



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION 162 OF 2019

(Consolidated with Petition No.176 of 2019)

(Before Hon. Lady Justice Hellen S. Wasilwa on 14th November, 2019)

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

THE SELECTION PANEL FOR

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE NATIONAL EXECUTIVE.....2ND RESPONDENT

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

THE SPEAKER OF THE NATIONAL ASSEMBLY.....4TH RESPONDENT

AND

GERSHOM OTACHI BW'OMANWA.....1ST INTERESTED PARTY

ALISTER MURIMI MUTUGI.....2ND INTERESTED PARTY

JAMES K. TUITOEK3RD INTERESTED PARTY

GETRUDE NDUKU NGUKU.....4TH INTERESTED PARTY

REGINALD OKUMU.....5TH INTERESTED PARTY

SAMUEL KAZUNGU KAMBI.....6TH INTERESTED PARTY

HUBBIE HUSSEIN AL-HAJI.....7TH INTERESTED PARTY

ESTERH MURUGI MATHENGE.....8TH INTERESTED PARTY

TIYA GALGALO.....9TH INTERESTED PARTY

KATIBA INSTITUTE (KI).....10TH INTERESTED PARTY

KENYA LAND ALLIANCE.....11TH INTERESTED PARTY

JUDGEMENT

1. This petition was initially filed in this court as Petition 162 of 2019. Another petition had previously been filed before the High Court as Petition 344 of 2019, which was later transferred to this court and renamed Petition 176 of 2019. Pursuant to this court's orders of 15th October 2019 the two petitions were henceforth consolidated under petition 162 of 2019 as the lead file.

2. Pursuant to the court orders issued on 24th September 2019, the 1st Petitioner, Okiya Omtatah Okoiti filed an Amended Petition on 30th September 2019 alleging violation of **Articles 3(1), 10, 19, 20(1), 27, 41(1), 47, 73, 129, 232, 250(2)(a) and (4) and 259(1) of the Constitution.**

3. The 1st Petitioner avers that the 2nd Respondent being the National Executive, endorsed the faulty recruitment exercise and failed to uphold regional and ethnic balance in nominating the 1st – 9th interested parties to be approved for vacancies at the National Land Commission (hereunder referred as NLC).

4. He avers that the 1st Respondent did not have capacity to recruit the chairperson and members of the NLC because it was improperly constituted by the President as there was no nomination of persons under Paragraph 1 (d) of the First Schedule to the National Land Commission Act.

5. The 2nd Petitioner, Anthony Otiende Otiende filed his Petition on 30th August 2019. He also filed an Affidavit sworn on 22nd October 2019, in support of the Amended Petition. In his Petition, he challenges the process, constitutionality and legality of the selection of the 1st and 2nd interested parties, being the 8th and 9th interested parties in the consolidated petition respectively.

6. He contends that the 1st Respondent's actions infringed on the constitutional rights of the members of the public, violated the rule of law and the principles of democracy, public participation, good governance, integrity, transparency, accountability, and public service as envisaged in the Constitution.

7. The Petitioners aver that the Selection of the Nominees to the NLC by the 1st Respondent was conducted in an opaque manner. In particular-

1. The 1st Respondent did not publish the results of the interviews, indicating how the candidates had scored at the interviews.

2. The 1st Respondent did not publish the names of the two (2) candidates it recommended to H.E. the President for appointment as Chairperson of the National Land Commission.

3. The 1st Respondent did not publish the names of the 16 candidates it recommended to H.E. the President for appointment as Member of the National Land Commission.

8. The Petitioners aver that the President appointed the 8th and 9th interested parties to be members of the commission yet they were never shortlisted or interviewed for the position of member. They aver that the aforementioned interested parties were shortlisted and interviewed for the position of chairperson but were unsuccessful. They further aver that the process of recruitment for the two positions was separate and distinct.

9. The Petitioners are of the position that it is unconstitutional and un-procedural for the President or the 1st Respondent to substitute the interested parties to the position of members after being unsuccessful in their quest for the position of the chairperson to the NLC.

10. The 1st Petitioner avers that the decision by the President nominating the 8th and 9th Interested Parties was contrary to Articles 10 (2) (c), 35 (3), 47(1) and 232 (1) (f) of the Constitution of Kenya.

11. It is further contended that failure by the 1st Respondent to publish all relevant facts including individual scores of each nominee was an infringement to the provision of Section 5 of the Access to Information Act, 2016 which requires the state to publish all relevant facts when formulating important policies or announcing decisions which affect the public.

12. The 1st Petitioner further contended that failure to publish the results of the interviews diminished the quality of public participation and stakeholder consultation held on the process.

13. It is further averred that the President's decision to endorse the flawed recruitment process without crosschecking whether or not it complied with the Constitution and the relevant statutes violates the provisions of Article 129, 131 (2) (a), 132 (1) (c) and 132 (e) of the Constitution of Kenya, 2010 as well as His Oath of office.

14. As regards regional balance, the 1st Petitioner avers that the President violated Articles 131 (2) (d) and 232 (1) (h) of the Constitution of Kenya, 2010.

15. The 2nd Petitioner avers that the nomination of the 8th and 9th interested parties contravened the provisions of the Constitution and statute. He contends that the nomination was conducted discriminatively and without transparency, openness and accountability; thereby locking out eligible members of the public who were qualified, had applied and were shortlisted for the position of member.

16. The 2nd Petitioner further avers that the 8th interested party's name in the list of applicants multiple times, was deliberate and intended to

confer on her an unfair and unjust advantage over other applicants from the shortlisting stage to the subsequent appointment as chairperson and members.

17. The 1st Petitioner seeks the following prayers that:

I) The Honourable Court be pleased to determine the following QUESTIONS:-

A. Whether the President's failure to appoint members of the Selection Panel under paragraph I (d) of the First Schedule to the NLC Act rendered the Panel incompetent.

B. Whether because the Selection Panel was incompetent, the entire recruitment and appointment process it undertook was invalid, null and void ab initio.

C. Whether the failure to publish the results of the interviews was fatal to the recruitment and appointment exercise?

D. Whether the failure to publish the names of successful candidates forwarded to H. E. the President for nomination was fatal to the recruitment and appointment exercise?

E. Whether the list of persons nominated to be appointed to the position of Member does not reflect regional balance?

F. Whether the nomination of the 8th and 9th interested parties for appointment to the position of Member is unconstitutional and, therefore, invalid, null and void ab initio?

G. Whether the respondents should be compelled to pay costs of these proceedings filed in the public interest?

II) The Honourable Court be pleased to make the following DECLARATIONS and issue the following ORDERS:-

a) THAT a declaration is hereby issued that the President's failure to appoint members of the Selection Panel under paragraph 1(d) of the First Schedule to the NLC Act rendered the Panel and the entire recruitment and appointment process invalid, null and void ab initio.

b) THAT a declaration is hereby issued that the failure to publish the results of the interviews was fatal to the recruitment and appointment exercise.

c) THAT a declaration is hereby issued that the failure to publish the names of successful candidates forwarded to H. E. the President for nomination was fatal to the recruitment and appointment exercise.

d) THAT a declaration is hereby issued that the list of persons nominated and appointed to the position of Member does not reflect regional balance.

e) THAT a declaration is hereby issued that the nomination and appointment of the 8th and 9th interested parties for appointment to the position of Member is unconstitutional and, therefore, invalid, null and void ab initio.

f) THAT the Honourable Court be pleased to issue and hereby issues an order quashing Gazette Notice No. 3758 of 23rd April, 2019 published in Nairobi on 26th July 2019 in the regular issue of The Kenya Gazette Vol. CXXI-No. 50.

g) THAT the Honourable Court be pleased to issue and hereby issues an order quashing the nomination and/or the appointment of the 1st interested party for appointment to the position of the Chairperson, and of the 2nd to 9th interested parties to the position of Member of the National Land Commission.

h) THAT the Honourable Court be pleased to issue and hereby issues an order quashing the report of the National Assembly's Departmental Committee on Land on the nominees for appointment to the positions of Chairperson and of Member of the National Land Commission.

i) THAT the Honourable Court be pleased to order the respondents to pay the costs of this Petition.

j) THAT the Honourable Court be pleased to issue any other or further remedy that the Honourable Court shall deem fit to grant.

