



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 47 OF 2018

IN THE MATTER OF ARTICLES 1, 2, 3 (1), 4(2), 10, 19, 20, 21, 22, 23, 24, 27, 41(1), 47, 48, 50(1), 156, 159, 165, 232, 234, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF THE ALLEGED VIOLATION OF ARTICLES 3(1), 10, 27, 41(1), 47, 73, 129, 232, 234, 259(1) OF THE CONSTITUTION AND SECTION 7(1) OF THE SIXTH SCHEDULE TO THE CONSTITUTION

IN THE MATTER OF ALLEGED VIOLATION OF SECTIONS 4(1) OF THE FAIR ADMINISTRATIVE ACTION ACT 2015

IN THE MATTER OF THE CONSTITUTIONAL VALIDITY OF SECTIONS 7(3), 26 AND 27(c) OF THE STATE CORPORATIONS ACT (CAP.446) AND SECTIONS 6(2) (a) & (e) OF THE KENYA REVENUE AUTHORITY ACT (CAP.469)

IN THE MATTER OF THE CONSTITUTIONAL VALIDITY OF APPOINTMENTS TO THE KENYA REVENUE AUTHORITY BOARD MADE DIRECTLY BY THE PRESIDENT UNDER SECTION 7(3) OF THE STATE CORPORATIONS ACT (CAP.469) WITHOUT THE INVOLVEMENT OF THE PUBLIC SERVICE COMMISSION, AND WITHOUT IDENTIFYING THE APPOINTEES THROUGH TO A FAIR, OPEN, COMPETITIVE, MERIT BASED, AND INCLUSIVE RECRUITMENT PROCESS

- BETWEEN -

OKIYA OMTATAH OKOITI.....PETITIONER

- VERSUS -

THE HON.ATTORNEY GENERAL.....1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

STATE CORPORATIONS ADVISORY COMMITTEE....3RD RESPONDENT

- AND -

FRANCIS K. MUTHAURA (AMB).....1ST INTERESTED PARTY

MUKESH SHAH.....2ND INTERESTED PARTY

LEONARD ITHAU (ENG).....3RD INTERESTED PARTY

SUSAN MUDHUNE.....4TH INTERESTED PARTY

CHARLES MAKORI OMANGA.....5TH INTERESTED PARTY

KENYA REVENUE AUTHORITY.....6TH INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 14th June, 2019)

JUDGMENT

The petitioner filed the petition on 29.05.2018 in person together with his supporting affidavit and exhibits thereto. The petitioner describes himself as a law abiding citizen of Kenya, a public spirited individual, a human rights defender, and a strong believer in the rule of law and constitutionalism. He states that he is a member of Kenyans for Justice and Development Trust, which is a legal trust, incorporated in Kenya and founded on republican principles and set up with the purpose of promoting democratic governance, economic development and prosperity. The respondents and the interested parties do not dispute the petitioner's description and the Court returns that indeed the petitioner has filed the petition in the capacity he has described himself.

The petitioner pleaded that the Court determines the following questions and issues:

- a) Whether gazette notices issued by the President without his seal and signature are invalid, null and void.
- b) Whether sections 7(3), 26 and 27(c) of the State Corporations Act (Cap.446) and sections 6(2) (a) & (e) of the Kenya Revenue Authority Act (Cap. 469) are in conflict with Articles 2, 10, 27, 47, 73(2), 129(1), 153(4), 232, 234(2) and 259(1) of the Constitution and, therefore, are void to the extent of the inconsistency, as decreed by Article 2(4).
- c) Whether appointments made under sections 7(3), 26 and 27 (c) of the State Corporations Act (Cap.469), which purport to allow the President and the Cabinet Secretary to handpick and appoint persons to the Kenya Revenue Authority (KRA) Board, without subjecting them to a fair, open, competitive, merit based, and inclusive recruitment process, and without involving the 2nd respondent, are constitutionally invalid, null and void.
- d) Whether the appointments of the 1st, 2nd, 3rd, 4th and 5th interested parties are constitutionally invalid and therefore, are null and void *ab initio*.
- e) Whether appointments can be backdated.

The petitioner prayed that the Honourable Court be pleased to make the following declarations and issue the following orders:

- a) That a declaration is hereby issued that gazette notices issued by the President without his seal and signature are invalid, null and void.
- b) That a declaration is hereby issued that sections 7(3), 26 and 27(c) of the State Corporations Act (Cap. 446) and sections 6(2)(a) & (e) of the Kenya Revenue Authority Act (Cap.469) are unconstitutional and therefore, invalid, null and void.
- c) That a declaration is hereby issued that the appointments of the 1st, 2nd, 3rd, 4th and 5th interested parties are unconstitutional and therefore, invalid, null and void *ab initio*.
- d) That a declaration is hereby issued that the appointments to public office cannot be backdated and any decisions made by any persons in office cannot be varied, amended, or vacated by backdating their purported removal from office.
- e) That a declaration be and is hereby issued that the State Corporations Advisory Committee is an unconstitutional organ whose functions encroach on those of the Public Service Commission.
- f) That the Honourable Court be pleased to issue and hereby issues an order quashing:
 - i) Gazette Notice No. 5142 dated 23.05.2018 vide which the President purported to have appointed Francis K. Muthaura (Amb) to be the Chairperson of the Board of the Kenya Revenue Authority.
 - ii) Gazette Notice No. 5140 dated 24.05.2018 vide which the President purported to have appointed Charles Makori Omanga to be a member of the Board of the Kenya Revenue Authority.
 - iii) Gazette Notice No. 5141 dated 25.05.2018 vide which the President purported to have appointed Mukesh Shah, Leonard Ithau (Eng.), and Susan Mudhune, to be members of the Board of the Kenya Revenue Authority.
- g) That the Honourable Court be pleased to issue any other or further remedy that the Honourable Court shall deem fit to grant.
- h) That the Honourable Court be pleased to order the respondents to pay the costs of the petition.

The petitioner's case is that vide a special Kenya Gazette Vol. CXX – No. 61 published on 25.05.2018 the President of the Republic of Kenya announced that he had made changes in the Board of the Kenya Revenue Authority as follows:

- a) By Gazette Notice No. 5142 dated 23.05.2018 the President in exercise of the powers conferred by section 7(3) of the State Corporations Act and section 6(2)(a) of the Kenya Revenue Authority Act, appointed Francis K. Muthaura (Amb.) to be the chairperson of the Kenya Revenue Authority up to 20.10.2019 and revoked the appointment of Edward Sambili (Dr.) with effect from 22.05.2018. (By Gazette Notice No. 8718 dated 22.10.2016 the President in exercise of the powers conferred by section 6(2) (a) of the Kenya Revenue Authority Act, appointed Edward Sambili (Dr.) to be Chairperson of the Board of the Kenya Revenue Authority for a period of 3 years with effect from 21.10.2016.)

b) By Gazette Notice No. 5140 dated 24.05.2018 the President in exercise of the powers conferred by section 7(3) of the State Corporations Act appointed Charles Makori Omanga to be a member of the Board of the Kenya Revenue Authority up to 14.06.2020 with effect from 30.05.2018 and revoked the appointment of Abdi Bare Duale. (By Gazette Notice No. 6671 dated 16.06.2017 in exercise of the powers conferred under section 6(2) (e) of the Kenya Revenue Authority Act, the Cabinet Secretary for National Treasury had appointed Abdi Bare Duale to be a member of the Board of the Kenya Revenue Authority for a period of 3 years with effect from 15.06.2017.)

c) By Gazette Notice No. 5141 dated 25.05.2018 the President in exercise of the powers conferred by section 7(3) of the State Corporations Act appointed Mukesh Shah, Leonard Ithau (Eng.) and Susan Mudhune to be members of the Board of the Kenya Revenue Authority up to 20.10.2019 effective 30.05.2018 and revoked the appointments of Evans Kakai, Constance J. Kandie, and Amb. Rashid Ali (Dr.) (By Gazette Notice No. 8735 dated 19.10.2016 in exercise of the powers conferred by section 6(2) (e) of the Kenya Revenue Authority Act, the Cabinet Secretary for National Treasury appointed Evans Kakai, Constance J. Kandie, and Rose Waruhiu to be members of the Board of the Kenya Revenue Authority for a period of 3 years with effect from 21.10.2016; and by Gazette Notice No. 9241 dated 07.11.2016 the Cabinet Secretary in exercise of the same powers had appointed Amb. Rashid Ali (Dr.) and Paul Icharia to be members of the same Board for a period of 3 years effective 11.11.2016 and, revoked the appointment of Paul Icharia and Ben Oluoch Olunya.)

