



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 51 OF 2018

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

JOSEPH KINYUA.....1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION.....ND RESPONDENT

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

(Before Hon. Justice Byram Ongaya on Friday 20th July, 2018)

JUDGMENT

The petitioner is Okiya Omtatah Okoiti. He filed the petition on 06.06.2018 acting in person. The petition was in the matter of Articles 1, 2, 3, 4(2), 10, 12(1) (A), 19, 20, 21, 22, 23, 24, 27, 41(1), 47, 48, 50(1), 73, 75, 156, 159, 162, 165, 232, 234, 236, 258 and 259 of the Constitution of Kenya 2010; in the matter of alleged violation of Articles 1, 2, 4(2), 10, 27, 41(1), 47, 73, 232, 234, 249(2) (b) and 259(1) of the Constitution; in the matter of the Constitutional and legal validity of the President executing the mandate of the Public Service Commission; the constitutional and legal validity of the circular Ref. No. OP/CAB.39/1A of 04.06.2018 issued by Joseph Kinyua purporting to send heads of procurement and accounting units in government ministries, departments and agencies including state corporations on compulsory leave for 30 working days; in the matter of the constitutional validity of the Presidential fiat and the mass sackings of public officers based on roadside declarations issued by the President; in the matter of the abuse of delegated legislation by the executive and the regulatory burden imposed on the people of Kenya; and in the matter of the doctrines of legitimate expectation, and void *ab initio*.

The petitioner prayed for:

- a) The declaration that circular Ref, No. OP/CAB.39/1A of 4th June 2018 is a statutory instrument subject to the Statutory Instruments Act, 2013.
- b) A declaration that the 1st respondent has no capacity in law to issue circular Ref. No. OP/CAB.39/1A of 4th June 2018.
- c) A declaration that circular Ref. No. OP/CAB.39/1A of 4th June 2018 is illegal and unconstitutional and, therefore, invalid, null and void *ab initio*.
- d) An order quashing circular Ref. No. OP/CAB.39/1A of 4th June 2018.

- e) An order compelling the respondents to pay the costs of this suit.
- f) Any other relief the Court may deem just to grant.

The circular Ref. No. OP/CAB.39/1A of 4th June 2018 was signed by the 1st respondent in his capacity as the holder of the office of Head of the Public Service and it was addressed to the Attorney General, all Cabinet Secretaries, all Principal Secretaries/Accounting Officers (with sufficient copies for Chief Executives, State Corporations), Comptroller of State House, the Clerk - National Assembly, the Clerk – Senate, the Chief Registrar of the Judiciary, the Director – General, National Intelligence Service; the Controller of Budget; The Auditor General, and, Independent Offices and Commissions. The circular stated as follows:

“RE: PRESIDENTIAL PROCLAMATION ON FRESH VETTING OF PUBLIC OFFICERS

Reference is made to H.E. The President’s Madaraka Day Speech delivered on 1st June 2018, and the proclamation therein on the fresh vetting of public officers.

The proclamation is in line with H.E. The President’s mandate to uphold and promote national values and principles of governance in the management of public affairs.

The first category of public officers to undergo fresh vetting are the Heads of Procurement and Accounting Units in Ministries, Departments, Agencies including State Corporations. Consequently, all Heads of Accounting Units and Heads of Procurement Units are directed to immediately hand over to their deputies and thereafter proceed on compulsory leave for 30 working days beginning 6th June 2018. The officers will continue to earn their salaries and allowances during this period. During the leave period, officers are not allowed to leave the country without requisite clearance by the Head of Public Service.

The officers are further required to submit to the Head of Public Service the following information to be delivered in sealed envelopes to Harambee House, 3rd Floor Reception on or before 5pm on Friday 8th June 2018.

- a) Personal particulars of the officer (Full Names; Identity Card Number; Passport Number; PIN Number; Driving License Number; Mobile Telephone Number; Daytime Telephone Number; Email);**
- b) Residential address(es) of the officer and spouse(s) for the last 5 years: Ownership status of current residence.**
- c) Power/water meter numbers; any other utility account numbers.**
- d) Current posting of the officer; Personal Number; Job Group; List of previous deployments and number of years served per deployment; History of disciplinary cases; Promotions applied for; Promotions received;**
- e) Full Names and Identity Card Numbers of immediate family members (spouse, children, dependants, parents, siblings, business associates; agents; or associates where the officer has a direct or indirect pecuniary or non-pecuniary interest;**
- f) List of known companies and businesses owned or controlled by the officer or immediate family members that have had commercial dealings with the MDAs for which the officer is deployed;**
- g) List of moveable and immovable assets owned/partly owned by the officer or the immediate family members, business associates or agents including data on acreage,**

location, and status (e.g whether charged to financial institutions, joint ownership, allotment etc) including dates of acquisition;

h) Machinery, vehicles, and other assets where the officer has a beneficial interest;

i) Stocks, Shares and Partnerships including investment groups of which the officer and spouse are members;

j) Certified copies of bank statements of the officer and spouse for the last 6 months including any foreign accounts.

k) Certified copies of mobile money statements of the officer and spouse for the last 6 months.

l) Kenya Revenue Authority Income Tax Returns for the officer and the officer's companies/businesses for the last 3 years;

m) Club membership(s);

n) Social media accounts / handles (Facebook, Twitter, Instagram etc);

o) List of liabilities (including loans, mortgages, chattels, guarantees, school fees and school accounts; cumulative insurance policies; holidays).

Affected officers may be required to present themselves for oral interviews. Additional information / clarification may also be sought arising out of the initial review and analysis. Non – compliance with this directive will lead to disciplinary action. All information submitted will be treated with utmost confidentiality.

Whereas this exercise is geared towards determining suitability to continue holding public office in the public trust, and promote confidence in the public service, the same will be undertaken in a fair and objective manner, exercised with due care and regard to officers' rights as enshrined in the Constitution.