18. The 2nd Petitioner seeks the following Orders:-

a) A declaration be and is hereby issued that the selection and nomination of the 1st and 2nd Interested parties as members of the National Land Commission is unconstitutional, invalid, null and void.

b) A declaration that within the intendment of Article 10, 27, 73 and 232 of the Constitution, any nomination/appointment of members to the National Land Commission be preceded by an open, transparent process that takes into account diversity, merit and

fair competition.

c) A permanent injunction does issue prohibiting the President, sued through the 2nd Respondent and his agents or assignees from appointing or gazetting the 1st and 2nd Interested Parties as members of the National Land Commission. By extension, the 1st and 2nd Interested Parties be and are hereby prohibited from taking oath as members of the National Land Commission arising from the impugned selection and nomination.

d) An order do issue invalidating the selection and nomination of the 1st and 2nd Interested Parties, as the case may be, as members of the National Land Commission.

e) Costs of this Petition.

f) Such orders and directions as this Honourable Court may deem fit, just and appropriate to grant in the circumstances.

19. The Amended Petition is supported by the Supporting Affidavit of the 1st Petitioner sworn on 25th September 2019 which reiterates the averments made in the amended petition and further seeks to rely on the documents annexed to the original petition dated 28th August 2019.

1st, 2nd and 3rd Respondent's Case

20. The 1st Respondent opposed the 2nd Petitioner's petition through the Affidavit of Hon. Priscilla Nyokabi Kanyua sworn on 1st September 2019. The Affiant avers that the members of the 1st Respondent were duly appointed by the President vide Gazette Notice 3758 of 26th April 2019. The Applicant further avers that applications were invited from interested persons through print media, the Public Service Commission website and my MYGov website on 4th and 11th June 2019.

21. The 8th and 9th interested parties were shortlisted for the position of chairperson and member. Thereafter, the 1st Respondent considered who was more suitable based on integrity, competence, suitability and public service. The 1st Respondent's contends that both parties had applied for the position of chairperson and member.

22. It is their position that in interviewing the 8th and 9th interested parties, the 1st Respondent acted within the provisions of the First Schedule of the National Land Commission Act which allowed the 1st Respondent to determine the procedure for conducting interviews and selection thereafter.

23. The affiant avers that the 1st Respondent also interviewed the 8th and 9th interested parties for the position of member since they were qualified for both positions, so as to save time and ensure there is no duplicity of work.

24. The affiant avers that the advertisements were clear that interested applicants could apply and be interviewed for both positions. It is her position that the process of appointment of the chairperson and member as under sections 7 and 8 of the NLC Act as read together with the First Schedule, does not portray a distinct process. Further, Section 8 requires applicants for both positions to possess the same qualifications save for experience, 15 years for the chairperson and 10 years for the members.

25. It is the affiant's averment that during the interview for the position of chairperson, the 8th and 9th interested parties were also interviewed for the position of member. It is her view that since the latter position was inferior to the former, the selection panel did not find any prejudice that would be occasioned to the other applicants or the wider public.

26. Additionally, by being shortlisted to be interviewed for the position of chairperson, the 8th and 9th interested parties automatically qualified to be shortlisted and interviewed for the position of member. After concluding the interview process, the affiant wrote a letter on behalf of the 1st Respondent, submitting the names of the successful candidates to the President.

27. It is the 1st Respondent's position that in appointing the members of the NLC, the President was exercising his executory powers and statutory mandate and had the discretion to decide who to appoint from the list that had been forwarded to him. As such, this Court lacks the jurisdiction to question the exercise of such discretion.

28. It is their further position that the 2nd Petitioner has not demonstrated that the appointment process was non-compliant with the Constitution and statute, or that the qualifications of the 8th and 9th interested parties do not meet the requirements in the Constitution or the Act. They contend that the entire process was open and transparent and that no applicant was condemned unheard.

29. The affiant avers that the 1st Respondent complied with the provisions of article 232 of the Constitution. She is of the view that since the Petitioners have not provided evidence on the composition of other commissions and independent offices, this Court cannot interrogate the 1st Respondent's compliance with Article 232. It is her position that this Court has previously held that the courts should not be swayed into making assumptions on ethnic and regional origins of nominees based on their names, which would be tantamount to negative ethnicity.

30. The 1st Respondent posits that the Petitioners have not made a case for the granting of the conservatory orders. Further, the granting of such orders will delay the impugned appointments thus hampering the delivery of services to the public and the government as regards the land sector such as allocation and allotment of public land, extension of leases, vesting and securing of public land.

31. The 2nd Respondent opposed Petition 176 of 2019 vide the Replying Affidavit of Dr. Nicholas Muraguri sworn on 17th September 2019.

The Affiant avers that the 2nd Petitioner has not demonstrated how the selection process breached his rights under the Constitution and the NLC Act.

32. He further avers that the purpose of the processes preceding the appointment is to accord the selection panel the opportunity to interact with the interviewees so as to ascertain whether they qualify to be appointed. This avoids duplicate interview sessions. It is his position that the qualifications of the 8th and 9th interested parties met the requirements of the Constitution and the NLC Act.

33. The 2nd Respondent's position is that granting the 2nd Petitioner the orders prayed will delay delivery of services and government projects which solely rely on compulsory acquisition, a function bestowed upon the NLC; which have not taken place since 20th February 2019 when the term of the previous commission came to an end.

4th Respondent's case

34. In response to the Amended Petition 162 of 2019 and Petition 176 of 2019, the 4th Respondent filed a Replying Affidavit sworn by Michael Sialai the Clerk of the National Assembly on 9th October, 2019.

35. He deposes that pursuant to sections 3 and 5 of the Public Appointments (Parliamentary Approval) Act and the letter dated 15th August, 2019, Head of Public Service, on behalf of His Excellency the President, forwarded to the Speaker of the National Assembly names of the 1st - 9th Interested Parties for approval as Chairperson and members of the National Land Commission, (NLC).

36. He deposes that he then invited the Lands Committee to hold approval hearings as required under section 6 (1) of the Public Appointments (Parliamentary Approval) Act. That on 12th September, 2019 he notified the public of the approval hearing and required them to submit their memoranda on the suitability of nominees by 18th September, 2019. Further, that on even day he invited the nominees by way of advertisement in two local dailies and their individual letters to the approval hearings indicating the time and place of the approval hearing.

37. He avers that on 12th September 2019, he wrote to the Ethics and Anti-Corruption Commission (EACC), Kenya Revenue Authority (KRA), Director of Criminal Investigations (DCI) and Higher Education Loans Board (HELB) requesting these bodies for reports with respect to the nominees' ethics and integrity, tax compliance, criminal records and high education loan repayment.

38. He states that the EACC in its letter dated 17th September, 2019 stated that it had not undertaken any investigation where the nominees had been found culpable. That with respect to tax compliance, KRA in its letter dated 17th September, 2019 confirmed that the nominees were tax compliance save for Mr. Gershom Otachi Bw'Omanwa and Hon. Tiyah Galgalo Ali, the 1st and 9th interested parties.

39. He deposes that on 20th September, 2019 the Lands Committee held a meeting with the Commissioner General KRA who clarified that the Tax Compliance Certificate issued to Mr. Gershom Otachi Bw'Omanwa was valid and was due to expire on 11th June 2020. That there was a payment delay on an instalment which made him non-compliant but he paid the full outstanding tax on 19th June, 2019 therefore making him tax compliant.

