REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. E412 OF 2023

KENYA HUMAN RIGHTS COMMISSION ……………………… 1ST PETITIONER

BOAZ WARUKU ………………………………………………... 2ND PETITIONER

ELIMU BORA WORKING GROUP ……………………………... 3RD PETITIONER

THE STUDENT CAUCUS……………………………………………4TH PETITIONER

VERSUS-

THE ATTORNEY GENERAL……………………………………… 1ST RESPONDENT

THE CABINET SECRETARY FOR EDUCATION …………… ….. 2ND RESPONDENT

THE HIGHER EDUCATION LOANS BOARD …………………… 3RD RESPONDENT

THE TRUSTEES OF THE

UNIVERSITIES FUND KENYA………………………… ………… 4TH RESPONDENT

THE KENYA UNIVERSITIES AND

COLLEGES PLACEMENT SERVICE ……………………………… 5TH RESPONDENT

3RD AND 4TH RESPONDENTS' LIST AND BUNDLES OF AUTHORITIES

NO	AUTHORITY	PAGE
1	Khelef Khalifa & 2 others vs Independent Electoral and Boundaries Commission & another [2017] eKLR	
2	Petition No. 45 of 2017 – Maya Duty Free Limited v Hon. Attorney General & 3 Others	
3	Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others [2014] eKLR	
4	Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272	
5	Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR	

DATED at **NAIROBI** this ..27th..... day of ……………MAY……………………….. 2024

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO 168 OF 2017

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 22, 23, 27, 47, 50, 81, 86, 165, 258, 259 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF ENFORCEMENT OF ARTICLES 2 AND 38 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF SECTION 44 OF THE ELECTIONS ACT AS AMENDED BY THE ELECTION LAWS (AMENDMENT) ACT, 2016 AND THE ELECTION LAWS (AMENDMENT) ACT, 2017

IN THE MATTER OF STANDARDS ACT, CHAPTER 496 OF THE LAWS OF KENYA

IN THE MATTER OF LEGAL NOTICE NO. 78 OF 15TH JULY 2005, THE VERIFICATION OF CONFORMITY TO KENYA STANDARDS OF IMPORT ORDER

BETWEEN

KHELEF KHALIFA ………………………….…....................................1ST PETITIONER

MAINA KIAI...2ND PETITIONER

TIROP KITUR...3RD PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST RESPONDENT

KENYA BUREAU OF STANDARDS..............................…….................2ND RESPONDENT

JUDGEMENT

Introduction

1. This petition invites this court to determine whether or not the Independent Electoral and Boundaries Commission (hereinafter referred to as the I.E.B.C) has breached the provisions of sections **44(1), (2) & (4)** of the Elections Act (as amended),the provisions of Legal Notice No. **78** of 15th July 2005 and the constitutional requirements for public participation and guarantee for free, fair, transparent and accountable elections by ensuring that technology to be used in the forth coming elections is simple, accurate, verifiable, secure, accountable and transparent.

2. It may be important to know whether, under legislation, an office-holder is obliged, or has a duty, to do something or whether the office-holder has a discretion, or a choice, to do or not to do it. Another way of putting this is to ask whether a legislative provision is obligatory or discretionary. If it has been concluded that an office-holder has an unfettered discretion as to whether to do something, failure to do the thing can hardly be the subject of legitimate complaint. On the other hand, if there has been a failure to perform an obligation imposed by legislation, quite apart from possible consequences for the office-holder, there may be an issue as to the consequences of that breach of the law for others. In relation to statutory obligations and discretions, two principal questions arise:- **(a)** how to determine whether a legislative provision imposes an obligation or confers a discretion; and **(b)** how to determine whether breach of a legislative provision imposing an obligation produces invalidity.

3. The answers to these questions as demonstrated later in this judgment are arrived at by carefully considering the act or omission alleged to constitute the alleged breach and also by interpreting the meaning of the provisions in question a process arrived at by applying the principles of statutory interpretation discussed later in this judgement.

4. It is imperative at the outset to state that in the process of determining whether a provision contained in legislation imposes an obligation or confers a discretion, courts and tribunals must strive for an interpretation that would promote the purpose or object underlying the provision. In carrying out this responsibility, they must not look at the provision in isolation, but must consider it in its context. Consistently with this, the issue may be resolved by interpreting the words according to their plain and ordinary meaning.

Petitioners case

5. This petitioners bring this petition pursuant to the provisions of article **165 (2) (d)** of the constitution which grants this court the jurisdiction to hear any question respecting the interpretation of the constitution including determination of **(i)** the question whether any law is inconsistent with or in contravention of the constitution; and **(ii)** the question whether anything said to be done under the authority of the constitution or of any law is inconsistent with, or in contravention of, the constitution. The petitioners further state that they bring this petition as a matter of Public Interest under Article **258 (2) (c)** of the constitution.

6. The first Respondent is the Independent and Electoral Boundaries Commission (hereinafter referred to as I.E.B.C.), a body established under Article **88** of the constitution and tasked with the responsibility of amongst others; conducting or supervising referanda and elections to any elective body or office established by the constitution and any other elections as may be prescribed by a Act f Parliament; the continuous registration of citizens as voters; the regular revision of the voter's roll; the registration of candidates for elections and voter education.

7. The second Respondent is the Kenya Bureau of Standards, (hereinafter referred to as K.B.S.), established under section **3** of the Standards Act[1](hereinafter referred to as the Act). It is mandated to promote standardization and commerce; prepare frame, modify or amend specification and codes of practice; and to provide for the testing of locally manufactured and imported commodities with a view to determining whether such commodities comply with the Standard Act on the standards quality.

The Petitioners case

8. The petitioners aver that the Elections Act[2] as amended establishes an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic

transmission of results and mandates the first Respondent to ensure that the technology in use is simple, accurate, verifiable, secure, accountable and transparent.

9. They also aver that pursuant to its mandate, I.E.B.C. undertook to acquire electronic electoral equipment from outside Kenya. The importation of such items must comply with the provisions of the Standards Act[3] and Legal Notice No. **78** of 15th July 2005, which stipulates the verification conformity to the Kenya Standards of Imports Order, but I.E.B.C. obtained waiver from the Minister exempting them from the procedures of pre-export verification of conformity. They state that the waiver was granted on the basis of the urgency of the timeline for the upcoming elections in that the timelines set in the Elections (Amendment) Act 2017 will bar the first Respondent from pursuing the proper process of ensuring the conformity to standards as set out in the said Legal Notice.

10. The petitioners also aver that failure to subject the said goods to verification to ensure that they meet the standards and are fit for the purpose poses a threat to their right to free and fare elections in that the Respondents "may have inadvertently imported into the county equipment that may not be suitable for the purpose and to facilitate the petitioners right to a free and fair elections."

11. It is averred that the foregoing is a violation of the law, principles of transparency, accountability, national values and principles and has the effect of undermining free and fair elections. The petitioners also cite absence of public participation, and also stated that the exemption from conformity to standards violated their right to equal benefit of the law.

First Respondents Replying affidavit

12. On behalf of the I.E.B.C is a detailed Replying Affidavit of **Ezra Chiloba** filed on 21st June 2017 stating *inter alia* that under section **44** of the Elections Act,[4] I.E.B.C. was required to put in place the integrated electronic system within **eight months** before the elections. Thus, this ought to have been done by **8th** December 2016.

13. Conscious of the practicability of the said requirement, I.E.B.C. considered and proposed to the National Assembly an amendment to the said provision. As a consequence, the Elections Act[5] was amended in January 2017, by *The Election Laws (Amendment) Act*[6] which provides that the integrated electronic system be put in place **four months** to the general elections scheduled for 8th August 2017 and that the system be tested by the commission **at least sixty days** before the said elections.

14. He further avers that in order to ensure compliance with section **44** of the Elections Act[7] and the Public Procurement and Asset Disposal Act, 2015,[8] he established a committee comprising of representatives of professional bodies as well as non-state agencies and various Political parties to develop specifications for the procurement of the Kenya Integrated Election Management System (hereinafter referred to as K.I.E.M.S.). The committee prepared the proposed specifications. This was followed by setting up a Technical Committee provided for in section **44 (8)** of the Elections Act,[9] to validate the K.I.E.M.S. specifications as prepared by the specifications committee. The report by the specifications committee was adopted by the Technical Committee on 6th December 2016 paving the way for invitation of bids from qualified suppliers.

15. On 16th December 2016, I.E.B.C. advertised in the local dailies inviting bids for the supply, delivery, installation, testing, commissioning and support of the K.I.E.M.S. The closing/opening of the bids was set for 9th January 2017. However on 29th December 2016, a request for Review was lodged by Dittel Limited at the Public Procurement Administrative Review Board, (hereinafter referred to as the Review Board) being Application Number **110** of 2016. The Review Board directed that the procurement process

be suspended pending hearing and determination of the Request for Review, hence the bids were not opened on 9th January 2017. However, the request for review was withdrawn on **17th** January 2017 and the Review Board issued further orders directing I.E.B.C. to extent the tender opening by a period of not less than **14 days** in order to accommodate the lost time when the matter was pending review.

16. In compliance with the said directive, I.E.B.C. published a notice extending the tender opening to 2nd February 2017. Upon opening, **10** tenders had been submitted and an evaluation team was set up to evaluate the tenderers. But prior to the completion of the evaluation, I.E.B.C. was served with an application for review filed before the Review Board being Application No. **19** of 2017, *Avante International Technology INC vs Independent Electoral and Boundaries Commission* and the Review Board **suspended** the procurement process pending the hearing and determination of the matter. After deliberations, I.E.B.C. opted to terminate the tender and seek for alternative modes of procurement.

17. In the meantime voter registration exercise was completed, hence, a component of the tender which related to voter registration was overtaken by events since the specification of the tender required an integrated system that incorporated voter registration, hence the tender was terminated on 28th February 2017. The public procurement regulatory authority and the tenderers were notified.

18. As a consequence of the foregoing, the tender could not meet timelines set out in section **44** of the Elections Act.[10] He added that taking into account all the requirements, the successful tenderer/supplier would require between **30** and **60** days to deliver the equipment or system and as such the timelines may have pushed the availability of the technology to sometimes in June 2017 or thereabouts which would be outside the statutory timelines envisaged by section **44** of the Elections Act.[11]

19. He also confirmed that other statutory timelines that were to be fulfilled in the intervening period under the subject tender included the biometric verification of the register of votes which was due on the 10th May 2017 and testing and certification of the system that was scheduled for 10th June 2017.

20. As a consequence, I.E.B.C. opted for restricted tendering, and owing to the limited time left (4 months), I.E.B.C. sought the exemption from K.B.S. The request was also supported by the Principal Secretary, Ministry of Industrialization, Trade and Co-operatives, hence I.E.B.C. was allowed to import the kits subject to payment of an inspection fee and to have a physical inspection of the kits upon entry. Thus, it was in the public interest to grant the said exemption.

21. He also averred that destination inspection of imported items is allowed in law under paragraph **7 (1)** of Legal Notice No. **78** of 2005 and that K.B.S. has conducted a physical inspection of the kits imported into the country and has issued a certificate of Physical Inspection certifying that the imported kits are in compliance with the required standards. A copy of the certificate is annexed to his affidavit.

22. He also stated that in order to certify compliance, I.E.B.C. appointed an inspection committee through a memo dated 28th April 2017 to conduct the inspection of the kits and upon inspection, the committee certified that the gadgets met the requirements. The committee issued a certificate of compliance indicating that the items met the specifications and a certificate on inspection and acceptance dated 8th May 2017 was issued. K.B.S. also issued results of laboratory tests/analyses of the kits power banks, mobile battery chargers and tablets confirming that they complied with the standards, hence, there was both physical inspection and laboratory testing by the second Respondent and software inspection by the Inspection Committee set up by I.E.B.C., both of which certified the items as fit for purpose.

23. He added that the inspection, examination and verification of the items and software is a technical process that can only be conducted by specialized persons representing the various stakeholders, a process which was duly followed and sufficiently met the requirements of public participation.

24. Lastly, he stated that caution needs to be taken to ensure that the equipments are only handled by the relevant and competent persons under a stringent process in order to avoid compromising the security and integrity of the electronic electoral system, hence, a public examination as proposed by the petitioners is undesirable. He reiterated that there was public participation since the kits resulted from a report of the various stakeholders as earlier stated.

Petitioners Advocates' submissions

25. Counsel submitted that the Respondents actions are in breach of the constitution, namely; articles **38 (2), 81, 86** of the Constitution and sections **44 (1) (2)** and **(4)** of the Elections Act[12] as Amended by the Elections Laws (Amendment) Act, 2016[13] and the Election Laws (Amendment) Act, 2017.[14] Counsel also submitted that section **44 (4)** of the act requires that IEBC to test, verify the electronic equipment.

26. Counsel also submitted that sections **3, 4, 6** and **8** of Legal Notice No. **78** of 15th July 2005 requires imported goods to meet Kenyan standards and tasks I.E.B.C. to appoint a body to verify the conformity to set standards of the goods to be imported at the country of origin and also requires I.E.B.C. to issue a certificate of conformity and that the minister may grant exception on grounds of national interest.

27. It is counsels submissions that free and fare elections is of great public interest and that the exemption by the minister was ill advised and does not fall within the ambit authorized under the law. He added that an election should be held in an atmosphere of free and fare elections.[15]

28. Further, he submitted that article **10** of the constitution provides for national values and principles of governance to be adhered to by all persons and cited the leading decision by the constitutional court of South Africa, *Doctors for Life International vs The Speaker of the National Assembly & 11 Others*[16] whereby the respected court pronounced itself on the question of public participation. Also cited is the case of *Robert N. Gakuru & Others vs Governor Kiambu County & 3 Others*[17](Both cases are referred to later). Further, counsel comment note no. **25** of the Committee on the Covenant on Civil and Political Rights which recognizes the right of the electorate to participate in activities of the state and added that constitutional rights cannot be sacrificed at the altar of expediency. Counsel cited absence of transparency and accountability.

First Respondents Counsels Submissions

29. Counsel for the I.E.B.C. submitted that the replying affidavit sufficiently answers the issues raised in the petition and reiterated that the equipment was subjected to testing and inspection. He also stated that no evidence was tendered on the alleged violation of provisions of the constitution, and that there is no legal requirement for peer review of the equipment and that public participation was undertaken and cited several decisions among them *Moses Muyendo and 908 Others vs AG & another*[18] whereby the court pronounced itself on sufficiency of public participation and stated that it is not necessary that every person or professional be invited to every forum in order to satisfy the terms of article 10.

30. The second Respondent did not file any Response to the petition nor did it participate in the proceedings.

Issues for determination

31. From the detailed descriptions of the Parties' positions and submissions, I have distilled the following issues for determination discussed below. *Whether or not I.E.B.C. violated the provisions of:- (a) Sections 44 (1), (2) & (4) of the Elections Act, and (b) Legal Notice No. 78 of 15 July 2005.*

32. When a court is called upon to review or determine whether or not the decision or action of a statutory body falls within provisions of the statute establishing the body, it is confronted with two questions. **First,** always, is the question of whether Parliament has directly spoken to the precise question at issue. If the intent of Parliament is clear from the provisions of the statute, that is the end of the matter; for the court, as well as the body, must give effect to the unambiguously expressed intent of Parliament.

33. If, however, the court determines Parliament has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the conduct in question is based on a permissible construction of the statute.[19]

34. In step 1, "the court's job is to determine whether the scope of ambiguity of the relevant language is sufficiently broad to invalidate the agency's construction or conduct."[20] If the language of the statute cannot bear the construction selected by the agency, the interpretation must be overturned.[21] If the statutory body's action or interpretation of the statute is supported by the statutory language in step 2, the court must uphold the interpretation, action or decision, unless it is unreasonable. If the statutory interpretation, action or decision is unreasonable, the policy decision implicit in the statutory body's interpretation is arbitrary and capricious and should be struck down. Thus, a court's task in applying step 2 is to determine whether the challenged action or decision adequately pursues the goals of the statute as evidenced by the language of the statute.

35. The courts, applying ordinary principles of interpretation, must in effect impute an intention to Parliament as to the consequences of a failure to comply.

36. Where a statute requires an act to be done at or within a particular time, or in a particular manner, the question arises whether the validity of the act is affected by a failure to comply with what is prescribed. If it appears that Parliament intended disobedience to render the act invalid, the provision in question is described as mandatory, absolute, imperative or obligatory, if on the other hand, compliance was not intended to govern the validity of what is done, the provision is said to be directory. [22]

37. The significance of the difference between ''mandatory" and "directory" provisions was high-lighted in *Howard v. Bodington*[23] in these terms:-

"Now the distinction between matters that are directory and matters that are imperative is well known to us all in the common language of the courts at Westminster. I am not sure that it is the most fortunate language that could have been adopted to express the idea that it is intended to convey; but still that is the recognized language, and I propose to adhere to it. The real question in all these cases is thus: A thing has been ordered by the legislature to be done. What is the consequence if it is not done" In the case of statutes that are said to be imperative, the courts have decided that if it is not done the whole thing fails, and the proceedings that follow upon it are all void. On the other hand, when the courts hold a provision to be mandatory or directory , they say that, although such provision may not have been complied with, the subsequent proceedings do not fail." (Underline mine).

38. I think, as held in the above case, it is pertinent to state that although the distinction between a mandatory provision and a directory provision is far reaching, there is no laid down general rule stating the formula for ascertaining precisely whether a particular provision is mandatory or directory though judges have evolved rules for guidance. It is the duty of the courts to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed and in such exercise the courts must look into the subject-matter, consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the statute and upon a review of the case in that aspect decide whether the provision is mandatory or only directory.[24]

39. One thing, however, is certain: that an absolute or mandatory (sometimes also referred to as imperative) enactment must be obeyed or fulfilled exactly; but in the case of a directory enactment, it is sufficient if it obeyed or fulfilled substantially.[25] In the case of imperative enactment the courts give effect to the provisions irrespective of consequences. Devlin, J. as he then was in *St. John Shipping CRPN. vs. J. Rank Ltd*.[26] was of that view when he stated that:-

" . . . one must not be deterred from enunciating the correct principle of law because it may have startling or even calamitous results. But I confess I approach the investigation of a legal proposition which has results of this character with a prejudice in favour of the idea that there may be a flaw in the argument somewhere."

40. It is important to mention that the word *"shall"* is used in section **4 (1), (2)** and **(4)** the act. The word "shall" in those provisions appear to me to be commanding enough to be regarded as mandatory rather than directory.[27] The words are clear, positive and unambiguous and dictate that literal interpretation be given to them. To hold otherwise would, in my view, be for this Court to perpetuate the mischief intended by the legislators to be prevented by the enactment of that section.

41. Importantly, the consequences of holding a provision to be mandatory or directory ought to be taken into account. In the absence of an express provision, the intention of the legislature is to be ascertained by weighing the consequences of holding a statute to be directory or imperative.[28] *The usual rule, however, is that [t]he … use of the word "shall" generally evidences an intent that the statute be interpreted as mandatory.*"[29] In arriving at the intention of parliament, the whole and every part of the instrument must be taken and compared together. In other words, effect should be given, if possible, to every section, paragraph, sentence, clause and word in the instrument and related laws.

42. *Sir Arther Channe*l amplified consequential consideration in *Montreal Steel Rail Co. v. Normandin***[30]** in these words:

"When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in respect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of acts done." (Underline mine).

43. Statutory bodies derive their authority or jurisdiction from a legal instrument establishing them, and may only do what the law authorizes them to so. This is known as the principle of legality, which requires that administrative authorities not only refrain from breaking the law, but that all their content comply with the Constitution and particularly the Bill of Rights. Their decisions must conform to the Constitution; legislation; and the common law.

44. The Constitution is the supreme law of the land. Any law or act which is inconsistent with it has no force or effect. The effect of this provision is that laws and administrative acts must comply with the Constitution. Thus, the provisions in question and the acts or omissions of the I.E.B.C must conform to the provisions of the constitution guaranteeing free, fair, transparent and credible elections. To me, this is the principle test. With this in mind, and considering the natural and ordinary meaning of the provisions in question, I now examine the explanation offered by Mr. Chiloba in his Replying affidavit.

