argued that JSC has stated that it has no power to appoint the Chairperson and Vice Chairperson of the Tribunal and that the Secretary to JSC administered the oath of office as an approval of the appointments. Approval by JSC cannot regularize that which is irregular or legalise that which is not legal. In any event JSC did not file any replying affidavit stating that it approved the appointments or that it had no mandate to make the appointments.
93. The Respondents and 1st to 5th Interested Parties have submitted that the Business Premises Rent Tribunal Act does not prescribe the procedure for appointment. This is correct and I agree with them. On the contrary, the Public Service (Values and Principles) Act provides at Section 10 provides for competition and merit based appointments as follows:-
 10. Fair competition and merit as the basis of appointments and promotions
 1. The public service, a public institution or an authorised officer shall ensure that public officers are appointed and promoted on basis of fair competition and merit.
 2. Despite subsection (1), the public service may appoint or promote public officers without undue reliance on fair competition or merit if—
 - a. a community in Kenya is not adequately represented in appointments to or promotions in the public service or in a public institution;
 - b. the balance of gender in the public service or in a public institution is biased towards one gender;
 - c. an ethnic group is disproportionately represented in the public service or in a public institution; or
 - d. persons with disabilities are not adequately represented in the public service or in a public institution.
 3. Each public institution or each authorised officer shall develop a system for the provision of relevant information that promotes fairness and merit in appointments and promotions.
94. The Cabinet Secretary did not comply with these provisions. As was held in *Community Advocacy Awareness Trust and 8 Others v Attorney General*, the Constitution 2020 “ushered in a new regime of appointments to public office”.
95. In the further affidavit of Amb. Johnson Weru sworn on 8th September 2020 he referred to some applications having been received from 11 candidates. He however did not state when invites were made for qualified persons to apply for these positions or how these 11 candidates learned about a vacancy and applied. Further, no mention has been made about the qualifications for appointment other than academic qualifications set out in the list marked Exhibit “JW-1” of the affidavit.
96. Applications for appointment cannot be made in abstract. There must be an announcement of a vacancy and a statement of the minimum qualifications, followed by shortlisting and interviews.



97. Article 10 and 232 as well as Section 10 the **Public Service (Values and Principles) Act** require more than academic qualifications. No mention has been made about the vetting of the candidates for compliance with tenets such as good governance, integrity, transparency and accountability.
98. For the foregoing reasons, I find that the appointments did not comply with articles 10, 47 and 232 of the Constitution and section 10 of the Public Service (Values and Principles) Act. The same was therefore unconstitutional.

Whether the Section 11 of the Business Premises Rent Tribunal Act is unconstitutional

99. Section 11 of the Landlord and Tenant (Shops, Hotels and Business Establishment) Act provides as follows –
11. Establishment of Tribunals
 1. A Tribunal shall consist of a person or persons appointed as such by the Minister, and shall exercise such jurisdiction as is conferred on it by or under this Act, over such area as shall be specified in such appointment.
 2. Persons other than public officers appointed under the provisions of subsection (1) of this section shall be paid such emoluments or allowances as the Minister shall determine.
100. Section 7 of the Sixth Schedule to the Constitution: Transitional and Consequential Provisions, provide as follows –
7. Existing laws.
 1. All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.
 2. If, with respect to any particular matter—
 - a. a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and
 - b. a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.
101. In view of the apparent conflict between Section 7 of the Sixth Schedule to the Constitution and Section 11 of the Landlord and Tenant Act, the Constitution would prevail. The was enacted many years before the Constitution. Until the Act is amended to align it with the provision of the Constitution, Section 7 of the Sixth Schedule to the Constitution provides that it is to be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. This means that the Constitution recognises the existence of such legislation in the form in which they are enacted but provides for their interpretation and application within the context of the provisions of the Constitution.
102. In view of the fact that the Constitution anticipated and provided a cure for such non-conformity, I do not find such legislation unconstitutional per se. The issue is not with the legislation but rather with the application thereof. It is the application that is addressed by Section 7 of the Sixth Schedule to the Constitution.



103. I thus do not find the Act unconstitutional.

Whether the appointment of the 1st to 5th Interested Parties violated Article 27 of the Constitution

104. Article 27 of the Constitution provides as follows –

27. Equality and freedom from discrimination.

1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
6. To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
7. Any measure taken under clause (6) shall adequately
8. provide for any benefits to be on the basis of genuine need.
9. In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

105. It is the petitioners and 8th Interested Parties position that by appointing only one woman out of 5 appointees, the 1st Respondent violated Article 27 of the Constitution which requires that not more than two thirds of elective or appointive positions are of the same gender.