40. He states that the Commissioner General informed that the Committee that the 9th interested party had been issued with a Tax Compliance Certificate on 23rd October, 2018 which she had applied for on 18th September, 2019 after filing a nil return indicating that she had not earned any taxable income for the period under review.

41. That the said nominee was required to explain why she filed nil returns and on 19th September, 2019 she amended her returns to include her earnings from the Parliamentary Service Commission and the County Government of Isiolo for the year 2017 and 2018. The Commissioner General informed the Committee that investigations were being done to ascertain the circumstances under which the Tax Compliance Certificate held by the nominee was issued yet she had not met conditions of issuance. He undertook to report to the Committee on 25th September, 2019.

42. He avers that the DCI in his letter dated 18th September 2018 confirmed that all nominees had been issued with clearance certificates save for Prof. James K. Tuitoek and Gertrude Nduku Nguku. The 3rd and 4th interested party whose certificates had expired. He stated that the two made fresh applications for forensic analysis and were issued with clearance certificates dated 24th September, 2019.

43. He states that HELB in its letter dated 13th September 2019 stated that the nominees had no outstanding loan with the Board while the Registrar of Political Parties in a letter dated 16th September 2019 stated that the all nominees are not officials of a registered political party.

44. He avers that by separate letters, the Committee invited the Petitioners, the Mr. Omtatah and Mr. Otiende, the Petitioners herein, to appear before the Committee on 11th September 2019. He contends that Mr. Otiende declined to appear before the Lands Committee to make his submissions during its sitting held on 17th September, 2019 despite being invited to do so by stating that the reliefs he sought before the High Court were incapable of being granted by the Committee or the National Assembly.

45. He avers that by 17th September, 2019 the Committee had received several memoranda contesting the nominations of some of the nominees. He contends that there was no memoranda contesting the nomination of Gershom Otachi Bw'Omanwa, Gertrude Nduku Nguku, Reginald Okumu, Alister Murimi Mutugi and Hubbie Hussien Al- Haji. He further contends that the Committee considered the responses of the nominees to the memoranda when they appeared before the committee.

46. He contends that Mr. Omtatah submitted his Affidavit sworn on 18th September 2019 in which he alleged that the Selection Panel's

process of nomination was opaque and that the nomination of the 8th and 9th interested parties as members of the NLC was invalid as they were never shortlisted and interviewed for the position of members but were shortlisted and interviewed for the position of chairperson of the NLC.

47. He avers that the Lands Committee analysed the memorandum and observed that the 1st Petitioner herein had raised issues for its consideration under section 7 of the Public Appointments (Parliamentary Approval) Act.

48. He avers that the Lands Committee resolved to request for a copy of the “Report of the Selection Panel on the Selection of all the Nominees to the NLC” in order to examine whether the procedure laid out in the National Land Commission Act were followed.

49. It is his case that the Committee observed that the procedure used to arrive at the nominees was construed from the time the Selection Panel was constituted, the way the selection process was undertaken and the subsequent nomination of the nominees.

50. He states that with respect to the allegation that the Selection Panel was not properly constituted, for reason that two nominees from the Non-Governmental Organizations Council had not been appointed by the President, the Committee made reference to letters dated 18th October 2018 and 30th October 2018 being correspondence between the Head of Public Service, Mr. Joseph Kinyua and the Chairperson of the Non- Governmental Organizations Co-ordination’s Board.

51. He states that Ms. Joyce Yiale on behalf of the Chairman of the Non- Governmental Organizations Coordination’s Board informed Mr. Joseph Kinyua that they were unable to nominate two persons required under paragraph 1 (d) of the First Schedule to the National Land Commission Act due to the fact that the Non- Governmental Organizations Council was still under leadership of different factions that had culminated into litigation.

52. He contends that the Committee observed that the absence of the persons under paragraph 1 (d) of the First Schedule of the National Land Commission Act was occasioned by the inability of the Council to nominate its nominees as required by the law. Therefore, the panel was properly constituted as the President had appointed the members of the said Selection Panel through Gazette Notice No. 3758 on 26th April 2019.

53. He states that the Committee observed that the Selection Panel did invite applications from persons wishing to be considered for appointment to the positions of chairperson and members of the National Land Commission as evidenced by advertisements placed in the print media, Public Service Commission and MyGov websites on 4th and 11th June 2019.

54. He states that the Selection Panel shortlisted 11 candidates for position of Chairperson and 50 for positions of member as evidenced in the shortlist and interview schedule available on the PSC website. That the Selection Panel observed that the names of the Applicants in the print media and PSC websites.

55. He contends that the Committee observed that the interviews were conducted at the Parliamentary Service Commission (PSC) and members of the public were invited to avail written information on the credibility of the nominees the Chairperson of the Selection Panel as evidenced in the information contained in the shortlist and interview schedule published in the PSC website. He states that the Committee observed that the Selection Panel followed all procedures required in law to be undertaken in arriving at all the 9 nominees to the NLC.

56. He contends that the Committee examined the shortlist and interview schedule and confirmed that the 8th and 9th interested parties had been shortlisted in the category of the Chairperson.

57. It is his case that the Committee further observed that the 8th and 9th interested parties had applied for positions of Chairperson and Members of the NLC. He states that the Committee received a letter dated 21st June 2019 from the 8th interested party addressed to the Selection Panel applying for both positions of Chairperson and Member of NLC.

58. He further states that the 9th interested party in her two letters of application dated 1st July 2019 addressed to the Chairperson of the Selection Panel, applied for the positions of Chairperson and Member of NLC.

59. He states that the Committee did examine that during the approval hearing, the 8th and 9th interested parties submitted that they had been shortlisted for the position of Chairperson and that on the day they appeared before the Panel they were interviewed for the positions of both Chairperson and Member of the NLC.

60. He states that paragraph 13 of the First Schedule to the NLC Act provides that the committee may determine its own procedure thus as part of the procedure adopted, the 8th and 9th interested parties were interviewed for both positions.

61. He states that the Committee recommended the approval of the nomination of all other nominees but rejected the nomination of the 9th interested party as a Member of the NLC. However, 3 members of the Committee Hon. Yaa Baya, Hon. Teddy Mwambire and Hon. Omar Mwinyi rejected the nomination of Hon. Samwel Kazungu Kambi and prepared a minority report on the finding.

62. That the House debated the Special Motion convening the Land Report on 1st October, 2019 and during the debate Hon. Hassan Hulufu moved an amendment to the majority report for the rejection of Hon. Galgalo as a member of NLC. That Hon. Hulufu’s amendment arose after KRA in a letter dated 30th September 2019 confirming it had finalised its verification exercise and established that Hon. Galgalo had fulfilled her obligations. The House approved the amended Majority Report and rejected the Minority Report.

63. He states that the issues raised by the Petitioners could have been raised and considered by the Lands Committee as it is a relevant body mandated to undertake a merit review of the entire selection process against the criteria set out under the applicable laws.

64. He avers that this Court lacks jurisdiction to carry out a merit review of the approval process or to sit on appeal over the decision of the National Assembly or to substitute the decision of the National Assembly. It is his case that the National Assembly complied with the Constitution and the principles it espouses when it approved the appointment of the 1st to 9th Interested Parties.

65. He avers that the Petitioners do not stand to suffer prejudice if the conservatory orders are not granted since this Court has jurisdiction to quash the approval process should the court find it unconstitutional.

The 1st Petitioner's Rejoinder

66. The 1st Petitioner filed a 3rd Supplementary Affidavit sworn on 17th October 2019 in response to the 1st, 2nd, 3rd and 4th Respondents' Replying Affidavits. He disputed their Replying Affidavits contending that they lacked annexures demonstrating authority to swear the affidavits in a representative manner.

