



REPUBLIC OF KENYA



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**Gikenyi B. & another v National Assembly & 6 others; Public Service Commission
(Interested Party) (Petition E018 of 2025) [2025] KEHC 12276 (KLR)
(Constitutional and Human Rights) (12 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 12276 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E018 OF 2025

AB MWAMUYE, J

AUGUST 12, 2025

IN THE MATTER OF:

**THE IRREGULAR, ILLEGAL & NON-COMPETITIVE UNCONSTITUTIONAL
APPOINTMENT OF VICE CHAIRPERSON AND MEMBERS OF THE PUBLIC SERVICE
COMMISSION (PSC)**

IN THE MATTER OF:

THE PUBLIC SERVICE COMMISSION ACT, CAP. 185 OF THE LAWS OF KENYA

IN THE MATTER OF:

**THE PUBLIC APPOINTMENTS (PARLIAMENTARY
APPROVALS) ACT, CAP. 7F OF THE LAWS OF KENYA**

IN THE MATTER OF:

**APPROVAL HEARINGS FOR PERSONS NOMINATED BY H.E. THE PRESIDENT FOR
APPOINTMENT AS COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION
(PSC)**

IN THE MATTER OF:

**ALLEGED CONTRAVENTION OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 25, 27,
28, 41, 43, 52, 53, 54, 55, 73, 75, 94, 129, 130, 131, 132, 162, 165, 232, 233, 236,
248, 249, 250, 258, 259, AND 260 OF THE CONSTITUTION OF KENYA**

IN THE MATTER OF:

**RULES 4, 10, 11, 13 OF THE CONSTITUTION OF KENYA (SUPERVISORY
JURISDICTION AND PROTECTION OF FUNDAMENTAL FREEDOMS) – HIGH COURT**



PRACTICE AND PROCEDURE RULES, 2013

IN THE MATTER OF:

DOCTRINES OF BILL OF RIGHTS, CONSTITUTIONALISM, RULE OF LAW AND
LEGITIMATE EXPECTATIONS

BETWEEN

DR. MAGARE GIKENYI B. 1ST PETITIONER

ELIUD KARANJA MATINDI 2ND PETITIONER

AND

THE NATIONAL ASSEMBLY 1ST RESPONDENT

THE SELECTION PANEL FOR THE RECRUITMENT OF NOMINEES FOR
APPOINTMENT AS VICE CHAIRPERSON AND MEMBERS OF THE PUBLIC
SERVICE COMMISSION 2ND RESPONDENT

THE HON. ATTORNEY-GENERAL 3RD RESPONDENT

MARY WANJIRA KIMONYE, CBS 4TH RESPONDENT

BOYA MOLU, EBS 5TH RESPONDENT

IRENE CHEROTICH ASIENGA 6TH RESPONDENT

FRANCIS MEJA 7TH RESPONDENT

AND

THE PUBLIC SERVICE COMMISSION INTERESTED PARTY

JUDGMENT

Introduction

1. This petition seeks to interrogate the legality and constitutionality of the appointments of four individuals, namely Mary Wanjira Kimonye, Boya Molu, Irene Cherotich Asienga, and Francis Meja, into the Public Service Commission (PSC), pursuant to Gazette Notices Nos. 385 and 386, both dated 16th January 2025 and published on 17th January 2025. The Petitioners, Dr. Magare Gikenyi and Mr. Eliud Karanja Matindi, moved this Honourable Court on 17th January 2025, contending that the said appointments violated express provisions of *the Constitution*, including Articles 10, 232, 233, 249, and 250, and the provisions of the *Public Service Commission Act*, particularly section 11 on tenure management. The Petitioners seek both declaratory and judicial review remedies to invalidate the said appointments.
2. On or about 20th December 2024, the President of the Republic of Kenya nominated eight persons for appointment to the Public Service Commission. The names were forwarded to the National Assembly for vetting pursuant to the Public Appointments (Parliamentary Approvals) Act. The National Assembly considered the nominees during a special sitting held on 16th January 2025, and approved all eight nominees. Thereafter, the President issued two Gazette Notices, No. 385 and 386,



dated 16th January 2025 and published on 17th January 2025, formally appointing the said individuals into office.

3. At the time of these appointments, it is not in dispute that there were already two commissioners in office: Amb. Anthony Muchiri, who was serving as the Chairperson, and Amb. Patrick Wamoto, a serving commissioner whose term had not expired. According to the Petitioners, this meant that only seven vacancies existed, namely, one for Vice Chairperson and six for members. The President's appointment of eight individuals, without any indication of effective dates of tenure or internal staggering mechanisms, effectively resulted, in the Petitioners' view, in a ten-member commission in breach of Article 233(2) of *the Constitution*, which limits the composition of the PSC to a Chairperson, Vice Chairperson, and seven other members.
4. The Petition further challenges the eligibility and suitability of four of the appointed individuals. The Petitioners allege that Mary Wanjira Kimonye, appointed as Vice Chairperson, hails from the same ethnic group as the Chairperson, Anthony Muchiri, and that this dual representation of one ethnic community at the helm of the Commission offends the constitutional values of inclusivity and diversity enshrined under Articles 10, 232, and 250(4) of *the Constitution*. It is argued that the Chair and Vice Chair cannot, consistently with the spirit and purpose of *the Constitution*, come from the same ethnic community in a multi-ethnic republic such as Kenya.
5. As regards Boya Molu and Dr. Irene Asienga, the Petitioners contend that these two individuals are statutorily and constitutionally barred from appointment under Article 250(6)(a), having already served full six-year terms in other constitutional commissions, Mr. Molu having served at the Independent Electoral and Boundaries Commission (IEBC) and Dr. Asienga at the Commission on Revenue Allocation (CRA). The Petitioners argue that Article 250(6)(a) provides for a single non-renewable six-year term for any holder of a commission or independent office, and that the phrase "a single term of six years" must be interpreted as a bar to further appointments to any constitutional commission, regardless of whether the office is in the same or a different commission.
6. With respect to the appointment of Mr. Francis Meja, the Petitioners allege that he was, within the last general election cycle, actively affiliated with the United Democratic Alliance (UDA) party, having allegedly participated in political campaigns in Kajiado County. It is alleged that Mr. Meja's political affiliation and recent involvement in partisan electoral processes disqualify him under Article 233(3) (c) and (d) of *the Constitution*, which prohibits the appointment of individuals who have held political office or have been candidates in parliamentary or county elections within the previous two general elections. The Petitioners assert that Mr. Meja's political proximity offends the principle of impartiality expected of members of an independent commission such as the PSC.
7. Beyond the qualifications and backgrounds of the specific appointees, the Petitioners also raises issue with the legality of the procedure adopted in making the appointments. It is alleged that the appointments as contained in Gazette Notices Nos. 385 and 386 violate section 11(2) and (3) of the *Public Service Commission Act*, which requires staggered terms to prevent a situation where all commissioners exit office at the same time. The Petitioners argue that the lack of distinct effective dates for each appointment will result in a concurrent lapse of the commissioners' tenures, thereby undermining continuity and the institutional memory of the Commission, which is essential for its effective functioning.
8. The Petition is supported by a certificate of urgency and a Notice of Motion seeking conservatory orders to halt the implementation of the appointments pending the determination of the main petition. The Petitioners also pray for declarations nullifying the said Gazette Notices and permanently barring the 4th to 7th Respondents from holding office. They further seek orders compelling the