The petitioner's case is that the powers the President purports to exercise under section 7(3) of the State Corporations Act (Cap.446) and section 6(2)(a) of the Kenya Revenue Authority Act (Cap.469) were available to the President under the repealed Constitution but no longer exist under the Constitution of Kenya, 2010. His further case is that the President could not validly act by way of a gazette notice because Article 135 of the Constitution provides, "**135. A decision of the President in the performance of any function of the President under this Constitution shall be in writing and shall bear the seal and signature of the President.**" The petitioner's case is that a violation of that provision renders the President's actions null and void. Further the petition faults the President for handpicking and appointing the persons in issue without the involvement of the 2nd respondent and without adhering to the laid down constitutional values and principles and procedures of the rule of law, fairness, inclusiveness, competitiveness, merit, and openness in public appointments.

The petitioner states that sections 7(3) and 26 of the State Corporations Act (Cap. 446) and sections 6(2)(a) and (e) of the Kenya Revenue Authority Act (Cap.469) were enacted pursuant to section 25(1) of the former Constitution of Kenya and purport to allow the President and the Cabinet Secretary to handpick and appoint the Chairperson and members of the Board of the Kenya Revenue Authority on advise of the 3rd respondent and without the involvement of the 2nd respondent contravenes the Constitution of Kenya, 2010. The petition further challenges the constitutional validity of appointments made directly by the President under section 7(3) of the State Corporations Act (Cap. 446) without the involvement of the Public Service Commission and without adhering to the laid down constitutional values and principles and procedures of the rule of law, fairness, inclusiveness, competitiveness, merit, and openness in public appointments. In that regard the petitioner's case is that Articles 41(1), 27, 73(1) (a), 73(2), 129(1), 153 (4) (a), 232(1) (g), 232(1) (i), 232(2), and 234(2) (a).

The petitioner's further case is pleaded as follows:

"23. The petitioner is aggrieved that, to achieve the undeclared collateral purpose of defeating the resolutions of the KRA Board, sacking its Commissioner General, the President purported to backdate the appointment of Francis K. Muthaura (Amb.), to Tuesday 22nd May 2018 while the appointments of other interested parties commence on 30.05.2018.

24. Given that Dr. Sambili chaired a board meeting on Wednesday 23rd May 2018, two days before the Special Issue of the Kenya Gazette, Vol. CXX – No. 61, was published in Nairobi on 25th May 2018, the decisions of the Board at that meeting cannot be varied, amended or vacated in any way by the purported backdated appointments.

25. The petitioner posits that appointments cannot be backdated and any decisions made by persons in office cannot be varied, amended, or vacated by backdating their purported removal from office.

26. The petitioner is aggrieved that the President's impugned actions are *ultra vires* and, therefore, invalid, null and void.

17. The petitioner avers that the President has no powers under the Constitution to handpick and appoint persons to the Board of the KRA."

The petitioner's further case is that the Constitution imposes upon the 2nd respondent and other organs of the state to fill public offices in a competitive, transparent, fair and open manner that conforms to all constitutionally required procedures including inclusiveness. The petitioner urges that he has a legitimate expectation that the criteria of appointment and recruitment of the chairperson and members of the KRA Board will ensure hiring of persons of demonstrable and predetermined expertise, and whereby expertise is the basis of the credibility of the persons appointed; and further legitimate expectation that the appointments will meet constitutionally sanctioned threshold to ensure that the holders of the offices are not beholden to partisan interests but will be free to discharge their mandate fairly, independently, without fear or favour, and according to the law.

The petitioner's case is that an appointment and recruitment criteria that does not meet the constitutional threshold may allow handpicking of persons of questionable technical credentials and competence and those appointed may be compromised subservient acolytes of the appointing authority who may be unable to assert the desired operational autonomy in the public interest, and, handpicking may also give the executive arm room to abuse public office to reward cronies – the consequence being that others qualified and fit to serve are discriminated against contrary to Article 27 of the Constitution.

For the respondents, two preliminary issues were raised in the preliminary objection, the grounds of opposition, and the application all filed on 19.06.2018 through Charles Mutinda, Deputy Chief Litigation Counsel, and, Schola Mbilo, Principal Litigation Counsel, both for the Attorney General – and the respondents' lead Counsel was Mr. Waweru Gatonye Advocate. The two points of preliminary objection are as

follows:

- a) The Honourable Court lacks the requisite jurisdiction to hear and determine the matter in light of the provisions of Article 162 of the Constitution as read with section 12 of the Employment and Labour Relations Court Act.
- b) The constitutionality of inter alia section 7(3) of the State Corporations Act and the exercise of the Presidential powers in appointment of board members of the state corporations is subject of litigation in **Nairobi High Court Constitutional Petition No. 331 of 2016, Katiba Institute and Africa Center for Open Governance –Versus – The Attorney General and the Public Service Commission**. The petition has been certified under Article 165(4) of the Constitution as raising substantive questions of law and the Chief Justice has empanelled a bench of three High Court Judges to hear the matter and the same is set for hearing on 13.07.2018. This being a Court of concurrent jurisdiction with the High Court, it would only be proper in the interest of justice the matter be stayed pending the determination of the said petition under the doctrine of *sub judice*.

In the notice of motion dated 19.06.2018 the respondents prayed that the present petition be consolidated and heard together with the said **Nairobi High Court Constitutional Petition No. 331 of 2016** or in alternative, the Court be pleased to stay the hearing of the present petition in that it is *sub judice* to the said **Nairobi High Court Constitutional Petition No. 331 of 2016, Katiba Institute and Africa Center for Open Governance –Versus – The Attorney General and the Public Service Commission**.

On 26.03.2019 the Court directed that the petition, the preliminary objection and the application be heard together.

The doctrine of *res sub judice* in Latin “means under judgment”. The doctrine aims at preventing courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations with respect to the same cause of action, same subject matter and same relief claimed – with the consequence that the court should stay the proceedings or the suit. Thus the Black’s Law Dictionary, 10th Edition defines “*sub judice*” as “**under a judge; Before the Court or judge for determination.**”

The Court has considered the pleadings in **Nairobi High Court Constitutional Petition No. 331 of 2016, Katiba Institute and Africa Center for Open Governance –Versus – The Attorney General and the Public Service Commission**. The parties in that petition are different from the present petition – in particular the interested parties in the present case are not parties in that earlier petition filed in 2016 and the petitioners as well are different. The appointments in that petition filed in 2016 are not in issue in the present petition and the present petition is based upon the appointments of the chairperson and members of the Board of KRA which is clearly a fresh cause of action. It is true that the petition at the High Court like the present petition challenges the selection and appointment by the President and Cabinet Secretaries of persons for positions of chairperson or members of boards to various state corporations and agencies on the basis that the mandate to select and appoint persons to those positions is reposed to the Public Service Commission which has to do so upon the values and principles in Article 232 of the Constitution. In the opinion of the Court that is only one issue urged in the two petitions but whose cause of actions are clearly different. The cause of action in the present petition accrued in 2018 consequential to the revocation of appointments and then fresh appointments to the Board of the KRA and which the petitioner urges to have been offensive and prompting him to file the present petition. The Court finds that the cause of action and the parties, and therefore the reliefs in the two petitions are clearly different and the doctrine of *res sub judice* will not apply. As submitted by the petitioner, even if the earlier petition pending at the High Court is decided one way or the other, the present petition as founded upon the pleaded cause of action and the remedies as prayed for will remain undetermined.