67. Additionally, in response to the averments in the Affidavit sworn on 7th October 2019 on behalf of the 1st, 2nd and 3rd Respondents, he contended that the First Schedule does not set out the quorum for the conduct of the 1st Respondent's business. In his view, where the law does not establish a quorum for conducting business of a body, the body's entire membership must sit to conduct valid business.

68. It was his averment that the Selection Panel invalidated its work when it presented to the President for nomination 3 instead of 2 shortlists of names provided for in law; the first set of two names under paragraph 4 (e) of the First Schedule to the NLC Act for the single position of Chairperson; the second set of 16 names under paragraph 4 (f) for the 8 positions of member; and the third set of 9 names under no provisions of the law, for appointment to both positions.

69. In response to the 4th Respondent's Replying Affidavit sworn on 9th October 2019, the 1st Petitioner contended that the vetting process was a sham as the Departmental Committee on Lands treated his and the public's submissions on the invalidity of the said recruitment and nomination process with utter contempt. He averred that he pointed out to the Committee that the 8th Interested Party did not apply for both positions but the Committee ignored him.

70. That the 4th Respondent did not consult the National Intelligence Service (NIS) and missed out on crucial information on the candidates such as the 8th Interested Party who has a pending Civil Case No. 2105 of 2010 which grossly affects his suitability to serve as a member of the NLC. That the fact the Departmental Committee went on to regularise the tax status of the 1st and 9th Interested Parties and the Police Clearance Certificates for the 3rd and 4th Interested Parties rendered the vetting process of the four illegal.

71. That no evidence has been adduced to demonstrate that the 2nd Respondent made an effort to reach out to the NGO Council averring that when the President was constituting the selection panel, the NGO Council was fully operational but no reason has been given why he did not consult them. He further averred that the NGO Council and the NGO Board are distinct bodies and neither body represents or acts on behalf of the other.

72. That in endorsing the failures of the 1st and 2nd Respondents, the National Assembly mocked the national values and principle of the rule of law. That under Article 162(2)(a) as read with 165(3)(d)(ii) and 5(b), this court has jurisdiction to determine whether anything said to be done under the authority of the Constitution or of any law is inconsistent with/ contravenes the Constitution.

Response by the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 11th Interested Parties

73. In response to the Petition filed herein the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 11th Interested Parties filed grounds of opposition setting out several grounds.

74. The interested parties contend that there was substantial compliance with both the letter and spirit of the Constitution of Kenya and other legislation and that no evidence has been availed by the Petitioner to support the assertion that the recruitment process as conducted by the selection process was opaque as alleged.

75. The interested parties further contend that there is no legal requirement for the publishing of results of the interviews as conducted by the selection panel. It is further the interested parties contention that the names of the short listed candidates were none the less published in various media of nation- wide circulation including print media, the Public Service Commission website and the MyGov Website. It is on this basis that the Interested Parties contend that the Petitioners' accusation that the Selection Panel violating Paragraph 4 (c) of the first schedule of the National Land Commission Act No. 5 of 2012 is based on a misrepresentation of the law, is misconceived and a fallacy.

76. The interested parties state that the Petitioners' assertion that the recruitment process for the position of Chairperson and Member are different is based on a misconception as the position for chairperson calls for essentially the same qualifications as those of Member with the only exception being the years of experience.

77. Further, that under Paragraph 4 (a) of the Fourth Schedule to the National Land Commission Act, provides that the members of the commission shall elect the vice chairperson of the commission from among themselves at the first sitting.

78. The interested parties therefore contended that conducting separate interviews for the position of Chairperson and Member of the Commission would be contrary to the sound practical judgment and well established Human Resource practice.

79. It is further the interested parties' contention that the recommendation as Member of the commission of a person shortlisted and interviewed for the position of chairperson is not whimsical or arbitrary and does not amount to procedurally unfair administrative action.

80. The interested parties' stated that the allegation that the National Executive failed to appoint persons nominated by the Non-Governmental Organizations Council to the Selection Panel is not founded in law as at the time the entire NGO Council was degazetted through Gazette Notice No. 2452 and no new council was in place at the said date.

81. The interested parties' further stated that the Petitioner has misconstrued to the extent that the required threshold under Article 250 (4) of the Constitution of Kenya, 2010 on the composition of the Commission. It is further contended that with only nine (9) vacancies it is impossible to achieve absolute ethnic diversity with at least 44 ethnic communities in the country. The Interested Parties therefore contended that there was no failure in recommending their names for appointment on this basis.

82. The interested parties' contend that there was no discrimination against any person as alleged by the petitioner. Further, that there is no evidence adduced to fault the president for the recommendations made to the National Assembly.

83. The interested parties' further contend that there is misjoinder of the 1st Respondent as it is not an entity capable of being sued as such in law. The Interested Parties further contend that the Petitioner lacks *locus standi* to present the instant Petition as he has failed to demonstrate or disclose the fundamental right or freedom that has allegedly been denied, violated, infringed or threatened in relation to him.

84. In conclusion, the interested parties' urged this Honourable Court to dismiss the instant Petition with Costs.

85. With regards to Petition 176 of 2019 the interested parties reiterated the averments made in their grounds of opposition to the petition filed in respect to Petition 162 of 2019.

86. In further response to the Petition the interested parties' contended that there were no integrity deficits whatsoever on account of the 2nd interested party appearing three times on the list of applicants.

87. It is further contended that the petitioner has not availed any evidence that indicates the omission gave the 2nd Interested Party an unfair and unjust advantage over the other applicants during shortlisting, interview and/or selection.

88. It is further contended that the Petitioner lacks *locus standi* to present the Petition as he has failed to demonstrate or disclose the fundamental right or freedom that has allegedly been denied, violated, infringed or threatened in relation to him and is hiding under the veil of Article 22 of the Constitution to abuse the process of the Court.

89. The interested parties similarly urged this Honourable Court to dismiss the Petition filed herein with costs.

Submissions by the Parties

Petitioners' Submissions

90. The Petitioners submitted that the consolidated Petitions meet the tests of bona fide public interest litigation since the Respondents have violated clear provisions of statute and the Constitution.

91. That public interest litigation is provided under **Articles 22 and 258 of the Constitution** vesting upon every person, *locus standi* to institute proceedings for the protection of rights and fundamental freedoms, as was affirmed in **Timothy Otuya Afubwa & another v County Government of Trans Nzoia & 3 others [2016] eKLR.**

92. The 2nd Petitioner submitted that **Article 23(3) of the Constitution** affords several reliefs to a party who asserts violation of any constitutional right or fundamental freedom pursuant to Article 22 of the Constitution.

93. The 2nd Petitioner submitted that this Court is constitutionally obliged to consider the Petition in accordance with the **Constitution, Section 5 of Access to Information Act** and **Section 8 of the NLC Act** together with the First Schedule thereto.

94. The 1st Petitioner submitted that the President did not make any appointments under **paragraph 1(d) of the First Schedule to the NLC Act** which provides for the mandatory appointment of *two persons of opposite gender, nominated by the NGO Council, who have demonstrated competence and capacity in matters related to natural resources*. That the panel was improperly constituted thus it is fatal to the whole recruitment and nomination process as it has no capacity to execute any functions. He cites the case of **Ethics and Anti-Corruption Commission –v- Nicholas Mwenda Mtwaruchiu & 8 others [2018] eKLR** where the court of appeal observed that the commission only had two members at the time it undertook the vetting exercise that terminated the petitioner's employment, and that it was not properly constituted with the requisite three members as under Article 250(1) of the Constitution.

95. The Appellate Court went on to hold that the vetting exercise by the 1st Respondent and any decision that arose therefrom was thus a nullity. The 1st Petitioner further relied on the decision in **Michael Sistu Mwaura Kamau v Ethics and Anti-Corruption Commission & 4 others [2017] eKLR** and **Charity Kaloki Ngilu v Ethics and Anti-Corruption Commission & 4 others [2017] eKLR.**

96. The 1st Petitioner also cited the case of **Republic v Complaints Commission, Media Council for Kenya & 2 others [2013] eKLR** where the Court held that without a chairperson, the commission could not be said to be validly in place or properly constituted.