Accounting Officers are further directed to ensure this information is brought to the attention of the affected officers immediately after it is received, and take responsibility for its effective implementation.

Signed

JOSEPH K. KINYUA, EGH

HEAD OF THE PUBLIC SERVICE”

It is not in dispute that the circular flows from the President's Madaraka Day Speech delivered on 1st June 2018. The Court has perused that Speech. The President stated that he had resolved to lead the nation in getting rid of corruption and division, the main challenges Kenya faces today, just like colonialism was then. He appealed to all Kenyans to join him “

...in the war we have started to vanquish corruption.” The President then stated, “Let me mention, as part of the raft of measures we intend to implement to tackle corruption, as an initial step, all Heads of Procurement and Accounts in Government Ministries, Departments, Agencies and Parastatals will undergo fresh vetting, including polygraph testing, to determine their integrity and suitability. Those who shall fail the vetting will stand suspended. I expect this exercise be concluded before the start of the new financial year (FY 2018/2019). You will hear of other tougher actions in the days to come.”

At paragraph 5 of the petition the petitioner sums up his grievance thus,

“5. The Petitioner is aggrieved that the 1st respondent has given himself powers and a mandate unknown in law as the occupant of the non-existent office of the Head of the Public Service, and has, in contemptuous violation of the express provisions of the Constitution of Kenya 2010, the Public Service Commission Act 2017, the Fair Administrative Action Act 2015, and the Statutory Instruments Act 2013, issued a statutory instrument (Circular Ref. No. OP/CAB.39/1A of 4th June 2018), purporting to send heads of procurement and accounting units in government ministries, departments and agencies, including state corporations, on compulsory leave for 30 working days.”

The petitioner invited the Honourable Court to intervene and determine the constitutional and legal validity of the impugned circular.

The petitioner alleged that the circular is oppressive and unreasonable, and is outright illegal and unconstitutional and therefore invalid, null and void *ab initio* upon the following grounds:

- a) The circular offends provisions of Article 50(2) (a) that an accused person is presumed innocent until the contrary is proved; Article 50(2) (b) on the right of an accused person to be informed of the charge with sufficient detail to answer it; Article 50 (2) (c) on the right of an accused person to have adequate time and facilities to prepare a defence; and Article 50 (2) (l) on the right to a fair trial including refusal to give self – incriminating evidence. The violation is grave because under Article 25(c) of the Constitution, the right to a fair trial may not be limited.
- b) The 1st respondent has no capacity in law to make such drastic policy statement anchored, as he claims therein, on the President’s Madaraka Day Speech delivered on 01.06.2018.
- c) The doctrine of limited power informs the Constitution of Kenya 2010 and Presidential declarations do not have the force of law.
- d) The circular amounts to directing the Public Service Commission in violation of Articles 260 on definition of the public service, Article 234 on the functions and powers of the Commission, and Article 249 on the objects, authority, and funding of the commissions and independent offices.
- e) The 1st respondent is not qualified to be employed in the public service because he is beyond the mandatory retirement age of 60 years and he was not competitively and meritoriously recruited as per Articles 73(2) (a) as read with Article 231(1) (g) of the Constitution as he was not vetted by the Parliament. In such circumstances the 1st respondent could not issue the circular to take over, control and direct the functions and operations of the Public Service Commission.
- f) The circular constitutes gross misconduct on the part of the 1st respondent and represents a gross violation of both the Constitution and the Public Service Commission Act, 2017. The circular invokes no law and is based on no law. The 1st respondent is not a regulation making authority under the law and therefore has absolutely no capacity to issue any directives.
- g) Article 260 of the Constitution defines “**legislation**” to include “**An Act of Parliament, or a law made under authority conferred by an Act of Parliament**”. Section 2 of the Statutory Instruments Act 2013 defines “**Statutory instrument**” to mean “**any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.**” Section 92(1) of the Public Service Commission Act, 2017 allows the Commission to make regulations prescribing anything required by the Act to be prescribed generally for the better carrying into effect of the provisions of the Act. Accordingly, it is the petitioner’s case that the circular by the 1st respondent

was a void statutory instrument for having been made in violation of the Constitutional imperative for public participation and for not conforming to the Statutory Instruments Act 2013, which provides for an elaborate process for making subsidiary legislation. The 1st respondent should not be allowed to oust the mandate of the 2nd respondent.

h) The public service is not run on the basis of presidential fiat and roadside declarations, but it is well organised and managed by an independent commission, the 2nd respondent.

i) The Constitution of Kenya 2010, as a departure from the former Constitution, establishes the autonomy of the public service from political control as per Articles 233 and 234 of the Constitution.

j) Under section 42(7) of the Leadership and Integrity Act, 2012, it is only investigations that can occasion the sending of an officer on compulsory leave and vetting is not a basis for dismissal from office. The officers affected by the circular are not under investigation and there exists no basis to send them on compulsory leave. The officers must be treated in accordance with due process.

k) The circular violates Articles 10, 24, 27, 41(1) and 47 of the Constitution and also violates statutory provisions.

l) The circular violates Article 2(4) because it amounts to an act in violation of the Constitution thus, “**...any act or omission in contravention of this Constitution is invalid.**”

m) The petitioner is aggrieved that the 2nd respondent has not lifted a finger to assert its authority and to prevent its turf from being encroached on by the 1st respondent. It is the petitioner’s case that the 2nd respondent has been a willing collaborator in the violation of the law and the Constitution.