45. Mr. Chiloba, avers that fearing that it was not practical to meet the eight months deadline, I.E.B.C. considered and proposed to the National Assembly an amendment to the law. As a consequence, the Elections Act[31] was amended in January 2017, by *The Election Laws (Amendment) Act***[32]** which provides that the integrated electronic system be put in place **four months** to the general elections scheduled for 8th August 2017 and that the system be tested by the commission **at least sixty days** before the said elections.

46. The question that follows next is whether the petitioners have satisfactorily established that I.E.B.C has failed to establish "*an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results"* as required under section **4 (1).** I have carefully examined the contents of the Replying Affidavit of Mr. Chiloba on this issue and in my view the petitioners have not rebutted Mr. Chiloba's averments on this issue.

47. Section **44 (2)** requires I.E.B.C. to "*develop a policy on the progressive use of technology in the electoral process."* I am unable to find in the petition evidence to suggest that this provision has been violated.

48. *Section **44 (**4***) enjoins the I.E.B.C. to, in an open and transparent manner — **(a)** procure and put in place the technology necessary for the conduct of a general elections at least eight months before such elections; and **(b)** test, verify and deploy such technology at least sixty days before a general election.

49. Again, the requirements of the above sub-section have in my view and in absence of evidence to the contrary been addressed exhaustively in the affidavit of Mr. Chiloba parts of which I repeat below as follows:-

*"In order to ensure compliance with section **44** of the Elections Act***[33]** *and the Public Procurement and Asset Disposal Act, 2015,***[34]** *he established a committee comprising of representatives of professional bodies as well as non-state agencies and various political parties to develop specifications for the procurement of the Kenya Integrated Election Management System (hereinafter referred to as K.I.E.M.S.). The committee prepared the proposed specifications. This was followed by setting up a Technical Committee provided for in section **44 (8)** of the Elections Act,***[35]** *to validate the K.I.E.M.S. specifications as prepared by the specifications committee. The report by the specifications committee was adopted by the Technical Committee on 6th December 2016 paving the way for invitation of bids from qualified suppliers.*

On 16th December 2016, I.E.B.C. advertised in the local dailies inviting bids for the supply, delivery, installation, testing, commissioning and support of the K.I.E.M.S....."

50. At paragraph **45** of his affidavit, Mr. Chiloba avers that all the electronic devices have undergone physical inspection and laboratory testing of the K.I.E.M.S. and by K.E.B.S. and have been certified as meeting the proper standards. In fact, the requisite certificates and inspection report are annexed to the Affidavit. In absence of evidence to the contrary, I find that I.E.B.C. has satisfied the requirements of section **44 (4)** of the Act.

51. The Standards Act[36]is an Act of Parliament to promote the standardisation of the specification of commodities, and to provide for the standardisation of commodities and codes of practice; to establish a Kenya Bureau of Standards, to define its functions and provide for its management and control; and for matters incidental to, and connected with, the foregoing. Section **3** of the act provides for the establishment of the Kenya Bureau of Standards, a body corporate with perpetual succession and a common seal.

52. Section **4 (1) (i)** of the act provides for the testing at the request of the Minister, and on behalf of the Government, of locally manufactured and imported commodities with a view to determining whether such commodities comply with the provisions of this Act or any other law dealing with standards of quality or description. Section **4** of the act empowers the minister after consultation with the Council, may make regulations generally for the better carrying out of the provisions and purposes of this Act.

53. Legal Notice No. **78** of 15th July, 2005 provides for compliance with standards. Because of its relevance to the issue under consideration, I reproduce sections **3** to **8** below:-

3.A person who imports goods must ensure that the goods meet Kenya Standards or approved specifications.

Appointment of an inspection body.

4. The Kenya Bureau of Standards shall appoint an inspection body or bodies in the country of origin of goods to undertake verification of conformity to Kenya Standards or approved specification.

Verification of conformity.

5. All goods which are specified by the Kenya Bureau of Standards in accordance with paragraph 2 shall be subjected to verification of conformity to Kenya Standards or approved specifications in the country of origin by an inspection body authorized by the Bureau, and may be re-inspected at the port of entry by the Bureau if it is deemed necessary.

Certificate of conformity and non-conformity report.

6. (1) The Kenya Bureau of Standards shall issue a certificate of conformity in respect of goods that conform with Kenya Standards or nonconformity approved specifications and a non conformity report in respect of goods which do not.

(2) No Goods that do not conform to the Kenya Standards or approved specifications shall be permitted into Kenya, and shall be re-shipped, returned or destroyed at the expense of the importer.

Destination inspection.

7. (1) Goods specified in accordance with paragraph 2 arriving at the port of entry without a certificate of conformity shall be subjected to destination inspection at a fee of 15% of the Cost, Insurance and Freight value of the goods.

(2) The importer of such goods shall, in addition to the fee imposed in paragraph (1), execute a security bond equivalent to the said fee.

(3) Where goods subjected to destination inspection under subparagraph (1) fail to conform, to Kenya Standards or approved specifications, they shall be re-shipped, returned or destroyed at the expense of the importer.

Exemption.

8.The Minister may, on the advice of the National Standards Council, exempt any imports from the provisions of this Order where the Minister is satisfied that it is in the national interest to do so.

54. Guidance can be obtained from the following passage in the Australian case of *Project Blue Sky Inc vs Australian Broadcasting Authority:-***[37]**

"An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition…."

55. Traditionally, the courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority. Cases falling within the first category are regarded as going to the jurisdiction of the person or body exercising the power or authority. Compliance with the condition is regarded as mandatory, and failure to comply with the condition will result in the invalidity of an act done in breach of the condition. Cases falling within the second category are traditionally classified as directory rather than mandatory. If the statutory condition is regarded as directory, an act done in breach of it does not result in invalidity.[38]

56. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts.[39] In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute.[40] My reading of rule **8** reproduced above is that the Minister has a wide discretion. It reads **"***The Minister may, on the advice of the National Standards Council, exempt any imports from the provisions of this Order where the Minister is satisfied that it is in the national interest to do so."* Unless it is demonstrated that the Minister acted outside his powers or was influenced by extraneous considerations, which has not been proved or suggested in this case, his decision in such a case may not be open to challenge.

57. I have carefully studied the provisions of Legal Notice No. **78** and the response filed by Mr. Chiloba and in all fairness, I am satisfied that the foregoing provisions were not breached in any manner. Further, no evidence to the contrary not even by way of a supplementary affidavit has been offered to rebut Mr. Chiloba's averments.

58. My reading of the above provision and the explanation offered by Mr. Chiloba does not in any manner reveal any breach of the provisions in question nor is the conduct of I.E.B.C or the Minister unreasonable considering the circumstances of the case. The provisions are clear and precise, and unambiguous.

59. Rule **8** reproduced above is clear. The explanation offered by Mr. Chiloba that "owing to the limited time left (4 months), I.E.B.C. sought the exemption from K.B.S. The request was also supported by the Principal Secretary, Ministry of Industrialization, Trade and Co-operatives, hence I.E.B.C. was allowed to import the kits subject to payment of an inspection fee and to have a physical inspection of the kits upon entry. Thus, in my view, it was in the public interest to grant the said exemption" which to me is reasonable.

Alleged violation of Articles 38 (2), 81 & 86 of the constitution

60. The questions as to whether (a certain act) can properly be said to (violate the Constitution) is however a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the people as expressed in its national institutions and its Constitution and further having regard to the emerging consensus of values in the civilized international community which Kenyans share.[41]

61. In cases of violation of fundamental rights, the Court has to examine as to what factors the court should weigh while determining the constitutionality of the actions complained of. The court should examine the allegations in light of the provisions of the Constitution. When the constitutionality of an action is challenged on grounds that it infringes a fundamental right, what the court has to consider is the *"direct and inevitable effect*" (if any) of such actions. This would help the court in arriving at a more objective and justifiable approach bearing in mind that Human rights enjoy a *prima facie*, presumptive inviolability, and can only be limited as provided under the constitution.

62. I have carefully examined the alleged violation of constitutional rights and bearing in mind that a person who alleges violation of constitutional rights has a duty to prove the allegations, I find that the petitioners have failed to prove the alleged violation of their rights.

Whether or not there was sufficient public participation

63. Article **10 (1)** of the constitution provides that "The national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them— *(a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions*.

64. Sub-article **(2) (a)** and **(c)** provides that "The national values and principles of governance include— **(*a*)** patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (*c*) good governance, integrity, transparency and accountability.

65. Article **10** of the Constitution expressly provides that public participation is one of the national values and principles of governance that bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions. As was appreciated by the majority ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate***:-[42]

"Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions. A consideration of different constitutions are highly legalistic and minimalistic, as regards express safeguards and public commitment. But the Kenya Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a constitution takes such a fused form in its terms, we believe, a court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm."

66. I must point out that it is not disputed that public participation was necessary in this case. In fact Ezra

Chiloba in his affidavit has gone in to details explaining the various stakeholders and professional they involved. To me this has not been challenged or rebutted. The position could have been different had the petitioners disputed the involvement of the stakeholders listed or even provide an affidavit from any one of them disputing the involvement.

67. I am clear in my mind that public participation is necessary for the purposes of the realization of the spirit of Articles **38** and **81** of the Constitution which espouse a free, fair, credible and transparent election. In order to realize this goal, the preparations leading to the elections must meet the minimum standards articulated in Article **81** of the Constitution that election system must be free and fair; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner.

68. Section **3** of the Public Procurement and Asset Disposal Act[43] provides as follows:-

Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

a) the national values and principles provided for under Article 10;

b) the equality and freedom from discrimination provided for under Article 27;

c) affirmative action programmes provided for under Articles 55 and 56;

*d) principles of integrity under the Leadership and Integrity Act, 2012***[44]**

e) the principles of public finance under Article 201;

f) the values and principles of public service as provided for under Article 232;

g) principles governing the procurement profession, international norms;

h) maximisation of value for money;

i) promotion of local industry, sustainable development and protection of the environment; and promotion of citizen contractors.

69. The South African Constitutional Court in *Doctors for Life International vs. The Speaker of the National Assembly & Others***[45]**held that:-

"The phrase "facilitate public involvement" is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are "facilitate" and "involvement". To "facilitate" means to "make easy or easier", "promote" or "help forward". The phrase "public involvement" is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of "involve" includes to "bring a person into a matter" while participation is defined as "(a) taking part with others (in an action or matter);…the active involvement of members of a community or organization in decisions which affect them". According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something…it is clear and I must state so, that it is impossible to define the forms of facilitating appropriate degree of public participation. To my mind, so long as members of the public are accorded a reasonable opportunity to know about the issues at hand and make known their contribution and say on such issues, then it is possible to say that there was public participation."

70. Sachs, J. in the South African case of the ***Minister of Health vs. New Clicks South Africa (Pty) Ltd*:-[46]** observed:-

"....... What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case." [Emphasis supplied]

71. In *Robert N. Gakuru & Others vs. Governor, Kiambu County* [47]it was held that*:-*

"….Public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively."

72. The essence of public participation was captured in the case of *Poverty Alleviation Network & Others vs. President of the Republic of South Africa & 19 Others,*[48] in the following terms:-

"…engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision."

73. In the *Matter of the Mui Coal Basin Local Community***[49]** a three-judge bench of the High Court considered relevant case law, international law and comparative jurisprudence on public participation and culled the following practical elements or principles which both the Court and public agencies can utilize to gauge whether the obligation to facilitate public participation has been reached in a given case:-

a) ***First,*** *it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.*

b) ***Second****, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.*

c) ***Third,*** *whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See* **Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya** *(JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:*

"Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them."

d) ***Fourth****, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to*

determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

e) ***Fifth****, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.*

f) ***Sixthly,*** *the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.*

74. Applying the above elements to the facts of this case, and considering the contents of the affidavit of Mr. Chiloba and the explanation that a specification committee was formed for the procurement, that the committee proposed the procurement, and that to ensure public participation in the procurement process I.E.B.C set up a Technical Committee as provided for under section **44 (8)** of the Election Act[50] to validate the K.I.E.M.S. specifications as prepared by the specification committee and that the Technical Committee was composed of representatives of professional bodies as well as state and non-state agencies and various political parties and the explanation that the Technical Committee worked in consultation of the relevant Agencies and various stakeholders including representatives of political parties, in absence of cogent evidence to the contrary, and considering the nature of the matter, logistical constraints and time constraints, I find that I.E.B.C. has demonstrated that there was some form of public participation sufficient to satisfy the requirement for public participation.

75. As pointed out earlier, the position would have been different had the petitioners provided sufficient material to counter this averment. In absence of such evidence, I find no reason to doubt Mr. Chiloba's explanation rendered on oath.

76. Consequently, I find and hold that the petitioners have failed to demonstrate that they are entitled to the reliefs sought in the petition.

77. The upshot is that this petition fails. Accordingly, I hereby dismiss this petition with costs to the Respondents.

Orders accordingly

Signed, Dated at Nairobi this__**19th**__ day of __**July**__2017

John M. Mativo

Judge

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[1] Cap 496, Laws of Kenya

[2] Act No. 24 of 2011

[3] Supra

[4] Supra

[5] Ibid

[6] Act No. 1 of 2017

[7] Supra

[8] Act No. 33 of 2015

[9] Supra

[10] Supra

[11] Ibid

[12] Supra

[13] Legal Notice No. 36 of2016

[14] Legal Notice No. 1 of 2017

[15] Counsel cited Dickson Daniel Karaba vs Ngata Kariuki & 2 Others {2010}eKLR

[16] CCT 12/05

[17] {2014}3KLR

[18] Pet No 16 of 2013

[19]*Chevron U.S.A. Incorporated v. Natural Resources Defense Council, Incorporated, 467 U.S. 837, 842-43 (1984). Chevron deference is not owed to agencies without rulemaking power. Atchison, Topeka and Santa Fe Railway Company v. Peña, 44 F.3d 437, 441 (7th Cir. 1994) (en banc).*

[20] McNary v. Haitian Refugee Center, 498 U.S. 479 (1991); Webster v. Doe, 486 U.S. 592, 603 (1988); Johnson v. Robison, 415 U.S. 361, 366-67 (1974); *Lepre v. Department of Labor*, 275 F.3d 59 (D.C. Cir. 2001); *cf.* Dalton v. Specter*,* 511 U.S. 462 (1994) (ultra vires action is not alone unconstitutional). *See also* cases collected in Richard Pierce, Administrative Law Treatise § 17.9 at 1663 (5th ed. 2010).

[21] Cases rejecting an agency interpretation on step 1 grounds are *Carcieri v. Salazar*, 555 U.S. 379, 129 (2009); Barnhart v. Sigmon Coal Company, 534 U.S. 438 (2002). *See also* Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421 (1987); *cf.* Environmental Defense v. Duke Energy Corporation, 549 U.S. 561, 574 (2007) (rebuttable presumption that same term in two different sections of same statute must be interpreted same). Recent cases upholding agency interpretations of unambiguous statues are *Zuni Public School District No. 89 v. Department of Education*, 550 U.S. 81 (2007); National Cable Telecommunications Association v. Gulf Power Company, 534 U.S. 327 (2002); and U.S. Department of Housing and Urban Development v. Rucker, 535 U.S. 125 (2002).

[22]The law in this area is stated in Halsbury I sLaws (4th Edn.) Vol. 44 para. 933

[23] By Lord Penzance {1877} 2 P.D. 203 at 210

[24]Liverpool Borough Bank v. Turner (1861) 30 L.J. Ch. 379 at p. 380 and Howard v. Bodington (Supra), page 211.

[25] See Woodward v. Sarsons {1875} L.R. 10 C.P. 733 at 746 Per Lord Coleridge, C.J..

[26] {1975} 1 Q.B. 267 at 282

[27]Maxwell on Interpretation of Statutes 12th Ed. p. 105.; Gartside vs. Inland Revenue Commissioners {1968} A.C. 553 at 612.

[28] Caldow v. Pixell (1877) 2 C.P.D. 562 at 566 Denman J

[29] *Demayo v. Quinn, 315 Conn. 37, 42 (2014).*

[30] {1917} A.C. 170 at 174

[31] Supra note 23

[32] Act No. 1 of 2017

[33] Supra

[34] Act No. 33 of 2015

[35] Supra

[36] Ca 496, Laws of Kenya

[37] {1998} 194 CLR 355 High Court of Australia

[38] Ibid

[39] James J Spigelman, 'From Text to Context: Contemporary Contractual Interpretation' (Address to the

Risky Business Conference, Sydney, 21 March 2007

[40] Tasker v Fullwood {978} 1 NSWLR 20, 24

[41]See the leading Namibian case of Ex-Parte Attorney General: In re Corporal Punishment by Organs of State 1991 NR 189, Mahomed AJA stated the principles of constitutional interpretation.

[42] Sup. Ct. Advisory Opinion Appl. No. 2 of 2012 at para 54

[43] Act No. 3 of 2005

[44] No. 19 of 2012;

[45] (CCT 12/05) [2006] ZACC 11; 2006 (12) BCLR 1399(CC); 2006 (6) SA 416(CC)

[46] {2005} ZACC

[47] {2014} eKLR

[48] CCT 86/08 [2010] ZACC 5

[49] {2015} eKLR

[50] Supra

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.93 OF 2010

IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27,40,48,50 AND/OR AS READ TOGETHER WITH ARTICLES 19,20,21,22,23 and 24 AND OF THE CONSTITUTION OF KENYA

MAYA DUTY FREE LIMITED.................................PETITIONER

VERSUS

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

AND

KENYA AIRPORTS AUTHORITY................2ND RESPONDENT

JUDGMENT

Petition

1. The petitioner filed the petition herein dated 8th October 2010 supported by supporting affidavit and subsequently amended petition filed on 11th July 2017 supported by supplementary affidavit dated 11th July 2017. The facts in support of the petition are found in the supporting affidavits and the annextures thereto.

2. The petition seeks *inter-alia;* a declaration section 33(1) of Kenya Airports Authority Act (Cap 395) of Laws of Kenya is inconstent with Article 48 of the Constitution of the Republic of Kenya in, that it unreasonably and without lawful cause or justification undermines, restricts or otherwise limits the petitioner's fundamental right to access to justice and is therefore void, invalid and/or inapplicable to the circumstances hereof as against the petitioner to the extent of the said inconsistency.

3. The petitioner further seeks other prayers if per chance prayer (a) in the petition is unavailable, under Article 23(3) of the Constitution, grant prayers (b), (c), (d), (e), (g) and (h) but to refer prayers (ff), (ffff) and (ffff) to chief Justice to appoint a single arbitrator for determination under section 33(1) of the Kenya Airports Authority Act *(Chapter 395)* of Laws of Kenya.

2nd Respondent's Response

4. In opposition to the petition the 2nd Respondent filed preliminary objection dated 19th January 2011 setting out several grounds of objection and a Replying affidavit sworn by Joy Nyaga sworn on 7th February 2011 both of which were filed on 20th January 2011 and 7th February 2011 respectively.

Analysis and Determination

5. I have considered the petition, preliminary objection, response thereto, submissions by counsel for the respective parties and authorities relied upon by both parties. The following issues have arisen for consideration:-

a) Whether the petition is incompetent for failure to comply with mandatory redress mechanism as provided for in section 33 and 34 of the Kenya Airport Authority Act and whether statutory provision in section 33 of Kenya Airport Authority Act is unconstitutional and amounts to denial of access to justice to the petitioner"

b) Whether the petition raises reasonable constitutional issue against the 2nd Respondent"

c) Whether granting the orders sought would be against the interest of justice and under public"

d) Whether the petitioner has been paying that for repossessed Gates 6 and 7 premises at Moi International Airport and Jomo Kenyatta International Airport respectively"

A) Whether the petition is incompetent for failure to comply with mandatory redress mechanism as provided for in section 33 and 34 of the Kenya Airport Authority Act and whether statutory provision in section 33 of Kenya Airport Authority Act is unconstitutional and amounts to denial of access to justice to the petitioner"

6. Section 33(1) of the Kenya Airports Authority Act provides as follows:-

"33. Compensation

(1) In exercise of powers conferred by sections 12, 14, 15 and 16 the Authority shall do a little damage as possible, and, where any person suffers damage no action or suit shall lie but he shall be entitled to such compensation thereof as may be agreed between him and Authority on, in default of agreement, as may be determined by single arbitrator appointed by the Chief Justice……

Section 34(a) provides:-

"Where any action or other legal proceedings is commenced against the Authority for any act done in pursuance or execution, or intended execution of this Act or any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provision shall have effect:-

a) The action or legal proceedings shall not be commenced against Authority until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceedings, has been served upon the managing director by the plaintiff or his agent…."