President to initiate a fresh process of recruitment in accordance with *the Constitution*, the PSC Act, and the *Public Service (Values and Principles) Act*.

9. In response, the Respondents through various replying affidavits, including those sworn by the 4th to 7th Respondents and the Attorney General, deny all allegations. It is contended that the appointments were lawfully made within the parameters of *the Constitution* and relevant statutes, and that the Petitioners have failed to provide credible evidence to support their claims. Specifically, it is denied that the Commission exceeded the numerical limit under Article 233(2), that the 4th and 5th Respondents come from the same ethnic community, or that Article 250(6)(a) bars a person from serving in more than one commission. As to the allegations against Mr. Meja, it is averred that no evidence has been tendered showing he was either a political candidate or an office holder in a political party.
10. This matter, therefore, calls for a careful constitutional examination of several legal questions, including the extent of the President's discretion in appointments under Chapter 15 of *the Constitution*; the meaning and scope of the term limit provision in Article 250(6)(a); the test for ethnic and regional diversity under Article 250(4); and the criteria for disqualification on account of political activity under Article 233(3). At its core, the petition invokes fundamental constitutional values such as integrity, transparency, accountability, fairness, inclusivity, and respect for the rule of law and invites the Court to pronounce itself on the constitutionality of public appointments in a context where the balance between executive authority and legal propriety must be carefully calibrated.

Petitioners' Case

11. The Petitioners, Dr. Magare Gikenyi and Mr. Eliud Matindi, submitted that the appointments of the 4th to 7th Respondents to the Public Service Commission were unconstitutional and procedurally defective. They argued that the cumulative effect of the appointments, when considered alongside the continued tenure of two existing commissioners, resulted in a composition that exceeded the maximum number permitted under Article 233(2) of *the Constitution*. It was their contention that the lack of clear commencement dates in the gazette notices gave rise to the presumption that all appointees assumed office concurrently, thereby resulting in an unconstitutional ten-member Commission.
12. The Petitioners further averred that the appointment of Mary Wanjira Kimonye as Vice Chairperson violated Article 250(4) of *the Constitution* by failing to reflect the ethnic diversity of Kenya, as she and the Chairperson allegedly hail from the same ethnic community. They also contended that Boya Molu and Dr. Irene Asienga were ineligible for appointment under Article 250(6)(a), having previously served full terms in other constitutional commissions. On the part of Francis Meja, they submitted that he was politically affiliated with the United Democratic Alliance and had been actively engaged in the 2022 elections, rendering him disqualified under Article 233(3)(c) and (d). They also argued that the failure to provide staggered terms in accordance with Section 11 of the PSC Act created a constitutional risk. The Petitioners therefore urged the Court to quash the appointments and compel the appointing authorities to conduct a fresh, constitutionally compliant process.

Respondents' Case

13. The 1st Respondent, through a Replying Affidavit sworn by Samuel Njoroge C.B.S. on 28th February, 2025 opposed the Petition in its entirety, maintaining that it conducted the vetting and approval of the nominees to the positions of Vice-Chairperson and Commissioners of the Public Service Commission strictly within the confines of the law. It was deponed that the process was undertaken in compliance with Article 250(2) of *the Constitution*, section 11 of the *Public Service Commission Act*, and the *Public Appointments (Parliamentary Approval) Act*. The Respondent outlined that upon receiving the President's notification of nomination, the Speaker acted in accordance with Standing Orders by