The 1st respondent Joseph K. Kinyua, EGH appointed V.A. Nyamodi & Company Advocates to act in the matter. He filed a replying affidavit on 13.06.2018 and sworn on 12.06.2018. The 1st respondent opposed the petition upon the following grounds:

n) The petitioner has failed to disclose to the Court that he has filed a multiplicity of other petitions challenging the 1st respondent’s capacity to hold the office of Head of the Public Service and to execute the functions of that office. One such case is **Okiya Omtatah –Versus- Joseph Kinyua and the Public Service Commission Petition 24 of 2018 at Nairobi** and while the present petition was pending, the Court (Abuodha J) delivered the judgment on 29.06.2018. In that case, the Court found that the office of Head of the Public Service was properly constituted or established in accordance with Article 132 (4) (a) of the Constitution and which provides that the President may perform any other executive 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. In the present petition the 2nd respondent’s Secretary and Chief Executive Officer Alice Otwala filed a replying affidavit on 25.06.2018 reproducing and exhibiting the affidavit evidence filed in the said Petition 24 of 2018. The Court considers that the issue of establishment and validity or legality or capacity of the 1st respondent to hold the office of Head of the Public Service is now barred for consideration by this Court by reason of the doctrine of **res judicata** and as submitted by counsel for the 1st respondent. While making that finding, the Court upholds and follows the findings by Abuodha J in the said Petition 24 of 2018 (as far as it relates to the present dispute) thus, “**16. Ms Otwala further stated that in 2016 the PSC in consultation with Government Departments reviewed organizational structures in all government departments and in the process established more offices in the executive office of the President including the establishment of the Office of Chief of Staff and Head of Public Service. The foregoing factual information**

read together with article 132 (4) (a) of the Constitution leads to the conclusion that the office of the Chief of Staff and Head of Public Service is properly constituted.”

b) Further and in relation to the dispute in the present petition, the Court upholds and follows the holding by Abuodha J in the said Petition 24 of 2018 that the President as Head of State and Government has the overarching role over state organs and the Commissions including the 2nd respondent are part of the public service hence answerable to the people of Kenya through the President as Head of State and Government. And further, **“22.The office of the President is an institution and one cannot reasonably expect the person occupying that office to do everything by himself or her. The 1st respondent made reference to Presidential circular No.1/2016 which stated that: “The Chief of Staff and Head of Public Service is responsible to the President for general efficiency of public service for coordination of the activities of public service and the overall organization of the machinery for the execution of government policies.” 23. To this extent the court is not persuaded that the designation of the Office that the 1st respondent holds as Head of Public Service usurps the power of the Chairperson of Public Service Commission.”**

c) It was the 1st respondent’s further case that under Article 132 (1) (c) of the Constitution, the President is required once every year to report in an address to the nation on all measures taken and the progress achieved in the realisation of the national values, referred to in Article 10 and publish in the Gazette the details of the said measures and progress. Article 234 (2) (h) of the Constitution requires the 2nd respondent to evaluate and report to the President and Parliament on the extent to which the values and principles referred to in Articles 10 and 232 of the Constitution are complied with in the public service. Article 132(3) (b) of the Constitution vests in the President the role of directing and co-ordinating the functions of ministries and government departments. Section 7(2) (a) of the National Government Coordination Act vests the coordination of national executive functions in, amongst others, the Office of the President. Section 8 of the Act recognises that the President shall be responsible for the co-ordination of functions of national government. Thus, the 1st respondent was appointed as Head of the Public Service to aid the execution of the President’s mandate under Article 132 of the Constitution. The Court considers that as already stated, that position has already been determined in the affirmative in the judgment in **Okiya Omtatah –Versus- Joseph Kinyua and the Public Service Commission Petition 24 of 2018 at Nairobi** and it is an already decided issue, with finality and only subject to appeal or review as may become necessary.

d) The 1st respondent’s further case is that the circular Ref. No. OP/CAB.39/1A of 4th June 2018 and the vetting involved is not a disciplinary process or imposed punishment as misconstrued by the petitioner. It is, according to the respondent, an inquiry into the record of the Heads of Procurement, their financial probity and integrity. Further, the 1st respondent’s case is that the officers are in continued employment on full pay and their respective rights have not been violated as alleged by the petitioner. The compulsory leave is not a collective punishment but a lawful matter of good administration during the inquiry. The inquiry, it is urged, is in the nature of an inquiry or appraisal rather than disciplinary – the aim being to facilitate the fight against corruption. In addition there will be officers to act in place of those on leave under the circular so that public service delivery will not suffer. A substantial number of affected officers having complied, allowing the petition would have the resultant consequence of bringing the fight against corruption to a halt thereby causing harm to the majority of over 40 million Kenyans. Thus, the 1st respondent by issuing the circular was merely coordinating the process on behalf of the President who is the ultimate accountable individual in the fight against corruption. Further the vetting had not yet commenced but when it does commence, the same will be carried out as required by law. Where disciplinary process is to be undertaken, then the relevant authority such as the 2nd respondent will undertake their statutory and constitutional mandate accordingly. It was urged that the mandate of the 2nd respondent had therefore not been usurped.

e) The 1st respondent's case was that the circular was not a subsidiary legislation and therefore it was not a statutory instrument under the Statutory Instruments Act, 2013. Thus, it was urged that its issuance would not be subject to the procedure under the Act.

f) The 1st respondent's further case was that the vetting or inquiry was not a fishing expedition as alleged by the petitioner but the information required was similar to that submitted periodically under Section 26 of the Public Officer Ethics Act. The information, it is urged, would also be submitted under Article 73 (2) (c) of the Constitution. It is urged that the exercise is not prejudicial because once a person accepts to become a public officer he or she is thereby open and available to public scrutiny.

g) The affected officers are available and if prejudiced would have moved the Court and the petitioner lacks the relevant standing to file the petition.

h) The petition is lacking in substance and therefore should be dismissed with costs.