7. The Petitioner submits the above-mentioned sections are grossly unconstitutional and egregiously violate the petitioner's fundamental right to access justice, guaranteed under Article 48 of the Constitution whereas the Respondent contents the present petition is incompetent for its failure to comply with the mandatory redress under the aforesaid section.

8. It is contended by the petitioner the said sections purports to oust the jurisdiction of the courts to hear civil disputes for compensation against the 2nd Respondent, and to issue appropriate relief under Article 23(3) of the Constitution, should it be determined, that the 2nd Respondent has violated fundamental rights to property.

9. Section 33 and 34 of the Kenya Airports Authority lays down the process to be followed by an aggrieved party in seeking compensation. It gives notice and opportunity to comply with section 33 and 34 of the Kenya Airports Authority Act. In the instant

petition, the petitioner had adequate notice and opportunity to follow the process set down before filing the petition but chose to file the petition before complying with the mandatory provision of the Act. The petitioner was on 8th September 2010 issued to the with notice requiring it to vacate the suit premises and re-organization exercise by 2nd Respondent carried out on 3rd December 2010, this was 3 months after notice was issued to the petitioner. The petitioner had time to comply with the provisions of section 33 and 34 of the Kenya Airport Authority Act. I find that the issue of infringement of the petitioner's right of access to justice does not hold any water, as there was a clear statutory and contractual mechanism of redress for the issues before this constitutional court and, that notwithstanding, as provided, the petitioner neglected, failed and/or refused to activate the clearly spelled out process, that would have led to a legitimate remedy. The issue complained of, in view of the above, do not lie with the formulation of section 33 and 34 of Kenya Airport Authority Act or the lease but on part of the indolence and failure of the petitioner to adhere to the law.

10. The petitioner suggest that the constitution under Article 159(1) and 165(3) and the right of access of justice by all parties under Article 48 (3) and 22(1) of the Constitution, stated above cannot be ousted by a statute. I have perused the aforesaid Articles and section 33(1) of Kenya Airports Authority Act I find, that the same do not contravene Articles 48, 3A, 22(1), 23(3) and 40 of the constitution. The said section 33(1) do not purport to oust court's jurisdiction to hear claims for compensation and issue appropriate reliefs as it merely sets the process to be followed and the period from which a relief for compensation can be commenced. This is not in my view an act, that can be said to oust the court's jurisdiction to hear claims for compensation. I find no inconsistence of section 33(1) of the Kenya Airports Authority with the constitution.

11. The petitioner further submit section 34(a) of Kenya Airports Authority Act, is equally unconstitutional. The petitioner referred to the case of **World Duty Free Company Limited vs Kenya Airports Authority** where it was held:-

"The first challenge by the Defendant on the application is that the court lacks jurisdiction by virtue of section 33 of the Act and that there was no notice of intention to sue contrary to Section 34(a) of the Act. …….In addition to what this Court said in that ruling, I doubt whether those Sections of the Act are any longer enforceable in view of the present constitutional dispensation. They seek to give the Defendant special, preferential treatment and privileged position in as far as the protection of the law is concerned. Can they stand the constitutional stipulation as to equality before the law" I doubt. If Section 13A of the Government Proceedings Act has been declared unconstitutional in the case of Kenya Bus Services Ltd & Another vs Minister for Transport & 2 others Hccc No. 504 of 2008…wherein Majanja J held that preferential treatment of the Government under Section 13 of that Act was in breach of Article 48 of the Constitution, I doubt if these two provisions can withstand constitutional scrutiny….."

12. It is urged by the petitioner, that the position of serving 30 days mandatory notice on the Government and Parastatal in Kenya, is no longer law in Kenya, by virtue of High Court in **Kenya Bus Services Ltd & another vs Minister for Transport & 2 others Hccc 504 of 2008** having declared section 13 A of the Government proceedings Act *(chapter 50 of Laws of Kenya)* to be unconstitutional, and in contravention to Article 48 of the Constitution of Kenya. It is the petitioners position therefore that section 33(1) and 34(a) of Kenya Airports Authority Act are unconstitutional and in contravention of Article 48 of the Constitution.

13. The petitioner suggestion is, that section 33 and 34 of Kenya Airports Authority Act, are unconstitutional by virtue of the holding in **Hccc No. 372 of 2012 World Duty Free Company Limited vs Kenya Airport Authority and Kenya Bus Services Limited & another vs Minister for Transport & 2 others (2012) eKLR.** I have perused the two judgments, and it is clear, that the aforesaid decisions did not declare the impugned section unconstitutional. The former decision is on the other hand, distinguishable in, that the requisite notice to institute legal proceeding, was issued by the plaintiff in that case, whereas in the instant case, no notice was ever issued as required. Secondly, section 33 of Kenya Airports Authority Act did not apply in that case, became damage had not been caused by the defendant against the plaintiff. In that case, the plaintiff exercised its option to renew the leases issued to it by the defendant but defendant failed to respond to the notices. Accordingly the plaintiff issued notice to sue to enforce the renewal. The plaintiff sought injunction reliefs to prevent them from being evicted from the leased premises. Indeed damage had not yet been occasioned upon them and therefore section 33 of Kenya Airports Authority Act could not apply in that case. Section 13A of the Government proceedings Act that was declared to be a violation of the constitution is from a different and distinct Act of parliament and not from Kenya Airports Authority.

14. I note, that subsequently several later decisions of the High Court and Court of Appeal have departed from the decision of by brother Hon. Justice Majaja in the **Kenya Bus Services Limited case (supra)** and have upheld the validity and constitutionality of section 13A of Government Proceedings Act. In **Miriam Njeri Njau vs Attorney General (2016) eKLR** Hon. Justice Ngaah Jairus in striking out the Appeal held as follows:-

"My conclusion is that the appellant's suit did not lie and without evidence that the respondent had been served with the mandatory statutory notice, it was misconceived and fatally defective. Rather than dismiss it as the learned magistrate did I would order that it be struck out with costs to the respondent."

15. Additionally, Hon. Justice Mbogo C.G. in **Michael Mwanzia Kitavi vs Lukenya University Trust Registered Trustees & 3 others [2017] eKLR** after analyzing the reasoning in **Kenya Bus Services Limited** case *(supra),* held as follows:-

"I will associate myself with the position that was held by the High Court in the case of Miriam Njeru Njau vs Attorney General [2016] eKLR and the Court of Appeal in the case of Joseph Nyamamba & 4 others vs Kenya Railways Corporation. As such, I hold that the plaintiff ought to have complied with the requirement of giving notice to the 2nd and the 3rd defendants before filing this suit correctly….The upshot of the foregoing is that the notice of preliminary objection has merits and in the circumstances I hereby proceed to strike out the entire suit as it is fatally defective with costs to the 1st, 2nd and the 3rd defendants."

16. Once more in a more recent decision of Hon. Justice Nzioki wa Makau in **Joseph Gitonga Wachira & 41 others vs Nyeri County Government & 2 others [2018] eKLR,** it was held as follows:-

"The subject of the suit is the employment of the Claimant and it is asserted that the 3rd Respondent was their employer before the contracts lapsed in June 2015. The 3rd Respondent is a state organ to which the provisions of Section 13A of the Government Proceedings Act would apply. The Claimants were required to give mandatory 30 days' notice prior to suing the 3rd Respondent. This suit against the 3rd Respondent is thus incompetent for want of the requisite notice."

17. I find upon considering Kenya Airports Authority Act, the parliament in its wisdom must have had good reason to enact Kenya Airports Authority Act, as a separate and distinct Act from Government Proceedings Act. The parliament in realizing the sensitive nature of the operations at the airport in Kenya established Kenya Airports Authority through the Kenya Airports Authority Act with special mandate to carry out various primary functions as provided under section 8 of the Act. It was with, that in mind the parliament enacted a statute, that would ensure smooth running of the aerodromes with a view to achieving passenger satisfaction and security. It is its primary function to protect and promote the public interest of the Airports, which interest overrides, the commercial desire of the petitioner to make profit at the airports. Infact if anyone was to be allowed to bring actions or other legal processes without following laid down procedures, against the 2nd Respondent, the sensitive statutory functions of the 2nd Respondent would be at a high risk of being paralyzed to the detriment of the larger public interest.

18. In view of the above I find section 33(1) and 34(a) of the Kenya Airports Authority Act are valid and constitutional.

19. The mechanism for redress of complaints against the 2nd Respondent in private arrangements are governed by section 33 and 34 of Kenya Airports Authority Act. The petition herein w filed without complying with section 33 and 34 of the Kenya Airports Authority Act, that require the serving of notice on the 2nd Respondent at least one month before commencement of the actions. The statutory notices which are mandatory, were ignored by the petitioner in filing the petition, which I find is statute barred. In **Joel Kiprono Langat vs Kenya Posts &Telecommunication Corporation Civil Appeal No, 144/1999 (unreported).** The plaintiff therein filed a suit against the defendant **(KPTC)** citing grounds of wrongful dismissal. When the matter came up for hearing, counsel for the defendant raised a preliminary objection on the ground, that the suit was incompetent for failure on the part of the Plaintiff to comply with the mandatory provisions of **Section 109 (a) & (b) of the KPTC Act, Cap 411.** The learned Judge upheld the preliminary objection on that ground.

20. In addition to the above in a case of **Julius Kariuki Mungai vs Baliga Limited & Another (Civil Case No. 124 of 2004) (unreported)** the counsel for the defendant therein raised a preliminary objection on the ground, that the suit was statute-barred by virtue of section 136 (1) of the Government Land Act Cap 280 of the Kenya as read together with Section 4 thereof, Hon. Justice Emukule stated as follows;

"If the plaintiff had any claim against the conveyance it ought to have brought its action within the tenets of section 136 (1) and (2) above cited. Firstly, it should have brought its action within the 12 months from the date of the conveyance to the first defendant and as such after appraising the first defendant and no doubt the second defendant of its intention to do so in terms of section 136 (2). The plaintiff failed to do so, and on this ground alone, I will find that the plaintiff's action is statute-barred and is consequently incompetent."

21. In view of the above I am satisfied, that the petitioner overloaded the provisions of section 33 and 34 of the Kenya Airports Authority Act by commencing proceedings against the 2nd Respondent contrary to mandatory provision of section 33(a) of the Kenya Airports Authority Act. The petition is therefore incompetent and defective.

B) Whether the petition raises reasonable constitutional issue against the 2nd Respondent"

22. The issues raised in the Amended petition on its perusal clearly turn out to be contractual rather than constitutional matters. The petition is expressed under the ambit of Article 40 of the constitution. The concept of property rights under **Article 40 of the constitution** are not absolute as there are some limitations. **Article 66 of the Constitution of Kenya** gives state the constitutional power to regulate land or any interest or right over any land in the interest of defence, public safety, public order, public morality, public health or land use planning.

23. In case of **Murang'a Bar Operator & Another vs Minister for State For Provincial Administration and Internal Security & 2 others [2011] eKLR,** a similar issue arose and the learned Judge held;

"As regards the provisions of Article 40 of the Constitution which guaranteed protection of the right to property, I did not find any merit in the petitioner's argument that the impugned Act or any section thereof is an infringement to their right to acquire and own property. Any applicant whose establishment complies with the licensing regulations will continue to be licensed as there before. As earlier stated, the control mechanisms set out in the Act are necessary."

24. In the instant petition I find nothing in Kenya Airports Authority Act, that violates the right of the petitioner to own property; secondly the control mechanism (re-organization of the Airports) are absolutely necessary for the interest of public safety, passenger comfort, immigration, national security and international competitiveness of the Jomo Kenyatta International Airport of the regional sub-Saharan International transport lab. The petitioner's right to property emanate from three sources.

a) The 2nd tenure at the airport and therefore the specific statutes under which airport land falls; namely The Registrar of Titles Act (Cap 287); Transfer of Property Act, 1882 and

b) The mandate and property rights vested on the landlord pursuant to The Kenya Airports Authority Act (Cap 395)

c) The Contract/Tenancy lease that was entered into between the petitioner and the 2nd Respondent.

I therefore find and hold contrary to the petitioner's assertion, the formulation of Article 40 does not grant unlimited rights and private control of property as submitted by the petitioner. This is simply because the constitution makes provisions, modification and limitations of private property right in public interest. In the instant case, the re-organization exercise at Jomo Kenya International Airport had many purposes including preventing nuisance. It is of great interest to note, that the use of property is governed by general public utility and anything that threatens to become a nuisance or danger is excluded.

C) Whether granting the orders sought would be against the interest of justice and under public.

25. The petitioner contends that it was virtuously and necessary evicted from the leased premises Gate 7 at Jomo Kenyatta International Airport and trolley space at Moi International Airport. The Leases in respect of the premises were express on periods and what steps the 2nd Respondent was supposed to take before the surrender of the acquisition by the 2nd Respondent. That notwithstanding express provision, the 2nd Respondent issued notice requiring the petitioner to surrender its leased spaces to which the petitioner wrote back asking for alternative space, before surrender or requisition by 2nd Respondent, to which the 2nd Respondent did not comply but instead instructed its agents to forcefully and virtuously evict the petitioner.

26. The 2nd Respondent urges, it is abundantly clear, that reinstating the petitioner back to the shops in dispute would be a case of continued congestion and confusion on gate 6 and 7 thereby causing serious security hazard for passengers termination or boarding their flights through those gates. It is further urged, that it would be great discomfort to the passengers waiting to board Plaines through the said gates. That moreover, the threat to the Jomo Kenyatta International Airport remaining as the region hub in the aviation industry cannot be overemphasized in that the discomfort and hazard posed by the shop would cause players in the aviation industry to prefer other airports especially the Bole International Airport in Addis Ababa.

27. I have considered and balanced the petitioner's interest against the interest of justice and the wider public interest, and I am of the view, that the petitioner ought not to be allowed to continue operating in the affected areas at the expense of the comfort and security of passengers and members of public. The petitioner's presence in the affected areas would continue interfering with the security of the general public and the passengers, a situation generally frowned by the law and Kenya Courts. The courts have consistently held, that where public interest outweighs the individual private interest, the private rights have to bow out to public interest. (See in **Republic vs Kenya National Commission on Human Rights** ***ex-parte*** **Uhuru Muigai Kenyatta [2010] eKLR).** Similar positions have been upheld in the decisions of **East African Cables Limited vs Public Procurement Complaints Review and Appeals Board & Another [2007] eKLR, and Kenya Power & Lighting Co. Ltd vs NGM Co. Ltd & 2 other (Nairobi, CA No. 74 of 2010) (unreported).**

28. Having considered the parties rival submissions, and the law, I find, that if the petitioner is granted the space sought, the order to, that effect would harm the greater number of people and in exercise of the discretion, based on the parties submissions and evidence, I would decline the orders sought for benefit of the wider public interest.

D) Whether the petitioner has been paying rent for repossessed Gates 6 and 7 premises at Moi International Airport and Jomo Kenyatta International Airport respectively"

29. The petitioner contends that it has paid rent for unavailable space at shop Gate 7 at Jomo Kenyatta International Airport for 4.7.47 square metres over **L.R. No. 21919** of United States Dollars *(USD)* 170,393.14, as itemized at paragraph 27 A (1) of the Amended petition. The payments were exhibited jointly as annexture **(KMS-1)** of the Supplementary Affidavit of Kuldip Sapra sworn on 7th July 2017. It is also urged the petitioner paid rent for unavailable space six (6) square meters Trolly at Moi International Airport Mombasa of United States Dollars 17593079 as itemized at paragraph 27A(ii) of the Amended petition, which payments were exhibited jointly as annexture **(KMS-1)** of supplementary affidavit of Kuldip Sapra sworn on 7th July 2017.

30. It is petitioner's submissions the claimed rebate for the overpaid rental sums, has been conceded to by the 2nd Respondent in an affidavit by M/s Katherine Kisila, in an affidavit sworn at Nairobi on 12th April 2017 in Nairobi Hcc Constitutional **petition No. 45 of 2017 Maya Duty Free Limited vs Kenya Airport Authority & others** at paragraph 8 in the following terms;

"….While it is correct that the Petitioner has been paying full rent in respect of the parts of the demised premises under the Lease….the payment is not as a consequence of any demand by KAA. KAA is in the process of processing a refund to the Petitioner as is appropriate."

The same was produced as KSM-3) of the supplementary Affidavit of Kuldip Sapra sworn at Nairobi on 17th July 2017.

31. The 2nd Respondent objects to the claim stating the invoices and receipts do not indicate, that they relate to Gate 6 and 7 and therefore cannot be rightly attributed to the said gates. The 2nd Respondent states the petitioner is still a tenant. The payments are for slip at Gate 5 for which 2nd Respondent continually issues invoice for space occupied by petitioner but not for space 6 and 7. The 2nd Respondent's affidavit by Katherine N. Kisila attached to the supplementary affidavit in the amended petition as **KMS-3** has been controverted. I find the petitioner has failed to demonstrate that the contents contained in the aforesaid affidavit are related to the two spaces in this petition but to any other space, as the petitioner has rented other space from the 2nd Respondent. The petitioners cannot therefore rely on the controverted affidavit to support its claim. Other independent evidence was not produced. The petitioner was supposed to strictly prove its claim but has failed to do so. I find the petitioner is not entitled to the sum claimed.

32. Having considered the petition I proceed to make the following orders:-

a) A declaration be and is hereby made to the effect that section 33 (1) of the Kenya Airports Authority Act, (Chapter 395) of the Laws of Kenya is not inconsistent with Article 48 of the Constitution of Republic of Kenya. It is not unreasonable and without lawful cause or justifiable nor does it undermine, restrict or otherwise limit the petitioner's fundamental right to access to justice. It is therefore not void, invalid, and/or inapplicable to the circumstances hereof as against the petitioner to the extent of any inconsistency.

b) The amended petition is further incompetent for failing to comply with the mandatory redress mechanism as provided for in section 33 and 34 of the Kenya Airports Authority Act.

c) The amended petition does not raise any reasonable constitutional issue against the 2nd Respondent as the matters raised thereon are contractual in nature and not constitutional matters.

d) There has been absolutely no violation of any constitutional right of the petitioner as the issues between the parties are in the nature of private contractual rights to be regulated by the agreements entered into between the parties and the applicable law thereto.

e) The 1st and 2nd Respondents have constitutional power to regulate any interest or right over any land in the interest of defence, public safety, public order, public morality, public health or land use planning as stipulated by Article 66 of the constitution.

f) The statutory provision under section 33 of Kenya Airports Authority Act does not amount to a denial of access to justice to the petitioner.

g) The petitioner had more than adequate notice and opportunity to comply with section 33 and 34 of Kenya Airports Authority Act but chose to file the present petition without compliance.

h) The Honourable court does not have power to waive the mandatory requirement of section 33 and 34 of Kenya Airports Authority Act.

i) Petition is dismissed with costs.

Dated, signed and delivered at Nairobi this 23rd day of May, 2019.

....

J .A. MAKAU

JUDGE

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REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Ojwang & Wanjala SCJJ)

PETITION NO. 14 OF 2014

BETWEEN

1. COMMUNICATIONS COMMISSION OF KENYA

2. THE HON. ATTORNEY GENERAL

3. THE MINISTRY OF INFORMATION COMMUNICATIONS AND TECHNOLOGY

4. SIGNET KENYA LIMITED..APPELLANTS

AND

1. ROYAL MEDIA SERVICES LIMITED

2. NATION MEDIA SERVICES LIMITED

3. STANDARD MEDIA GROUP LIMITED

4. CONSUMER FEDERATION OF KENYA (COFEK)

5. STAR TIMES MEDIA LIMITED

6. PAN AFRICAN NETWORK GROUP KENYA LIMITED

7. GOTV KENYA LIMITED

8. WEST MEDIA LIMITED..RESPONDENTS

NATURE FOUNDATION LIMITED......PROPOSED INTERESTED PARTY/APPLICANT

(Being an application by Nature Foundation Limited to be enjoined in these proceedings as an Interested Party)

RULING

A. INTRODUCTION

[1] This is an application dated 23rd May, 2014, filed pursuant to Rule 25 of the Supreme Court Rules, 2011, seeking to have Nature Foundation Limited (the applicant herein) enjoined as an Interested Party to the proceedings, and granted of leave to file and serve a cross-petition to the appeal.