97. He submitted that failure to constitute the selection panel made it impossible to validly elect a chairperson pursuant to **paragraph 2(a) of the First Schedule to the NLC Act**. That the provisions of **Section 53 of the Interpretation and General Provisions Act** are not applicable where a body is not properly constituted and that the section only comes into operation after the concerned body has been established. That **Articles 1, 2, 129 and 131(2) of the Constitution** also limit the exercise of executive power.

98. The 2nd Petitioner submitted that the appointment of chairperson and members of the NLC is guided by the Constitution, **Sections 7 and 8 of the NLC Act** and the procedure set out in the First Schedule of the Act; with the chairperson position prescribed under **paragraph 4(e)** and that of member under **paragraph 4(f)** of the said Schedule.

99. That in this case, the interviews of the shortlisted candidates were conducted in secrecy contrary to **paragraph 4(d)** which mandates that the same be done in public. That the Respondent forwarding names of the 8th and 9th interested parties as being qualified for positions for which they were not interviewed infringes **Articles 27(1) and (3) of the Constitution** on the right to equal benefits of the law and equal treatment politically, economically, culturally and socially. He relied on the case of **Consumer Federation of Kenya (COFEK) v Attorney General & 2 others [2012] eKLR** where the High Court cited with approval the case of **Community Advocacy and Awareness Trust & Others vs. Attorney General, Nairobi Petition 243 of 2011** where the Court stated that Article 10 sets out the values that must be infused in every decision making process including making appointments.

100. The 1st Petitioner submitted that the requirement to publish the results of interviews is anchored in the constitutional requirement for transparency and accountability under **Articles 10(2), 232(1)(e) and (f) and 35(3)** on publicising information that is important and which affects the nation.

101. The 1st Petitioner further submitted that the failure to publish the results of the interviews diminished the importance of public participation and stakeholders' consultation and resulted in the public being locked out in the process. That failure to also mention the ethnicity of the candidates suggests that the 1st Respondent may not have considered ethnic diversity which is below the constitutional threshold under **Article 250(4)** and makes the process invalid, null and void. That further, the lists of appointees for member position are void for not reflecting regional balance and failing to disclose the ethnicity of the candidates.

102. Both Petitioners submitted that the 1st Respondent contravened **paragraph 4(c) of the First Schedule to the NLC Act** when it failed to publish the names of the shortlisted applicants in at least two daily newspapers of nationwide circulation. That this was further contrary to **paragraph 5(i) of the Selection Panel advertorial for vacancies** which calls for publishing of qualified applicants for each post in the print media and the PSC website and that the 1st Respondent therefore violated its own procedure.

103. The 1st Petitioner submitted that provisions of an enactment must be construed strictly and that a statutory body can only do that which it is expressly authorised to do by statute. That the panel by unilaterally creating a third category of successful candidates to be considered for both positions expanded its mandate beyond its terms of reference under the NLC Act and the schedule thereto and thus invalidated the recruitment and nomination exercise. He relied on the case of **Republic v University of Nairobi Ex-Parte Lazurus Wakoli Kunani & 2 others [2017] eKLR** where the court held that statutory power can only be exercised validly if exercised reasonably and that no statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily or in bad faith.

104. He further submitted that the nomination and appointment of the 8th and 9th interested parties to the position of member was contrary to **Article 47(1)** of the Constitution on administrative justice and was therefore invalid.

105. The 1st Petitioner submitted that **section 7(a) of the Public Appointments (Parliamentary Approval) Act** prescribes the process of arriving at a nominee and which section the departmental committee of parliament was supposed to adhere to but failed. That the vetting exercise was thus a sham because the committee glossed over the violations of law and facts that were fatal to the entire recruitment and nomination exercise and that it uttered falsehoods to save individual nominees. Further, that he had a legitimate expectation that the Respondents would exercise their mandate under the law and in accordance with the law

106. The 1st Petitioner submitted that in **John Waweru Wanjohi & 27 others -v- Attorney General & 6 others [2012] eKLR** the court stated that the standard applied by court in reviewing the nominations and appointments was recently examined in detail and affirmed in the unreported case of **Trusted Society of Human Rights Alliance v Attorney General and others, Nairobi Petition 229 of 2012** where the Court concluded that the constitutional standard is that the Court is entitled to review the process of appointment to State or Public Offices for procedural infirmities as well as for legality.

107. The 2nd Petitioner further submitted that the justification for the constitutional threshold was explained in **Okiya Omtatah Okiiti & 3others -v- Nairobi City County & 5 others [2014] eKLR** in which the High Court approved the case of **Benson Riitho Mureithi vs. J.W. Wakhungu & 2 others, Petition No. 19 of 2014** where it was stated that:-

“[84] It may seem that the Constitution has imposed an irksome and onerous burden on those responsible for making public appointments by requiring that they make the appointments on the basis of clear constitutional criteria; that they allow for public participation; and that those they appoint meet certain integrity and competence standards. This burden, however, is justified by our history and experience, which led the people of Kenya to include an entire chapter on leadership and integrity in the Constitution...”

108. The 2nd Petitioner further submitted that this Court has jurisdiction to nullify and revoke an appointment that violates the spirit and letter of the Constitution and it relies on the case of **Resley -v- City Council of Nairobi [2006] 2 EA311** where the Court stated that the Court is one of the inherent and unlimited jurisdiction with the duty to ensure that the law is followed.

109. He submitted that the imposition of the 8th and 9th interested parties without adhering to the legal procedures is unconstitutional and infringing on his rights as the functions of the NLC have a direct impact on him and the public at large and that the two assuming office despite the illegality would therefore be against public policy. That the orders he seeks will save the country meagre resources in repeat exercise in case the court declares selection and nomination of the 8th and 9th interested parties unconstitutional, null and void.

110. The 1st Petitioner submitted that since it is trite law that costs follow the event and his Petition has merit, the orders sought should be granted. That this court should find legal and constitutional infirmity in the impugned actions of the Respondents and allow the Petition as prayed.

1st, 2nd and 3rd Respondent's Submissions

111. The 3rd Respondent filed submissions on its own behalf and on behalf of the 1st and 2nd Respondent herein. It is submitted that the President's failure in appointing the selection panel as provided under paragraph 1 (d) of the 1st Schedule of the NLC Act did not make the whole process incompetent. An invitation was extended to the NGO Board on 18th October 2018 to make the appointment and the chairman of the NGO Board responded on 30th October 2018 indicating that they were unable to nominate members due to the existing differences and the pending suit.

112. It is the 3rd Respondent's submissions that pursuant to sections 53 and 55 of the Interpretation and General Provisions Act, the selection panel was duly constituted. As such, any action taken thereafter cannot be invalidated on account of that vacancy.

113. The 3rd Respondent contended that pursuant to clause 13 of the 1st Schedule that allows the 1st Respondent to determine its own procedure, the 1st Respondent was not bound to publish the scorecards of the interviewed candidates.

114. It was his position that article 35 of the Constitution is not a non-derogable right hence a citizen must request for the information from the relevant body and give reasons for such request, which has not been done as contemplated in section 8 of the Access to Information Act. Further, the information sought by the Petitioner is exempt under section 6 (5) of the Access to Information Act.

115. He relied on the case of **Nairobi Law Monthly Company Limited vs. Kenya Electricity Generating Company & 2 Others [2013] eKLR** and **Kahindi Lekalhaile & 4 Others vs. Inspector General National Police Service & 3 Others [2013] eKLR**. It is his position that the Petitioners ought to have requested for the information and appealed to the Commission on Administrative Justice if the request was denied.