The 3rd respondent relied upon the supporting affidavit of Dr. Eng. Karanja Kibicho, CBS filed on 08.06.2018 through Kennedy Ogeto, the Solicitor General for the Attorney General. Mr. George Oraro SC urged the 3rd respondent's case. The 3rd respondent's case was based upon the following grounds:

a) Article 10 of the Constitution sets out the national values and principles of governance which include good governance, integrity, transparency and accountability.

b) Article 132(3) (b) of the Constitution vests in the President the mandate of directing and co-ordinating the functions of ministries and government departments. Section 7 of the State Corporations Act provides that the President may give directions of a general or specific nature to State Corporations with regard to better exercise and performance of the functions of the state corporation and the Board shall give effect to those directions. Sections 7 and 8 of the National Government Coordination Act provides that the President shall be responsible for the co-ordination of functions of Ministries, State and government departments, and for that purpose, sufficient National Government Administrative Officers shall be appointed for efficient and effective co-ordination of national government functions. Thus, that presidential coordination function is given effect to through the office of Head of the Public Service which was established for that purpose.

c) In the recent past Kenya has been faced with rampant corruption which has led to the government losing billions of shillings and most corruption scandals revolve around procurement such as in the case of multibillion National Youth Service (NYS) scandal. Further, the overwhelming problem of corruption was manifested in the annual report by the Ethics and Anti-Corruption Commission for year 2017/2018 where a total of 8, 044 reports on corruption related complaints and allegations were analysed. The annually reported cases by that Commission had been increasing over the years thus 3, 355 in 2012/2013; 4, 006 in 2013/2014; 5, 660 in 2014/2015; and 7,929 in the year 2015/2016. There were serious complaints and allegations of corruption as enumerated in the affidavit. Accordingly and in view of the runaway corruption, the government resolved to undertake an appraisal of public officers starting with the Heads of Procurement and Accounting Units in Ministries, Departments and Agencies including State Corporations. The appraisal is not a disciplinary issue and or punishment but it is an inquiry into the record of the Heads of Procurement and Accounting including their financial probity and integrity. Throughout the process the officers will continue to earn their full salaries. Thus the compulsory leave is a necessary holding measure pending inquiries and is lawful and a matter of good administration.

d) The affected officers, not even a single one, are a party to the present proceedings. The affected officers had already complied with the terms of the circular as directed

e) The disclosure of the information required would not be prejudicial to the affected officers and the exercise is in the greatest benefit to the public being the continued war or fight against corruption. The directive is therefore reasonable and justifiable in any comparable democratic and

just jurisdiction.

The **1st issue** for determination is whether the petitioner enjoys the relevant standing to file and prosecute the present petition. It was submitted for the respondents and more so for the 1st respondent that the circular in issue was addressed to specific officers requiring them to undertake specific actions as directed in the circular. Further none of the affected officers was a party to the petition and none has sworn and filed an affidavit to support the petition. Thus the petitioner lacked standing or *locus standi* to bring the petition because he seeks to assert a personal right in circumstances whereby he is not the person whose personal right has been affected – the person whose personal right has been affected being the right person to move the Court. It was submitted that the use of “**Every person....**” in Articles 22 and 258 of the Constitution did not mean “**any person**”. The officers affected by the circular having not moved the Court in their individual capacity, the petitioner should be found to have lacked the necessary standing and the petition should be dismissed.

The petitioner submitted that Articles 22 and 258 of the Constitution of Kenya, 2010 are tailored for the community and they enact into the Constitution of Kenya, 2010 the doctrine of public interest litigation. They vest every person with *locus standi* to institute proceedings for the protection of rights and fundamental freedoms, and the Constitution. The petitioner submitted that Article 22 and 258 of the Constitution take away the notion of *locus standi* which meant that only an aggrieved party demonstrating damage or harm can approach the Court and seek a remedy.

The Court follows the petitioner’s submission that in **Timothy Otuya Afubwa & Another –Versus- County Government of Trans Nzoia & 3 Others [2016]eKLR** it was held that a petition under Articles 258(2)(c) and 22 (1) of the Constitution can be brought by a person acting on behalf of the public.

The Court further follows Mumo **Matemu –Versus- Trusted Society of Human Rights Alliance & 5 others [2013]eKLR**, where the Court of Appeal stated, thus “**Today, by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in public interest.**” This Court in **Trusted Society of Human Rights Alliance –Versus- Nakuru Water and Sanitation Services Company & Another [2013]eKLR** held that a petitioner had the relevant *locus standi* once it was established that the petition was about a public interest.

In this case the petitioner has urged that he seeks to primarily enforce the mandate of the Public Service Commission and the cited constitutional provisions as against the impugned circular and the Court returns that such is a cause of action amounting to a public interest that confers the petitioner the relevant standing. Further, considering that cause of action, the Court returns that the petitioner’s case was remotely about enforcement of the rights and freedoms of the affected officers so that it was not necessary for any of such officers to have been a party to the proceedings and as was urged for the 1st respondent. The Court finds that looking at the material on record, the issue of violation of the rights of the officers affected by the circular was a secondary and not the primary or proximate basis of the cause of action.

To answer the **2nd issue** for determination the Court has already found that the office of the Head of Public Service is duly established in accordance with Article 132 (4) (a) of the Constitution and the holder of that office, the 1st respondent, is charged with the responsibility of aiding the President in undertaking the constitutional and statutory function of directing and coordinating the functions of ministries and government departments per Article 132 (3) (b) and sections 7 and 8 of the National Government Co-ordination Act, 2013. The Court has already found that the matter was res judicata in view of the judgment in **Okiya Omtatah –Versus- Joseph Kinyua and the Public Service Commission Petition 24 of 2018 at Nairobi** (Abuodha J).

The **4th issue** is whether the responsibilities of the 1st respondent as Head of the Public Service override or usurp the constitutional powers and functions of the 2nd respondent, the Public Service Commission. The Public Service Commission Human Resource Policies and Procedures Manual for the Public Service states that the Chief of Staff and Head of Public Service shall be responsible for general efficiency of the

public service; co-ordination of the activities of public servants; overall organization of the machinery for the execution of the government policies; and ensuring that all agencies of government are adequately staffed for the performance of their functions.

On the other hand, Article 234 of the Constitution provides the functions and powers of the 2nd respondent to include, 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; exercise disciplinary control over and remove persons holding or acting in those offices; promote the values and principles mentioned in Articles 10 and 232 throughout the public service; investigate, monitor and evaluate the organisation, administration and personnel practices of the public service; ensure that the public service is efficient and effective; develop human resources in the public service; 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; evaluate and report to the President and Parliament on the extent to which the values and principles mentioned in Articles 10 and 232 are complied with in the public service; 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.