The respondents admit that on the basis of the holding by the Court of Appeal in **Daniel N. Mugendi –Versus- Kenyatta University & 3 others [2013]eKLR**, and which upheld Majanja J in **Petition No. 170 of 2012 United States International University (USIU) –Versus- The Attorney General and 2 others**, this Court has jurisdiction not only to deal with the employment and labour issues that arise in the dispute but also has jurisdiction to deal with all constitutional issues that arise in the dispute subject to the suit. However the respondents submit that they do not see employer – employee relationship between the petitioner and the respondents and so the petition is outside the jurisdiction of the Court. The respondents rely on the holding in **Kenya Council of Employment and Migration Agencies & Another – Versus- Samuel Mwangera Arachi & 2 Others [2015]eKLR**, where Abuodha J held, “ **16. Whereas and from the foregoing provisions of the Law, the Court has jurisdiction to adjudicate constitutional questions, these questions must arise within the broad relationship parameters set out under section 12 of the Act and further they can only be agitated by persons identified under section 12(2) of the Act acting in person or through authorised representative as stated earlier. The Act makes no representation by civil society which the applicant is.**

17. Even assuming the applicant could have a right of audience before the Court, it is not clear on whose behalf the application has been brought. Judicial Review orders are issued for the benefit of a person or class of persons aggrieved by a decision of a public body or a quasi-judicial body. They do not issue in the air. There has to be a person or persons aggrieved by such decision.”

The Court has considered the submissions and finds that it is clearly distinguishable from the present case in which the petitioner pleads that he is aggrieved and that the petition is in the public interest within the provisions of Articles 258 and 22 of the Constitution on enforcement of the constitutional provisions and the Bill of Rights respectively.

The Court has held that public officers are servants of the people and are engaged or employed within a framework of constitutional and statutory provisions as well as lawful policies and practices. The Court finds that the dispute relates to employment of public officers as defined in the Constitution and further relates to applicable constitutional and statutory provisions or lawful policies and practices in that regard and the dispute is clearly within the Court’s jurisdiction.

The Court follows its decision in **Abdikadir Suleiman –Versus-County Government of Isiolo and Another [2015]eKLR** thus:

“As stated by the court earlier in this judgment, the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests with this court as vested with the appropriate

jurisdiction under Articles 159(1), 162 (2) (a) as read with Article 165(5) and (6) of the Constitution; Articles 22(1) and 258(1) of the Constitution, and the provisions of the Employment and Labour Relations Act, 2011. The court holds that the jurisdiction spreads to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under Article 22 of the Constitution and enforcement of the Constitution under Article 258 as far as the issues in dispute are, evolve, revolve or relate to employment and labour relations. The court holds that the compass or golden test for the court's jurisdiction is the subject matter in the dispute namely disputes relating to employment and labour relations as provided for Article 162 (a) of the Constitution and as amplified in the Employment and Labour Relations Court Act, 2011 and not the remedies sought or the procedure of moving the court or the situ of the applicable law or any other extraneous considerations as may be advanced by or for a litigant."

Again the Court follows the opinion in its recent 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."

Again in **Richard Bwogo Birir –Versus- Narok County Government and 2 Others [2014] eKLR** the Court stated "The court has carefully considered the enumerated constitutional provisions and holds that all persons holding public or state office in Kenya in the executive, the legislature, the judiciary or any other public body and in national or county government are servants of the people of Kenya. The court holds that despite the level of rank of state or public office as may be held, no public or state officer is a servant of the other but all are servants of the people. Thus, the court holds that the idea of servants of the crown is substituted with the doctrine of servants of the people under the new Republic as nurtured in the Constitution of Kenya, 2010. The hierarchy of state and public officers can be complex, detailed and conceivably very long vertically and horizontally but despite the rank or position held, the court holds that they are each a servant of the people and not of each other as state or public officers. They are all the servants of the people. The court holds that there are no masters and servants within the hierarchies of the ranks of state and public officers in our new Republic."

Thus to answer the preliminary issue the Court returns that it has jurisdiction to entertain the present petition. The Court adds that whether it is about employment law or policy or about individual public officer's grievances, the jurisdiction of the Court would properly be available in that regard."

The Court finds that the dispute is about employment in the public service. The Court finds that the chairperson and the members of the Board of the KRA (just like the chairpersons and members of other state corporations or boards of other public bodies) are public officers bound by applicable constitutional and statutory provisions and lawful policies and practices that govern public employment. The Court holds that in the constitutional framework under the Constitution of Kenya 2010, the public officers despite their designation or position held in the service, they are all in public or state service and governed by specific applicable constitutional and statutory provisions and lawful policies and practices – so that the variance in positions held or designation does not render any of the public or state officers to escape their being servants of the people, employed by the people, within such applicable constitutional and statutory provisions, and, lawful policies and practices. Thus the provisions of Article 73 as read with Article 80 (c), and, Article 232 apply accordingly. In view of that finding, the dispute in the present petition is about employment within the complex framework of public service or public sector employment. The substantive law applicable to such employment ranging from declaration of vacancy, recruitment and selection procedures, appointment procedure, and termination procedure would be the applicable public service constitutional and statutory provisions and such other lawful policies and practices to the extent that they prescribe minimum or better terms and conditions of service than those envisaged in the Employment Act, 2007.

Thus in the ruling delivered on 06.03.2015 in **Margaret Lorna Kariuki –Versus- Embu County Government [2015]eKLR**, the Court held as follows, "The second issue for determination is whether the office of the county secretary was excluded from the application of the Employment Act, 2007. The parties were in agreement that the office had not been excluded by the Minister under section 3 of the Act. The court finds as much and further holds that even if it had been excluded, the better or similar terms under the special arrangements as submitted for the claimant would need to be established so that the court would determine the case upon such special terms of service. Such better or similar terms, in the opinion of the court, would include the minimum safeguards of valid reasons; and notice and a hearing as provided in sections 43 and 41 of the Employment Act, 2007. In the opinion of the court, the import and scope of the proviso to section 3(5) of the Act is that if the terms and conditions of the special arrangement of an excluded office are inferior to the terms and conditions provided under the Act, then the provisions of the Act will swiftly apply to the case by default. The court further holds that if an office is excluded from terms of the Act under section 3 of the Act, the court's jurisdiction is not thereby ousted; the court will hear and determine that excluded employment dispute on the basis of the better terms of service as provided for in the special arrangement. Thus, the specific contractual terms would apply in determining the dispute."

In the present petition, the 1st interested party filed submissions on 23.05.2019 through Musyoki Mogaka & Company Advocates and it was submitted that the Board members for the Board of the KRA receive sitting allowance and reimbursements of expenses which were alleged not to satisfy the requirement in establishing the employer and employee relationship because, in their submissions, such was not a salary or wage. While the Court has found that the 1st to 5th interested parties by reason of their appointment to the Board of KRA they thereby became persons employed in the public serve by reason of applicable constitutional and statutory provisions and such lawful policies and practices, the Court further finds that such sitting allowances and reimbursements amounted to "wage". **Black's Law Dictionary 19th Edition** defines "Wage" as payment for labour or services based on time worked or quantity produced; compensation of an employee based on time worked or output of production, and "Wage include every form of remuneration payable for a given period to an individual for

personal services, including salaries, commissions, vacation pay, bonuses, and the reasonable value of board, lodging, payments in kind, tips, and any similar advantage received from the employer.” Thus the Court considers that the definition of “**employee**” under section 2 of the Employment Act, 2007 as a person employed for wages or salary easily applies.

The Court holds that state corporations may and are usually established as corporate bodies by statute but the constitutional and statutory provisions do not confer the board members a distinctive status separate from that of other public officers including those serving as staff in the state corporations – the difference amongst public officers being distinctiveness in the role played as vested by the Constitution, statute or terms and conditions of service and as based on the public or state office held by the individual. They are all governed by the general statutory and constitutional provisions on public or state service and paid out of monies provided by the taxpayer so that such “**board members**” are clearly different from or unlike the board members under the Companies Act whose service is clearly distinct from staff of a company registered under the Companies Act. The Court considers that the board members in a state corporation would not hold any better stakes in the state corporation (like KRA or its Board) than is held by other citizens and the allegiance of such board members is to the best public interest as provided in the applicable provisions of the Constitution and statute or lawful policies and practices. The Court finds accordingly.

To answer the **1st issue** for determination, the Court returns that the preliminary objections as raised for the respondents will collapse with costs thereof in favour of the petitioner.

The **2nd issue** for determination is whether sections 7(3), 26 and 27(c) of the State Corporations Act (Cap. 446) and sections 6(2)(a) & (e) of the Kenya Revenue Authority Act (Cap.469) are unconstitutional and therefore, invalid, null and void. The respondents did not file replying affidavits to dispute the facts leading to the dispute as pleaded for the petitioner in the petition and the supporting affidavit. The Court finds that the facts leading to the petition are therefore not in dispute and are as pleaded in the petition and the supporting affidavit.