B. THE APPLICATION

[2] The essence of the application was elaborated in the body of the application and in the supporting affidavit of Alfrida Boinett. The deponent averred that the applicant had been a party in other matters connected to the subject of the present appeal, and had demonstrated a keen interest in liberalizing the broadcast-airwaves in Kenya. In addition, it was deponed that the applicant was the beneficiary of a Court decision allowing it the privilege to be a player in the media industry, but which finding had been compromised by the 1st, 2nd and 3rd respondents. As a result, the applicant, by the application, gives realization to the said privilege. It was averred that the applicant was the only party in a position to present certain pertinent information to the Court at the hearing of the appeal, and that in the absence of such information, the Court would be incapable of reaching a considered and just determination.

[3] The applicant stated that he would be seeking the dismissal of the petition of appeal, on the grounds that the 1st, 2nd and 3rd respondents lacked the operating mandate, as their licences had expired and had not been renewed, pursuant to Section 46 of the Kenya Information and Communications Act (Cap 411A), Laws of Kenya) and that, therefore, they had been operating illegally.

[4] The applicant had petitioned the High Court in Nakuru ***[Republic v. The Minister for Information and Communications & Another ex-parte The Nature Foundation Limited***, Misc. Civil Application No. (JR) 51 of 2010 (Misc. Civil Application No. (JR) 51 of 2010)] for an Order of Certiorari to quash Regulation 46(1), (2) and (3) of the Kenya Communications (Broadcasting) Regulations for the reason that they were *ultra vires* Sections 46A (a) and (d), 46D (2)(b) and (d) and 46K (a) of the Act. The High Court held that Regulation 46(3) had been made contrary to the intent and objects of the Act, and therefore fell outside the mandate of the Communications Commission of Kenya (CCK). However, the Court declined to grant Orders of certiorari, as the applicant failed to demonstrate sufficient interest or standing in the matter before it.

[5] According to the applicant, this Regulation (46) having been declared *ultra vires* the parent Act, by the High Court, was null and void, and anything done in pursuance thereof was illegal. To the applicant, this decision meant that the 1st, 2nd & 3rd respondents were operating illegally, having failed to apply for new broadcasting licences from the 1st appellant, pursuant to Section 46 of the Act.

[6] It was clear from the application that the applicant intended to join the broadcast industry, on the basis of a legitimate expectation drawn from its own comprehension of the right enshrined under Article 34 of the Constitution. According to the applicant, this right was being hindered by the 1st, 2nd and 3rd respondents, who continued to monopolise the broadcasting frequencies. It was the applicant's intent, upon obtaining joinder in the appeal, to make out a case for an open and democratic media space, in place of a unilateral domination by a few players.

C. THE PARTIES' RESPECTIVE CASES

i. The Applicant

[7] In addition to the averments made in the application and the supporting affidavit, counsel for the applicant, Mr. Oriema argued that the applicant had been involved in similar litigation and had been a party in ***Republic v. The Minister for Information and Communications & Another ex-parte The***

Nature Foundation Limited, Misc. Civil Application No. (JR.) 51 of 2010, which sought orders of certiorari to quash Regulations 46(1), (2) and (3) of the Kenya Communications (Broadcasting) Regulations, for the reason that they were *ultra vires* Sections 46A (a) and (d), 46D (2)(b) and (d), and 46K(a) of the Act. Counsel submitted that the applicant had a legitimate cause to be enjoined in these proceedings, because it was litigating in favour of liberalizing the broadcasting frequencies on its own behalf, and on behalf of other interested and affected parties, and members of the general public. The applicant intended to demonstrate that the frequencies were unobtainable because the 1st, 2nd and 3rd respondents were holding the same illegally, under the sanction of the 1st appellant. The applicant would thus be asking the Court to order a release of those frequencies, opening up opportunities to others.

ii. The 1st Appellant

[8] Learned senior counsel, Mr. Fred Ojiambo, appearing with learned counsel, Mr. Kilonzo, for the 1st appellant, submitted that the applicant had neither applied for nor obtained any broadcasting frequencies and, therefore, had no right or interest in the appeal before the Court. Counsel submitted that the Orders sought by the applicant would have the effect of disorganizing the time-frame allocated to the hearing and determination of the appeal. He submitted that the present appeal arose from the decision of the High Court in ***Royal Media Services Ltd & 2 Others v. Attorney General & 8 Others***, H.C. Constitutional Petition No 557 of 2013 (H.C Constitutional Petition No 557 of 2013) which was subsequently the subject of first appeal in ***Royal Media Services Ltd & 2 Others v. Attorney General & 8 Others***, Civil Appeal No. 4 of 2014, and now the subject of second appeal before this Court; and that this Court was sitting in exercise of its appellate jurisdiction, and not its original jurisdiction. Counsel urged that the applicant was seeking a remedy in the reserve of the High Court, and not this Court sitting on appeal. In addition, it was submitted that the public interest issues alluded to by the applicant were live in other Courts, and this Court would have an opportunity to address them subsequently.

[9] Counsel submitted that the applicant had not sought joinder in the proceedings before the High Court or the Court of Appeal, and had not offered any explanation as to why such joinder had not been sought at those earlier stages.

[10] Learned counsel urged that the applicant was seeking to introduce a new cause of action, with new sets of fact neither laid before the High Court nor the Court of Appeal. Counsel relied on the cases of ***Kenya Section of the International Commission of Jurists v. The Attorney-General & 2 Others***, Sup. Ct. Criminal Appeal No. 1 of 2012; [2012] eKLR and ***Peter Oduor Ngoge v Francis Ole Kaparo & 5 Others***, Sup. Ct Petition No. 2 of 2012; [2012] eKLR, for the proposition that the applicant could not advance a cause of first instance at this appellate forum.

[11] It was submitted that the issues intended by the applicant were also directly and substantially in issue before the High Court in the case of ***Media Owners Association v. The Attorney General & Others***, H.C Constitutional Petition No. 244 of 2011, in which a cross-petition raising similar issues as those in the proposed cross-petition has been filed. It was urged that similar issues to those proposed by the applicant, were also directly in issue in ***Republic v The Communications Commission of Kenya ex parte Magic Radio Limited, Nairobi***, Misc. Civil Application Number (JR) 284 of 2011; and thus, allowing the admission of the applicant as an Interested Party to the proceedings, and the subsequent filing of cross-petition, would prejudice the matters pending before the High Court.

iii. The 2nd & 4th Appellants and the 7th Respondent

[12] Learned counsel, Mr. Kilonzo, holding brief for learned counsel, Mr. Njoroge for the 2nd appellant, learned counsel, Mr. Saende for the 4th appellant, and learned counsel, Mr. Monari for the 7th respondent

contested the application, and argued that the application as presented, contemplated two possible options: first, joinder of the applicant as an interested party; and secondly, corresponding leave to file a cross-petition to the appeal. Counsel urged that the primary purpose of the intended cross-petition was the dismissal of the appeal, and that in the circumstances, the proposed role of the applicant as intervener was in the nature of a sham; and appellant was a stranger to the proceedings. Learned counsel further submitted that, Rule 38 of the Supreme Court Rules only allows a respondent to file a cross-appeal, but not a non-party to the proceedings.

[13] In conclusion, learned counsel urged the Court to grant costs, in compensation for loss of time occasioned by the instant application.

iv. The 1st 2nd and 3rd Respondents

[14] The application was contested by the 1st, 2nd and 3rd respondents in their grounds of opposition dated 21st July, 2014, in which they perceived the application as an abuse of Court process, in the following particulars:

i. there was no basis to allow the joinder of the applicant pursuant to rule 25 of the supreme court rules, 2012;

ii. rule 54(1)(a) and (2) makes provision for parties who wish to be enjoined as *amicus curiae* and who must establish expertise, impartiality and independence, none of which elements had been established by the applicant;

iii. the applicant was not involved in the broadcasting industry, and had not demonstrated an identifiable stake or legal interest in the proceedings before the Court;

iv. the proceedings in High Court Miscellaneous Application No. 51 of 2010, being relied upon by the applicant, to the present appeal;

v. the applicant had not demonstrated the value it would add to the present proceedings, in light of the weighty constitutional issues raised in the appeal;

vi. while the applicant was aware of the proceedings before the High Court and the Court of Appeal, it never made any application to be enjoined in those proceedings, and the present application would only prejudice the expeditious hearing and determination of the appeal.

[15] Learned counsel for the 1st, 2nd and 3rd respondents, Mr. Kimani submitted that the application did not present an ordinary case for joinder, but one that amounted to an interference with the setting for an appeal before this Court. Counsel submitted that the applicant had provided information confirming that it was indeed a party in a concluded cause before the High Court in Nakuru (Misc. Civil Application No. (JR.) 51 of 2010), and in that case, the High Court dismissed the claim, though it agreed *obiter*, with the applicant that Regulation 46(3) had been made contrary to the intent and objects of the Act, and so was inconsistent with the mandate of CCK.

[16] Counsel submitted that the applicant's true intentions were to present a fresh cause of action at this advanced stage, and that the application ought to be dismissed with costs.

v. *The Applicant's Response*

[17] Learned counsel for the applicant invited the Court to recognise that the application had been filed

well before the appeal was set down for hearing, and that the intention of the applicant was not to delay the hearing and determination of the appeal.

[18] Counsel urged that the applicant intended to present vital information to the Court, arising from statute as well as judicial pronouncements, with the object of aiding the Court to reach a considered determination.

D. THE ISSUES FOR DETERMINATION

[19] The issues emerging for resolution in this application are as follows:

i. ***whether the applicant should be enjoined to these proceedings as an Interested Party, pursuant to Rule 25 of the Supreme Court Rules, 2012, and whether the applicant should be allowed to file a cross-petition at this stage of the proceedings;***

ii. ***whether the issues intended in the cross-petition are already in issue before this Court;***

iii. ***whether the applicant intends to argue a fresh cause, by way of cross-petition;***

iv. ***whether there are similar matters pending before the High Court.***

v. ***costs***

E. ANALYSIS

[20] The applicant seeks to be enjoined in the appeal as an Interested Party, with further leave to file and serve a cross-petition. Before considering the merits of the application, we wish to correct certain errors on the face of the application. The application is premised upon Rule 25 of the Supreme Court Rules, 2011. The correct Rule is Rule 25 of the Supreme Court Rules, 2012. As noted in ***Nicholas Kiptoo Arap Korir Salat v. The Independent Electoral and Boundaries Commission & 7 Others,*** Sup Ct. Civil Application No.16 of 2014; [2014] eKLR, the Supreme Court Rules, 2011 were repealed and therefore no longer in operation. In this case, the Court held:

"In developing this rich jurisprudence, the Court will not [refrain] from correcting glaring errors of law when presented by litigants and/or counsel……….Counsel referred to the Supreme Court, Rules 2011 which were repealed on 26th October, 2012 via Legal Notice No. 123 by the enactment of Supreme Court Rules, 2012."

[21] Rule 25 of the Supreme Court Rules, 2012 provides:

"1. *A person* ***may at any time in any proceedings before the Court*** *apply for leave to be enjoined as an interested party.*

2. *an application under this rule shall include-*

a) a description of the interested party;

b) any prejudice that the interested party would suffer if the intervention was denied; *and the* ***grounds or submissions to be advanced*** *by the person interested in the proceeding, their* ***relevance*** *to the proceedings and the* ***reasons*** *for* ***believing*** *that the submissions will be* ***useful*** *to the Court and* ***different*** *from those of the other parties"* [emphasis supplied].

[22] In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court's Ruling in the ***Mumo Matemo*** case where the Court (at paragraphs 14 and 18) held:

"[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause *ab initio*. ***He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause…"***

[23] Similarly, in the case of ***Meme v. Republic,***[2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

"(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;

(ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;

(iii) joinder to prevent a likely course of proliferated litigation."

[24] We ask ourselves the following questions: *(a) what is the intended interested party's stake and relevance in the proceedings" and (b) will the intended interested party suffer any prejudice if denied joinder"*

[25] In accordance with Rule 25 (2)(a), the applicant has been described as a limited liability company undertaking diverse public-interest projects related to public awareness, environmental conservation, community development, and empowerment through various forms and mediums in Kenya. In accordance with Rule 25(2)(c), the applicant also stated that its relevance in these proceedings was drawn from its litigation history, in support of liberalizing the broadcasting frequencies in Kenya, on its own behalf and on behalf of other interested parties and members of the general public. We note, however, that in the instant appeal, the applicant was neither a party at the High Court nor at the Court of Appeal. It is, therefore, not evident from the record that the applicant has a legitimate stake, or interest in the matter.

[26] The matter giving rise to this appeal was first determined in High Court Constitutional Petition No. 557 of 2013, in which Judgement was delivered on 23rd December, 2013. The 1st, 2nd and 3rd respondents being aggrieved by the decision of the High Court, filed an appeal before the Court of Appeal (Civil Appeal No. 4 of 2014). On 28th March, 2014, the Court of Appeal allowed the said appeal with costs, and which decision is now the subject of the present appeal. The applicant now seeks to be enjoined in this matter, even though it was neither a party at the High Court nor at the Court of Appeal. The applicant has not demonstrated how the ends of justice would better be served by enjoining it in the appeal. Despite the applicant's argument that its rights under Article 34 of the Constitution will be violated if not allowed to join in the appeal, we note that the proper forum of first instance, in seeking the enforcement of the Bill of Rights, is the *High Court*, and not this Court.

[27] We cannot exercise our discretion to enjoin a party that disguises itself as an Interested Party, while in actual fact merely seeking to institute fresh cause. On this point, we are guided by the principle which we had pronounced in the ***Mumo Matemo*** case (at paragraph 24), as follows:

"A suit in Court is a 'solemn' process, 'owned' solely by the parties. This is the reason why

there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings."

[28] In our view, the standards to be applied in considering whether or not the applicant should be enjoined as an Interested Party, have not been established. This application, in our perception, is premised upon mere apprehension and speculation, that rights not-yet crystallized, will be violated.

[29] The applicant also seeks leave to file a cross-petition to the appeal. Part 6 of the Supreme Court Rules, 2012 regulates the mode of filing appeals before this Court, and makes reference to a *cross-appeal,* as opposed to a *cross-petition*. Rule 38(1) of the Rules provides the procedure for filing a *cross -appeal* as follows:

*"A **respondent** who intends to cross-appeal shall specify the grounds of contention and the nature of the relief which the **respondent** seeks from the Court"* [emphasis supplied].

[30] The ***Black's Law Dictionary,*** 9th ed (at page 133) defines "cross-appeal" as follows:

*"to seek **review** (from a lower court's decision) by a higher court"*

And "cross-petition" (p.433) as follows:

*"i. a claim asserted by a **defendant** against another party to the action;*

*ii. claim asserted by a **defendant** against a person not a party to the action for a matter relating to the subject of the action."*

[31] From the above definitions, there is a difference between a cross-appeal and a cross-petition. A cross-appeal is an action by a respondent, who intends to counter an appellant's cause in an appeal, with the view of obtaining certain relief(s) from the Court. A cross-petition on the other hand, is an action by a defendant in first-instance claims, intending to counter the claim of a petitioner with the view of obtaining certain remedies. The applicant, therefore, does not bear the right to file a cross-petition or even a cross-appeal, as this is a preserve of a respondent who has a claim against another party already in the appeal (cross-appeal), or another party to the suit (cross-petition).

[32] Learned Senior Counsel, Mr. Ojiambo submitted that the issues which the applicant sought to raise were live, before this Court. We have already outlined the issues that the applicant intends to raise, upon being enjoined to the appeal. Does the applicant intend to introduce arguments different from those of the other parties" The 2nd appellant intimates that, in ***Attorney General & Another v Royal Media Services,*** Sup Ct. Petition No. 14C of 2014, one of the broad questions of law that this Court will be asked to consider is, whether the rights of the 1st, 2nd and 3rd respondents, as enshrined under Article 34 of the Constitution, have been violated. Also in issue is the question whether the 1st, 2nd and 3rd respondents are acting illegally. The 1st appellant asks the Court to address *inter alia,* the constitutionality of CCK's existence; the constitutionality of the Regulations; the scope of legitimate expectation by the 1st, 2nd and 3rd respondents under the terms of Articles 33 and 34 of the Constitution; the scope of the judicial mandate in respect of Article 33 and 34; the appellate jurisdiction; the doctrine of the separation of powers; and the concept of judicial restraint.

[33] In ***Communications Commission of Kenya & 3 others v. Royal Media Group & 7 Others,*** Sup

Ct Petition No. 14 of 2014, the 1st Respondent contends that the composition of CCK at the time the frequencies were allocated was not as envisaged under Article 34(3)(b) of the Constitution, and that CCK, therefore, lacked the legal competence to regulate airwaves after the promulgation of the Constitution. The 1st respondent also argues that the Broadcasting Signal Distribution (BSD) licences procurement-process was conducted in an illegal manner. Similar issues have been raised by other parties to the appeal, and will be addressed in the main appeal. While the nature of these questions will avail the applicant the benefit of binding precedent, the same shall not accord it the intended remedies, as these can only be sought from the High Court. In these circumstances, it is clear to us that no prejudice will be occasioned to the applicant if not enjoined, since there are still open avenues for pursuing its cause.

[34] Learned Senior Counsel, Mr. Ojiambo had expressed an apprehension that the intended cross-petition would raise new matters of law and fact, which had not previously been adjudicated upon at the High Court or the Court of Appeal.

[35] We note from the application that the applicant, upon being enjoined, will be contending that it has a legitimate expectation to join the broadcasting industry, by virtue of Article 34 of the Constitution. It appears from the application that, the cross-petition will be urging this Court to find that media space should not be monopolized by a few entities, as Parliament has already, by express legislation, opened it up. These are new issues requiring adjudication by a Court of original jurisdiction.

[36] This Court will only exercise original jurisdiction pursuant to specific provisions of the Constitution: Article 58(5) *(in determining the validity of a state of emergency)*; Article 163(3)(a) *(in hearing disputes relating to the elections to the office of the President)*; and Article 163 (6) *(relating to Advisory Opinions)*. This Court, in ***Peter Oduor Ngoge v. Francis Ole Kaparo and 5 Others,*** Sup Ct. Petition No. 2 of 2012; [2012] eKLR, *(Ojwang & Njoki SCJJ)* determined that:

"The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals......"

[37] That same principle is stated in ***Shabbir Ali Jusab and 2 others v. Anaar Osman Gamrai and Another,*** Sup Ct. Petition No. 1 of 2013, (at paragraphs 39 and 40):

"If this Court were to consider the matters raised, we would not be providing our further input, but merely undermining the role of the other Courts, and encroaching on the unlimited original jurisdiction of the High Court, which is provided for under Article 165 (3)(a) of the Constitution………"

"Further, the substantive matters in the appellant's petition remain unanswered, as they have not yet been canvassed in the proper forum. As a Court not furnished with facts, we run the risk of perpetuating an injustice, as both parties should first be heard in the appropriate Court, before preferring an appeal either to the Court of Appeal or to this Court. It is such initial hearing on fact that constitutes the centerpiece of the right to be heard, and to fair trial."

[38] Recently, in the case of ***Zacharia Okoth Obado v. Edward Akong'o Oyugi & 2 Others, Sup Ct. Petition No 4 of 2014,*** the Court (at paragraph 84) thus held:

"The affidavit sought to introduce the issue of rigging, which had been canvassed neither at the High Court, nor at the Court of Appeal. This Court has on previous occasions pronounced itself

on the nature of an appeal, and the extent of our appellate jurisdiction. In *Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board,* SC Petition No. 5 of 2012***, this Court held that:***

'In our opinion, a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a superior Court of first instance is to be resolved at that forum in the first place, before an appeal can be entertained. Where, before such a Court, parties raise a question of interpretation or application of the Constitution that has only a limited bearing on the merits of the main cause, the Court may decline to determine the secondary claim if in its opinion, this will distract its judicious determination of the main cause; and a collateral cause thus declined, generally falls outside the jurisdiction of the Supreme Court'.