As was submitted by Mr. Nyamodi for the 1st respondent, the Court returns that the powers and functions of the 2nd respondent are constitutional and clearly distinct and separate from the powers and functions of the office of the Head of the Public Service as currently held by the 1st respondent and the 1st respondent's responsibilities or duties do not usurp the 2nd respondent's powers and functions. It is clear that the responsibilities of the office of the Head of Public Service flow from the President's functions under Article 132(3) (b) being directing and co-ordinating the functions of ministries and departments of national government and as amplified in the provisions of the National Government Co-ordination Act, 2013 and especially sections 7 and 8 thereof. The Court finds as much.

Accordingly, the Court has considered the responsibilities of the office held by the 1st respondent against the functions and powers of the Public Service Commission in Article 234 (2) of the Constitution and returns that the responsibilities do not override or usurp the Commission's constitutional powers and functions.

The **5th issue** for determination is whether the President's statement on measures to be undertaken towards combating corruption during the Madaraka Day celebrations on 01.06.2018 was unconstitutional. It is the petitioner's submission that the President's pronouncements amounted to running the public service on the basis of presidential fiat and roadside declarations. It is the petitioner's submission that the Constitution does not give the President the powers to issue oral proclamation for vetting of the public officers.

For the respondents and in particular the 3rd respondent it was submitted that under Article 132(1) (c) the President is required once every year to report, in an address to the nation, on all measures taken and the progress achieved in the realisation of the national values referred to in Article 10; and to publish in the Gazette the details of the measures and progress as reported in that address. Further Article 234 (2) (h) of the Constitution vests in the 2nd respondent the specific function to evaluate and report to the President and Parliament on the extent to which the values and principles mentioned in Articles 10 and 232 are complied with in the public service. Mr. Oraro SC therefore concluded that it was clear that those constitutional provisions as read with the provisions of Chapter 6 of the Constitution on Leadership and Integrity made it clear that on issues of ethics, integrity, transparency and the national values and principles in Article 10, all must report to the President so that the President cannot sit and simply watch and wait the independent offices and constitutional commissions to report.

The Court returns that the respondents' submissions are well grounded and valid. The Court finds that it was misconceived for the petitioner to allege and submit that the President in addressing the nation on Madaraka Day was engaged in a roadside declaration. Article 9 (3) of the Constitution provides that the national days, which under Article 9(4) shall be public holidays, include Madaraka Day to be observed on 1st June; Mashujaa Day to be observed on 20th October; and Jamhuri Day to be observed on 12th

December. The Court considers that the national days are constitutionally recognised as crucial attributes of the sovereign Republic and the President's speech and address was within the satisfaction of Article 131 which provides, inter alia, that the President is the Head of State and Government; is a symbol of national unity; shall safeguard the sovereignty of the Republic; shall promote and enhance the unity of the nation; shall promote respect for the diversity of the people and communities of Kenya; and ensure the protection of human rights and fundamental freedoms and the rule of law.

Further, the Court has considered the provisions of Article 135 of the Constitution that a decision of the President in the performance of any function of the President under the Constitution shall be in writing and shall bear the seal and signature of the President. The petitioner has filed the Presidential Speech on Madaraka Day of 01.06.2018 which he downloaded from the website and on a balance of probability (the petitioner having not sought the production of the certified copy of the original Speech) the Court returns that the constitutional requirement that the Presidential decision is written was sufficiently satisfied.

The Court further returns that the President was entitled to address the issue of corruption, integrity, national values and principles as he did on Madaraka Day of 01.06.2018. As was submitted by Mr.Oraro SC, under Article 132(1) (c) the President is required once every year to report, in an address to the nation, on all measures taken and the progress achieved in the realisation of the national values referred to in Article 10; and to publish in the Gazette the details of the measures and progress as reported in that address. Nevertheless, and as was submitted for the respondents, that is not the only occasion that the President may address the matter of measures taken and the progress achieved in the realisation of the national values referred to in Article 10, but, the President may address the nation about such matters at any other time or occasion as need and opportunity arises. The Court finds as much and in particular the Court invokes Article 259 (3) (a) which provides that every provision of the Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things, a function or power conferred by the Constitution on an office may be performed or exercised as occasion requires, by the person holding the office.

Thus the Court returns that the President's statement on measures to be undertaken towards combating corruption during the Madaraka Day celebrations on 01.06.2018 was constitutional and within the functions as cited for the respondents and vested upon the President.

The **6th issue** for determination is whether the circular Ref. No. OP/CAB.39/1A of 4th June 2018 was a statutory instrument under the provisions of section 2 of the Statutory Instruments Act 2013 which defines "**Statutory instrument**" to mean

"any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued."

The respondents have submitted that the circular was not a legislative or statutory instrument but, the 1st respondent by issuing the circular was merely coordinating the process on behalf of the President who is the ultimate accountable individual in the fight against corruption. Further the vetting had not yet commenced but when it does commence, the same will be carried out as required by law. Where disciplinary process is to be undertaken, then the relevant authority such as the 2nd respondent will undertake their statutory and constitutional mandate accordingly.

For the petitioner, it was submitted that the circular was pretending or masquerading to be a statutory instrument under the Statutory Instruments Act 2013 but without having been passed in accordance with the provisions of the Act involving public participation and approval by Parliament. Under the definition in the Act, a statutory instrument is one issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued. In issuing the circular the 1st respondent did not purport to do so pursuant to a provision of a statute or Act of Parliament or in exercise of delegated parliamentary power

to make subsidiary legislation. To the contrary and in line with the respondents' case that the circular was issued in furtherance of the President's function to coordinate the functions of ministries, departments and agencies of national government, the circular stated its source thus,

“Reference is made to H.E. The President’s Madaraka Day Speech delivered on 1st June 2018, and the proclamation therein on the fresh vetting of public officers.