- transmitting the message to Members and referring the matter to the Departmental Committee on Labour, the mandated body to conduct approval hearings and report to the House. The Respondent emphasized that all procedural requirements, including notification to nominees, facilitation of public participation, and invitations for submission of memoranda, were duly complied with.
14. It was further averred that the nominees were subjected to clearance and compliance checks with key institutions, including the EACC, KRA, DCI, HELB, ORPP, and ODPP, all of which confirmed the nominees' integrity and compliance with legal requirements. Approval hearings were held on 9th January 2025, guided by section 6(7) and (8) and section 7 of the *Public Appointments (Parliamentary Approval) Act*. The Committee examined the nominees' academic credentials, professional experience, personal integrity, and overall suitability for appointment. It was observed that all nominees were Kenyan citizens without dual citizenship, held no political party positions, met the requirements of Chapter Six of *the Constitution*, and had no adverse integrity or disciplinary records.
 15. On the memorandum of objection lodged by Dr. Magare Gikenyi, it was stated that each nominee provided written and oral responses, which were duly considered by the Committee. Regarding allegations of ethnic imbalance against Mrs. Mary Wanjira Kimonye, the Committee found that she was from the Ameru community and that constitutional commissions should be considered collectively in assessing ethnic diversity, as held in *Legal Advice Centre v Attorney General & 3 Others (2015) KEHC 7141 (KLR)* and *Consortium for the Empowerment and Development of Marginalised Communities & Others v Chairman, Selection Panel for appointment of chairperson and Commissioner to the Kenya National Human Rights Commission, H.C Petition No. 385 of 2012*. As to Mr. Boya Molu and Dr. Irene Cherotich Asienga, the Committee held that Article 250(6) (a) did not bar service in a different commission after serving in another. For Mr. Francis Meja, the Committee determined that his previous political engagement did not offend Article 233(3) since he had not contested in the last two general elections and was not a political party official.
 16. The Respondent also submitted that the nomination process complied with statutory timelines. In particular, it was argued that Article 259(8) of *the Constitution* and paragraph 5 of the First Schedule to the *Public Service Commission Act* require initiation of the recruitment process at least six months before the expiry of a Commissioner's term. The nomination of a replacement for Amb. Patrick Wamoto, whose term lapses in April 2025, was therefore lawfully commenced in December 2024. It was further stressed that the substantive assumption of office by new Commissioners would only occur upon the expiry of incumbents' terms, ensuring compliance with constitutional and statutory provisions.
 17. In conclusion, the 1st Respondent maintained that the entire nomination and vetting exercise adhered to *the Constitution*, statutory provisions, and parliamentary procedures. The Committee's recommendations were adopted by the House on 16th January 2025, thereby completing the approval process. The Respondent contended that the Petition was devoid of merit, constituted an unwarranted attack on a lawful parliamentary process, and should be dismissed with costs to the National Assembly.
 18. The individual appointees, the 4th to 7th Respondents, also filed individual responses. Mary Kimonye averred that she is from the Ameru community and not the Kikuyu, and thus her appointment did not offend Article 250(4). Boya Molu and Dr. Irene Asienga argued that Article 250(6)(a) only bars reappointment to the same commission, not fresh appointments to a different one. Francis Meja denied any political affiliation, stating that he had never held office in a political party nor stood for elective office in the last two elections. All Respondents urged the Court to dismiss the Petition for lack of evidentiary foundation and to uphold the legality of the appointments.



19. The Petition was canvassed by way of written submissions and the parties complied by filing their respective submissions.

Petitioners' Submissions

20. The Petitioners argued that the Respondents had failed to uphold the constitutional obligation to observe, respect, protect, promote, and fulfil the rights in the Bill of Rights. Relying on *Institute of Social Accountability & Another v National Assembly & 4 Others* [2015] eKLR, they emphasized the need for a purposive and liberal interpretation of constitutional provisions that advances the rule of law, human rights, and good governance, while warning against acts by State agencies outside the confines of the law as condemned in *Entick v Carrington* (1765) 2 Wils KB.
21. They contended that any appointing authority is constitutionally bound, under Articles 2, 10, 27, 73, and 232, to ensure appointments reflect national values, principles of governance, and fairness in public service. Referring to *Hezekiah Chepkwony & 2 Others v Cabinet Secretary, Ministry of Health & 2 Others* [2020] eKLR, they submitted that public offices are held in trust for the people and must be filled in a transparent, equitable, and merit-based manner. The Petitioners further argued that the President violated Section 11(2) and (3) of the *Public Service Commission Act* by appointing the Vice Chairperson and members of the PSC on the same day, thereby ensuring their terms would lapse simultaneously contrary to the express statutory requirement for staggered terms. They relied on *Krystalline Salt Limited v KRA* [2019] eKLR to argue that the use of the word “shall” in legislation denotes a mandatory obligation.
22. On ethnic and regional balance, the Petitioners submitted that *the Constitution*, read together with the *Public Service Commission Act* and the *Public Service (Values and Principles) Act*, prohibits the appointment of both the Chairperson and Vice Chairperson of a constitutional commission from the same ethnic community or region. They argued that the nomination of Mrs. Kimonye, from the same ethnic background and region as the current Chairperson, contravenes Articles 10, 232, 249, and 250 of *the Constitution* by undermining ethnic diversity and equitable regional representation. They urged the Court to nullify her appointment, asserting that ethnicity is determined by lineage and not marriage, and that the current composition disenfranchises other communities.
23. The Petitioners also contended that the impugned appointments failed the constitutional rationality and reasonableness test as articulated in *Trusted Society of Human Rights Alliance v Attorney General & Others* [2012] eKLR. They argued that there was no rational relationship between the constitutional objectives of diversity, fairness, and merit, and the appointments made. They further submitted that Article 250(6)(a) prohibits any person from serving in more than one constitutional commission, and therefore former commissioners such as Mr. Molu and Dr. Asienga were ineligible for reappointment to another commission. Additionally, they maintained that Article 233(3)(c) and (d) disqualifies politicians from appointment to the PSC within ten years of active political participation, and that the appointment of Mr. Meja, an active participant in the 2022 elections, was unconstitutional.
24. Finally, the Petitioners argued that the appointments violated Article 233(2) by creating a commission of ten members instead of the constitutional maximum of nine, even if temporarily, and that this illegality could not be cured by effluxion of time. They asserted that the Respondents' actions thwarted the legitimate expectation of Kenyans that constitutional and statutory provisions would be respected, relying on *Oindi Zaippeline & 39 Others v Karatina University & Another* [2015] eKLR. The matter, they submitted, was of great public interest as it involved the integrity of public appointments. They urged the Court to grant the orders sought to remedy the illegalities and restore adherence to constitutional norms.



1st Respondent's Submissions

25. The 1st Respondent submitted that the vetting process adhered strictly to Article 250(2) of *the Constitution*, Section 11 of the *Public Service Commission Act*, and the *Public Appointments (Parliamentary Approval) Act*, 2011. The 1st Respondent emphasizes that upon receiving the President's notification, the Speaker duly referred the matter to the relevant Committee, which issued timely notifications to the nominees and the public, thereby ensuring compliance with the requirements of public participation under Articles 10 and 118 of *the Constitution*.
26. It was averred that the public was invited to submit memoranda, and indeed, a memorandum was received from the 1st Petitioner contesting the suitability of four nominees. In fulfilment of Section 6(7) of the *Public Appointments (Parliamentary Approval) Act*, clearance was sought from relevant State agencies including the KRA, EACC, DCI, and HELB, all of which confirmed compliance with Chapter Six of *the Constitution*. It is the Respondent's case that the Committee duly considered the memorandum by the Petitioner, sought written and oral responses from the nominees, and addressed each objection comprehensively. The Committee concluded that there was no basis to disqualify the nominees and proceeded to recommend their approval to the National Assembly, which adopted the report.
27. On the specific objections raised, it was submitted that the claim of ethnic imbalance against the Vice Chairperson nominee, Mrs. Mary Wanjiru Kimonye, was unfounded, as she is a Meru by origin, and *the Constitution* requires consideration of ethnic diversity "taken as a whole" across commissions. For nominees Mr. Boya Molu and Dr. Irene Cherotich Asienga, the Committee held that prior service in other commissions is not prohibited by Article 250(6)(a), as the six-year term limitation applies to the same office within a particular commission. Regarding Mr. Francis Meja, it was established that he had not held any prohibited political office within the preceding five years, had not participated in the last two general elections, and had merely expressed interest in a gubernatorial seat without being a party official.
28. The Respondent further submits that the nomination and approval process was within the law, as the recruitment commenced at least six months before the anticipated vacancies, in line with paragraph 5 of the First Schedule to the *Public Service Commission Act*. It is argued that Article 259(8) of *the Constitution* permits such action to be taken without unreasonable delay and as often as the occasion arises. The nominations were therefore timely and legally compliant, addressing both current and impending vacancies in the Commission.
29. In conclusion, the 1st Respondent urges the Court to find that the National Assembly complied with all constitutional and statutory provisions in the vetting and approval process, considered and addressed all objections raised, and acted within the confines of the law. Relying on the precision pleading principles in *Anarita Karimi Njeru v Republic* (1976-1980) KLR 1272 and *Mumo Matemu v Trusted Society of Human Rights Alliance & Others* [2013] KECA 445 (KLR), as well as the sufficiency threshold outlined in *Canada (AG) v Bedford* [2013] SCC 72, it is contended that the Petition is speculative, lacks the requisite specificity, and does not demonstrate any actual constitutional violation to warrant the Court's intervention. The Respondent thus prays for the Petition to be dismissed with costs.

2nd – 7th Respondents' Submissions

30. The 2nd to 7th Respondents in their written submissions, submitted that at no time did the PSC's composition exceed the constitutional maximum prescribed under Article 233(2) of *the Constitution*,



- as confirmed by affidavits from the commissioners concerned. They invoked Section 107 of the *Evidence Act* to argue that the burden of proof lay with the petitioners, who had failed to discharge it.
31. On the allegation of ethnic imbalance, the Respondents argued that the petitioners had misconstrued Article 250(4) of *the Constitution* and presented incorrect facts. They clarified that the vice-chairperson, Madam Mary Kimonye, is from the Ameru community, not Kikuyu, as evidenced in her national identity card. The Respondents further submitted that the Ameru and Agikuyu are distinct ethnic groups and that Kenya is divided into counties under Article 6(1), not into former provincial or regional boundaries. Relying on *Mohamed Osman Wafra & 3 Others v Office of the President & 5 Others* [2013] KEHC 2741 and *Consortium for the Empowerment & Development of Marginalized Communities v Chairman Selection Panel for KNCHR* [2013] eKLR, they argued that regional and ethnic diversity must be assessed across all commissions and independent offices “taken as a whole,” not on the basis of a single commission’s composition.
 32. In addressing the eligibility of Mr. Boya Molu and Ms. Irene Cherotich Asienga, the Respondents contended that the petitioners had misapplied Article 250(6) of *the Constitution*. They asserted that the general provisions of Article 250 do not override the specific provisions of Article 233 governing the PSC, which does not bar persons previously serving in other commissions from appointment. They relied on *Katiba Institute v Attorney-General & 9 Others* (Petition 17 of 2020), where the Supreme Court held that prior public service is not a disqualifying factor under Article 233(3), and on *Law Society of Kenya v Attorney-General & 4 Others* (2023) KESC 19 (KLR) to emphasize that Chapter Fifteen commissions are not homogeneous in their composition and tenure provisions.
 33. With respect to Commissioner Francis Meja, the Respondents maintained that his appointment was constitutional. They argued that under Article 233(3), the disqualification applies only to persons who have, within the last five years, held elective office, been members of political party governing bodies, or stood as candidates for parliamentary or county assembly seats. Mr. Meja, in his affidavit, denied ever holding such offices or being a candidate in the 2022 general elections, clarifying that although he had expressed interest in the Kajiado gubernatorial seat, he did not proceed past the primaries. His position was corroborated by public records and the National Assembly’s vetting process. The Respondents submitted that the petitioners had adduced no evidence to the contrary.
 34. On the question of staggered appointments, the Respondents submitted that the commissioners’ terms do not lapse simultaneously and that appropriate measures were taken to ensure continuity in the PSC’s operations. They contended that since the commissioners are already in office, their removal can only be effected in accordance with the procedure set out in Article 251 of *the Constitution*, which had not been invoked in this case. Consequently, they urged the Court to find that the petition and the accompanying application were devoid of merit and to dismiss them with costs.
 35. Having set out the context and factual matrix, the Court will now proceed to identify the issues for determination.

Issues for Determination

36. Having considered the Petition, the responses thereto, the affidavits filed, and the submissions of the parties, the Court identifies the following as the issues that fall for determination:
 - a. Whether the composition of the Public Service Commission, following the impugned appointments made through Gazette Notices Nos. 385 and 386 of 16th January 2025, exceeded the maximum number of commissioners allowed under Article 233(2) of *the Constitution*.



- b. Whether the appointment of Mary Wanjira Kimonye as Vice Chairperson of the Public Service Commission contravened the constitutional principles of ethnic and regional diversity as set out under Articles 10, 232, and 250(4) of *the Constitution*.
- c. Whether the appointments of Boya Molu and Dr. Irene Cherotich Asienga were in violation of Article 250(6)(a) of *the Constitution*, having previously served full terms as commissioners in other constitutional commissions.
- d. Whether the appointment of Mr. Francis Meja to the Public Service Commission was unconstitutional by reason of disqualification under Article 233(3)(c) and (d) of *the Constitution* for political involvement within the preceding five years.
- e. Whether the appointments made under Gazette Notices Nos. 385 and 386 violated the requirements of Section 11(2) and (3) of the *Public Service Commission Act* regarding staggered terms of office for commissioners.
- f. Whether the Petitioners have satisfied the legal and evidentiary threshold to warrant the grant of the declaratory, judicial review, and injunctive reliefs sought in the Petition.

Analysis and Determination

Whether the composition of the Public Service Commission, following the impugned appointments made through Gazette Notices Nos. 385 and 386 of 16th January 2025, exceeded the maximum number of commissioners allowed under Article 233(2) of *the Constitution*

37. Article 233(2) of *the Constitution* of Kenya is explicit and unambiguous in stipulating the composition of the Public Service Commission. It provides that the Commission shall consist of a Chairperson, a Vice Chairperson, and seven other members. The total number of commissioners under this provision is therefore capped at nine. This provision is couched in mandatory terms, leaving no room for discretion on the part of the appointing authority to increase the number beyond what is constitutionally prescribed. The central question that this Court must determine is whether the appointments effected by Gazette Notices Nos. 385 and 386 dated 16th January 2025 resulted in a composition that exceeded the constitutionally allowed number of commissioners.
38. The Petitioners have contended that at the material time, there were already two serving members of the Commission, namely, the Chairperson, Amb. Anthony Muchiri, and a commissioner, Amb. Patrick Wamoto, whose term had not expired. They assert that the President, by appointing eight additional individuals on 16th January 2025, brought the total number of commissioners to ten, thereby offending Article 233(2) of *the Constitution*. They further argue that no evidence has been provided to show that the appointments were replacements for exiting commissioners, and that the absence of specified commencement dates in the gazettelement creates a legal presumption that the appointees assumed office contemporaneously, resulting in an unlawful enlargement of the Commission.
39. In response, the Respondents have submitted that the appointments did not cause the Commission to exceed the constitutional limit of nine members. They argue that the appointments were made to fill existing vacancies caused by the expiry of the terms of other commissioners, and that there is no evidence that ten commissioners were in office at the same time. It is the Respondents' position that the Petitioners have not discharged the evidentiary burden of proving that the PSC ever comprised more than the constitutionally permitted nine members.
40. This Court is alive to the principle that constitutional provisions must be given a purposive and holistic interpretation in line with Article 259 of *the Constitution*. The objective of Article 233(2) is



to establish a clear and limited structure for the composition of the Public Service Commission. The limitation to nine members ensures not only administrative coherence but also fosters accountability and fiscal prudence in the management of public resources. The constitutional ceiling is, therefore, not a procedural formality but a substantive safeguard against institutional bloating.

41. It is trite law that he who alleges must prove. Under Section 107(1) of the *Evidence Act* (Cap. 80, Laws of Kenya), the burden of proof lies with the party who desires the Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts. The Petitioners in this matter have made serious allegations of constitutional breach but have not tendered any conclusive evidence to show that the Commission, after the impugned appointments, comprised more than nine active members. No documentation has been placed before this Court to demonstrate that all the eight newly appointed individuals took office at a time when the two previously serving commissioners were still in office.
42. This Court finds persuasive the reasoning in *George Bala v Attorney General* [2017] KEHC 8350 (KLR), where the High Court held that

“Our Constitution, in my view is a value-oriented Constitution as opposed to a structural one. Its interpretation and application must therefore not be a mechanical one but must be guided by the spirit and the soul of *the Constitution* itself as ingrained in the national values and principles of governance espoused in the preamble and inter alia Article 10 of *the Constitution*.”

In that case, the Court further emphasized the need to evaluate the substance of appointments and their effect, not merely the form. Applied to the present case, it is insufficient for the Petitioners to show that eight people were appointed; they must demonstrate that such appointments translated into ten concurrently serving commissioners. This they have not done.

43. Additionally, in *Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 others* [2014] eKLR, the Court affirmed that the law does not presume irregularity merely because of timing or sequence. A gazette notice, though indicative of appointment, does not conclusively determine the date of assumption of office. The absence of explicit effective dates in the gazette notices does not, without more, establish a constitutional violation unless it is proven that the commissioners actually assumed office on overlapping or impermissible terms. In arriving at the decision, the court while quoting *Macfoy Vs United Africa Co Ltd* where Lord Denning distinguished between an act that is a mere irregularity and one that is a nullity. A mere irregularity is not void, but voidable. An act that is voidable is valid until it is made or declared void. It ceases to have effect after it is declared void; it is not void ab initio. What has been done or accomplished before, pursuant to that act, is not affected by the declaration. On the other hand, a nullity is really something that is void, a nothing right from the beginning. In the words of Lord Denning:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside; and



the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it.

44. Further, this Court takes judicial notice of the ordinary and practical operations of public appointments, where the formal date of gazettelement does not always coincide with the date of assumption of office or issuance of instruments of appointment. There may be administrative steps, such as issuance of letters of appointment, declarations of income and assets, or taking of oaths, that are completed before a commissioner legally assumes office. In the absence of evidence that such processes were dispensed with or manipulated to produce an unconstitutional outcome, this Court cannot declare the appointments unlawful purely on the basis of temporal proximity.
45. In conclusion, this Court finds that although the Petitioners have raised an important question regarding potential over-composition of the Public Service Commission, they have failed to produce specific evidence showing that the number of active commissioners exceeded nine. The principle of constitutionality of public appointments is vital, but the enforcement of constitutional ceilings must be based on demonstrable facts, not speculative or inferential reasoning. In the absence of evidence showing simultaneous service by more than nine commissioners, the Court finds that the impugned appointments did not violate Article 233(2) of *the Constitution*.
46. Accordingly, the first issue is answered in the negative. The Petitioners have not proved that the composition of the Public Service Commission exceeded the constitutional limit of nine members following the appointments gazetted on 16th January 2025.

Whether the appointment of Mary Wanjira Kimonye as Vice Chairperson of the Public Service Commission contravened the constitutional principles of ethnic and regional diversity as set out under Articles 10, 232, and 250(4) of *the Constitution*

47. The second issue calls for an interpretation of the constitutional principles that govern inclusivity and representational balance in public appointments, particularly with regard to ethnicity and regional diversity. The Petitioners have challenged the appointment of the 4th Respondent, Mary Wanjira Kimonye, as the Vice Chairperson of the Public Service Commission on the grounds that she comes from the same ethnic community as the current Chairperson of the Commission, Amb. Anthony Muchiri. It is alleged that both individuals hail from the Kikuyu community, and that their concurrent leadership at the helm of the Commission offends the constitutional requirements of ethnic and regional diversity.
48. The constitutional provisions relevant to this claim include Article 10, which enshrines national values and principles of governance, including inclusiveness, equality, non-discrimination, and protection of marginalized groups; Article 232(1)(h), which mandates representation of Kenya's diverse communities in the public service; and Article 250(4), which specifically provides that the composition of each commission and independent office shall reflect the regional and ethnic diversity of the people of Kenya.
49. The question that therefore arises is whether the appointment of the 4th Respondent, viewed in light of the existing composition of the Commission, violates these constitutional principles. This inquiry requires not only a factual determination of the ethnic origins of the Chairperson and Vice Chairperson, but also a jurisprudential interpretation of what constitutes "ethnic and regional diversity" in the context of public appointments.
50. In her replying affidavit, the 4th Respondent deponed that she hails from the Ameru community, which is indigenous to Meru County in the former Eastern Province. This assertion was not effectively controverted by the Petitioners. The Petitioners relied on a general claim, unsubstantiated by any



documentary evidence, that she belongs to the Kikuyu community. They did not place before the Court any official or persuasive source such as an identity card, curriculum vitae, previous official records, or public statements that would displace the 4th Respondent's sworn assertion of her ethnic identity.

51. In the case of *Leonard Otieno v Airtel Kenya Limited* [2018], the High Court observed that the onus of proof lies on the party alleging a violation of constitutional rights to establish their claim with cogent evidence. The same principle was echoed in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR, where the Court of Appeal held that constitutional petitions must be pleaded with precision and particularity, especially where they allege violations of diversity and inclusion principles.
52. It is not the function of this Court to speculate about the ethnic identity of public officers, nor to draw adverse inferences from names, regions, or social associations. Ethnic identity is a matter that must be established by admissible evidence and not by conjecture or perception. In this case, the Petitioners have not displaced the 4th Respondent's affidavit evidence, and the Court therefore accepts that she is from the Ameru community.
53. Even if the Court were to accept, purely for argument's sake, that the Chairperson and Vice Chairperson are from the same ethnic community, that fact alone would not constitute a constitutional violation under Article 250(4). The said Article provides that the composition of a commission "taken as a whole" shall reflect the ethnic and regional diversity of the people of Kenya. The test is not applied to individual appointments but to the collective configuration of the Commission. The appointment of two persons from the same or closely related ethnic group does not, by itself, negate the broader requirement of institutional diversity.
54. The same reasoning was adopted by the Court of Appeal in *Community Advocacy and Awareness Trust and Others V Attorney General*, where it was held that constitutional principles on diversity are intended to promote inclusivity, not to create rigid ethnic quotas. The principle is one of representational fairness, not arithmetical balance.
55. On the question of regional diversity, it must be noted that Kenya's administrative and political organization is structured around counties rather than ethnic groupings. Article 6(1) of *the Constitution* recognizes 47 counties as the principal units of devolution and governance. As such, regional diversity may be interpreted in terms of county or regional representation, not strictly ethnic lines.
56. In view of the foregoing, this Court finds that the appointment of Mary Wanjira Kimonye has not been shown to violate the principles of ethnic and regional diversity. The Petitioners have not provided credible evidence to support their claims.

Whether the appointments of Boya Molu and Dr. Irene Cherotich Asienga were in violation of Article 250(6)(a) of *the Constitution*, having previously served full terms as commissioners in other constitutional commissions.

57. This issue concerns the constitutional limitation placed on the tenure of commissioners of independent constitutional commissions. Article 250(6)(a) of *the Constitution* provides that a member of a commission shall be appointed for a single term of six years and is not eligible for reappointment. The Petitioners assert that both the 5th Respondent, Mr. Boya Molu, and the 6th Respondent, Dr. Irene Asienga, previously served full six-year terms in other commissions, Mr. Molu at the Independent Electoral and Boundaries Commission (IEBC), and Dr. Asienga at the Commission on Revenue



Allocation (CRA). They argue that any subsequent appointment to the Public Service Commission constitutes a violation of the term-limit clause in Article 250(6)(a).

58. The fundamental question is whether Article 250(6)(a) bars a person who has served a full term in one commission from being appointed to a different commission established under Chapter Fifteen of *the Constitution*. In other words, does the phrase “a member of a commission... is not eligible for reappointment” apply generally across all commissions, or is it confined to reappointment to the same office or commission?
59. In light of this, the Court finds that the appointment of Mr. Molu and Dr. Asienga to the Public Service Commission does not violate Article 250(6)(a). Their prior service in IEBC and CRA, respectively, does not amount to reappointment to the same office. Each constitutional commission is a distinct legal entity with its own mandate and institutional framework.
60. Moreover, there is no allegation that either of the appointees had previously served in the PSC or had exceeded the six-year term limit in their prior postings. The constitutional bar under Article 250(6)(a) is not to “public service” per se, but to reappointment within the same commission, a fact pattern that is not present in this case.
61. This Court is bound by the doctrine of stare decisis to follow the authoritative pronouncements of the Supreme Court on the interpretation of constitutional provisions. Accordingly, this Court finds that the Petitioners’ arguments under this issue are inconsistent with established jurisprudence.

Whether the appointment of Mr. Francis Meja to the Public Service Commission was unconstitutional by reason of disqualification under Article 233(3)(c) and (d) of *the Constitution* for political involvement within the preceding five years

62. The fourth issue concerns the eligibility of Mr. Francis Meja, the 7th Respondent, for appointment to the Public Service Commission in light of the disqualifications set out under Article 233(3) of *the Constitution*. Article 233(3)(c) provides that a person shall not be qualified for appointment as a member of the Commission if the person has, at any time within the preceding five years, held office in a political party. Article 233(3)(d) further disqualifies any person who has stood for election as a member of Parliament or a county assembly in the two immediately preceding general elections.
63. The Petitioners allege that Mr. Meja was, prior to his appointment, affiliated with the United Democratic Alliance (UDA) political party. Specifically, they assert that he actively campaigned during the 2022 general elections in Kajiado County and was closely aligned with the ruling party’s agenda. However, no direct evidence has been adduced to show that Mr. Meja held office in a political party or that he stood for election as a candidate in the last or penultimate general election.
64. The 7th Respondent, in his replying affidavit, has categorically denied any political affiliation. He depones that he has never been a registered member or office bearer of any political party, nor has he ever contested or declared interest in any elective political office. He avers that his public service career has been marked by professionalism and impartiality, including his previous tenure as Director-General of the National Transport and Safety Authority (NTSA). The Attorney General has similarly submitted that the Petitioners have failed to discharge the burden of proof required under Article 50(1) and Section 107 of the *Evidence Act*.
65. This Court reiterates that constitutional disqualifications are grave matters that touch on the integrity and legitimacy of public office. As such, the evidentiary threshold for establishing disqualification is correspondingly high. It is not enough to allege political association by perception or general



public opinion. The Court must be presented with cogent and credible evidence that satisfies the constitutional standard of proof.

66. The Petitioners in this matter have not placed before the Court any documentary evidence showing that Mr. Meja was ever a registered member of a political party, nor have they produced evidence of his candidature in the 2017 or 2022 elections. No nomination papers, party membership lists, IEBC clearance records, or sworn affidavits from witnesses attesting to his political conduct have been presented. While the Court does not trivialize the importance of political neutrality in appointments to Chapter Fifteen commissions, the principles of fairness, due process, and evidentiary sufficiency must guide its determination.
67. It is worth noting that mere association with a political movement or expression of personal views during an election cycle does not in itself amount to holding office in a political party or standing for election. To hold otherwise would cast too wide a net and unjustly disqualify many Kenyans who, though politically aware, remain outside the realm of formal partisan activity.
68. This Court therefore finds that the Petitioners have failed to prove that the 7th Respondent was disqualified under Article 233(3)(c) or (d) of *the Constitution*. In the absence of clear evidence of political participation within the meaning of these provisions, the challenge to his appointment must fail.

Whether the appointments made under Gazette Notices Nos. 385 and 386 violated the requirements of Section 11(2) and (3) of the *Public Service Commission Act* regarding staggered terms of office for commissioners

69. The fifth issue touches on the statutory requirement for staggered terms of service among commissioners appointed to the Public Service Commission. Section 11(2) and (3) of the *Public Service Commission Act* is intended to give effect to the principle of continuity and institutional memory within the Commission. Specifically, Section 11(2) provides that upon the first appointment of members of the Commission, the President shall determine which of the appointed members shall serve for a shorter term to ensure that the expiry of terms is staggered. Section 11(3) further empowers the President to, in subsequent appointments, stagger terms where necessary to maintain continuity.
70. The Petitioners argue that all eight individuals appointed through Gazette Notices Nos. 385 and 386 were appointed on the same date, and that the said notices do not indicate different commencement or expiry dates. They assert that this will result in the concurrent termination of the terms of all members after six years, contrary to the principle of staggered terms. According to them, this failure to stagger the terms of the commissioners violates both the express provisions of the PSC Act and the constitutional imperative of orderly governance.
71. In opposition, the Respondents contend that the obligation to stagger terms arises primarily during the initial constitution of the Commission and that any subsequent staggered arrangement can be administratively addressed without judicial interference. They submit that the absence of express term durations in the gazette notice does not ipso facto render the appointments unlawful, and that the President retains the administrative discretion to issue instruments of appointment with staggered end dates in due course.
72. The Court begins by acknowledging that Section 11 of the PSC Act is a critical safeguard against institutional disruption. It ensures that not all commissioners exit office simultaneously, thereby preserving stability, continuity of leadership, and progressive reform within the Commission. This statutory requirement is aligned with international best practices for governance in constitutional commissions.