We are of the opinion that the issue of rigging was a new issue, which the 1st respondent sought to introduce for the first time at the Supreme Court, and therefore, it cannot be entertained."

[39] On the basis of those principles, we cannot allow the applicant to raise the issues intended in the cross-petition. The applicant's recourse may be found in applying to be enjoined in similar cases pending before the High Court, and at the discretion of that Court. Alternatively, the applicant may opt to institute fresh proceedings at the appropriate forum.

[40] It is clear that there is a similarity between the issues raised by the applicant, and those arising in Constitutional Petition No. 244 of 2011 at the High Court. Determining those issues at this final stage, in view of the terms of Article 163(7) of the Constitution, would encroach on the independent mandate of the High Court to exercise its jurisdiction, a prospect not to be entertained by this Court. Where litigation is properly commenced, the High Court has the professional aptitude to deal with the issues before it, and it is our obligation to sustain such constitutional mandate.

[41] Learned counsel Mr. Kilonzo for the 1st appellant, prayed for a dismissal of the application, and for an Order for costs, against the applicants. Counsel was of the view that the time expended in addressing the application could have been used in preparing the ground for the appeal. Other learned counsel also sought the dismissal of the application, and an Order for costs in their favour.

[42] Section 21(2) of the Supreme Court Act provides that:

"In any proceedings, the Supreme Court may make any ancillary or interlocutory orders, including any orders as to costs that it thinks fit to award".

[43] This Court had the opportunity of pronouncing itself on the issue of costs in ***Mike Wanjohi v. Steven Kariuki & Others,*** Sup. Ct. Petition No. 2A of 2014 by affirming its holding in ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh & 4 Others,*** Sup Ct. Petition 4 of 2012; [2013] eKLR (at paragraphs 120 and 121):

"It emerges that the award of costs would normally be guided by the principle that 'costs follow the event': the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice………"

"In instances where there is a vexatious claim brought by the petitioner or the respondents, the

Court will determine whether a party is to be disallowed costs, or the burden of paying costs will fall on such a party… The scope for discretion in this regard, it is clear, is more limited than is the case in normal civil procedure. The purpose is to compensate the successful litigant for expenses incurred in prosecuting the case."

[44] We are convinced that the current application was not meritorious, and should not have come before this Court in the first place. It is plainly speculative and as such, misconceived, and is an abuse of the process of the Court. This being an ordinary civil application, we find that we have a broad latitude to exercise our discretion in determining the issue of the costs.

[45] We note that, not all the parties were involved in the active canvassing of the application; and we shall restrict our Order as to costs accordingly.

F. ORDERS

[46] In all the circumstances of this matter, our Orders shall be as follows:

a. the application dated 23rd May, 2014 is hereby dismissed.

b. the costs of the 1st, 2nd, 3rd and 4th appellants and the 1st, 2nd, 3rd and 7th respondents shall be borne by the Applicant.

c. the 4th, 5th, 6th and 8th respondents shall bear their own costs.

DATED and **DELIVERED** at **NAIROBI** this **25th** day of **JULY, 2014.**

…………………………………….…….

J.B. OJWANG

JUSTICE OF THE SUPREME COURT

……………………..……………………..

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR, SUPREME COURT

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION NO 4 OF 1979

ANARITA KARIMI NJERU ....APPLICANT

VERSUS

REPUBLIC ....DEFENDANT

JUDGMENT OF THE COURT

The applicant moves this Court for a declaration that during her trial before the Resident Magistrate Meru upon two charges of stealing by a person employed in the public service (involving respectively Shs 46,574/40 and Shs 9,936) the provisions of section 77 of the Constitution of Kenya were contravened. She further asks for orders that her trial be nullified or otherwise disposed of under those provisions.

The manner in which the Constitution is said to have been infringed is set out in the supporting affidavit dated 5th January 1979 of Mr Mwirichia, of counsel, who has appeared for the applicant both at the trial and in the proceedings before us. Paragraphs 5 to 9 respectively of that affidavit state:

5. That the submissions under section 210 of the Criminal Procedure Code occupied 13th and 19th September 1978 and a ruling under section 211 of the Criminal Procedure Code was made at the close of the proceedings on 19th September 1978.

6. That the defence applied for summons to issue on a defence witness resident at Nyeri immediately following the ruling of court on 19th September 1978 in accordance with section 211 (2) of the Criminal Procedure Code.

7. That summons were issued returnable on 21st September 1978.

8 That on 21st September 1978 the summons were returned unserved.

9. That the Court refused a defence application to adjourn the hearing suitably to enable the serving officer to effect service of the summons on the witness.

The witness referred to in this part of the affidavit was Richard Francis Mase, the resident manager in Nyeri of Pannell , Bellhouse Mwangi & Co, the firm of accountants who audited the accounts of the St Mary's Girl's Secondary School, Egoji, Meru, of which the applicant was headmistress until 26th July 1974, in which capacity she was convicted of committing these offences. Mr Mwirichia's affidavit and its seven exhibits are filed with these proceedings. They comprise the auditor's report, the balance sheet and income and expenditure account for the calendar year 1973, together with correspondence passing

between the firm and the applicant's successor, Mrs Njue, relating to payment of the firm's charges for preparing those accounts. Their charges were not in fact paid until 25th January 1978.

In paragraph 13 of Mr Mwirichia's affidavit it is further alleged that the Court refused a defence application for an adjournment to enable the applicant to secure the attendance of witnesses other than Mr Mase, of whom it is said the defence had notified the Court. These matters are also covered in paragraphs 10 and 21of the applicant's petition of appeal. This appeal was not heard because the application to file the intended appeal out of time was rejected by Cockar J on 22nd December 1978. Mr Mwirichia quite rightly agreed that he was precluded from raising before us any of the remainder of his grounds in the applicant's petition of appeal, that is to say those not dealing with points validly attributable to the Constitution.

On the morning of the commencement of the hearing before this Court Mr Muttu representing the Republic raised a preliminary objection. After hearing it, we then invited Mr Mwirichia to give us further and better particulars of precisely that which he is alleging under the second head of his complaint, that is to say that the applicant was not given facilities to procure the attendance of witnesses other than Mr Mase. In the event he did not do so; and in our opinion he could not validly do so, for he is on record as having said to the magistrate, after he had returned to conduct the applicant's defence, that the only evidence the defence wished to call was that of Mr Mase. Accordingly, in our view, the only complaint that can lie of an alleged refusal to afford the defence such facilities (and we accept that this means "reasonable facilities" under section 77(2) (e) of the Constitution) is as respects Mr Mase. We mention that we also sought to be enlightened as to which of the paragraphs of section 77 of the Constitution were thereby alleged to have been infringed, and Mr Mwirichia referred to his list of authorities (filed on to the day preceding the hearing) which mentioned both paragraphs (c) and (e) of subsection (2) of that section. This was a rather curious manner of bringing a statutory provision to the notice of a court of law, but, at all events, we were prepared to permit Mr Mwirichia to develop his arguments under both paragraphs. In the event, on the second day of the hearing before us, Mr Mwirichia abandoned the position he had previously taken up under paragraph (c) . We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

While we are dealing with matters of this kind we also draw attention to the way in which the proceedings are instituted. They are numbered "Miscellaneous Criminal Application No 4 of 1979". This was because the firm of advocates acting for the applicant drafted the papers in this way. We observe that both *East African Community v The Republic* [1970] EA 457 and *Okunda v The Republic* [1970] EA 453 (to both of which authorities we were referred in argument) were filed specifically as constitutional references. Though we do not wish to make an issue of this at this stage, we are nevertheless satisfied that that is the correct form of heading. We are also satisfied that the rest of the heading "In the matter of the Constitution of Kenya" and so on, is appropriate to a reference of this nature.

What Mr Muttu argued in support of his submission was that the application was incompetent for one of two reasons, that it was too late for the applicant now to seek redress because she could and should have sought it whilst on trial in the subordinate court; and that, having appealed or sought to appeal to this Court against her convictions and sentences, she should not be allowed to come here again for what is in effect the same purpose. She was attempting, under the guise of a Constitutional reference, to get us to resolve grounds of appeal which this Court had said it would not entertain. For his part, Mr Mwirichia urged us to hold that the fact that the applicant had not sought a reference to this Court whilst on trial was of no consequence; and that, though she had taken other proceedings in this Court, she had

been frustrated in her purpose and had had no alternative but to apply to us, for otherwise the decision of the trial magistrate (which he said was unjust) would have to stand. We should invoke the spirit of the Constitution in the applicant's favour to protect a fundamental right which the Constitution had given, and the magistrate had taken, from her.

We will deal with the last point first. The Constitution is a liberal document and we are concerned with that part of it appearing in a chapter which is headed "Protection of Fundamental Rights and Freedoms of the Individual", but we apprehend it to be required of us to proceed on the lines set out in a *dictum* of Das J in *Keshava Menon v State of Bombay* [1951] SCR 228 which this Court adopted in *The Republic v El Mann* [1969] EA 357, 360, and which reads:

An argument founded on what is claimed to be the spirit of the Constitution is always attractive for it has a powerful appeal to sentiment and emotion: but a Court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view.

What then are the facts, the law and the arguments upon which we must resolve the preliminary objection set before us" The facts are these. The applicant, whilst on trial, was denied an adjournment to enable her to call a witness, did not thereupon ask for a reference to this Court as to whether or not such denial was constitutional and allowed the trial to go on and to be completed. Then having been convicted and sentenced, she drew up a petition of appeal (which, *inter alia*, contained the points which she would now wish us to resolve) and being out of time to lodge it in this Court as of right, applied for leave to appeal, which Cockar J refused. The law is to be found in Chapter V of the Constitution and comprises sections 70 to 86, and particularly section 77(2)(e) which reads:

Every person who is charged with a criminal offence ... (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the Court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the Court of the same conditions as those applying to witnesses called by the prosecution ...

and section 84 (1) to (4) which provides:

(1) Subject to subsection (6), if any person alleges that any of the provisions of section 70 to 83 (inclusive) [of this Constitution] has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction (a) to hear and determine any application made by any person in pursuance of subsection (1) (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3), and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of section 70 to 83 (inclusive) [of this Constitution].

(3) If in any proceedings in any subordinate -court any question arises as to the contravention of any of the provisions of sections 70 to 83 (inclusive) [of this Constitution], the person presiding in that Court may and shall if any party to the proceedings so requested, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous and vexatious.

(4) Where any question is referred to the High Court in pursuance of subsection (3), the High Court shall

give its decision upon the question and the Court in which the question arose shall dispose of the case in accordance with that decision.

The arguments were these. Mr Muttu asked us to hold that because section 84(3) specifically deals with proceedings in subordinate courts, section 84(1) has no application where a question as to the contravention of a fundamental right or freedom of the individual has arisen in such a Court, and that in any event the applicant having applied for redress in other proceedings cannot now apply under section 84(1) for the same redress, even if (contrary to what he had primarily urged) subsections (1) and (3) of section 84 are not mutually exclusive. To support his argument he drew our attention to Durga Das Basu's *Commentary on the Constitution of India* (5th Edn) Vol 1, where, on page 193 under the subhead "(X) The question must be raised at the proper stage", the author says:

(A) USA. In the United States, it has been established that Constitutional questions must be raised "reasonably", that is at the earliest practicable moment. As a result of this rule "A constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it".

The application was not "reasonably" raised, he said. He also referred us to the wording of section 84(2) which, he claimed, drew the distinction he was making for him because its paragraph (a) refers to applications made under section 84(1) and its paragraph (b) refers to the determination of questions arising from references made under section 84(3). He asked us to adopt a passage from *Craies on Statute Law* (6th Edn) which is reproduced in *The Republic v El Mann* [1969] EA 357, 359, and which reads:

The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. "The tribunal that has to construe an Act of a Legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to enquire what is the subject-matter with respect to which they are used and the object in view.

and we are content to do so. Mr Mwirichia urged upon us that section 84(1) applies, as it says, to "any person" and speaks of "any of the provisions of sections 70 to 83 (inclusive)", pointing to section 77 being possible of contravention only in a Court. He asked us to hold that section 84(3) is what he called "permissive", meaning that an accused may, in a subordinate court, ask for a reference, but may resolve not to do so without forfeiting his rights under section 84(1) because he would yet be "any person" within it. He told us, "You cannot expect section 84(3) to be utilised every time there is a refusal of an adjournment". He contended that the other steps which the applicant had taken did not prevent her from making (and succeeding in) her instant application because section 84(1) was always there to be utilised. When, however, we drew attention to the words which appear in the subsection in brackets and asked him whether he was saying that an unsuccessful application (say for *habeas corpus*) could be followed by an application for the same relief under section 84(1), he said that it was not possible. But he drew a distinction between such a situation and that now before the Court because "There is no prior decision on this issue".

We are in general agreement with the arguments which Mr Mwirichia advanced as to the relationship of subsections (1) and (3) of section 84; we do not believe that the two subsections are mutually exclusive. Section 84(1) refers, without qualification, to sections 70 to 83 (inclusive) and section 77 is one of those sections. Nor can we convince ourselves, and here we have in mind the principle to which we were referred, that in a document enshrining the rights and freedoms of the individual it was seen fit to limit to a single moment that time when redress must and can only be sought for the contravention of such

rights. We are well aware of the maxim", *ignorantia juris neminem excusat*; but the Legislature of this country could surely not have ignored the fact that the great majority of persons accused of criminal offences before the Courts are not represented by counsel. Moreover, though it would be unwise for us, without argument, to essay an analysis of section 84(3) we think it right nonetheless to say that it appears to us to contain nothing to suggest that which Mr Muttu would have us hold, and it does not say that the contraventions for which it caters must have occurred in a subordinate court, only that they must have arisen in proceedings before such Court, which may not necessarily be the same thing.

We must now consider the expression "without prejudice to any other action with respect to the same matter" in section 84(1); and we shall deal first with the words "without prejudice to" and then go on to consider those which follow them. It is clear that a person may utilise the section 84(1) to enable him to secure redress if no other action has ever been available to him; but what if such other action is or had been ‚available" Mr Mwirichia would interpret "without prejudice to," in its context as meaning "apart from"; but we prefer "without derogating from," the Latin "*prae*" meaning (for our purpose) before in point of time and "*judicium*" meaning judgment, which leads us to the conclusion that you can apply under section 84(1) before, but not after, you have taken other action, and it is to be observed that section 84(1) says "any other action ... which is lawfully available", it does not say "which was lawfully available".

Accordingly, we read section 84(1) as providing the individual with a means of obtaining redress only if he has never had or has not already utilised such other action as was lawfully available to him. The applicant cannot, therefore, now be heard on this application if the steps she has taken amount to such other action. But to what does "action" refer" Unfortunately, neither counsel dealt with this point. Section 86(1) of the Constitution (which is the definition provision covering section 84) does not interpret the word, whilst section 3 of the Interpretation and General Provisions Act defines it (save where there is something in the subject or context inconsistent with such construction or interpretation, and except where it is expressly otherwise provided) as "any civil proceedings in a Court and includes any suit as defined in section 2 of the Civil Procedure Act". On the other hand, the dictionary meanings (so far as they can apply to the matter under discussion) are "a lawsuit" or "proceedings in a Court".

There can be no doubt that for certain alleged contraventions civil proceedings would be an appropriate way of seeking redress, but what of contraventions offending section 77(2) which concerns itself only with criminal offences" Presumably prerogative writs might go, but in *Re Keshavlal Punja Parbat Shah* (1955)22 EACA 381 it was held that this Court had jurisdiction to entertain proceedings for prerogative writs on the criminal or the civil side of its jurisdiction according to the nature of the proceeding and we take the view that in its context "action" in section 84(1) cannot properly be limited only to civil proceedings. Were this not so, it would enable applications to be made thereunder whenever an alleged contravention set before a Court in a criminal cause had been turned down, but not otherwise; unless, that is, subsections (1) and (3) of section 84 are (contrary to our view) mutually exclusive. Utilising the dictionary meaning seems to us to be the correct approach and we believe that in its context the word "action" means proceedings in a Court. And there were such proceedings in this case, ie those before Cockar J although they were prematurely determined. In those proceedings there were grounds of appeal with respect to the same matters which Mr Mwirichia wishes us now to consider. Nor are we attracted by the argument that whatever may have been done in the past, no other remedy is now available; *interest reipublicae ut sit finis litium* commends itself to us and, as Mr Mwirichia conceded, a Court ought not to be asked to adjudicate more than once on the same issues. We do not think it right to go behind the order which this Court made. Cockar J has in fact said to the applicant "You are too late to raise these questions" and we do not think that we should now add "but not in respect of one or two of them". The preliminary point taken before us thus succeeds, but having heard Mr Mwirichia on the merits we shall now discuss them.

Trevelyan J then described the details of the events before the magistrate on 19th,, 20th and 21st September 1978 and concluded: The Defence left the matter until the submission of no case had been rejected on 19th September, before applying for the witness summons. We are not impressed by Mr Mwirichia's contention that he was taken by surprise because the prosecution called only twenty-three witnesses, instead of the anticipated thirty-two, and thus concluded their case earlier than expected. It may well be that Mr Mase was on vacation in August, and that the accountants' head offices were in Nairobi. Nonetheless there remained nearly three weeks within which to secure his attendance. They could have applied for a summons well before 19th September. In our view the defence was not entitled to take it for granted that the magistrate would accede to its submissions of no case, or await its rejection, before applying for the summons. Even were this not so, the summons was issued on 19th September, and it was by no means impossible for it to be served on Mr Mase, 90 miles away though he was, and for him to have attended on 21st September.

Mr Mwirichia at this juncture referred us to *Muyimba v Uganda* [1969] EA 433, in which Russell J is recorded as having said that it was unreasonable to expect a professional man to drop everything and hasten 80 miles by road to the Court. But that was said in relation to an advocate defending an accused person, and moreover the trial magistrate was under a misapprehension as to the advocate's knowledge of the hearing date, a fact which appears to have been induced by his clerk. In a similar case, that of *Dixon Gokpa v Inspector-General of Police* [1961] 1 All NLR 423 it was said that there had been a denial of a fair trial.

At all events in the instant case, we are satisfied that the defence were well aware of the nature of the evidence they needed, and by whom it would be given, at latest by 16th August, and very probably well before that. Given the circumstances we have set out we are quite unable to say that the magistrate's discretion exercised under section 211 (2) of the Criminal Procedure Code, was unjudicially or in any way improperly, exercised. This does not necessarily mean that had either of us been trying the case we would have exercised the discretion in the same manner; although we might very well have done so. It follows that, in our view, the claim that the defence was not afforded reasonable facilities to procure the attendance of the witness Mr Mase fails, since we have not been persuaded that the magistrate's discretion, which was undoubtedly exercised, was exercised un-judicially or improperly.

Application dismissed.

Dated and delivered at Nairobi this 29th day of January 1979

E. TREVELYAN

JUDGE

A.R.W HANCOX

JUDGE

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IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA, OUKO, KIAGE, GATEMBU KAIRU & MURGOR, JJ.A)

CIVIL APPEAL NO. 290 OF 2012

BETWEEN

MUMO MATEMU ………………………………….....…………APPELLANT

AND

TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE…..…1ST RESPONDENT

THE ATTORNEY GENERAL …………...………………......….2ND RESPONDENT

MINISTER OF JUSTICE & CONSTITUTIONAL AFFAIRS....3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS...….….........…....4TH RESPONDENT

THE KENYAN SECTION OF THE

INTERNATIONAL COMMISSION OF JURISTS..................5TH RESPONDENT

KENYA HUMAN RIGHTS COMMISSION....…...….......…..6TH RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Joel Ngugi, MumbiNgugi, G. V. Odunga, JJ) dated 20th September, 2012

in

Petition No. 229 of 2012 (Formerly Nakuru H. C. Petition No. 19 of 2012)

****

JUDGMENT OF THE COURT

1. **Overview**

(1) The historical and political context against which leadership and integrity principles are entrenched in the Constitution of Kenya (2010) leave no doubt that a new constitutional ethos has been called forth. This summon to a new normative order is perhaps the touchstone of our constitutional founding. Its

embodiment is the increasing public quest for and discourse on ethics and integrity in governance and leadership. Its other emblem is the emergence of pleas for judicial intervention to interpret, enforce and breathe life to the values and principles that permeate the edifice of our Constitution. One such instance is this case, which arises from the decision of the High Court (Joel Ngugi, Mumbi Ngugi, G.V. Odunga, JJ.) delivered on 20th September, 2012 at Nairobi in Petition No. 229 of 2012. In that case, the High Court upheld a petition questioning the constitutionality of the appointment of Mr. MumoMatemu, the interested party therein, and appellant herein, as the chairperson of the Ethics and Anti-Corruption Commission.

2. **Facts and Procedural History**

(2) The facts of the petition, borne out of the record of the High Court are as follows. In accordance with ***Article 79*** of the Constitution of Kenya, ***section 6*** of the Ethics and Anti-Corruption Commission Act, 2011 ('the Act') establishes the procedure for the appointment of the chairperson and members of the Ethics and Anti-Corruption Commission ('the Commission'). In pursuance of ***section 6(1)*** of the said Act, the President constituted a selection panel on 5thSeptember, 2011 to invite and consider applications from persons who qualify for nomination and appointment to the position of chairperson and member of the Commission.

(3) The selection panel, comprising representatives from, among others the Office of the President; the Office of the Prime Minister; the Ministry of Justice, National Cohesion and Constitutional Affairs;the Judicial Service Commission; the National Gender and Equality Commission; the Kenya National Commission on Human Rights; the Media Council of Kenya; the Joint Forum of religious organizations and the Association of Professional Societies in East Africa, then advertised the vacancies on 26th September, 2011, shortlisted candidates on 4th November, 2011 and thereafter invited the public on the same day to submit any relevant information on the candidates. In view of the statutory deadlines under **section 6** of the Act, the selection panel conducted interviews on 8thNovember, 2011, and thereafter recommended to the President three persons including the appellant alongside four other persons for appointment as chairperson and members of the Commission respectively.

(4) The President and the Prime Minister selected the appellant from the list of persons recommended and submitted his name alongside Prof. Jane Kerubo Onsongo and Ms. Irene Cheptoo Keino to the National Assembly for approval on 24th November, 2011. The National Assembly, in accordance with its procedures, once more, invited members of the public on 2nd December, 2011 to submit any representation on the suitability or otherwise of the nominees, including the appellant. The appellant was interviewed by Parliament's Departmental Committee on Justice and Legal Affairs on 14th December, 2011. In its report to the National Assembly, the Committee recommended the rejection of the nomination of the appellant, alongside the other nominees stating that they **"lacked the passion, initiative and the drive to lead the fight against corruption"**. However, this report made no recommendations relating to the unfitness or unsuitability of the appellant or the other nominees, who have since assumed office.

(5) The report of the Parliamentary Committee was duly tabled and debated by members of the National Assembly on 14thDecember, 2011. Following protracted debate, borne out of a copy of the *Parliamentary Hansard Report* in the record of appeal, the National Assembly rejected the recommendations of the report of the Parliamentary Committee and approved the nomination of the appellant and the members of the Commission.

(6) The President, following receipt of the notification of approval by the National Assembly, appointed the appellant via Gazette Notice Number 6602 (Volume CXIV-No. 40) on 11th May, 2012 as chairperson

of the Ethics and Anti-Corruption Commission.

(7) The High Court was then moved by the 1st respondent in this appeal, Trusted Society of Human Rights Alliance, a non-governmental organization based in Nakuru in a Petition dated 15th May, 2012 and supported by an affidavit sworn by one Mr. Elijah Sikona, the chairperson of the society, to issue a declaration that the process and manner in which the appellant herein was appointed was unconstitutional. The petitioner's prayers in the amended petition dated 4th June, 2012 were as follows:

"(a) A declaration that the process and manner and the decision in which the Government has managed and or intends to appoint or has appointed the interested party is unconstitutional, illegal, embarrassing to Kenyans and a constitutional coup hence null and void.

(b) A declaration that the respondents are escapists and have abdicated their constitutional mandate.

(bb) A declaration that the interested party is not a fit and proper person with due regard to his honesty, dignity, personal integrity, dignity (sic) ***and suitability and hence his appointment shall be to that*** (sic) ***inconsistent with the constitution and invalid.***

(cc) An order of review and setting aside the approval and appointment of the interested party.

(d) The petitioners be paid costs."

(8) The appellant, the 2nd, 3rd and 4th respondents opposed the petition. The High Court, following submissions by the 1st, 2nd, and 3rd respondents, *amici curiae* and the appellant reduced the issues in that Petition to the following:

"(a) Does the Court have jurisdiction to hear the petition"

b. ***Does the petitioner have locus standi to sue and has it sued the right respondents"***

(c) Is the Petition moot for failure to complain about the appointment during the appointment process"

d. ***If the Court has jurisdiction to entertain the Petition, the Petitioner has standing to sue and it has sued the right parties, does the appointment of the interested party pass constitutional muster"***

e. ***Who is entitled to the costs of the Petition""***

(9) It was the 1st respondent's case at the High Court that the appellant did not meet the constitutional threshold required for appointment to the office of the chairperson of the Ethics and Anti-Corruption Commission. It was its case that the appellant's acts and omissions when he held several senior positions at the Agricultural Finance Corporation ('the AFC'), a public body established under the Agricultural Finance Corporation Act (Cap 323), rendered him unsuitable for the position. These allegations included approval of loans by the appellant without proper security, involvement in fraudulent payment of loans to unknown bank accounts, swearing an affidavit with false information in a case before the High Court, and failure to prevent loss of public funds entrusted to the AFC. The 1st respondent argued further that while the "right" process was followed, the appellant's appointment was invalidated by its contention that Parliament had failed to discuss the appellant's integrity.

(10) In opposing the petition, the appellant, the 2nd, 3rd and 4threspondents, respectively, submitted that the 1st respondent lacked *locus standi* to institute the case. They argued that the petition did not disclose with reasonable certainty the actions complained about and the provisions of the Constitution and the Ethics and Anti-Corruption Commission Act which are alleged to have been contravened. It was their case further that the petition was an abuse of the court process as the 1st respondent had failed to submit the complaints about the appellant's character and integrity to the organs of appointment, that is, the Selection Panel, the National Assembly and the Executive. Finally, the 1st and 2nd respondents argued that the petition was in contravention of the doctrine of separation of powers as it constituted an attempt to undertake a "merit review" and not "procedural review" of the appointment of the appellant.

(11) It was the 3rd respondent's submission that the petition ought to be dismissed as the appellant was not under investigation by the Director of Public Prosecutions (DPP) as claimed by the petitioner. The 3rd respondent further submitted that the DPP had been wrongfully enjoined in the petition; that the petition was an afterthought as the 1st respondent had failed to submit the complaints about the appellant's character and integrity to the organs of appointment.

(12) The Kenya Human Rights Commission (the 6th respondent) and the Kenya Section of the International Commission of Jurists (the 5th respondent), *amici curiae* in the petition, argued that the fulfillment of ***Article 73*** of the Constitution by members of the Ethics and Anti-Corruption Commission was a requirement for the independence of this important constitutional organ. They submitted that the High Court had a duty to use its own objective measure to determine whether Parliament acted in accordance with the Constitution. *Amici* further argued that sufficient documentary evidence had been placed before the High Court impugning adherence to constitutional requirements.

(13) The evidence before the High Court in the petition comprised copies of documents and reports relating to questions on the appellant's integrity and the process of his appointment as chairperson of the Ethics and Anti-Corruption Commission. Key among these include a copy of a complaint letter from the Rift Valley Agricultural Contractors Ltd ('the RVAC'), a private company, to the 1st respondent on claims of fraudulent dealings by the company's co-director, the National Bank of Kenya ('the NBK') and the AFC. Another key document is a copy of a letter from the 1st respondent to the DPP, in response to the above complaint, allegedly implicating the appellant as having "overlooked the fraud" at the AFC. Annexed to the letter are copies of loan agreements between the AFC and the RVAC, copies of cheques drawn by the AFC to the NBK, and copies of purchase agreements of assets claimed to have been used to secure AFC loans. Annexed further is an affidavit sworn by the appellant in his official capacity as the deputy chief legal officer in a case between the RVAC and its directors, HC Nairobi Civil Case No. 1535 of 1999, supporting documents and part of the pleadings in that case. There is further correspondence between the Criminal Investigations Department (CID) and the NBK, intradepartmental records and correspondence at the CID, and copies of communication between the DPP and the CID on a dispute between the RVAC directors. The third set of evidence comprises copies of official reports and media extracts in relation to the process of appointment of the appellant.

(14) The High Court, on the basis of the evidence and submissions before it, held as follows:

"97. All the organs involved in the appointment of the Chairperson of the Commission had the obligation to consider whether the applicants met the qualifications in the Constitution and in the Act. They were required to investigate the background of the applicants and to conclusively consider any information which went to their qualifications. From the record presented to the Court, it is evident that the appointing authorities gave lip service or no consideration at all to the question of integrity or suitability to hold the office. They failed to ascertain for themselves whether the Interested Party met the integrity or suitability threshold. They did not give due

attention to all information that was available, and which touched on his integrity or suitability. Because of this failure, none of them makes any conclusive determination on whether the Interested Party met the integrity or suitability test set out in the Constitution. We consider this failure – the failure to honour the duty to diligently inquire –coupled with the failure to adequately apply the constitutional test to have rendered the procedure used to appoint the Interested Party to chair the Commission to be fatally defective and to be violative of the spirit and letter of the Constitution. It is, therefore, constitutionally untenable, null and void.

………………………………

111. So it is in this case. We have already established that on available evidence the Interested Party faces unresolved questions about his integrity. The allegations which he is facing are of a nature that, if he is confirmed to this position, he will be expected to investigate the very same issues which form the gist of the allegations against him. It requires no laborious analysis to see that this state of affairs would easily lead many Kenyans to question the impartiality of the Commission or impugn its institutional integrity altogether. Were that to happen, it would represent a significant blow to the very institution the Interested Party is being recruited to head and lead in its institutional growth. In our view, this makes the Interested Party unsuitable for the position. As in the Centre for PIL and Another v Union of India [Petition Writ no. 348 of 2010], we find that the appointing authorities did not sufficiently take into consideration the institutional integrity of the Commission or its ability to function effectively with the Interested Party at its helm when they made or approved the appointment.

112. For all these reasons, therefore, the court finds that the appointment of the Interested Party, Mr. MumoMatemu as the Chairperson of the Ethics and Anti-Corruption Commission offends the requirements of the Constitution, and in particular Article 73, and holds the same to be unconstitutional. We hereby set the appointment aside."

(15) Having been aggrieved by the High Court's decision above, the appellant filed a notice of appeal dated 24th September,2012.

C. **Grounds of Appeal**

(16) In the memorandum of appeal supported by the appellant's affidavit, the appellant stated 42 grounds of appeal. This Court has narrowed down on the following:

"24. THAT the learned Judges of the superior court erred in law and in fact holding that the petitioner in the superior court had locus standi to commence the proceedings before the superior court since it was a person acting in public interest and failed to appreciate that such interest can only be weighed against the interest of the person actually aggrieved and failing to come to Court in their own name.

……………………………

32. THAT the learned Judges of the superior court erred in law and in fact in determining that the superior court had jurisdiction to entertain the proceedings before it as framed by the petitioner.

33. <u>THAT</u> the learned Judges of the superior court erred in law and in fact by holding that the petitioner in the superior court need not have pleaded its case with reasonable precision by setting out the provisions of the Constitution which were alleged to have been contravened and the manner in which they had been contravened in relation to the petitioner.

…………………………..

37. <u>THAT</u> the learned Judges of the superior erred in law and in fact by developing an inchoate test of rationality which is neither supported by precedent or statute and applied the same to the proceedings before the superior court.

……………………………

39. <u>THAT</u> the learned Judges of the superior court erred in law and in fact in purporting to set aside the appointment of the appellant.

……………………………..

41. <u>THAT</u> without prejudice to the foregoing, the learned Judges of the superior court erred in law and in fact in failing to appreciate that there was no material placed before the honourable court to warrant the making of the various findings they made."

(17) In the appeal, the appellant seeks orders among others that:

"(a) The whole of the judgment and/or orders of the High Court be set aside and/or vacated in its entirety;

b. ***A declaration that the Appellant was lawfully appointed as the Chairperson of the Ethics and Anti-Corruption Commission by all the relevant organs of appointment."***

D. **Summary of the Appellant's Case**

(18) This Court heard submissions from the appellant and the respondents as follows. Lead counsel for the appellant, Mr. Waweru Gatonye assisted by Mr. TaibTaib and Mr. Wambua Kilonzo submitted that the 1st respondent did not have *locus standi* to institute the petition at the High Court. In contextualizing the basis of the 1st respondent's claims, counsel stated that, contrary to the petition, the appellant was not implicated in the case in which the substance of the allegations emanated from. Counsel further stated that the petition had been instituted in bad faith, and was an attempt to reopen the said dispute through a third party, the 1st respondent herein; that the petition before the High Court failed the requirement to state the alleged constitutional provisions violated and the acts or omissions complained of with reasonable precision; that such failure to describe with precision the petition had prejudiced the appellant.

(19) Learned counsel further submitted that the High Court is subject to the Constitution and must act as such when seized of cases challenging the actions of the Legislature or other constitutional organs. In such cases, as was in the petition, the High Court can neither substitute its decision for the Legislature's choice nor conduct its own inquiry as this would constitute judicial usurpation of functions vested elsewhere. Counsel further urged us to find that the material before the High Court did not warrant a holding that the appellant was not suitable for appointment as chairperson of the Ethics and Anti-Corruption Commission. Instead, they submitted that the High Court shifted the burden of proof

from the 1st respondent to the appellant; that the Court went ahead to conduct a merit review, disguised as review of legality of the appointment, despite having warned itself that the proceedings before it were not fit for that purpose. Finally, counsel submitted that in exercising jurisdiction in the petition, the High Court overlooked ***section 41*** of the Leadership and Integrity Act, 2012, which provides the ground for removal of State Officers from office.

E. **Summary of the 2nd, 3rd and 4th Respondents' Case**

(20) Mr. L.N. Muiruri, for the 2nd and 3rd respondents supported the submissions of the appellant and argued that the material before the High Court showed that due procedure had been followed his appointment. Counsel stated that the Court's examination of the breadth of parliamentary debate constituted an encroachment on the Legislature's remit. Citing documents in the record of appeal, counsel maintained that the appellant was neither linked to, nor questioned in the investigations relating to the funds alleged to have been paid by the AFC to the National Bank of Kenya or the said theft of funds by directors of the Rift Valley Agricultural Contractors Ltd. This position was supported by Mr. Edwin Okello, for the 4th respondent.

F. **Summary of the 1st Respondent's Case**

(21) The 1st respondent opposed the appeal. In his submissions, counsel on record Mr. B. N. Kipkoech argued that the 1st respondent had the *locus standi* to commence the proceedings as ***Articles 3*** and ***260*** of the Constitution of Kenya empower any person, regardless of a personal injury, to defend the Constitution. He stated that ***Article 165(3)(d)(ii)*** of the Constitution grants the High Court jurisdiction to interrogate anything done under the authority of the Constitution. Counsel submitted further that the petition had framed the legal issues with precision, citing ***Articles 10*** and ***73*** and particulars of complaints against the appellant. Relying on various reports and documents, Mr. Kipkoech averred that the appellant not only approved loans without adequate security, as the chief legal officer of the AFC, but was also responsible for the alleged payment of the approved sum of money to an unknown account at the National Bank of Kenya. He posed the question: what does the appellant know about these transactions, and the happenings at the AFC" In closing, it was his case that Parliament had trivialized the issues raised on the integrity of the appellant and as such the High Court was within its limits to interrogate the appellant's appointment.

G. Submissions by *Amici Curiae*

(22) The 5th and 6th respondents, *amici curiae*, represented by Mr. Wilfred Nderitu, submitted that it is the mark of constitutional supremacy that any violation of the Constitution by Parliament in the performance of its functions is subject to judicial review by the High Court. In his view, the test for intervention in the case at hand was whether constitutional principles had been contravened. He submitted that the parliamentary debates were beset by anomalies and insufficient public participation contrary to ***Article 10*** of the Constitution.

H. **Issues for Determination**

(23) This Court has considered the appellant's case and the respondents' positions as advanced in the pleadings, submissions and the hearings. For purposes of judicial economy, we have distilled the issues for our determination as follows:

"(a) Did the 1st respondent have the locus standi to lodge the petition before the High Court"

(b) Did the High Court have jurisdiction to review and set aside the appointment of the appellant"

(c) Was the principle in <u>Anarita Karimi Njeru</u> case requiring that constitutional petitions are pleaded with reasonable precision properly applied by the High Court"

(d) Did the High Court in its rationality test misapply the doctrine of separation of powers thereby usurping the powers and functions of other arms of government"

(e) Was the appointment of the appellant undertaken in accordance with the Constitution and the law"

a. **Did the 1st respondent have the *locus standi* to lodge the petition before the High Court"**

(24) The issue of the 1st respondent's standing to lodge the petition before the High Court was canvassed at length before this Court. It was the appellant's submission that the 1st respondent did not have *locus standi* to lodge the petition at the High Court as the allegations complained of had emanated from a private dispute between directors of a private company, the RVAC. Mr. Gatonye stated that the petition was an attempt to reopen a concluded legal dispute through a third party, the 1st respondent herein. Moreover, it was his submission that the petition had been instituted in bad faith, given that the appellant had been in no way directly mentioned in the complaints by the said third party for whom the 1st respondent was acting as an interlocutor. It was the appellant's case further, that despite the opportunity so to do, the 1st respondent had failed to raise the complaints during the antecedent processes in the appointment of the appellant, including the relevant Committee of the National Assembly. This position was supported by the 2nd, 3rd and 4th respondents.

(25) The appellant's submissions on *locus standi* were opposed by the 1st respondent. Learned counsel for the 1st respondent averred that **Article 3** of the Constitution grants a duty on every person, natural or juristic, to respect, uphold and defend the Constitution, thereby bestowing *locus standi* on anyone to institute proceedings seeking judicial enforcement of the Constitution. Moreover, as a duly registered NGO with a mandate to promote human rights, Mr. Kipkoech argued, the 1st respondent had standing to bring a matter that touched on the enforcement of constitutionality. Further, it was the 1st respondent's case that *locus standi* is not contingent upon a personal or direct injury to the party instituting a case. These submissions were supported by counsel for the *amici curiae.*

(26) It is hard to maintain the argument that the 1st respondent did not suffer any injury to warrant its standing to lodge the petition before the High Court. It is equally hard to maintain the position that the 1st respondent was acting as an interlocutor for a private third party, in a matter of public interest such as this. In the context of our commitment to integrity in leadership as expressed in the Constitution, we cannot gainsay the importance of the issue of the leadership and institutional integrity of the Ethics and Anti-Corruption Commission.

(27) Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under ***Article 10*** of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for *locus standi* that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the arguments of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without

more, the 1st respondent had the *locus stand* to file the petition. Apart from this, we agree with the superior court below that the standard guide for *locus standi* must remain the command in ***Article 258*** of the Constitution, which provides that:

"258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

a. ***a person acting on behalf of another person who cannot act in their own name;***

b. ***a person acting as a member of, or in the interest of, a group or class of persons;***

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members."

(28) It still remains to reiterate that the landscape of *locus standi* has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view, the hitherto stringent *locus standi* requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. 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 the public interest. Pursuant to ***Article 22 (3)*** aforesaid, the Chief Justice has made rules contained in Legal Notice No. 117 of 28th June 2013 – The Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013–which, in view of its long title, we take the liberty to baptize, the **"*Mutunga Rules"***, to *inter alia*, facilitate the application of the right of standing. Like ***Article 48,*** the overriding objective of those rules is to facilitate access to justice for all persons. The rules also reiterate that any person other than a person whose right or fundamental freedom under the Constitution is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under ***Articles 22 (2)*** and ***258*** of the Constitution.

(29) It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under ***Articles 22*** and ***258*** of the Constitution.

(30) It is our consideration that in filing the petition the 1st respondent was acting not only on behalf of its members and in accordance with its stated mandate, but also in the public interest, in view of the nature of the matter at hand. The 1st respondent, its members and the general public were entitled to participate in the proceedings relating to the decision-making process culminating in the impugned decision.

(31) However, we must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting *bona fide* with a view to vindicating the cause of justice. Where a

person acts for personal gain or private profit or out of political motivation or other oblique consideration, the Court should not allow itself to be seized at the instance of such person and must reject their application at the threshold. The time is now propitious at this stage of our constitutional development where we can state as was stated by the Supreme Court of India in the case of ***S.P. Gupta v President of India & Others*** ***AIR [1982] SC 149*** that:

"The view has therefore been taken by the courts in many decisions that whenever there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the Constitution or the law, any member of the public acting bona fide and having sufficient interest can maintain an action for redressal of such public wrong or public injury. The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busy-body or a meddlesome interloper but who has sufficient interest in the proceeding. There can be no doubt that the risk of legal action against the State or a public authority by any citizen will induce the State or such public authority to act with greater responsibility and can thereby improve the administration of justice. Lord Diplock rightly said in Rex v Inland Revenue Commrs. [1981] 2 WLR 722 at p. 740.

'It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by a outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped… It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a Court of Justice for the lawfulness of what they do, and of that the Court is the only judge.'

This broadening of the rule of locus standi has been largely responsible for the development of public law, because it is only the availability of judicial remedy for enforcement which invests law with meaning and purpose or else the law would remain merely a paper parchment, a teasing illusion and a promise of unreality. It is only by liberalizing the rule of locus standi that it is possible to effectively police the corridors of powers and prevent violations of law."

(32) It was submitted that the 1st respondent was actuated by bad faith and malice in filing the petition to challenge the appellant's appointment as the chairperson of the Commission; that in failing to raise the alleged misconduct of the appellant before the selection panel or the Parliamentary Committee, the 1st respondent acted *mala fides.* There was no evidence or serious argument advanced to support that claim and we are therefore not persuaded that there was any reason why the 1st respondent would act in bad faith against the appellant.

b. **Did the High Court have jurisdiction to review and set aside the appointment of the appellant"**

(33) It is trite that the jurisdiction of any court provides the foundation for its exercise of judicial authority. As a general principle, where a court has no jurisdiction, it has no basis for judicial proceedings much less judicial decision or order. The applicable standard remains the statement of the Court of Appeal in ***The Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd*** ***[1989] KLR 1*** where it was stated:

"Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."

(34) In the grounds of appeal and subsequent submissions, learned counsel for the appellant and for the 2nd and 3rd respondents argued that the High Court had misapprehended the doctrine of separation of powers, which divests the court of jurisdiction to review some decisions and actions of the other branches of government; that the High Court had failed to appreciate the nature, extent and applicability of the doctrine of justiciability; that the petition had not been framed with precision, thus negating clarity whether the court had jurisdiction. A final pitch was made that the right procedure to question the constitutionality of the appellant's appointment ought to have been the removal procedure under ***Article 251*** of the Constitution and ***section 41*** of the Leadership and Integrity Act, 2012.

(35) Counsel for the 1st respondent, responding to these arguments submitted that the High Court has jurisdiction under ***Article 165 (3) (d) (ii)*** of the Constitution to hear any question respecting the interpretation of the Constitution including the determination of a question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution. Mr. Kipkoech posited that the doctrine of separation of powers does not prevent the High Court from interrogating the legality of actions of other arms or organs of Government.

(36) In our view, the issue of the jurisdiction of the High Court to admit and consider the petition turns on the constitutional provision constituting and investing the Court with judicial authority. ***Article 165(3)d*** and ***(5)*** of the Constitution provides inter alia that the

"165 (3) Subject to clause (5), the High Court shall have-

…

(d) jurisdiction to hear any question respecting the interpretation of this Constitution, including the determination of

…

(ii) the question whether anything said to be done under the authority of this Constitution or if any law is inconsistent with, or in contravention of, this Constitution."

(37) It is clear that on its face, the jurisdiction of the High Court is broad enough to cover review of the constitutionality or legality of appointments by other organs of government. However, the analysis does not end there. We were urged by learned counsel for the appellant that having been gazetted, the appellant could only be removed through the procedure provided under ***Article 251*** of the Constitution; that the High Court had no jurisdiction to set aside the appellant's appointment because such an order amounted to a removal exercisable only by a tribunal appointed under ***Article 251*** of the Constitution. It was contended further that had the learned Judges of the superior court below considered the provisions of ***section 42*** of Leadership and Integrity Act, 2012, they would have laid down their tools and required the 1st respondent to comply with the procedures set therein for lodging complaints against a State Officer. We considered this latter argument as an averment that the petition was rendered moot by the gazettement of the appointment of the appellant.

(38) We disagree with this approach and are not prepared to hold as urged by the appellant as such an

approach would pose a recharacterization risk in similar forms of constitutional litigation. In our considered opinion, the petition before the High Court was not instituted as a removal procedure nor as a complaint against the appellant in his capacity as a State Officer. The petition was a challenge to the constitutionality of the process and manner of the appellant's appointment. This Court takes the view therefore that it is not the *outcome* of litigation that is determinative of its nature, but its *substance* at the time of seizure and proceedings. Viewed thus, an order setting aside the appointment of the appellant flows from a judicial finding of the unconstitutionality of the process and manner of appointment, not as a consequence of a removal procedure. We note with affirmation the holding of the High Court in the ***Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & Another (2011) eKLR,*** which we cite below in *extenso* for its relevance:

"In our view the jurisdiction of this Court under Article 165 is completely different from that of Tribunal under Article 168. It is clear that the Tribunal's jurisdiction kicks in when there is an alleged misconduct on the part of the Judge or when he is unable to perform the functions of his office …

……………………………….

On the other hand, the question that is for our determination is about the process and it is our view that no step is greater than the other and any of the three steps are equally important and constitutionally mandatory. Therefore, what is at stake is the process used to nominate and appoint the Supreme Court Judges. It is our duty to evaluate and assess whether the business conducted by the *Judicial Service Commission* ***was in accordance with the law, fairness and justice. If the process of appointment is unconstitutional, wrong, unprocedural or illegal, it cannot lie for the Respondents to say that the process is complete and this Court has no jurisdiction to address the grievances raised by the Petitioners. In our own view, even if the five appointees were sworn in, this Court has the jurisdiction to entertain and deal with the matter. The jurisdiction of this Court is dependent on the process and constitutionality of appointment****. In this sense, if the Judicial Service Commission a State Organ does anything or omits to do something under the authority of the Constitution and which contravenes that Constitution, that act or omission when so proved before the High Court shall be invalid. Accordingly we find and hold that we are properly seized of this Petition as we have the requisite jurisdiction."*(emphasis supplied)

(c) Was the principle in *Anarita Karimi Njeru* case requiring that constitutional petitions be pleaded with reasonable precision properly applied by the High Court"

(39) The issue was raised that the 1st respondent had omitted to frame their case or complaint with precision as required under the High Court's pronouncement in ***Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272***. Counsel for the appellant submitted that the petition failed the requirement as it did not state the alleged constitutional provisions violated and the acts or omissions complained of with reasonable precision. Apart from citing omnibus provisions of the Constitution, the petition provided neither particulars of the alleged complaints, the manner of alleged infringements or the jurisdictional basis of the action before the court. He maintained that such failure to draft the petition with precision had prejudiced the appellant and the other respondents.

(40) It was the averment of learned counsel for the 1st, 5th and 6th respondents that the petition had cited with precision complaints regarding the violation of ***Articles 10*** and ***73*** of the Constitution; that ***Article 159*** of the Constitution enjoined the courts to administer justice without undue regard to procedural technicalities.

(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude *ex ante* is to miss the point.

(42) However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in ***Anarita Karimi Njeru*** *(supra)* underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to ***Article 159*** of the Constitution and the overriding objective principle under ***section 1A*** and ***1B*** of the Civil Procedure Act (Cap 21) and ***section 3A*** and ***3B*** of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in ***Anarita Karimi Njeru*** *(supra)* that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of ***Thorp v Holdsworth (1876) 3 Ch. D. 637*** at 639 holds true today:

"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules…was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

(43) The petition before the High Court referred to ***Articles 1, 2, 3, 4, 10, 19, 20*** and ***73*** of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.

(44) We wish to reaffirm the principle holding on this question in ***Anarita Karimi Njeru*** *(supra)*. In view of this, we find that the petition before the High Court did not meet the threshold established in that case**.** At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting," without requiring remedy by the 1st respondent.

(d) Did the High Court in its rationality test misapply the doctrine of separation of powers thereby usurping the powers and functions of other arms of government"

(45) This Court was urged by the appellant to find that the High Court misapplied the doctrines of separation of powers and constitutional supremacy in conducting an intrusive standard of review and setting aside an appointment by other branches of Government. Counsel for the appellant conceded that whereas the High Court may issue declarations against the decisions by Parliament, the case at hand was not an instantiation of such case as the Legislature had complied with the Constitution and the Ethics and Anti-Corruption Commission Act, 2011. Mr. Gatonye cited the High Court's decisions in ***Community Advocacy and Awareness Trust and Others v The Attorney General and Others* (2012) eKLR** and the ***Kenya Youth Parliament & 2 Others v AG & Another*, Constitutional Petition No. 101 of 2011** to support his proposition that the courts may not interfere with the decisions of other organs of government absent any illegality.

(46) In opposing these arguments, learned counsel for the 1st respondent conceded that the jurisdiction of the High Court to interrogate the actions of other arms or organs of Government, including appointments to State or Public Offices, is confined to legality. Conceding further that the process had been complied with in the appointment of the appellant, Mr. Kipkoech however averred that the question of legality was not confined to process, but also substantive review by the courts of such appointments. He submitted that the High Court had not conducted a "merit review" in the case at hand as claimed by the appellant.

(47) We also heard from learned counsel for the *amici*, who characterized the High Court's jurisdiction in examining appointments to State or Public Office as a form of "judicial review of parliamentary actions." Mr. Nderitu submitted that the object of such review was to subject parliamentary functions and processes to constitutionality. Counsel reiterated that the principle of constitutional supremacy entitled the courts to intervene where there existed a constitutional violation in terms of the Legislature's decision or internal process. He further stated that procedural soundness of the appointment process includes an examination of the process to determine if the appointing authority conducted a proper inquiry to ensure that the person appointed meets the constitutional requirement.

(48) Learned counsel for *amici* submitted that the courts could substitute their own decision for that of the impugned body only on exceptional grounds, and on clear constitutional principles. The High Court's role, was therefore to review the decision of Parliament and to consider whether there had been:

"(i) 'unconstitutionality' or 'illegality', i.e., whether Parliament misapplied or misdirected itself under the constitution or in law;

(ii) 'irrationality,' i.e., whether Parliament was outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it (Wednesbury unreasonableness); or

(iii) 'procedural impropriety,' i.e., whether there was departure by Parliament from any procedural rules governing its conduct or a failure to observe the basic rules of natural justice. This is commonly referred to as 'fundamental unfairness,' since in such situations, the absence of justice is conspicuous."

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

function. We therefore agree with the High Court's dicta in the petition the subject of this appeal that:

"[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the Respondents also concede, the Courts have an interpretive role - including the last word in determining the constitutionality of all governmental actions..."

(50) It now remains to examine whether the High Court applied this standard to its logical conclusion. In our view, the place to focus on in this case is the scope of review by the superior court below, as a proxy for its application of the doctrine of separation of powers. We recall that the High Court had held that:

"The constitutional standard emerging from these cases, which we now adopt, is that the Court is entitled to review the process of appointments to State or Public Offices for procedural infirmities as well as for legality. A proper review to ensure the procedural soundness of the appointment process includes an examination of the process to determine if the appointing authority conducted a proper inquiry to ensure that the person appointed meets the constitutional requirement."

(51) The appellant opposed this approach. It was the appellant's case, which position was supported by the 2nd, 3rd and 4th respondents, that a review by the courts of appointment decisions of other arms of government not only amounted to a reopening of a process exclusively reserved for other arms of government, but also entailed a substitution by the court of the decisions of those other organs. Counsel further argued that the finding that the Court may review not only the "procedural soundness" of the appointment process but also the legality or the "appointment decision", what counsel referred to as "merit review" was wrong in fact and law. Counsel cited the High Court's judgment in **HC Petition No. 538 of 2012** ***Washington Jakoyo Midiwo v Minister for Internal Security & Others*** and this Court's decision in **Civil Appeal No. 307 of 2012** ***Ex Chief Peter Odoyo Ogada & Others v Independent Electoral and Boundaries Commission & Others***, in which we held that:

"Our reading of Article 89 does not yield or point to authority or jurisdiction of the High Court, while exercising the power of review under that Article to substitute the decision of the IEBC with its own. With due respect to the High Court, we hold that it was in error to substitute its own opinion, as a decision to supplant the decision of the IEBC, which had been lawfully and procedurally arrived at following the public hearings, consideration and adoption by Parliament, all the way to the publication in the Gazette. All that lies within the province of IEBC and no other organ. It has been given that mandate by the Constitution as other organs like the High Court has been given under Article 165, except that the High Court has also been given the power to review the decision of the IEBC. That power of review, according to us, is limited to the prayers in the application under Article 89 (10), if the applicants demonstrate that indeed a fault featured in the manner IEBC went about delimiting electoral boundaries. And as we have stated earlier, in the event the High Court should so find, it should direct the IEBC to get back and do the correct and proper thing….

Article 89 (10) does not give room for the High Court to put its own decision on delimitation of electoral boundaries in place of that made by IEBC. It can only find fault with it and order a fresh exercise. This we say because the High Court cannot and is not mandated to go, meet and consult residents of a given area, take their views on various aspects which go into delimitation before deciding accordingly, be it on boundaries or names. T]hat is the mandate of IEBC. The time to do that, resources, sources of expertise required to carry out that exercise is within the

constitutional mandate of IEBC and IEBC alone*."* (emphasis supplied).

(52) Having heard from the parties, we agree in principle with the High Court's finding that it may conduct review of appointments to State or Public Office on grounds of procedural soundness as well as the legality of the appointment decision itself to determine if it meets the constitutional threshold, provided that it accords with this Court's holding in ***Ex Chief Peter Odoyo Ogada*** **(***supra***)** that:

"A body or organ performing statutory duties has discretion when handling matters falling within its mandate. There is a margin of discretion conferred by the Constitution and the law upon those who make decisions and the test of rationality ensures that any legislation or official act is confined within the purposes set by the law. It is the insistence that decisions must be rational that limits arbitrariness and not discretion by itself. Where a body like IEBC applied its mind to constitutional requirements, regarding delimitation, reaching a rational conclusion, the courts should not review that decision."

(53) In view of this Court's statement of the general principle above, we are hesitant to approve the High Court's application of the rationality and reasonableness tests in the petition. In our view, the rationality or reasonableness tests are irreducible, as stated by the superior court below, to an inquiry whether a reasonable person would not have reached the determination in question. This would be too simplistic, and subjective a test. It would also render the court an appellate forum over the opinion of the other branches of government. We further note, as did the Constitutional Court of South Africa in ***Democratic Alliance v The President of the Republic of South Africa & 3 Others*****:** ***CCT 122/11 [2012] ZACC 24***, that:

"[I]t is useful to keep the reasonableness test and that of rationality conceptually distinct. Reasonableness is generally concerned with the decision itself…

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The rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected and given full effect. If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large."

(54) In our view, the test is whether the means applied by the organs of appointment to meet their legal duty has been performed in compliance with the object and purpose of the Ethics and Anti-Corruption Act as construed in light of ***Article 79*** of the Constitution of Kenya. Under this test, the courts will not be sitting in appeal over the opinion of the organ of appointment, but only examining whether relevant material and vital aspects having a nexus to the constitutional and legislative purpose of integrity were taken into account in the actual process. Stated otherwise, the analysis turns on whether the process had a clear nexus with a determination that the candidates meet the objective criteria established in law rather than a judgment over the subjective state of mind of the decision makers. This in our view provides a fact-dependent objective test that is judicially administrable in such cases. We are persuaded by the holding of the Supreme Court of India in ***Centre for PIL*** **(***supra***)** where the Court, in rejecting "merit review" of appointments by the courts, stated thus:

"44. As stated above, we need to keep in mind the difference between judicial review and merit review. As stated above, in this case the judicial determination is confined to the integrity of the decision making process undertaken by the HPC in terms of the proviso to Section 4(1) of the

2003 Act. If one carefully examines the judgment of this Court in Ashok Kumar Yadav's case (supra) the facts indicate that the High Court had sat in appeal over the personal integrity of the Chairman and Members of the Haryana Public Service Commission in support of the collateral attack on the selections made by the State Public Service Commission.

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33… Judicial review seeks to ensure that the statutory duty of the HPC to recommend under the proviso to Section 4(1) is performed keeping in mind the policy and the purpose of the 2003 Act. We are not sitting in appeal over the opinion of the HPC. What we have to see is whether relevant material and vital aspects having nexus to the object of the 2003 Act were taken into account when the decision to recommend took place on 3rd September, 2010."(emphasis supplied).

(55) This Court reiterates, for the avoidance of doubt, the holding of the High Court in ***Kenya Youth Parliament & 2 Others v AG & Another*, Constitutional Petition No. 101 of 2011**, that:

"We state here with certain affirmation, that in an appropriate case, each case depending on its own peculiar circumstances, facts and evidence, this court clothed with jurisdiction as earlier stated, would not hesitate to nullify and revoke an appointment that violates the spirit and letter of the Constitution but the Court will hesitate to enter into the arena of merit review of a constitutionally mandated function by another organ of State that has proceeded with due regard to procedure. The Court's intervention would of necessity be pursuant to a high threshold."(emphasis supplied).

(56) The question then becomes, what is the standard or the test of the review" It was the contention of the appellant that the standard of review must be deferential given that appointments are committed to the other organs of government. In view of our constitutional design and the institutional competences attendant to it, it seems to us that this view cannot and has not been seriously contended in principle by any of the respondents. Deference is multi-directional, and we are prepared to hold that in the same way the other branches are to defer to the jurisdiction of the courts, the courts must also defer to the other branches where the constitutional design so ordains. We hold that the standard of judicial review of appointments to State or Public Office should therefore be generally deferential, although courts will not hesitate to be searching where the circumstances of the case demand a heightened scrutiny provided that the courts do not purport to sit in appeal over the opinion of the other branches.

(57) In the case at hand, the court below conflated the rationality and reasonableness tests despite their distinction in judicial practice. The result is that its findings became the subject of challenge before this Court. To oversimplify, it is not clear to what or whom the rationality requirement applies in its test – the decision; the legislator or the bystander" Although we do note that it is perhaps to expect much of the courts to render precise doctrines which in the nature of things are irreducible to precision, some uncertainty may be created by the court's rendition of its tests thus:

"Additionally, the Court must review the appointment decision itself to determine if it meets the constitutional threshold for appointment. The test here is one for rationality: can it be said that the appointing authority, after applying its mind to the constitutional requirements, reached a rational conclusion that the appointee met the constitutional criterion" While the appointing authority has a sphere of discretion and an entitlement to make the merit analysis and determination of the question whether the appointee actually meets the constitutional criteria, Courts will review that determination where, rationally, a reasonable person would not have reached that determination. The test, then, is one of reasonableness: substantively, the Court will

defer to the reasonable determination of the appointing authority that a proposed appointee has satisfied the constitutional criterion. Where such a determination is unreasonable or irrational, however, the Court will review it. To this extent, therefore, the constitutional review is not for error but for legality."