The proclamation is in line with H.E. The President’s mandate to uphold and promote national values and principles of governance in the management of public affairs.”

The Court returns that the circular was not and did not pretend to be a statutory instrument. The use of the word “**proclamation**” must be construed in the context and in the literal sense to mean announcement or public statement and not a proclamation or decree as would be pursuant to an Act of Parliament as envisaged in the Statutory Instruments Act, 2013.

The 7th issue for determination is whether the circular departed from the President’s speech and promise to the nation on Madaraka Day. The circular was pursuant to the President’s address thus,

“Let me mention, as part of the raft of measures we intend to implement to tackle corruption, as an initial step, all Heads of Procurement and Accounts in Government Ministries, Departments, Agencies and Parastatals will undergo fresh vetting, including polygraph testing, to determine their integrity and suitability. Those who shall fail the vetting will stand suspended. I expect this exercise be concluded before the start of the new financial year (FY 2018/2019). You will hear of other tougher actions in the days to come.”

The clear President’s scheme or design was that first, the officers in issue would be vetted towards determining their integrity and suitability, and second, those who shall fail the vetting will stand suspended. The Court finds that as a design of things, there was nothing unconstitutional or unlawful as pronounced by the President. That is so in the understanding that the vetting would be within the established legal provisions and the suspension would be in accordance with the relevant procedures and regulations applicable to individual officers as would be affected in the lawfully executed process.

What did the circular prescribe? The circular directed all Heads of Accounting Units and Heads of Procurement Units to immediately hand over to their deputies and thereafter proceed on compulsory leave for 30 working days beginning 6th June 2018. The officers were to continue to earn their salaries and allowances during the period. During the leave period, the officers were not allowed to leave the country without requisite clearance by the Head of Public Service. The Court finds that the circular substantially deviated from the President’s design of first, the vetting, then, those who are unsuccessful to stand suspended. Instead the circular introduced compulsory leave for 30 days with full pay. The Court returns that the circular to that extent deviated from the President’s directive.

The 8th issue for determination is whether the compulsory leave that was imposed was a lawful or constitutional design towards implementing and achieving the President’s directive. The 1st respondent’s replying affidavit exhibits the Public Service Commission Human Resource Policies and Procedures Manual for the Public Service, May, 2016. The Manual provides for leave in Section E. The categories of leave listed include annual leave, maternity leave, child adoption leave, paternity leave, unpaid leave, compassionate leave, special leave for sportspersons, sick leave, terminal leave, and festive holidays. There is no constitutional or statutory or regulatory or other statutory instrument that has been shown to provide for compulsory leave. Even if the circular provided for a design or plan to be implemented by the respective authorities in law, the Court returns that the implementation of that particular provision would face serious challenges. To that extent the Court finds that the circular offended Article 47(1) which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. Further, the design of compulsory leave amounted to unfair labour practice in violation of Article 41 (1) of the Constitution because it has not been shown that such leave was envisaged in the individual public officers’ contracts of service, the public service regulations or

policies, the statutory provisions, or even constitutional provisions. Needless to state, the officers while on compulsory leave would earn without working and in circumstances whereby as at the time of imposition of the leave there was nothing to justify such application of public resources – the involved financial and human resources. It is the Court's view that economical use of such resources demands that any interference with the public's enjoyment of benefits flowing from the resources would need to be clearly justified. The circular's prescription of a compulsory leave without a thing, adverse or otherwise, against the affected officers would not pass the constitutional test. The Court finds that to that extent, the circular was not in line with Articles 232(1) (b) on the values and principles of public service including efficient, effective and economical use of resources; and Article 129(2) that executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit. The Court finds that there was no established reasonable justification for the affected officers not to continue in service while the appraisal or vetting, as it was called, was under way. Every circular must be drawn within law.

Thus, on the full analysis, the Court returns that to the extent that the circular imposed a design of compulsory leave with full pay, the rule of reasonableness as now codified in Article 47(1) of the Constitution was offended. In that regard the Court is guided on the principle of unreasonableness per Lord Greene in Associated Provincial Picture Houses Limited –Versus- Wednesbury Corporation (1947) 2ALL ER 680 at 682-683 thus,

“It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word ‘unreasonableness’ in a rather comprehensive sense. It is frequently used as general description of the things that must not be done. For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey these rules he may truly be said, and often is said, to be acting ‘unreasonably’. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head.”

The Court finds that the general principle and best practice on leave is that leave is agreed upon by the parties to the contract of service as it is normally to the benefit of the employee. In a circumstance whereby the employer imposes leave upon the employee the same would amount to an interdiction or suspension connoting a disciplinary process – so that there must be something adverse preferred against the employee for a compulsory leave to issue and which under the statutory provisions cited applying to the public service, it must be a suspension or interdiction in strict compliance with the relevant disciplinary procedures. The respondents have not cited statutory or other lawful provision that would justify the implementation of the design on compulsory leave with full pay as per the plan as laid out in the impugned circular.

To answer the 9th issue for determination the Court returns that there was no case of an accused person and violation or threatened violation of the rights of an accused person as cited and as urged for by the petitioner – and the Court finds that such submission was not only misleading but also misconceived. The Court considers that the officers will provide or have provided the required information in sealed envelopes as prescribed in the circular and the 1st respondent has received them or will receive them within the coordinating function. The circular does not say that the 1st respondent will undertake the vetting or the appraisal as it has been called for and designed. It is the Court's considered view that once the information is provided by the officer, through the 1st respondent's coordinating function, each of the constitutional or statutory authority such as the 2nd respondent will take over the process in accordance with their respective constitutional or statutory functions and powers. Thus, the Court finds that “Vet” in

this case can only be understood in its literal meaning per **Concise Oxford English Dictionary, 12th Edition**, thus, **“Check or examine very carefully. Investigate (someone) thoroughly to ensure that they are suitable for a job.”** In the Court’s opinion such is a function or power already vested in relevant constitutional and statutory authorities and the circular does not propose to undermine such provisions with the accompanying provisions of due process in undertaking such suitability interviews or appraisals. It is the Court’s view that as per the respondents’ submission, the vetting or suitability or appraisal interviews will be in the nature of the interviews for recruitment, selection or promotion and not leading to a criminal process but a determination on continued employment. Thus, on the material on record, the Court is unable to find violations of the rights of an accused person as provided for in Article 50 of the Constitution. It is the Court’s further opinion that any criminal investigations are not suggested in the circular or urged for the respondents and if any criminal investigations were to take place, then the prescribed constitutional and statutory provisions will have to be complied with.