106. The 8th Interested Party submits that both Articles 27 and 232 provide for equal opportunities for both genders in appointments, training and advance at all levels of the public service. That Kenya is a signatory to CEDAW, Beijing Declaration and Maputo Protocol, all for which provide for elimination of all forms of discrimination against women.

107. In the High Court case of Marilyn Kamuru and Others v Attorney General and Another (2016) eKLR, the court held that failure of the president to appoint a cabinet that meets the two third gender rule principle was a violation of Article 27 of the Constitution and the right to dignity of the petitioners. It also held that realisation of the two third gender principle in appointments is immediately realisable and not progressively realisable. Article 21(2) provides that only the rights under Article 43, that is economic and social rights, are to be realised progressively.



108. The Court in *Federation of Women Lawyers (FIDA-K) & 5 Others v Attorney General & Another* [2011] eKLR stated:

Article 27... is clearly not only meant to prevent discrimination or inequality, but also in our context and history to eliminate them presently and in the future. It is an attempt to level the playing field where legislation is inadequate or does not address the needs of a particular vulnerable group. To the extent that people were disadvantaged by the past discriminatory laws or practices in the socio, economic, political and education fields, Article 27(8) permits Parliament to enact legislation for the advancement of such people.”

109. For the respondents and 1st to 5th Interested Parties, it is submitted that only two women from the same ethnic origin and region applied and therefore only one was appointed. Further, that there is room to appoint more members to the Tribunal to balance the gender equation.

110. Article 27(6) and (7) are specific that the state takes both legislative measures and policy decisions including affirmative actions to redress any disadvantages suffered by individuals or groups because of past discrimination. It is now 10 years since the promulgation of the Constitution. There is no lack of qualified women for appointment to the Tribunal. No valid reason has been given by the Respondents for failure to appoint at least two thirds of women to the Tribunal. The legal fraternity is awash with women who meet the qualifications that the Respondents allege they were looking for. All they needed to do was to advertise publicly for those qualified to apply.

111. I thus entirely agree with the sentiments of the Judge in *Marilyn Muthoni Kamuru & 2 others v Attorney General & another* [2016] eKLR that: -

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

112. I find that the 1st Respondent was in breach of not only Article 27 but also 232(1)(i) of the Constitution by appointing only one woman out of 5 appointees.

113. There were arguments on the issue whether the law sets out the number of members of the Tribunal. That Section 11(1) of the Act provides as follows:

A Tribunal shall consist of a person or persons appointed as such by the Minister.”

114. That Rule 20 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) (Tribunal) (Forms and Procedure) Regulations, 1966 (Revised. 2015) state as follows;

Proceedings of the Tribunal shall be open to the public

- i. Where the Tribunal consists of more than one person, the members present shall, if the chairman is absent, elect one of their members to act as chairman of the Tribunal.
- ii. Where the Tribunal consists of two members who arrive at different findings, the decision of the chairman or the acting chairman, as the case may be, shall be the decision of the tribunal.



- iii. Where the Tribunal consists of more than two persons, the decision of the Tribunal shall be the decision of the majority of the members present.

115. These provisions envisage that the Tribunal would constitute of more than one member. Further, Section 11(1) of the Landlord and Tenant Act does not prescribe the minimum or maximum number of members of the Tribunal. I therefore agree with the Respondents and Interested Parties that the appointing authority has discretion on the number of members to the Tribunal.

Remedies

116. Having reached the forgoing conclusion, I make the following orders in both petitions –

- a. A declaration be and is hereby issued that the appointment of the 1st to 5th Interested Parties is in violation of Articles 2, 10, 27, 47, 169(1)(d), 172(1), 232(1)(f) & (g) and 259 of the Constitution of Kenya, Article 2 of CEDAW, Article 2 of Maputo Protocol, Section 32 of the Judicial Service Act together with Section 10 of the Public Service (Values and Principles) Act.
- b. An order of Certiorari be and is hereby issued quashing Gazette Notice No. 4244 dated 22nd June, 2020 issued by the Cabinet Secretary for Industrialization Trade and Enterprise Development and any consequential actions arising therefrom.
- c. Each party to bear their own costs in both petitions

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30 DAY OF OCTOBER 2020

MAUREEN ONYANGO

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE