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

Section 26 of the State Corporations Act provides as follows:

- 1) There shall be a Committee to be known as the State Corporations Advisory Committee which shall consist of –**
 - a) the Permanent Secretary in the Office of the President who shall be the Chairman;**
 - b) the Permanent Secretary to the Treasury;**
 - c) the Director of Personnel Management;**
 - d) the Inspector General (Corporations);**
 - e) eight other members appointed by the President.**
- 2) The Committee may co-opt any person for such purpose and for such period as it may determine.**
- 3) The president shall appoint a public officer to be secretary to the Committee.**
- 4) Subject to directions by the President, the Committee shall determine its own procedure.**
- 5) The members and the secretary of the Committee shall be paid out of public funds such remuneration and in such manner as the President may approve.**

Section 27 of the State Corporations Act provides as follows:

- 1) The Committee shall advise on the matters and perform any functions it is required by this Act to perform and in addition shall –**
 - a) with the assistance of experts where necessary, review and investigate the affairs of state corporations and make such recommendations to the President as it may deem necessary;**
 - b) in consultation with the Attorney-General and the Treasury, advise the President on the establishment, reorganisation or dissolution of state corporations;**
 - c) where necessary, advise on the appointment, removal or transfer of officers and staff of state corporations, the secondment of public officers to state corporations and the terms and conditions of any appointment, removal, transfer or secondment;**

d) examine any management or consultancy agreement made or proposed to be made by a state corporation with any other party or person and advise thereon;

e) examine proposals by state corporations to acquire interests in business or to undertake new business or otherwise expand the scope of activities and advise thereon.

Section 6 (2) (a) of the Kenya Revenue Authority Act provides that the Board of Directors of the KRA shall comprise, amongst other members, “**a chairman to be appointed by the President;**” and section 6 (2) (e) provides that the Board shall as well comprise, amongst other members, “**six other persons appointed by the Minister by virtue of their knowledge and experience in accountancy, commerce, law, taxation, business administration or public administration.**”

The respondents have opposed the petitioner’s challenge to the cited statutory provisions by filing grounds of opposition on 19.06.2018 and upon the following grounds:

a) That the powers of the Public Service Commission under Article 234 of the Constitution to appoint persons in the public service are subject to the Constitution in its entirety and legislation. Accordingly, powers of the Commission to make appointments in the public service can be limited by the Constitution and by legislation.

b) That Article 132(4) of the Constitution gives the President power to perform any other executive function provided for in the Constitution or in national legislation.

c) The State Corporations Act is a national legislation giving the president and the Cabinet Secretary under section 6 powers specifically to appoint chairpersons and members of boards of state corporations.

d) Section 6 of the State Corporations Act as read with section 6 of the Kenya Revenue Authority Act give the President and the Minister sole powers to appoint the chairperson and members respectively of the Board of KRA.

e) Article 2(2) of the Constitution prohibits any person from exercising authority except as authorised under the Constitution and therefore the Public Service Commission does not have authority in regards to establishment and abolition of offices, and appointment of persons to hold or act in offices in State Corporations and, its functions are to be exercised with due regard to operational legislation.

f) That section 7(3) of the State Corporations Act gives the President discretionary powers in the national interest, to revoke the appointment of any member and appoint another member for the remainder of the term or constitute a new board for a period to be determined in consultation with the State Corporations Advisory Committee. In issuing the gazette notices No. 5142 dated 23rd May, 2018, No. 5140 dated 24th May 2018 and No. 5141 dated 25th May, 2018, subject to the proceedings herein, the President invoked the powers bestowed upon his office under section 7(3) of the State Corporations Act and section 6(2) (a) of the Kenya Revenue Authority Act. The actions of the President were thus in line with the law and the Petitioner has not demonstrated otherwise. Unless the statutory provisions under which the President acted are declared unconstitutional, the President’s actions in that regard are legal and the law cannot apply retrospectively.

g) That in regards to the determination of the extent of the applicability of the principle of fair competition and merit in appointments under Article 232 of the Constitution, this must be evaluated as against the process leading to the formation of state corporations as corporate whose shareholding is the Government and the legal procedure for appointment of chairpersons and members of state corporations accountable to the government through the Executive. Government’s structuring of these entities, including their governance framework, performance target setting, expectations and rewards framework is differently structured towards achieving the desired objectives.

h) That the governance framework regarding state corporations under the distinct established legislation of the State Corporations Act do not provide an elaborate procedure regarding the appointments of chairpersons and members to state corporations. The legislation allows the appointing authority discretion to select and the caveats are basic parameters of gender and regional balance, persons who will best deliver the objectives and targets of the corporation – bringing into consideration additional parameters such as the stature and standing of proposed board members; networking abilities as well as to attract strategic partnerships for the entities; political considerations and the ability to engage with political interlocutors inter alia. That is in line with corporate governance principles guiding similar entities.

i) The appointments in issue were under section 7(3) of State Corporations Act and done in great national and public interest for a specific time in order to ensure continuity of the institution and that there would be no vacuum in the Board of KRA before a substantive Board was appointed as per provisions of the Kenya Revenue Authority Act.

j) That in interpreting the law governing matters of state corporations the Court is enjoined to consider the legal doctrine of *lex specialis derogate legi generali*, which connotes that the law governing specific subject matters overrides a law which only governs general matters.

k) Provisions of Article 135 of the Constitution that decisions of the President in performance of his functions under the Constitution shall be in writing and shall bear the seal and signature of the President does not apply because the gazette notices in issue were made pursuant to powers of the President under the State Corporations Act and Kenya Revenue Authority Act and not the Constitution. Section 6(2) of the State Corporation Act requires that appointment is by name and by notice in the gazette. Section 3 of the Interpretation and General Provisions Act defines “**the Gazette**” to mean the Kenya Gazette published by authority of the Government of Kenya and includes any supplement thereto. Thus the President acted within the law.

l) The State Corporations Advisory Committee is established under section 26 of the State Corporations Act with the mandate under section 27 to inter alia advise the President on establishment, reorganisation, or dissolution of state corporations and where necessary advise on the appointment, removal or transfer of officers and staff of state corporations, secondment of public officers to state corporations and the terms and conditions of any appointment, removal, transfer or secondment. As such it is anchored under clear statutory provisions and the petitioner has failed to demonstrate how unconstitutional the State Corporations Advisory Committee is and cannot be heard to make mere allegations of unconstitutionality. The Committee is not a body corporate and cannot sue or be sued as was done in the present proceedings.

m) The KRA collects and receives all government revenues and is a key strategic institution for the functioning of the Government and the Country as a whole. Nullifying the appointments to the board will be detrimental to the public interest as the same, “**...will paralyse the functions of the institution causing great public outcry.**” KRA was therefore a key interested party.

n) The petition lacks legal foundation and the Court has not been served with substantive issues of constitutional law requiring its intervention because a constitutional petition must set out issues for substantive determination by the Court.

The Court has considered the pleadings, the affidavits and the submissions filed for the parties. The Court determines the matters in dispute under the 2nd issue for determination as follows.

First, the Court has already found that the chairperson and members of the Board of KRA are public officers. The 1st interested party filed a replying affidavit on 23.07.2018 and purported to urge that the KRA is not part of public service. It was urged in the affidavit that Article 260 of the Constitution defines public service to mean the collectivity of all individuals other than state officers, performing a function within a State Organ, and, State Organ under the constitutional definition refers to a commission, office, agency or other body established under the Constitution whereas, a public officer is given the meaning of any state officer or any person other than a state officer, who holds a public office. Thus, the 1st interested party urged that KRA being a State Corporation was not a public service institution. The Court respectively returns that the conclusion as urged for the 1st interest party was misconceived because clearly KRA is established by statute under the Parliament’s legislative powers as it is established under the Constitution accordingly. The Court holds that constitutional definitions of public service, public office, public officer and public body as defined in Article 260 of the Constitution are reckoned to fully apply to the KRA, chairperson and members of the Board of KRA and the staff of KRA accordingly. For avoidance of doubt and without the Court dwelling unnecessarily on this rather obvious point of law, section 5(1) of the Kenya Revenue Authority Act provides that the KRA shall under the general supervision of the Minister be an **agency** of the Government for the collection and receipt of all revenue.

Second, the Public Service Commission is established under Article 233 of the Constitution of Kenya 2010. The Commission’s functions and powers are provided for in Article 234 of the Constitution. Article 233 (3) of the Constitution provides that the constitutional functions and powers of the Commission shall not apply to:

- a) State offices;
- b) An office of high commissioner, ambassador, or other diplomatic or consular representative of the Republic;
- c) An office or position subject to the Parliamentary Service Commission; the Judicial Service Commission; the Teachers Service Commission; the National Police Service Commission; or an office in the service of a county government, except as contemplated in clause (2) (i) – on hearing and determining appeals in respect of county governments’ public service.

The Court holds that the KRA is not one of the entities excluded from the Commission’s constitutional functions and powers. Accordingly, subject to such constitutional and statutory provisions as will be shown to apply as exempting such application in specific circumstances, the Court returns that the constitutional powers and functions of the Public Service Commission apply to the KRA and for avoidance of doubt, the Board of KRA.

Third, Article 234 (2) of the Constitution provides for the functions and powers of the Public Service Commission and provides that the Commission shall-

- a) subject to the Constitution and legislation -
 - i) establish and abolish offices in the public service; and
 - ii) appoint persons to hold or act in those offices, and to confirm appointments;
- b) exercise disciplinary control over and remove persons holding or acting in those offices;
- c) promote the values and principles referred to in Articles 10 and 232 throughout the public service;
- d) investigate, monitor and evaluate the organisation, administration and personnel practices of the public service;
- e) ensure that the public service is efficient and effective;
- f) develop human resources in the public service;
- g) review and make recommendations to the national government in respect of conditions of service, code of conduct and

qualifications of officers in the public service;

h) evaluate and report to the President and Parliament on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the public service;

i) hear and determine appeals in respect of county governments' public service; and perform any other functions and exercise any other powers conferred by national legislation.

Article 234 of the Constitution provides thus, **“(5)The Commission may delegate, in writing, with or without conditions, any of its functions and powers under this Article to any one or more of its members, or to any officer, body or authority in the public service.”** The Court considers that the Board of KRA would be one such body or authority that the Commission may delegate any of its functions and powers but such delegation has not been an issue in the present petition.

Further, the Public Service Commission is one of the Commissions and Independent Offices subject to Chapter Fifteen of the Constitution and Article 249 (2) (a) of the Constitution states that the Commission is subject only to the Constitution and the law. Further, Article 234(2) (a) of the Constitution provides that the Commission shall, subject to the Constitution and legislation establish and abolish offices in the public service; and appoint persons to hold or act in those offices, and to confirm appointments.

The Court has considered the provisions and returns that by reason of Article 249(2) (a) legislative or statutory provisions may prescribe matters touching on the Commission's discharge of its constitutional functions and powers and provided such provisions are consistent with constitutional provisions, the Commission is bound accordingly. Further, by legislation and in view of Article 234(2) (a), the Commission's function and power to establish and abolish offices in the public service; and appoint persons to hold or act in those offices and to confirm appointments can be limited by statute or all together taken away by statute. The respondents' submission in that regard is upheld. Thus it is not uncommon for the Parliament to legislate creating public bodies and offices or to make appointments to public offices by way of designating public office holders as duly appointed.

The Court holds that by reason of Article 234 (2) (a) Parliament is thereby at liberty to legislate on matters auxiliary or supplementary to establishment and abolition of offices, appointments and confirmation of appointments and which matters would be within the proper function of the Public Service Commission but not specifically mentioned in the Article. Such matters would include recruitment and selection procedures, promotional criteria, transfer and deployment criteria, work load analysis and parameters to consider in establishment and abolition of offices and generally all matters incidental to establishment and abolition of offices, appointments and confirmation of appointments.

The Court further reckons that the enumerated Parliamentary authority to legislate about the Commission is also aimed at appropriately chaining the discretion of the Public Service Commission in the performance of its functions for the obvious reason and fear that all are fallible and therefore amenable to some kind of checks and balances that is always desirable in a true civilised democracy that is subject to rule of law and constitutionalism.

Fourth, the Court therefore returns that the Parliament was entitled to enact Section 7(3) of the State Corporations Act. The section empowers the President to revoke appointment of a board of state corporation and to appoint another board in that regard. The Parliament has effectively transferred to the President and from the Public Service Commission the power to initiate appointment in that regard by way of **“nominating”** the candidate by himself and as envisaged in Article 234(2) (a) that the Commission's function and power to appoint can be subject to legislation. The petitioner challenged the President's power to revoke appointment of the chairperson or member of the board under the section on account that it would not be subject to due process. However the Court has revisited the section and it clearly chains the exercise of Presidential powers thereunder by stating thus, **“...the President may, if at any time it appears to him that a Board has failed to carry out its functions in the national interest...”** Accordingly the Court holds that the reason for revocation of the appointment of the chairperson or member of the board under the section must be the statutory reason, namely failure to carry out functions in the national interest. There was no allegation or evidence before the Court to show that in revoking the appointments in issue, the statutory test or circumstance had not accrued. To that extent the Court returns that the section is within the provisions of Article 47 on fair administrative action and Article 236 on protection of public officers from being victimised or discriminated against for having performed the functions of office in accordance with the Constitution or any other law; or dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.

In the present case, it was not the petitioner's case that the revocations as undertaken failed to meet the threshold of the provisions in the section and the Court considers that a public officer being a member of a board and whose appointment is revoked under the section unfairly without the statutory test being met or satisfied would be entitled to move the Court appropriately such as on account of unreasonableness or violation of the protection of public officers under Articles 47 and 236 of the Constitution respectively and as a case may be alleged accordingly. There being no such allegations in the present petition, the petitioner's case that the revocation was unconstitutional was unfounded and the Court considers that the revocation is capable of being implemented in accordance with the constitutional provisions. The section does not inherently breach any constitutional rule or prescription; it is capable of being implemented in line with the constitutional safeguards of due process and reasonableness and the Court holds that it is not unconstitutional. The Court considers that the application of the section may be shown to have breached specific constitutional provision such as Articles 47 or 236 in which event it is the unconstitutional application that would be impugned but not the section. The Court finds that the section in its content has no unconstitutional elements.

While making that finding the Court considers that the section is to be invoked in cases where a board has failed to carry out its functions in the national interest and in that case the Court finds that it exists as a remedial or emergency temporary measure rather than the norm. In that sense, there would be no reason to challenge the Parliament's wisdom for a summary action by the President to nominate a board member or chairperson for temporary service in the circumstances envisaged in the section. To that extent, the Court upholds the submission made for the respondents that the section is an exception to the general provisions on appointment and removal or dismissal in the public service and the Court upholds the legal doctrine of ***lex specialis derogate legi generali***, which connotes that the law governing specific subject matters overrides a law which only governs general matters.

The Court further finds that there was nothing unlawful in the President, pursuant to the revocations made under section 7(3) of the State Corporations Act, by himself appointing the members of the Board of KRA to replace those whose tenure had been revoked and doing so under section 6(2) (e) of the Kenya Revenue Authority Act because, “**Minister**” being construed as “**Cabinet Secretary**” under the Constitution of Kenya, 2010, under section 3 of the Interpretation and General Provisions Act, Cap.2, “**Minister**” means a person appointed as a Minister of the Government of Kenya under the Constitution, or the President, the Vice-President or the Attorney-General.

Further, the Court finds that section 7(3) of the State Corporations Act did not confer the President power to establish an office so that Article 132 (4) (a) providing that the President may establish an office in the public service in accordance with the recommendation of the Public Service Commission did not begin to apply in the present case. The Court further holds that establishment of a public office by the President under Article 132(4) (a) of the Constitution envisages an administrative action by the President to establish the office, the establishment being independent of or free from a statutory prescription or provision. Thus, it is the Court’s considered opinion that Article 132 (4) (a) does not apply to instances where, by statute the President is vested with an authority or power or function to establish an office and in which event, unless such statute makes it a requirement, the Commission’s recommendation under Article 132(4) (a) is inapplicable. The Court holds that Article 132(4) (a) should therefore be construed within the framework of constitutional checks and balances and where a statute has vested the power in the President to establish one or other public office, then the purpose of constitutional checks and balances would have already been served and looking back to the Commission’s recommendation under Article 132(4) (a) would not only be superfluous but also amount to seeking to do so in a circumstance not contemplated in the Article. Needless to repeat, the Court has already elaborated on the liberty of Parliament to legislate on functions and powers of the Commission provided the legislation so enacted is consistent with the provisions of the Constitution and in which event, the Commission is clearly bound by reason of Articles 234 (2) (a) and 249 (2) (a). Such legislation would include vesting in the President or other trustworthy authority or body or person the power or function to establish one or other public office, and to do so, with or without statutory conditions as may be enacted.

Fifth, the Court readily returns that there is nothing established that is unconstitutional in the establishment and functions of the State Corporations Advisory Committee under sections 26 and 27 of the State Corporations Act. In particular the Committee’s functions are advisory and section 27 (c) provides thus, “**where necessary, advise on the appointment, removal or transfer of officers and staff of state corporations, the secondment of public officers to state corporations and the terms and conditions of any appointment, removal, transfer or secondment;**” The Court has already returned that under Article 234(2) (a) the Commission’s function and power to appoint can be subject to legislation. The Court finds that section 27 (c) of the Act in so far as vests an advisory function in the Committee does not take away anything from the powers and functions of the Commission and even if it had taken away something, the same would be within the permissible Parliament’s authority to so enact as envisaged in Article 234(2) (a).

While making that finding, the Court returns that Article 234(2) (a) recognises that the powers and functions vested in the Commission in that Article may progressively be vested in other trustworthy authorities to achieve responsive, efficient, effective, and ethical delivery of the functions. By the nature of the functions in Article 234(2) (a), it may be inefficient, ineffective and not responsive to the needs of the public service if the Commission were to undertake all such functions by itself across the vast public service. Thus the Article carefully allows the Parliament to legislate appropriately on the functions and powers thereunder in line with the emerging development and complexity of the new Republic but such legislation being strictly within the constitutionally provided values, principles and standards guiding and governing employment in the public service. Thus, by the tools of legislation and delegation, it is the Court’s opinion that the Public Service Commission would progressively and primarily undertake the constitutional roles of regulation and oversight of delivery of human resource functions in the public service rather than role of by itself undertaking the executive or administrative delivery of the human resource functions in the vast service. Accordingly, once building of confidence is achieved to the effect that others in the public service can be trusted to execute and administer the human resource functions and powers mentioned in Article 234(2) (a) at the standards and honesty just like the Commission would do within its constitutional reputation and character, by legislation and delegation, the execution and administration of such functions and powers would be left to the appropriate other players in the service towards achieving effective, efficient and responsive delivery of the human resource functions in the vast public service. The Commission would then concentrate on the delivery of its constitutional roles of regulating and oversight over the public service rather than the otherwise executing and administering of the human resource functions by itself and which the Court considers would be cumbersome, inefficient, ineffective, and not responsive when undertaken by the Commission itself away from the many state departments, ministries, agencies, state corporations and other public bodies. The Court therefore returns that one of the urgent and important national agenda of the new Republic is the nourishment and implementation of governance strategies and attitudes conducive for building such desired confidence, honesty and trust at appropriate levels in the state organs, departments, ministries, agencies, state corporations and other public bodies to have capacity to execute and administer their own human resource functions just like the Public Service Commission would do within its constitutional reputation and character. The Court is alert that the process may be achieved slowly and the Commission will have to continue, by itself, undertaking substantial work of administering and executing human resource functions while at the same time delivering on its regulatory and oversight roles falling within its constitutional functions and powers.

Sixth, the Court has already found that under Article 249 (2) (a) of the Constitution the Commission is subject only to the Constitution and the law. Further, Article 234(2) (a) of the Constitution provides that the Commission’s function and power to appoint is subject to legislation. The Court returns that section 6 (2) (a) of the Kenya Revenue Authority Act which provides that the Board of Directors of the KRA shall comprise, amongst other members, “**a chairman to be appointed by the President;**” and section 6 (2) (e) that provides that the Board shall as well comprise, amongst other members, “**six other persons appointed by the Minister by virtue of their knowledge and experience in accountancy, commerce, law, taxation, business administration or public administration;**” are not unconstitutional as they do not breach any constitutional provision and are capable of being implemented within the applicable constitutional tests and standards on public service employment.

Seventh, the Court holds that unless a petitioner shows or establishes the constitutional rule or provision a statutory provision breaches or violates, such statutory provision being capable of being implemented or applied within the relevant constitutional rule or provision cannot be declared null and void as being unconstitutional. Further where a statutory provision is clearly enacted pursuant to a constitutional provision and is not shown in its content to be inconsistent with any constitutional provision, even where the statutory provision has been applied in a given instance in violation of a given constitutional provision, it is the Court’s opinion that the statutory provision does not thereby become liable for a finding that it is unconstitutional. The Court’s opinion is that unconstitutional application of a statutory provision that is inherently or in its content not unconstitutional only renders the outcome or decision or process of the unconstitutional application as null and void - because only the ensuing outcome or decision or process is unconstitutional but such statutory provision remains lawful as it

cannot be rendered null and void.

In the present case the Court holds that the cited statutory provisions as enacted are in line with Articles 132(4), 249 (2) (a) and 234(2) (a) of the Constitution and their content is not inherently unconstitutional. As submitted for the respondents, the statutory provisions are in line with Article 132 (4) (a) which provides that the President may perform any other function provided for in the Constitution or in national legislation and, except as otherwise provided for in the Constitution, may establish an office in the public service in accordance with the recommendation of the Public Service Commission.

The Court 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.**”

Accordingly, to answer the 2nd issue for determination the Court returns that sections 7(3), 26 and 27(c) of the State Corporations Act (Cap. 446) and sections 6(2)(a) & (e) of the Kenya Revenue Authority Act (Cap.469) are not unconstitutional and therefore, they are not invalid, null and void. The sections as enacted are in line with Articles 132(4) (a), 234(2) (a), and 249 (2) (a) of the Constitution. The statutory provisions have not been shown to inherently contain unconstitutional content, they are capable of being constitutionally applied, and they are therefore not unconstitutional. The Court finds accordingly.

The 3rd issue for determination is whether the President and the Cabinet Secretary in making an appointment under sections 6(2) (a) and (e) respectively of the Kenya Revenue Authority Act (Cap.469) would be acting unconstitutionally because the section is unconstitutional for violation of constitutional provisions on public service appointments. The President is to appoint a chairperson and the Cabinet Secretary is to appoint six other members to the Board of KRA. The respondents have submitted that appointments as were made under section 7(3) of the State Corporations Act were in great national and public interest for a specific time. The petitioner submits that the action by the President under the section is subject to due process in recruitment as provided in Articles 232(1) (g), (h) and (i) on, subject to (h) and (i) fair competition and merit as the basis of appointments and promotions; representation of Kenya’s diverse Communities; and affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service of men and women, the members of all ethnic groups; and persons with disabilities. The petitioner further states that it is an appointment subject to Article 73 (2) (a) on selection on the basis of personal integrity, competence and suitability or election in free and fair election. The petitioner further submits that the appointment is subject to values and principles in Articles 10 and 232 generally such as on participation, transparency, and accountability.

The Court has already found that appointments pursuant to section 7(3) of the State Corporations Act such as the appointments in the present petition are on urgency basis and the section is invoked where a board of a state corporation has failed to carry out its functions in the national interest and in that case the Court finds that it exists as a remedial or emergency temporary measure rather than the norm. In so far as the 1st to 5th interested parties were so appointed pursuant to section 7(3) of the State Corporations Act and section 6(2) (a) and (e) respectively of the Kenya Revenue Authority Act (Cap.469), the appointments being for a period lapsing sometimes in October 2019, the Court returns that the appointments as made were well within the proper exercise of the presidential discretion as vested in the President under section 7(3) of the State Corporations Act and within the statutory conditions.

Outside the urgent remedial measures under section 7(3) of the State Corporations Act, the Court returns that normal appointments under section 6(2) (a) and (e) respectively of the Kenya Revenue Authority Act (Cap.469) must comply with the criteria for appointment as prescribed in Articles 232, 73, and 10 of the Constitution. The court upholds its opinion in **Robert Muriithi Ndegwa –Versus- Minister for Tourism, Petition No. 41 of 2012 at Nairobi**, where it stated thus, “**....Article 232 of the Constitution provides for the values and principles of public service to 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 paragraph (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 men and women; the members of all ethnic groups; and persons with disabilities.