Thus for example, section 62 of the Anti-corruption and Economic Crimes Act, 2003 provides that a public officer charged with corruption or economic crime under the Act shall be suspended, at half pay, with effect from the date of the charge until conclusion of the case which shall be determined within twenty-four months. Section 13 of the Public Service (Values and Principles) Act makes provision on making of complaints alleging the violation of the values and principles of public service by a public officer and the section prescribes steps to be taken by the relevant service commission in processing such a complaint. Section 42 of the Leadership and Integrity Act, 2015 prescribes lodging of complaints and investigations about alleged breach of the Leadership and Integrity Code. Section 70 and 71 of the Public Service Commission Act, 2017 provides for interdiction and suspension respectively. Section 35 and 36 of the Public Officer Ethics Act, 2003 provides for enforcement of the Public Officer Code of Conduct and Ethics by way of investigations and disciplinary action. It is the Court’s conclusion that there are clear provisions on dealing with a public officer in matters of alleged contravention of the prescribed code of conduct, ethics and integrity. There is due process to be followed in all instances of such alleged contravention, and the prescribed procedures and measures do not include paid compulsory leave. The Court finds imposition of paid compulsory leave as designed in the circular to be unlawful and not in the best interests of the affected public officer for want of due process and has adverse effect upon the tax payer or the public who suffers double tragedy of paying an officer who in the meantime is not rendering public service as expected.

Taking the contents of the circular into account, it is clear that the affected officers will provide or have provided the information required in sealed envelopes. The vetting will then have to be undertaken within the relevant constitutional and statutory provisions. It was submitted in detail for the 3rd respondent that such applicable statutes included the Public Service Commission Act, 2017; the Public Officer Ethics Act, 2003; the Leadership and Integrity Act, 2012; the Public Service (Values and Principles) Act, 2015; the Anti-Corruption and Economic Crimes Act, 2003; the Fair Administrative Action Act, 2015; and the National Government Co-ordination Act, 2013. It was submitted that the Acts had elaborate safeguards for public officers in the processes of enforcing alleged violation of the public service ethics, conduct and integrity standards. It was submitted that assuming there was a breach of rights of a public officer and there was no relief under the cited Acts of Parliament, then the Public Service Commission Act, 2017 had elaborate provisions giving public officers the right to be heard, to appeal against decisions and to seek review of decisions. Such reliefs, it was submitted for the respondents, were available prior to individual officers invoking the jurisdiction of the Court. Thus, the circular was to be understood to mean that the ministries, departments and agencies will carry out the vetting exercise in accordance with their respective authority in law and as per the relevant constitutional and statutory provisions. Ms. Mbilo for the 2nd respondent supported that line of submission.

The Court has considered the foregoing detailed respondents’ submissions and understands that it is their case that the vetting or suitability interviews or appraisals when they properly commence will be carried out in strict compliance with the prevailing and relevant constitutional and statutory provisions. Further, it is the Court’s opinion that in line with the petitioner’s submission (but in view of the respondents’ submissions an unnecessary venture as of now), if the prevailing statutory provisions are deficient, then the concerned actors will have to stop and put in place the necessary and further statutory framework to achieve the essential lawful goals of the vetting process.

The Court finds that the parties are therefore not in dispute but they are in agreement, and correctly so, that the vetting, or suitability or appraisal interviews in issue will have to comply with the provisions of the Constitution and will have to be through a process as prescribed in legislation. That being the case, the Court holds and declares that the vetting, or suitability or appraisal interviews in issue shall have to comply with the provisions of the Constitution and shall have to be through a lawful process as prescribed in relevant legislation, and where the prevailing legislation is deficient, such further legislation to be enacted as will be necessary or appropriate.

A related issue was whether the information required was declaration of income, assets and liabilities as per section 26 and the clarifications in that regard as per section 28 of the Public Officer Ethics Act, 2003. The Court has analysed the material on record and it is clear that none of the two sections have been invoked by the respondents in designing that the affected public officers provide the required information in sealed envelopes. It is the respondents' case that the information as asked for is for purposes of suitability interviews or appraisals or the vetting for continued service in the public service – a sought of *ad-hoc* appraisal. The Court returns that in absence of any other information, the information once provided is capable of being lawfully used by the relevant appointing authorities in the public service as it would apply at times of recruitment and selection at initial appointments or promotional interviews and within the relevant legal provisions and the request would not amount to a declaration or clarification under the cited provisions of the Act and in which event, the provisions of the Act would strictly apply. Taking it that the information provided is the kind of information the appointing authorities in public service would analyse during the initial appointment or promotion, it is the opinion of the Court that the same would be available in a like manner for the proposed vetting or, suitability or appraisal interview.

To answer the **10th issue** for determination, the Court returns that as submitted for the respondent, the kind of information the circular designs to be submitted by the officers would be the kind of information the public officers would ordinarily be required to provide under the declaration of incomes, assets, and liabilities as provided for in the Public Officer Ethics Act, 2007 but clearly outside sections 26 and 28 of the Act prescribing declarations and clarifications in that regard. Should there be any requirement for offensive disclosure as against the affected officers in that regard such as in furtherance of contravention of the right to privacy or other rights and freedoms, it was submitted for the respondents that nothing would prevent an affected officer from seeking appropriate intervention including legal action. As the circular stands now, it was submitted that the petitioner had not established that the kind of information to be provided by the affected public officers was, by reason of breach of a constitutional or statutory safeguard, offensive. Thus, for example the Public Service Commission Human Resource Policies and Procedures Manual for the Public Service, May, 2016 in Section G provides for Performance Management with clear staff performance appraisal process and staff performance appraisal system - and it was submitted for the respondents that the respondents had confirmed that the vetting was essentially such appraisal or suitability interviews.