73. However, this Court is also mindful that the mechanism for implementing staggered terms is primarily administrative. The statute does not require that the staggered nature of the terms be set out in the gazette notice. Rather, it is sufficient if the instruments of appointment issued contemporaneously or thereafter, indicate varying durations, provided they are consistent with the overall constitutional term of six years per Article 250(6)(a). Indeed, it is possible to have staggered terminations without altering the constitutional six-year cap, by varying the effective dates of entry into office or the issuance of oaths of office.
74. In the case of *Aura v Cabinet Secretary, Ministry of Health & 11 others; Kenya Medical Practitioners & Dentist Council & another (Interested Parties) (Constitutional Petition E473 of 2023) [2024] KEHC 8255 (KLR)*, the Court stated that courts must be careful not to overreach into matters of executive discretion unless there is clear evidence of constitutional or statutory breach. The court stated as follows;
- “The courts have emphasized time and again that it is not in the space of the Judiciary to interfere with the role of Parliament in the exercise of its constitutional mandate. We proceed from a well guided front on the need to avoid judicial overreach.”
75. In the present case, there is no evidence that the President failed to issue staggered terms by instrument of appointment or that he deliberately intended to subvert the statutory requirement. There is also no evidence that the commissioners have taken office without regard to sequence or term variation. In the absence of such evidence, the Court cannot infer illegality from the mere silence of the gazette notices.
76. Accordingly, the Court finds that while the importance of staggered terms under Section 11 of the PSC Act is acknowledged, the Petitioners have not demonstrated that the appointments were made in breach of this provision.

Whether the Petitioners have satisfied the legal and evidentiary threshold to warrant the grant of the declaratory, judicial review, and injunctive reliefs sought in the Petition

77. This final issue calls upon the Court to determine whether, based on the pleadings, evidence, and legal arguments presented, the Petitioners have discharged the requisite burden to justify the grant of constitutional and judicial review remedies. The Petitioners seek a broad array of reliefs including declarations of unconstitutionality, orders of certiorari quashing Gazette Notices Nos. 385 and 386, a writ of mandamus compelling the initiation of a fresh recruitment process, and a permanent injunction restraining the 4th to 7th Respondents from holding office.
78. The grant of declaratory and judicial review remedies in constitutional petitions is governed by *the Constitution*, the *Fair Administrative Action Act*, the *Law Reform Act*, and judicial precedent. Article 23(3) of *the Constitution* empowers the Court to grant appropriate relief, including declarations and judicial review orders, where a violation or threat to constitutional rights or principles is established. However, these remedies are not granted as a matter of course, they must be based on proven violations, illegality, or unreasonableness.
79. It is trite law that a party seeking declaratory or judicial review relief must meet a three-pronged threshold: firstly, that there exists a legal duty or constitutional obligation; secondly, that the Respondent has breached that duty or acted in excess of jurisdiction or unreasonably; and thirdly, that the Court’s intervention is necessary to remedy the illegality. This test was articulated in *Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300*, where the Court stated that judicial review relief will only issue where the decision-maker is guilty of illegality, irrationality, or procedural impropriety.



80. Furthermore, in *Anarita Karimi Njeru v Republic* (supra), the Court laid down the principle that constitutional petitions must be pleaded with particularity and supported by cogent evidence. This principle was reaffirmed by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* (supra), which cautioned against granting constitutional reliefs on the basis of unsubstantiated allegations or generalized assertions.
81. In the present case, the Petitioners have raised several important questions relating to constitutional appointments. However, upon detailed analysis of each of the five substantive issues raised, this Court has found that none of the impugned appointments contravened *the Constitution* or the relevant statutes. The Petitioners failed to provide sufficient evidence to support the claim that the composition of the PSC exceeded the constitutional limit. They did not discharge the burden of proving that the 4th and 7th Respondents belonged to the same ethnic group or that the 7th Respondent was politically affiliated in a manner that violates Article 233(3). Their interpretation of Article 250(6)(a) was inconsistent with binding Supreme Court authority, and their reliance on the absence of staggered terms was not supported by evidence of actual procedural breach.
82. This Court is of the view that while it has a sacred duty to protect *the Constitution* and uphold the principles of good governance and accountability, it must do so within the confines of evidentiary rigor and legal principle. Judicial power must not be used to invalidate executive action merely because there is political disagreement or public controversy surrounding it.
83. In sum, the Petitioners have not satisfied the evidential or legal thresholds necessary for the grant of the reliefs sought.
84. This Petition has raised weighty constitutional issues regarding the interpretation and enforcement of the provisions governing the composition, qualification, and appointment of members of constitutional commissions. The questions brought forth by the Petitioners underscore the importance of vigilance in the enforcement of *the Constitution* and the need for public officials to adhere to principles of transparency, inclusivity, and good governance.
85. However, constitutional litigation, especially where it touches on the validity of public appointments, must be grounded on concrete evidence, not on assumptions, broad perceptions, or generalized claims. In the present case, the Petitioners have not proved that the impugned appointments violated Article 233(2) in terms of numerical composition; nor have they shown that Article 250(4) on ethnic diversity was breached. They have not proved that the appointments of the 5th and 6th Respondents contravened Article 250(6)(a) on term limits; nor have they proved that the 7th Respondent was disqualified under Article 233(3) for political engagement. Further, no breach of the staggered term requirement under Section 11 of the *Public Service Commission Act* has been established.
86. In discharging its constitutional duty under Article 165(3)(d) to interpret *the Constitution* and determine the constitutionality of public actions, this Court is guided by the doctrine of separation of powers and the principle of judicial restraint. The Court does not sit in judgment over the wisdom of appointments but only their legality.
87. In this case, the Petitioners have not demonstrated illegality, irrationality, or procedural impropriety.
88. Accordingly, for the reasons set out above, this court finds that the Petition dated 17th January 2025 lacks merit and is hereby dismissed in its entirety with no orders as to costs.
89. Orders accordingly. File closed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF AUGUST, 2025.



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BAHATI MWAMUYE

JUDGE

In the presence of: -

1st Petitioner in person - Dr Magare Gikenyi

Counsel for the 1st Respondent - Mr Atingo

Counsel for the 2nd – 7th Respondents – Mr Marwa h/b Mr Bitta

Counsel for the Interested Party -Mr Marwa h/b Mr Oddukenya

Court Assistant - Ms Neema