116. The 3rd Respondent submitted that section 7 and 8 of the NLC Act did not envisage a separate process for the appointment of the chairperson and members. It is was also his submissions that the 1st Respondent was satisfied that the 8th and 9th Interested Parties had qualified for the position of member and they were interviewed for the position of member so as to save on time and public resources. Further, the public was invited to make submissions on the suitability of the nominees.

117. It is further submitted that the Petitioners have not demonstrated to this Honourable Court that they were denied a chance to present their case. As such, the appointment of the 8th and 9th Interested Parties was done in accordance with the constitution.

118. He relied on the cases of **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**, **Peter Odoyo Ogada & Others vs. Independent Electoral and Boundaries Commission & Others [2013] eKLR**, **John Waweru Wanjohi & 2 Others vs. Attorney General & 3 Others [2012] eKLR** and **Municipal Council of Mombasa vs. Republic & Umoja Consultants Limited [2002] eKLR**.

119. The 3rd Respondent submitted that the Petitioners have not specifically demonstrated how their constitutional rights were violated. They have merely reproduced constitutional provisions. He relied on the cases of **Anarita Karimi Njeru vs. Republic [1976-80] 1 KLR 1272** and **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**.

120. The 3rd Respondent submitted that although rule 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure, 2013 gives Court the discretion in awarding costs, the discretion should not apply to suits that are frivolous and vexatious like the petitions herein.

121. He concluded his submissions by stating that the Petitioners had not demonstrated the illegality, procedural impropriety, irrationality, unreasonableness and violation of rights in the selection, nomination and appointment process hence the petition is baseless, lacks merit and should be dismissed with costs to the Respondent.

4th Respondent's submissions

122. The 4th Respondent submitted that save for prayer (h) in the Amended Petition, the Petitioners have not pointed out in their petitions any articles of the Constitution or sections of the law that have been contravened by the National Assembly.

123. He submitted that pursuant to paragraph 1 (d) of the First Schedule to the National Land Commission Act the Non-Governmental Organisations Council is required by law to nominate the 2 persons of opposite gender. However, the Committee observed that the failure to nominate the 2 person was due to the inability of the Council to nominate its nominees. He therefore argued that the Committee observed that the Selection Panel was constituted in accordance with the dictates of the First Schedule to the National Land Commission Act.

124. It was his submission that the Non-Governmental Organisations Council did not question the composition of the Selection Panel and in

the absence of any controversy between stakeholders, the Court will only engage itself in a theoretical exercise as held by the Court of Appeal in the **National Assembly of Kenya v The Institute for Social Accountability and Others [2017] eKLR:-**

“In this case, there was, in fact no dispute between the two Houses. The Senate did not question the amendment Bill in the High Court. In the absence of any controversy pertaining to the amendment Bill between the stakeholders, the court not only engaged itself in a theoretical exercise but also usurped the constitutional role of competent institutions in the legislative process.”

125. He submitted that paragraph 13 of the First Schedule of the NLC Act provides that the Selection Panel may determine its own procedure. He maintained that Hon. Esther Murugi and Hon. Tiya Galgalo having applied for both positions of Chairperson and Member of NLC, the Committee noted that having to conduct separate interviews on different dates to a candidate who had applied for both positions may not have been necessary and efficient as the qualifications for both positions were the same.

126. He submitted that the parameters guiding the National Assembly’s approval hearings on nominees forwarded to it by the respective appointing authority are set out under section 7 of the Public Appointments (Parliamentary Approval) Act 2011.

127. He submitted that in carrying out its approval hearing, the Lands Committee is mandated to scrutinise the nominees by examining whether correct procedure was used in arriving at the nominees’ names, the constitutional and statutory requirements relating to the office the nominees have been proposed, and if the nominees are suitable for the proposed office.

128. He submitted that the Court in **Marilyn Muthoni Kamuru & 2 Others v Attorney General & another [2016] eKLR** held the following with respect to the National Assembly’s exercise of its mandate on approval of nominees:-

“From the material before me, and to my mind and in approving the nominees, the National Assembly would be failing in its duty if it were to blindly or unquestioningly approve every appointment that comes its way from the President. Article 152(2) does not define the strictures within which the National Assembly is to operate its endeavour to fulfil its obligations. It has been given a leeway to determine how best to carry out its constitutional mandate. In that regard, the National Assembly was indeed entitled to satisfy itself before approving the nominees that the nominations comply with the constitutional and statutory provisions...”

129. It was therefore his submission that one of the issues that the Committee considered is whether the correct procedure was used to arrive at the nominees’ names. In respect of this, he argued that the Petitioners ought to have raised the issues herein before the committee.

130. He submitted that jurisdiction of this Court over the approval process extends only to review of the manner in which the National Assembly carried out the approval process. He contended that the Court’s mandate is to check whether the National Assembly acted in accordance with the Constitution and the law but not to substitute the decision of the National Assembly with its own. He relied on the cases of **Katiba Institute v Attorney General & 6 Others [2018] eKLR** and **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**.

131. He further submitted that the Supreme Court in **Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR** set out the principles with regard to the doctrine of separation of powers and the extent to which the Courts can interfere with parliamentary processes.

132. He argued that the Court issued *ex parte* orders in Petition 162 of 2019 and extended the said orders without affording the National Assembly any hearing.

133. He contended that the Petitioners have failed to meet the test for grant of conservatory orders set out by the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR** for reasons that the Petitioners gave failed to demonstrate; a prima facie case with probability of success, if the conservatory orders are not granted they will be prejudiced and that it is in public interest that the conservatory orders should be granted.

134. He submitted that the Petitioners do not stand to suffer any prejudice if the conservatory orders are not granted and or set aside since the Court has jurisdiction to quash the approval process should it find it to be unconstitutional. In support of this argument, he relied on the decision in the **Katiba Institute case [supra]**.

135. In conclusion, he submitted that the *ex-parte* conservatory orders should be lifted and set aside and that the Petitioners’ Petition should be dismissed with costs to the National Assembly.

Submissions by the 10th Interested Party

136. Mr. Ochiel submitted on behalf of the 10th interested party that the selection panel was incompetent and acted ultra vires and that Parliament’s vetting process was irrational.

137. He further submitted that on this basis this Court has sufficient reason to nullify the process. To buttress this argument Mr. Ochiel cited the case of **Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR**.

138. Mr. Ochiel further submitted that shortlisting is a crucial stage and the highest degree of transparency must be exhibited. He further submitted that the Rule of Law must be followed and that Court’s can intervene in the event the law is not followed.

139. Mr. Ochiel further submitted that Parliament has a role to check the executive which role was not what happened in this instance. He

contended that it was the role of parliament to scrutinize each of the nominees based on what was tabled before it. For instance he submitted that failed to examine the documents in relation to Hon. Tiya Galgalo on her Tax Compliance and Hon. Samuel Kazungu kambi. To fortify its argument he cited the case of **Community Advocacy and Awareness Trust & Others vs. Attorney General, Nairobi Petition 243 of 2011.**

140. Mr. Ochiel further submitted that the 8th and 9th interested parties were accorded special treatment as they both applied and were shortlisted for the position of Chairperson yet they were appointed as members to NLC. To fortify this argument he cited and relied on the case of **Trusted Society of Human Rights Alliance & 3 Others Vs Judicial Service Commission & Another (2016) eKLR** where it was held:-

“shortlisting stage is a very crucial one in the recruitment process and the highest degree of transparency ought to be exhibited... the law as I understand it is that where the law expressly empowers a public body to exercise statutory power; the power it exercises and the manner of doing so must be strictly in accordance with the statute since statutory bodies operating as such ordinarily do not exercise inherent jurisdiction.”

141. It is further submitted that the Selection Panel’s conduct undermined the rule of law as it failed to publish the mandatory list of all qualified persons as required by Paragraph 4 (c) of the First Schedule.