The Court takes it that as per the respondents' submissions, such elaborate provisions will apply towards achieving the goals of the circular. The Court does not need to emphasise that such safeguards that may have been incorporated in the individual public officer's contracts of service as flowing from the applicable constitutional, statutory and regulatory provisions will have to be complied with throughout the vetting or, suitability or appraisals interviews as they have been referred to. It is the Court's view that throughout that process and the subsequent decisions to be made in that regard, all will be founded upon and implemented in accordance with Article 236 of the Constitution on protection of public officers and which states as follows;

“236. A public officer shall not be –

- a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or**
- b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.”**

To answer the 11th issue for determination, the Court returns that it is now clear that the petitioner was entitled to approach the Court by way of a petition rather than by ordinary action or other originating process. In view of the findings on the constitutional transgression as alleged or shown to attach, it is apparent that the petitioner was entitled to move the Court by way of a constitutional petition under Article 22 and more so Articles 258 as read with 3(1) of the Constitution. The Court follows **Revital Healthcare (EPZ) Limited & Another –Versus- Ministry of Health & 5 Others [2015]eKLR** (Anyara Emukule J) that a constitutional issue exists only if there was no alternative forum to resolve the dispute. Again in **COD & Another –Versus- Nairobi City Water & Sewerage Co. Ltd [2015]eKLR** (Onguto J), thus,

“14.The law above is crystal clear that where there exist sufficient and adequate mechanisms or forums to deal with a specific issue or dispute by other designated constitutional organs or under a statute, the jurisdiction of the High Court under Article 165(3) (b) of the Constitution should not be invoked until such mechanisms have been exhausted. To my mind therefore, not every litigant ought to come to court by way of a constitutional petition even where there are no constitutional issue arising and where there are adequate remedies provided in other laws to determine such situations.” The Court finds that in the present case, there were no established alternative mechanisms that were available to the petitioner to question the impugned circular, the petitioner was not trapped by the principle of constitutional avoidance, and the Court returns that the petitioner moved the Court properly through a constitutional petition.

On the 12th issue for determination, parties considerably submitted on the issue of collective punishment. It was urged for the respondents that the circular did not impose collective punishment. The petitioner submitted that it was against due process for a collective punishment to be imposed. The Court has already made findings on the offensive portion of the circular. The Court further follows its opinion in in **Kenya Plantation & Agricultural Workers’ Union –Versus- Roseto Flowers [2013]eKLR** thus,

“The notions of collective ownership and collective responsibility are best implemented through citizens’ participation in decision making. The idea of ownership is extended to cover control of shared resources and liabilities. The consequence is to achieve intergenerational justice and fairness. Future interests and fairness amongst varying interest groups in the state are taken care of as in “sustainable environmental management”. Collective ownership, collective responsibility and people-participation are at the core of good governance as a basis of the other principles such as accountability, transparency, affirmative action, meritocracy and constitutionalism. In that perspective, the notions of collective ownership and responsibility yield desirable outcomes.

However, when applied in misconduct and punishment, the notions of collective ownership and responsibility as invoked in the ultimatum principle can very easily yield into absurd and unjust outcomes. It can very easily lead to imposing punishment against innocent persons who are not aware of the ultimatum or who are not involved in the dispute at hand or who have individual explanations in self-exculpation.

The court has considered the submissions and finds that under our constitutional and statutory regime in employment and labour relations law, the string that flows throughout is that employers must uphold due process in a fair procedure in terminating employment on account of poor performance, misconduct and even ill-health. The constitutional and statutory law does not provide for the ultimatum principle as it obtains in South Africa and as submitted for the claimant, in absence of legislation on ultimatum principle, the court finds that the court may not coin an interpretation as to apply it in cases of strikes in Kenya’s employment and labour relations. The court upholds the opinions as consistently elaborated in the cases cited for the claimant.”

Thus, the Court returns that collective punishment is not tenable under our justice system and in the present case, there being no established disciplinary process or criminal trial, it cannot be said that collective punishment was imposed in the circumstance of the case.

Finally, the parties made elaborate submissions on costs and they were in agreement that costs should follow the event. The Court has considered the parties' respective margins of success and returns that the 2nd and 3rd respondents will jointly or severally pay the petitioner's costs of the suit. The Court has considered that the 1st respondent was sued in person but only on the account that at all material time he was the holder of the office of Head of the Public Service. Section 22 of the National Government Coordination Act, 2013 provides that nothing done by a public officer appointed under the Act shall, if done in good faith for the purpose of executing the functions of the office, render such officer personally liable for any action, claim or demand. The Court returns that the material on record shows that at all material times the 1st respondent acted in good faith towards the execution of the responsibilities of the office he held. Accordingly, the Court considers that he will not and cannot be held liable to pay the petitioner's costs of the suit.

In conclusion, judgment is hereby entered for the petitioner against the respondents for:

- a) The declaration that the circular Ref. No. OP/CAB.39/1A of 4th June 2018 is illegal and unconstitutional only to the extent that by designing and prescribing imposition of a compulsory leave with full pay the circular thereby contravened Articles 47(1), 41(1), 129(2), and 232(1) (b) of the Constitution of Kenya, 2010 and only to that extent, the circular is rendered null and void.
- b) The 2nd and 3rd respondents will jointly or severally pay the petitioner's costs of the petition.

Signed, dated and delivered in court at **Nairobi** this **Friday 20th July, 2018**.

BYRAM ONGAYA

JUDGE