Section 22 of the Public Officer Ethics Act, 2003 provides that public officers shall practice and promote the principle that public officers are selected on the basis of integrity, competence and suitability or elected in fair elections. Thus, by the Constitution and by statute, the standards for undertaking public employment have been determined. In the instant case, the petitioner was recruited competitively and it is not said that he lacks qualifications. The court holds that there would be no suitability or merit in public employment in event of presence of bribery, cronyism, nepotism, tribalism, and in absence of qualifications, competence, competition, integrity and respect for inclusion and diversity....”

While making that finding the Court returns that in so far as section 6(2) (a) and (e) respectively of the Kenya Revenue Authority Act (Cap.469) vests in the President and the Cabinet Secretary the power to appoint, the sections do not provide for the recruitment and selection criteria of the persons to be so appointed. The Court returns that the Public Service Commission Act, 2017 clearly provides for the applicable procedure and criteria.

The long title to the Public Service Commission Act, 2017 states thus, **“AN ACT of Parliament to make further provision as to the functions, powers and the administration of the Public Service Commission established under Article 233 of the Constitution; to give effect to Article 234 of the Constitution and for connected purposes.”** Under section 2 of the Act, "a public body" includes—

- a) any corporation, council, board, committee or other body which has power to act under and for purposes of any written law relating to the undertakings of a public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law;
- b) a corporation, the whole or a controlling majority of shares which are owned by a person or entity that is a public body by virtue of any of paragraph (a) of this definition;
- c) statutory public bodies; or
- d) any public body brought under the jurisdiction of the Commission by an Act of Parliament for a specified function to the extent of that function.

The Court observes that by reason of paragraph (b) of the definition even where a state corporation is established under the Companies Act, the criterion for applying the Public Service Commission Act is clearly spelt out.

Thus the Court returns that KRA and the Board of KRA are clearly covered under the Act. For avoidance of doubt, section 3 of the Act on scope and application provides thus, **“Subject to Articles 155(3) (a), 158(3) , 234(2)(a), 234(3) and 252(1) of the Constitution and section 28 of the Kenya Defence Forces Act, this Act shall apply to all public bodies and persons holding office in the public service.”** The mentioned constitutional and statutory provisions relate to offices specifically removed from the Commission’s functions or powers and Article 234(2) (a) is specifically mentioned and the Court returns that if legislation had provided for the specific or special recruitment and selection criteria for the chairman and members under section 6(2) (a) and (e) respectively of the Kenya Revenue Authority Act, then the Public Service Commission Act would not apply. However no such special or specific recruitment and selection criterion that meets the constitutional parameters has been established or enacted and to that extent, the Public Service Commission Act, 2017 criteria applies.

Section 36 (1) of the Public Service Commission Act, 2017 on criteria for appointments provides that in selecting candidates for appointment or promotions, the Commission or other lawful appointing authority (such as the President and the Cabinet Secretary in the instant case) shall have regard to —

- a) merit, equity, aptitude and suitability;
- b) the prescribed qualifications for holding in the office;
- c) the efficiency of the public service;
- d) the provable experience and demonstrable milestones attained by the candidate; and
- e) the personal integrity of the candidate.

Section 36 (2) of the Act provides that for the purposes of the section, "merit" in regard to a person means, the person—

- a) has the abilities, aptitude, skills, qualifications, knowledge, experience and personal qualities relevant to the carrying out of the duties in question;
- b) has potential for development; and
- c) meets the criteria set out in subsection 36 (1).

Section 37 of the Act makes advertisement of vacancies as mandatory step in filling vacancies in the public service. The section provides that advertisement of the vacancy shall be in the Commission's website, at least one daily newspaper of nationwide coverage, the radio and other

modes of communication, so as to reach as wide a population of potential applicants as possible. The advertisement shall not discriminate against any person and shall ensure that the applicants, including persons who for any reason have been or may be disadvantaged, have an equal opportunity to apply for the advertised positions. The section further provides that an advertisement inviting applications to fill any vacancy in a public office shall provide for —

- a) the title and rank of the public office;
- b) the public body in which the office is tenable;
- c) the background and context of the work, where necessary;
- d) the terms of employment;
- e) the applicable remuneration including salary, allowances and other benefits;
- f) the prescribed qualifications applicable, including any desired previous achievements;
- g) the core duties of the office;
- h) the expected deliverables of the office;
- i) the supervision, accountability and reporting arrangements;
- j) any added advantage applicable;
- k) the mode and deadline of transmitting the application;
- l) any consideration that may occasion disqualification; and
- m) any consideration of equity or affirmative action.

To answer the 3rd issue for determination, the Court considers that until Parliament enacts specific recruitment and appointment procedure, the provisions of the Public Service Commission Act, 2017 on criteria for appointments and advertisement of vacancies shall apply to normal appointments made under section 6(2) (a) and (e) respectively of the Kenya Revenue Authority Act (Cap.469) – because except for the urgent remedial appointments pursuant to section 7(3) of the State Corporations Act, the Court returns that normal appointments under section 6(2) (a) and (e) respectively of the Kenya Revenue Authority Act (Cap.469) must comply with the criteria for appointment as prescribed in Articles 232, 73, and 10 of the Constitution. The Court further considers that for temporary and remedial appointments by the President, like in the instant case, as made under sections 6(2) (a) and (e) respectively of the Kenya Revenue Authority Act (Cap.469) and pursuant to section 7(3) of the State Corporations Act, they are not unconstitutional for want of competitive recruitment and selection as such appointments are clearly vested in the President’s discretion by the statute and in the specific statutory circumstance.

While making the foregoing findings, the Court upholds the petitioner’s submission that sections 6(2) (a) and (e) respectively of the Kenya Revenue Authority Act (Cap.469) being enacted prior to 27.08.2010 (the effective date of the Constitution of Kenya 2010) the sections must be construed as subject to section 7(1) of the 6th Schedule to the Constitution which provides, “**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.**” Thus the exercise of the power to appoint by the President and the Cabinet secretary under sections 6(2) (a) and (e) respectively of the Kenya Revenue Authority Act must be construed as exercisable in accordance with the values and principles as well as the other constitutional tests provided for in Articles 10, 73, and 232 of the Constitution.

Further as submitted for the petitioner, this Court in **Richard Bwogo Birir –Versus- Narok County Government & 2 Others [2014]eKLR** held that the pleasure doctrine did not apply in the new Republic under the Constitution of Kenya, 2010 and the same was upheld by the Court of Appeal in **Narok County Government & Another –Versus- Richard Bwogo Birir & Another [2015]eKLR**. The Court held that in the new Republic public service by public and state officers is guided by the doctrine of the servants of the people and the doctrine of due process and not the doctrine of the servants of the crown and the pleasure doctrine. The Court adds that in matters of appointment or election to public office, the string that flows through the Constitution entails the application of the constitutional values, principles and standards such as the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalised; good governance, integrity, transparency and accountability; sustainable development; selection on the basis of personal integrity, competence and suitability, or election in free and fair elections; honesty in the execution of public duties; the declaration of any personal interest that may conflict with public duties; accountability to the public for decisions and actions; efficient, effective and economic use of resources; accountability for administrative acts; fair competition and merit as the basis of appointments and promotions; representation of Kenya’s diverse communities; and affording adequate and equal opportunities for appointment, training and advancement at all levels of the public service of men and women, the members of all ethnic groups, and persons with disabilities. The principles, values and tests are set out clearly in the Constitution including in Articles 10, 73 and 232.

The Court reckons that the values, principles and standards have been applied in the election of the President, the Deputy President, the Governors and Deputy Governors, the Senators and the Members of the National Assembly, and the Members of the County Assemblies. They have been applied in the appointment of Principal Secretaries, Judges, Members of Constitutional Commissions and Independent Offices and other state and public officers. The Court holds that there is no established constitutional reason, basis or other legitimate cause

that the same constitutional values, principles and tests for public service appointments should not be applied to the appointment of chairpersons and members of the boards of state corporations and other public bodies as may be established in written law or various statutes.