142. In conclusion, it is submitted that the vetting process was marred with irregularities and failed to follow due process. It is on this basis that the 10th Interested Party urged this Honourable Court to allow the Petition with Costs.

The 11th Interested Party’s Submission

143. The 11th interested party filed its submissions in support of the 2nd Petitioner’s Petition dated and filed in Court on 30th August, 2019.

144. It is further the 11th interested party’s submission that the 1st Respondent’s decision to qualify the 8th and 9th Interested parties for the position of Member of the Commission is unjustifiable both in law and/or principle and the said impugned decision was flawed, amounts to procedural impropriety, illegal, unconstitutional and taints any subsequent process that flows from it, the two having applied and interviewed for the position of Chairperson to the Commission.

145. It is further the 11th interested party’s Submission that the decision by the 1st Respondent further offends the provisions of Section 8 (1) and (2) of the National Land Commission Act which provides for qualifications for the position of Chairperson and Member to the Commission respectively as read together with the 1st Schedule of the Act which clearly envisage a situation where the two positions are separate and distinct and that the process of selection therefore is meant to be distinct and separate. To buttress this argument the 11th Interested Party cited and relied on the decision in **John Mining Temoi & Another Vs Governor Bungoma County & 17 Others (2014) eKLR.**

146. It is further submitted that this decision by the 1st Respondent to appoint the 8th and 9th interested parties in the position of Members to the Commission despite being shortlisted and interviewed for the position of chairperson failed to inspire public confidence in the process and uphold the rule of law and that the only remedy that is available is to vitiate the impugned decision.

147. It is contended that the process of selection of the 8th and 9th interested parties and their eventual appointment to the position of Member of the Commission offends and violates Articles 10, 73 and 232 of the Constitution of Kenya, 2010. It is further submitted that the said decision flows from a nullity and is null and void ab initio. For emphasis the 11th Interested party cited and relied on the case of **Robert Murithi Ndegwa Vs Minister for Tourism, Petition 41 of 2012.**

148. It is further submitted that there was no fair competition as the 8th and 9th Interested Parties were never interviewed for the position of Commissioners of the National Land Commission yet they were purportedly appointed to the said positions.

149. It is further submitted that in absence of such competition, appointments in the Public Service would not adhere to the principle of merit as set out in the Constitution of Kenya, 2010 and in other statutes on Leadership and Integrity. To buttress this position the 11th Interested Party relied on the case of **Okiya Omtatah Okoiti Vs Attorney General 2 Others; Francis K. Muthaura (AMB) & 5 others (Interested Parties) (2019) eKLR** as well as the provisions of Section 46 of the Public Service Commission Act.

150. In conclusion, the 11th interested party submitted that the Petitioner has made out a case for grant of the prayers sought in the consolidated Petition and urged this Honourable Court to allow the same as drawn.

151. I have considered all the averments and submissions of all the parties herein and I set down the issues for this courts consideration as follows:-

1. Whether the Selection Panel as constituted was incompetent.

2. If yes whether, the entire recruitment and appointment process it undertook was invalid, null and void ab initio.

3. Whether the failure to publish the results of the interviews was fatal to the recruitment and appointment exercise?

4. Whether the failure to publish the names of successful candidates forwarded to H. E. the President for nomination was fatal to the recruitment and appointment exercise?

5. Whether the list of persons nominated to be appointed to the position of Member does not reflect regional balance?

6. Whether the nomination of the 8th and 9th interested parties for appointment to the position of Member is unconstitutional and, therefore, invalid, null and void ab initio?

7. Whether the vetting process by Parliament of the 8th and 9th Interested Parties was done in excess of parliamentary powers?

8. Whether the respondents should be compelled to pay costs of these proceedings filed in the public interest?

ISSUE NO. 1

152. The 1st Schedule of the NLC Act paragraph 1 states as follows:-

“The President shall, within fourteen days after the commencement of this Act and whenever a vacancy arises, constitute a selection panel comprising:-

a) a nominee of the Office of the President;

b)

c) a representative of the Cabinet Secretary;

d) two persons, of opposite gender, nominated by the Non- Governmental Organisations Council, who have demonstrated competence and capacity in matters related to natural resources;

e) one person who is a citizen of Kenya, nominated by the Kenya Private Sector Alliance from their member organizations who has demonstrated competence and capacity in the land sector.

f) a nominee of the Association of Professional Societies in East Africa; and

g) a nominee of the National Gender and Equality Commission.

153. The Petitioners have submitted that though the Hon President proceeded to nominate persons of the selection panel, he omitted to include the persons named at paragraph (d) above representatives of the NGO Council thus rendering the entire panel an illegal entity and incapable of transacting any business.

154. From the submissions of the 4th Respondent and which is evidenced by the Affidavit of the 4th Respondent deponed on 9th October 2019 by one Michael Sialai and filed in Court on 14th October 2019 with annexures therein ,the Office of the President through the Head of Public Service wrote to the Chairperson of the NGO Council on 18th October 2018. The letter requested the Council to nominate 2 members for inclusion in the selection panel for appointment of chairperson and members of the NLC.

155. The Council was expected to submit the nominees by 26th October 2018. It appears that the Council did not nominate the representatives as expected because on 30th October 2018, the chairman of the NGO Co-ordination Board responded to the letter from the office of the president and admitted that they were unable to nominate members to serve in the selection panel because the Council was still under leadership of different factions that had culminated into litigation and the matter was still pending in Court awaiting determination.

156. After this confirmation it is not apparent what transpired but it is noteworthy that the panel was later established by the Office of the President vide a gazette Notice No. 3758 of 26th April, 2019.

157. The Petitioners have averred that though the NGO Council had internal problems as at 18th October, 2018 the Council resolved its problems as per a consent order entered into by the parties on 8th March, 2019. In HCCC 31 of 2016. That may indeed have been the position but there is no indication that the Council wrote to the Office of the President to indicate that they had resolved their internal problems and sought to be included in the selection panel. There is also no indication that the AG was part of the case involving the NGO Council and was aware when the Council resolved its internal problems.

158. In the circumstances onus of showing that the Council was well constituted and able to discharge its mandate in the Selection Panel lay with the NGO Council itself and the Office of the President cannot be faulted for proceeding to set up the Panel without inclusion of the members of the NGO Council.

159. In terms of the fact that the panel was constituted without key members as provided by the law, the panel was improperly constituted.

ISSUE NO. 2

160. Though the Panel was improperly constituted, the omission to have all eligible members included has been explained above. However, the Interpretation and General Provisions Act, Cap 2 Laws of Kenya Section 53 states as follows:-

“Where by or under a written law a board, commission, committee or similar body, whether corporate or un-incorporate, is established, then, unless a contrary intention appears, the powers of the board, commission, committee or similar body shall not be affected by:-

a) a vacancy in the membership thereof; or

b) a defect afterwards discovered in the appointment or qualification of a person purporting to be a member thereof.”

161. Further, Section 55 of the of the Act states as follows:

“Save as is otherwise expressly provided by a written law, where an act or thing may or is required to be done by more than two persons, a majority of them may do it.”

162. In the circumstances, the fact that the selection panel proceeded to act and discharge its mandate in the absence of other expected members of the panel does not render the entire recruitment and appointment process it undertook invalid, null and void ab initio by that very reason.

ISSUE NO. 3

163. It has also been submitted by the Petitioners that failure by the selection panel to publish results of the interviews was fatal to the entire recruitment process.

164. In this regard, I refer again to the 1st Schedule of the NLC Act which states how the recruitment process should be carried out. Paragraph 4 of the schedule states as follows:-

“The selection panel shall within twenty-one days after the expiry of the deadline for receipt of applications under paragraph (3):-

a) consider the applications received under paragraph (3) to determine their compliance with the provisions of the Constitution and this Act;

b) short list the applicants;

c) publish the names of the shortlisted applicants and the qualified applicants in at least two daily newspapers of nationwide circulation;

d) conduct interviews of the shortlisted persons in public;

e) shortlist two qualified applicants for the position of chairperson;

f) shortlist sixteen qualified applicants for the position of the members; and

g) forward the names of the qualified persons to the President.

165. Under this paragraph there is no obligation on the selection panel to publish results of the interviews. The omission therefore in not publishing the said results cannot be fatal.

ISSUE NO. 4

166. As indicated above under issue number 3, there is also no mandatory requirement to publish names of the successful candidates before forwarding to the President. In the circumstances, the omission is also not fatal to the recruitment process.

ISSUE NO. 5

167. On the issue of regional balance, the Petitioner has submitted that the selected persons for the position of chairperson and member of the NLC do not reflect regional balance. It is noteworthy that Kenya is indeed a country with diverse ethnic groups.

168. The Constitution also mandates appointments in the public service to be open and transparent and to follow values and principles stated at article 10 of the Constitution. When dealing with 45 tribes, and in attempting to fill up 9 vacancies, regional balance cannot be tribal balance.

169. This Court has on various occasions alluded to the fact that Courts should not be swayed into making assumptions as to ethnic and regional origins of Kenyans based on the names of the nominees and thereby falling into the deep pit of negative ethnicity.

170. Without any clear evidence or analysis as to lack of regional balance in this process it would be indecisive to the entire process for this

Court to delve into negative ethnicity which I decline to do.

ISSUE NO. 6

171. On this issue, the Petitioner submitted that the nomination of the 8th and 9th Interested Parties to the position of member was unconstitutional and invalid. The main contention of the Petitioner and the 10th and 11th Interested Parties were that the two interested parties applied for position of chairperson of the NLC. That they were also interviewed for the position of chairperson but were subsequently nominated for the position of member which is irregular.

172. Indeed, the 8th and 9th Interested Parties denied this fact. The 4th Respondent submitted before this Court, letters showing that the two interested parties applied for both positions of chairperson and member of the NLC.

173. From the list submitted by the 4th Respondent showing the person who had applied for various positions attached to the 4th Respondent's Replying Affidavit filed in Court on 14th October 2019, the 8th and 9th Interested Parties both applied for the position of chairperson and member NLC. The two were also shortlisted for the position of Chairperson of the NLC as per the list filed by the 2nd Petitioner on 30th August 2018 as Appendix A003. The two were never shortlisted for the position of member of the NLC.

174. In trying to demystify this entire process of selection and nomination of the 8th and 9th interested Parties, I note that an employment process starts from the advertisement process to the shortlisting onto the interview and finally selection process. The processes must therefore be above board.

175. The process of shortlisting is as important as the process of interviewing and it beats logic to imagine that a candidate may apply for two positions and be shortlisted for one of such positions and be appointed to an altogether different position.

176. The Interested Parties submitted that they were qualified for both positions which is not disputed. They were however shortlisted for one position and not both. They could not have been appointed to a position for which they were never shortlisted for.

177. In the case of *Trusted Society of a Human Rights Alliance & 3 Others vs. Judicial Service Commission & Another* [2016] eKLR at paragraph 316 and 324 concerning the shortlisting of candidates for the position of judge of the Supreme, DCJ and CJ, the High Court (Odunga J.) held that:-

“In this respect whereas I associate myself with Musinga J. as he then was in Andrew Omtatah Okoiti vs. Attorney General & 2 Others [2011] eKLR, when he quipped that shortlisting stage is a very crucial in the recruitment process and the highest degree of transparency ought to be exhibited ... The law as I understand it is that where the law expressly empowers a public body to exercise statutory power, the powers it exercises and the manner of doing so must be strictly in accordance with the statute since statutory bodies operating as such ordinarily do not exercise inherent jurisdiction.”

178. Indeed the position of chairperson and that of member is distinct and separate and there can be no situation where one submits for interview for one position and gets hired for a different position. This would be tantamount to abuse of office and flouting regulation that govern the hiring process.

179. The Interested Parties submitted that their being hired to the position of member of NLC did not prejudice anyone. I find that not being the correct position because the two must have been nominated to position that would have been for there interviewed for position of member of NLC and who were greatly prejudiced by the outcome of the process as meted out by the selection panel.

180. In answer therefore to the 6th Issue, it is my finding that nomination of the 8th and 9th Interested Parties, that is, Hon. Esther Murugi Mathenge and Hon. Tiyah Galgalo respectively as Members of NLC was unconstitutional flouting principles of appointment in the Public Service as provided under Article 232 of the Constitution which states as follows:-

“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:-

a) men and women;

(ii) the members of all ethnic groups; and

(iii) persons with disabilities.”

181. In the circumstances, I find the said nomination invalid, null and void and proceed to quash their nominations accordingly.

ISSUE NO. 7

182. On this issue, the Petitioners submitted that Parliament acted in excess of its powers by going beyond their mandate and asking the nominees who did not have the requisite documents to get them.

183. The case in point relates to Hon. Tiyah Galgalo who did not have a tax compliance certificate from the Kenya Revenue Authority at the time of the interview process but during the vetting process in parliament was given time to produce one.

184. It has been submitted by the 4th respondent that this Court's mandate only extends to reviewing Parliament's processes to ensure they complied with the law and that this Court cannot substitute the decision of the National Assembly with its own.

185. Indeed, due to the doctrine of separation of powers, the job for the judiciary is cut out and so is that of the national assembly. None of the two organs can load on each other. This was the holding in the Supreme Court's finding in the **Wambora Case (Supra)**. Also in **Petition 628 of 2014; Coalition for Reforms and Democracy (CORD) vs. Republic & 10 Others [2015] eKLR**, the Court in a five judge bench decision held as follows:-

“128. To our mind, the doctrine of separation of powers does not stop this court from examining the acts of the Legislature or the Executive. Under Article 165(3)(d) of the Constitution, the Judiciary is charged with the mandate of interpreting the Constitution; and has the further mandate to determine the constitutionality of acts done under the authority of the Constitution as was held in Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No. 2 of 2011 in which the Supreme Court expressed itself as follows:-

“The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the Courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that the totality of governance powers is shared out among different organs of government, and that these organs play mutually countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation.

We are duly guided by the principles enunciated in the above authorities, and it is clear that the doctrine of separation of powers does not prevent this court from exercising its jurisdiction under Article 165(3)(d).”

186. In exercise of this Court's jurisdiction as mandated by the Constitution, I note that indeed it was excess of its power for parliament to bend back and ask a nominee to go and get document to qualify her for nomination when the duty of parliament was to find out her suitability for nomination as presented before her. This was indeed improper exercise of parliamentary power, which should be exercised without regard to matters beyond its mandate to vet the nominees.

187. It is my finding that the 9th Interested Party did not have tax compliance certificate and also having found that she was nominated for a position she may not have been interviewed for; parliament should not have proceeded to vet her as suitable for appointment. In my view therefore, parliament acted in excess of its mandate in the circumstance.

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188. As this is a public interest matter, I will not issue any order as to costs.

189. The upshot of this Petition is that the Petition succeeds partly and the Orders given are as follows-

1. The selection panel as constituted was incompetent but that did not affect the outcome of its entire process.

2. The nomination of the 8th and the 9th interested parties herein Esther Murugi Mathenge and Tiyah Galgalo is hereby quashed.

3. The vetting process by Parliament of the 8th and 9th Interested Parties was done in excess of parliamentary powers.

4. There will be no order as to costs.

Dated and delivered in open Court this 14th day of November, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Otiende 2nd Petitioner – Present

SC Waweru Gatonye & Nderitu for 1st to 9th Interested Parties - Present

Kosgei holding brief Ochiel for 10th Interested Party – Present

Eyase for 11th Interested Party – Present

Kuyioni for 4th Respondent – Present