The petitioner's concerns and which the Court has found to be effectively addressed by the Constitution of Kenya 2010 on appointment of chairpersons and members of the boards of state corporations were earlier considered in the **Report of the Public Service Structure and Remuneration Commission of 1970 – 1971** well known as the **Ndegwa Commission Report, 1971** – the Commission having been appointed by the President under the Commissions of Inquiry Act, Cap. 102. The **Ndegwa Commission Report, 1971 at Page 279 to 294** made specific recommendations on appointment of chairpersons and members of the boards of state corporations as follows. First, as far as possible appointments of chairmen and directors of boards should be made on the basis of ability, judgment, experience and integrity. Second, that step should be taken to minimize patronage in appointment of chairmen, directors, chief executives and staff of boards so that greater attention is paid to qualifications, experience and ability. However, while making the recommendations, the Court observes that the Report did not address the scope and nature of legislative enactments or interventions that would be necessary so as to effectively achieve the desired outcomes as was recommended in the Report. The Court holds that the cited constitutional provisions and the relevant provisions of the Public Service Commission Act, 2017, as found in this judgment to apply, aim at achieving the recommendations in the **Ndegwa Commission Report, 1971** and which are equally the petitioner's concerns in the present petition.

The Court has as well informed itself about the provisions of **Mwongozo, the Code of Governance for State Corporations** issued jointly by the Public Service Commission and the State Corporations Advisory Committee in January, 2015. In the introduction the Code stated thus, **“This code of Governance is anchored on the Constitution of Kenya, 2010. Article 10 of the Constitution entrenches national values and principles of governance while Article 73 places emphasis on public trust, honor and dignity of public offices. Personal integrity, and values and principles of public service are reinforced in Article 232, which also provides for efficiency, effectiveness and economic use of resources. The Code takes into consideration Chapter Six of the Constitution on Leadership and Integrity as well as the Public Officers and Ethics Act, 2003.”** Chapter 1 of the Code is on the Board of Directors and the governance statement is stated thus, **“To achieve its strategic objectives, the organization should be led by an effective Board. The Board should be composed of competent, diverse, and qualified members capable of exercising objective and independent judgment. The Board should have appropriate autonomy and authority to exercise its functions and should be accountable to shareholders and act responsibly towards stakeholders.”** One of the governance principles on the Boards is that the composition and size of the Board should provide a diversity of gender, competencies, and skills required for the effective leadership of the organization. Some of the governance practices on the appointment, composition and size of the Board of Directors for a state corporation as provided for in the Code and as relates to the present dispute include:

- a) Board appointments shall be made in line with Article 27 of the Constitution of Kenya.
- b) The Board should be appointed through a transparent and formal process governed by the overriding principle of merit.
- c) The Board membership of all state corporations shall be between seven and nine members.
- d) The chief executive officer shall be a Board member with no voting rights.
- e) Board appointments should take into consideration the mix of skills and competencies required for the achievement of the organization's long-term goals.
- f) The appointing authority shall ensure that any person appointed to the Board of a state corporation satisfies the fit and proper requirements.
- g) The Board may recommend the removal of a member based on non-performance, non-attendance of meetings, unethical conduct or as set out in any constitutive documents or applicable law.
- h) The chairpersons of all state corporations shall be appointed by the President and shall at minimum possess the qualifications, skills and experience set out in Attachment 1.
- i) The Board members of state corporations shall be appointed by the Cabinet Secretary of the parent ministry and shall at minimum possess the qualifications, skills and experience set out in Attachment 1.
- j) At least one third of the Board members shall be independent upon appointment and maintain their independence during their term of service on the Board.

In view of the provisions of the Code or “**Mwongozo**”, the Court considers that the respondents have held fears and concerns which are substantially similar to those raised by the petitioner about the appointment of chairpersons and members of Boards of state corporations and the Code demonstrates the respondents' aspiration and desire that the appointments should accord to the constitutional values, principles and standards. The Court holds that it is imperative and obligatory that the constitutional values, principles and standards apply to the appointment of the chairpersons and members if the aspirations of the quality of the Boards and the respective chairpersons and members as expressed in the Code are to be achieved.

To answer the 4th issue for determination, the Court returns that as submitted for the respondent, a gazette notice (like the ones in issue in the present petition) are a public information published to notify the public the matters contained in the gazette notice and as was held in **Hassan Ali Joho –Versus- Suleiman Said Shahbai and 2 Others [2014]2KLR**, and in **Mumo Matemu –Versus- Trusted Society of Human Rights Alliance & 5Others [2014]eKLR**, the gazette notice serves as a notification to the public and the gazette notice does not constitute the instrument of the decision as notified in the gazette notice. Thus as urged for the petitioner the appointments by the President herein were such decisions by the President as contemplated in Article 135 of the Constitution required to be in writing and to bear the seal and signature

of the President. The Court finds that the gazette notices herein do not constitute the President's instrument for appointment of the 1st to 5th interested parties and therefore there was no material before the Court to be considered by the Court towards a finding on whether such instrument of appointment complied or failed to comply with Article 135 of the Constitution. The Court considers that the appointments having taken effect and there being no other material on the instruments of the appointments in issue in the present petition, the logical and reasonable presumption on a balance of probabilities is that the instruments of the respective appointments must have complied with Article 135 of the Constitution.

The 5th issue for determination is whether the retroactive appointments offended the law. The petitioner has not identified a provision of law that would bar retroactive appointments. The petitioner pleaded and submitted about his apprehension of the effect of the retroactive appointment and alleged that the effect was to nullify decisions of the Board of KRA made prior to revocation of the appointments of the chairman and members of the Board of KRA in issue. The petitioner pleaded that the decisions of the Board affected included the decisions on the lapsing tenure of the KRA Commissioner General. The Court finds that there was no evidence about the decisions that may have been affected by the retroactive appointments and the dispute in issue was not about the effect of the revocations and appointments on the decisions made in that process of changing the chairperson and some members of the Board of KRA. Section 35 of the Public Service Commission Act, 2017 provides, "**The effective date of appointment, acting appointment, promotion or re-designation shall be the date of the decision to appoint, promote or re-designate or such date as the Commission or authorised officer may determine.**" The Court returns that the principle as enacted applies and there is no basis to find that the retroactive appointments were unlawful.

To answer the 6th issue for determination the Court has considered the parties' respective margins of success including on the preliminary objections and the Court returns that the respondents will jointly or severally pay 50% of the petitioner's costs of the proceedings and the other parties shall bear own costs of the proceedings.

In conclusion, judgment is hereby entered on the preliminary objections and the petition for:

- a) Dismissal of the preliminary objections filed for the respondents.
- b) The declaration that sections 7(3), 26 and 27(c) of the State Corporations Act (Cap. 446) and section 6(2)(a) & (e) of the Kenya Revenue Authority Act (Cap.469) are not unconstitutional and therefore, they are not invalid, null and void because the sections as enacted are in line with Articles 132(4) (a), 234(2) (a), and 249 (2) (a) of the Constitution of Kenya 2010, they have not been shown to inherently be unconstitutional in their content and they are capable of being constitutionally applied or implemented.
- c) A declaration that normal appointments (meaning appointments not being pursuant to section 7(3) of the State Corporations Act) made under section 6(2) (a) and (e) respectively of the Kenya Revenue Authority Act (Cap.469) shall comply with the criteria for appointment as prescribed in Articles 232, 73, and 10 of the Constitution and for that purpose, unless the Parliament enacts specific procedures for open, competitive, transparent, inclusive, accountable and meritorious recruitment and appointment to boards of state corporations, the provisions of the Public Service Commission Act, 2017 on criteria for appointments and advertisement of vacancies shall apply to the normal or regular appointments made to boards of state corporations such as those that may be made under section 6(2) (a) and (e) respectively of the Kenya Revenue Authority Act (Cap.469).
- d) A declaration that the appointment of the 1st, 2nd, 3rd, 4th and 5th interested parties herein to the Board of the Kenya Revenue Authority was lawful because they were temporary and remedial appointments by the President under sections 6(2) (a) and (e) respectively of the Kenya Revenue Authority Act (Cap.469) made pursuant to section 7(3) of the State Corporations Act and therefore they were not unconstitutional for want of advertisement and competitive recruitment and selection as making of such remedial appointments was clearly vested in the President's discretion by the statute and in the specific statutory remedial circumstances.
- e) The respondents to jointly or severally pay the petitioner's 50% costs of the proceedings herein and the other parties to bear own costs of the proceedings accordingly.

Signed, dated and delivered in court at Nairobi this Friday 14th June, 2019.

BYRAM ONGAYA

JUDGE