(58) We respectfully suggest that such ambiguous application of doctrines can undermine proper judicial inquiry. It is therefore our considered view, that the superior court below misapplied the doctrine of separation of powers in its standard of review. We are of the view that had the court applied the rationality test in light of the principle of separation of powers, its analysis no less its result would have been different. We note here that the rationality test is a judicial standard fashioned specifically to accommodate the doctrine of separation of powers, and its application must generally reflect that understanding. This much has been noted by the South African Constitutional Court in ***Democratic Alliance v The President of the Republic of South Africa & 3 Others, CCT 122/11 [2012] ZACC 24***, where it stated that:

"[42] It is evident that a rationality standard by its very nature prescribes the lowest possible threshold for the validity of executive decisions: it has been described by this Court as the "minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries." And the rationale for this test is "to achieve a proper balance between the role of the legislature on the one hand, and the role of the courts on the other."

[43] ……………………………

"The rational basis test involves restraint on the part of the Court. It respects the respective roles of the courts and the Legislature. In the exercise of its legislative powers, the Legislature has the widest possible latitude within the limits of the Constitution. In the exercise of their power to review legislation, courts should strive to preserve to the Legislature its rightful role in a democratic society."

This applies equally to executive decisions. " (Footnotes omitted).

(59) We wish to reiterate, having disposed of the issue of separation of powers, that leadership and integrity are broad and majestic normative ideas. They are the genius of our constitutional fabric. However, their open-textured nature reveals that they were purposefully left to accrue meaning from concrete experience. Restated, whereas these concepts germinate from the ground of normativity, they grow in the milieu of the facticity of real experience. Their life blood will therefore be our experience, not merely the abstract philosophy or ideology that may underlie them.

(60) This Court is of the opinion that in view of the nature of the principles contained under ***Article 73*** of the Constitution, a fact-dependent objective test provides a less burdensome standard of review of constitutionality of appointments on grounds of integrity. In fashioning this judicial test, we do not exile the rationality test which is equally controlling in the examination of constitutional validity, if properly applied in terms of the means-ends analysis and the separation of powers framework. We are guided by the fact that an objective test provides judicial manageability by focusing the analysis of the constitutionality of appointments to factual ascertainment of the means and purpose as opposed to the subjective standard of a reasonable or rational person. This latter path, if untamed, amounts to transforming the courts into appellate forums on the opinion of the other branches for which they may not be equipped.

(61) We further reiterate that whereas the centrality of the Ethics and Anti-Corruption Commission as a vessel for enforcement of provisions on leadership and integrity under Chapter 6 of the Constitution warrants the heightened scrutiny of the legality of appointments thereto, that is neither a license for a court to constitute itself into a vetting body nor an ordination to substitute the Legislature's decision for its own choice. To do so would undermine the principle of separation of powers. It would also strain judicial competence and authority. Similarly, although the courts are expositors of what the law is, they cannot prescribe for the other branches of the government the manner of enforcement of Chapter 6 of the Constitution, where the function is vested elsewhere under our constitutional design.

(e) Was the appointment of the appellant undertaken in accordance with the Constitution and the law"

(62) This case involves the husbandry and leadership of a key institution in our constitutional democracy. Its circumstances therefore warranted a heightened scrutiny of the evidence. Moreover, a determination of unsuitability to hold office is a drastic form of judicial review and must therefore be premised on findings based on cogent and conclusive evidence. Indeed, the lower superior court, in deciding that the case before it entailed twin issues for determination- procedural soundness of the appointment process and the legality of the appointment decision- warned itself as follows on the latter issue:

"A determination of lack of integrity or unsuitability for a position will, therefore, tend to be an <u>intensely fact-based inquiry</u>." (emphasis supplied).

(63) In pursuit of its inquiry, the superior court below reduced its decision to analysis of two main issues, namely:

"(a) Whether the appointment process of the appellant as the Chairperson of the Ethics and Anti-Corruption Commission failed the procedural test because both organs failed to consider vital information that was available to them about the appellant herein; and

(b) Whether the appellant herein is unsuitable, in its words, simply because it is not possible to say, with any sense of reasonableness or rationality, that he can meet the substantive requirements of Chapter 6 of the Constitution and particularly Article 73 (2) on integrity and suitability."

(64) It has been contended by the appellant that on each of the issues for determination, the evidence before the superior court below was so insufficient or non-existent as to support a finding in his favour or a dismissal of the petition altogether. On the question of the procedural propriety or otherwise of the entire appointment process, learned counsel for the appellant submitted that there was no evidence that the organs responsible for the process of his appointment had not considered the allegations or complaints raised in the petition. They argued that on the contrary, the evidence borne out of the record of appeal confirmed substantive parliamentary debate. On the question of the suitability or otherwise of the appellant for appointment to State Office, it was further averred that there was no sufficient evidence or no evidence at all on allegations of want of integrity on the appellant's part. He cited the High Court's statement, which we reproduce at length on account of its relevance as follows:

"<u>There is no doubt that, if true, these are serious allegations</u> and they would, ineluctably, affect any reasonable person's assessment of the integrity of the Interested Party or his suitability to head the Commission. <u>We are not in a position to make any findings whether these allegations are proved or not. That will have to await appropriate legal proceedings tailored for that purpose.</u>

<u>However, what we are prepared to hold at this point is that the allegations are serious enough and sufficiently plausible</u> to warrant any reasonable person who is charged with the constitutional responsibility of assessing the integrity or suitability of the Interested Party for an appointment to a State or Public Office, especially one which is as sensitive as the Chairperson of the Ethics and Anti-Corruption Commission, to conduct a proper enquiry before such an appointment. <u>We say so on a cursory assessment of the evidence made available to us...</u>

………………………………

…In this particular case as outlined above, the Petitioner alleges that the Interested Party <u>must have been involved</u> in shady transactions which led to the approval of unsecured loans and the loss of public funds at the AFC. <u>Though the evidence the Petition relies on is yet to be tested in judicial proceedings and cannot be taken as the truth of the matter,</u> the allegations are substantial enough that it is not possible for any appointing authority to rationally make a determination without the aid of proper inquiry to solve the issue one way or the other, that the Interested Party has passed the integrity test demanded by our Constitution." (emphasis supplied)

(65) ***<u>Democratic Alliance</u>*** *(supra)*, whose progenitor the court below relied upon, stands for the requirement that courts satisfy themselves of the evidence before making determinations on procedural infirmity or unsuitability. In that South African case, the Court had before it conclusive evidence from reports of a commission of inquiry and the Public Service Commission, both in which the appointee testified on oath, and the opposing affidavit of the President. These materials provided support to the Court's conclusion that the Executive failed to consider material adverse to the appointee. Thus, apart from a finding of procedural infirmity based on cogent evidence including the appointment official's affidavit, the Court was armed with tested evidence about the moral probity of the appointee with which to reach a conclusion that the appointee was unfit to hold office. Similarly, in ***<u>Centre for PIL</u>*** **(***supra***),** the person whose appointment was impugned stood as an accused in a criminal case pending in court with respect to offences under the Prevention of Corruption Act, 1988 of India and the Indian Penal Code.

(66) Liberty, it has been said, finds no refuge in the jurisprudence of doubt. A court in doubt is not at liberty to arrive at a conclusion which is unsupported by the material before it. To do so would be to undermine the basic principle that any conclusion of a court must be based on findings premised on the applicable evidentiary standards otherwise its decision stands impugned. The evidentiary standard in constitutional cases of this nature is a balance of probabilities. In cases involving heightened review, or "intensely fact-based inquiry," as noted by the superior court below, that balance acquires a higher gradation and must be exercised judiciously. Moreover, it does not do to shift the burden of proof to the institutions whose actions are impugned, or the person whose appointment is questioned, to prove procedural propriety or suitability. That would be an absurdity in this type of litigation, and we can almost foresee with certainty all that such an approach may entail were this Court to endorse it.

(67) It is a fundamental tenet of the rule of law that evidence, whether real, documentary, circumstantial or presumptive, is the basis of any judicial decision. This is why judicial decisions are not founded on a toss of the coin. We have reviewed the decision of the lower superior court and note its doubts as to its own conclusion, captured in its statements reproduced at length above. We will now consider each of the allegations and the material before us for their determination.

i. **Procedural Impropriety**

(68) It was the High Court's finding, as urged by the 1st respondent, that no proper inquiry on the claims of lack of integrity on the part of the appellant was conducted by the Executive or the Legislature. The 1st

respondent argued that the 2nd, 3rd and 4th respondents deliberately ignored public concerns and full information impugning the appellant's integrity. This position was supported by *amici curiae,* who cited a statement by a legislator that the Parliamentary Committee had denied a member of the public the opportunity to make representations on material adverse to the appellant.

(69) In his affidavit and submissions through counsel, the appellant maintained that the 1st respondent had not adduced material to demonstrate that it had been denied a chance to petition Parliament on his suitability. He urged us to find that the issue of his integrity and suitability had been extensively discussed by the National Assembly on two separate occasions, the 15th December and 20th December, 2011. He averred that in giving its approval, Parliament conclusively considered the allegations which formed the basis of the Petition.

(70) The general evidentiary standard applicable in judicial review of the procedural propriety of appointments process is that there must be a showing by the claimant that there were substantive defects in that procedure, fundamental omissions, or a consideration of extraneous considerations as to render the cumulative process unconstitutional. We note the importance and import of the principle recently stated by the High Court in ***Kenya Youth Parliament*** **(***supra***)** as follows:

"They [the Petitioners] failed to show any defects in that procedure and process. There was no evidence that all the allegations, complaints and all matters complained of as against the 2nd respondent were not considered by all the organs…

……………………………

…The Constitution vests different functions to different organs and to ask this Court to fault processes by those organs without presenting material to prove any wrong doing is to ask the court to usurp the functions of those organs."

(71) It was the 1st respondents own admission in the High Court that the process of recruitment, selection and appointment of the appellant as laid down in ***section 6*** of the Ethics and Anti-Corruption Commission Act was duly followed. However, it was its submission, without more, that the process failed the "integral/intrinsic" part.

(72) In our view, the 1st respondent did not provide any evidence to show that there was no proper inquiry on the suitability of the appellant in the cumulative process of appointment. There was no evidence of the alleged denials, but for anecdotal statements to that effect. The said affidavit of the member of the public who had been allegedly denied an opportunity to testify before the Parliamentary Committee was not placed on record. There was no further evidence to prove that the Committee did not comply with the Public Appointments (Parliamentary Approval) Act, 2011.

(73) In sum, it is our finding that the record before the High Court did not provide details of the manner in which the appointing authorities performed their inquiries to warrant a finding of impropriety. In light of our statement of principle above, the appointment process is a cumulative process, with various stages and appointing organs – the Selection Panel, the National Assembly and the Executive. A finding of procedural impropriety must be as substantive as to impeach the entire process. We therefore respectfully disagree with the High Court's conclusion that there was material before it to return a finding of impropriety. To find as the High Court did is to overturn the presumption of validity. In our view, the absence of records evidencing proper inquiry does not lead to a presumption of improper inquiry.

(74) There is, in addition, more to this analysis. It was the High Court's holding that the failure of the

appointing authorities to give due attention to all information that was available on the integrity or suitability of the appellant constituted a ground to invalidate his appointment. In its view, the unresolved questions touching on the appellant implied that there had been no proper inquiry. While the argument is logical, the irresolution of the said questions cannot in itself amount to procedural impropriety on the part of the Executive or the Legislature. We note that the superior court below itself noted the inconclusive nature of the evidence and suggested in its decision, without explication, that such unresolved questions remained to be determined only by "appropriate legal proceedings tailored for that purpose." By logical inference, a holding that the omission to resolve the questions constituted procedural impropriety is in our humble view inconsistent with its own statements. We are persuaded here by the determination of the Constitutional Court of South Africa in ***Democratic Alliance*** *(supra)* that a meeting of evidentiary threshold is key to a determination of procedural impropriety. That evidentiary threshold is high, given the principle of separation of powers, and in our view, it has not been met in this case.

(75) In sum, this Court agrees with the High Court's dicta that procedural propriety cannot be based on mechanical compliance with procedural hoops. In our view, however, the applicable general principle is that there must be a showing that there were substantive defects in that procedure, or significant omissions as to render it unconstitutional. Absent such showing, or arbitrariness or absence of debate altogether, a judicial determination on the quality of the debate or its outcome is to overstep the demarcated boundaries of our constitutional enterprise. In our view, to conclude, as the High Court did, that there was no substantive debate is to cross the boundary.

(76) It is also our considered view, moreover, that the applicable principle is that the process must be examined cumulatively as a whole, without cherry picking an episode which may tend to color the process without impugning its substance. Such an approach would be a wild search for error. That is not the purpose of judicial review. On this principle alone, there is no material before us to sustain the High Court's conclusion that the procedural aspects of the appointment of the appellant by the Executive and Legislature did not pass the constitutional standard. There has been no material either to sustain the claim touching on procedural propriety to the effect that the appellant had failed to meet any of the conditions and qualifications set out in ***section 5*** of the Ethics and Anti-Corruption Commission Act.

(77) For the avoidance of doubt, we also reiterate that a court reviewing the procedure of a legislature is not a super-legislature, sitting on appeal on the wisdom, correctness or desirability of the opinion of the impugned decision-making organ. It has neither the mandate nor the institutional equipment for that purpose in our constitutional design. Moreover, the process cannot be wrong simply because another institution, for example the courts, would have conducted it differently. It must be accepted that the institutional environment is controlling on the manner in which an organ disposes of its issues. We note the holding of the High Court in ***Washington Jakoyo Midiwo v Minister, Ministry of Internal Security and 2 Others [2013] eKLR*** where the Court stated:

"The facts presented by the petitioner are drawn directly from the proceedings of the National Assembly. Members of the National Assembly in these debates express various views and it is not for the Court to judge the quality of the debates. What is clear is that the issue of whether and to what extent KDF can be deployed in the country was a matter within the competence of the legislature. In effect what the petitioner wants is for the Court to evaluate the debate in the National Assembly and on that basis issue the declarations sought in the petition. I decline to adopt this course as this would be interfering with what is clearly within the mandate of the legislature.

ii. **Unsuitability and Unfitness**

(78) It remains now to turn to the issue of the suitability of the appellant for appointment as the chairperson of the Ethics and Anti-Corruption Commission. It was the 1st respondent's case that the appellant herein was not suitable for appointment on account of allegations centering on claims of financial impropriety, negligence of duty, failure to prevent fraud, and perjury. On the basis of these allegations, the 1st respondent averred that there remained significant unresolved questions which rendered the appellant unfit for appointment to any State or Public Office.

(79) The determination of unsuitability or unfitness of a person to hold State or Public Office on grounds of lack of integrity is a factual issue dependent upon an evaluation of material evidence. When presented as a constitutional challenge, the evidentiary standard is on a balance of probabilities. This standard is heightened, given its implications on due process, fairness and equal protection. An approach in this regard is to undertake what the High Court called "an intensely fact-based enquiry."

(80) We have considered each of these allegations individually. Three of these, which comprised the main claims by the 1st respondent, warrant closer attention. The first claim is that while the appellant held several senior positions at the AFC, he approved loans irregularly, without proper or adequate security. In an affidavit sworn by Mr. Elija Sikona, the 1st respondent stated that the appellant approved a loan of Ksh.24,000,000/= without security, and two further loan facilities of Ksh.18,000,000/= and Ksh.19,000,000/= based on inadequate security. The circumstances in which these loans were awarded and paid, the 1st respondent claimed, were the subject of criminal investigations. In a related claim, it was the 1st respondent's averment that the appellant was involved in the writing off of such debts, leading to loss of funds by the AFC.

(81) This Court, moved by the seriousness of these claims, has examined the record meticulously to make a determination. We have reviewed a copy of a letter from the 1st respondent to the DPP, in response to the above complaint, and its subsequent trail. In the replying affidavit on behalf of the DPP, it was stated that the complaint was not against the appellant. We have also reviewed copies of loan agreements between the AFC and the RVAC, the entity alleged to have been awarded loans irregularly, copies of cheques drawn by the AFC to the NBK, and copies of purchase agreements of the assets claimed to have been used to secure AFC loans. We were not given any evidence on the parties involved in initiating and processing the loans at both ends of giver and receiver in the said transactions. However, in respect of the complaint, the 4th respondent swore an affidavit stating that no such investigations are underway in the Directorate of Public Prosecutions.

(82) These documents, standing alone, do not illuminate any portrait on the 1st respondent's claim. Quite apart from the absence of proof on the claim of irregular award of loans, we have not been able to link the appellant to the alleged complaint. The nakedness of the documents is such that they can support any circumstantial claim, but only if there is more to substantiate the allegations. That is where the evidence requirement sets in. Moreover, the records before us do not show that any of the documents alleged to emanate from the AFC were done under the appellant's hand or authority. The alleged failure by the AFC to secure loans properly has neither been proved, nor was there proof of the involvement of the appellant in such practice. Further, we find controlling the submission of counsel for the appellant on the managerial and governance structure of the AFC. The role of the appellant, if any, must be examined in light of ***sections 14, 19*** and ***20*** of the Agricultural Finance Corporation Act (Cap 232), which vest the power to grant loans and matters appurtenant thereto in the board, provided that the board may delegate the power to the General Manager of the corporation. Nothing was advanced before us in argument or evidence to demonstrate that the appellant had any authority to grant loans. We therefore find it hard to sustain the 1st respondent's claim, absent this showing or a demonstration

that the loans were granted irregularly by the appellant as is alleged.

(83) The second claim concerned allegations contained in the affidavit sworn on behalf of the 1st respondent to the effect that the appellant "presided over the loss of massive public resources" at the AFC. It was further alleged that the appellant not only approved the loans, but also colluded with some individuals to fraudulently make payments of the approved loans to fictitious bank accounts. In the 1st respondent's claim, the appellant colluded with some individuals to divert funds amounting to Kshs.37,200,000/= due to the RVAC as loan payment to unknown accounts at the NBK. These actions, the 1st respondent alleged, were subject to investigation by the Criminal Investigations Department.

(84) Having been moved by the seriousness of this claim, we have reviewed a copy of a letter from the 1st respondent to the Director of Public Prosecutions stating that the appellant had overlooked the fraud at the AFC and its trail of responses. We have also reviewed copies of loan agreements between the AFC and the RVAC and copies of cheques drawn by the AFC to the NBK in respect of those loans. We examined further reports on the said investigations. This Court has reached the finding that these documents standing alone do not illuminate a full portrait of the 1st respondent's claim. Apart from the weaknesses of the evidence before us, the appellant is not implicated in any of these documents. Not in a single of these documents is he named. The investigation report, in particular, made no reference to the appellant nor was he questioned by the investigators. On this basis, therefore, the appellant was remote to these investigations. We take cognisance again, as we did before, of the provisions of ***section 14, 19*** and ***20*** of the AFC Act, which outline the role of the board and the General Manager in financial management and the exercise of controls at the corporation. Given that the circumstances of the alleged payments to the NBK are not clear to us, and so is the involvement of the appellant, we cannot sustain the 1st respondent's claim of fraud against the appellant.

(85) Finally, it was the 1st respondent's claim that the appellant had sworn an affidavit with false information in a case before the High Court involving Directors of the RVAC, ***HCCC 1535 of 1999***, ***Rift Valley Agricultural Contractors Limited and Another v Mahesh Kumar Manibhai Patel***. The said affidavit was placed on record, but annextures to it or the full pleadings in the case were not. There was no further evidence to substantiate the claims of falsehood on the part of the appellant. On the basis of the incompleteness of the record on this issue, we can make no accurate determination over the claim and therefore dismiss the allegation without any further analysis.

(86) We have examined each of these grounds and our finding is that the evidence before the High Court or before us is not probative of any of the claims. We note that the High Court itself noted the evidentiary shortcomings by stating that it was not in a position to make any findings whether the above allegations had been proved or not. Therefore, we respectfully hold that the court misdirected itself by concluding that the appellant was unsuitable to hold office, despite its own finding that there had been no conclusive proof of the allegations. It is our considered view that in cases seeking review of an appointment on grounds of the integrity of the appointee, the review cannot be half-hearted. It must be conclusive, fair and just. It was not enough for the High Court to state its commitment to "an intensely fact-based enquiry," and then proceed to declare that only later legal proceedings would determine the "unresolved questions" while still holding the appellant to be unsuitable to hold State Office. To do so would be to drown the imperatives of due process, justice and fairness into tumultuous waters.

I. **Summary of Findings and Conclusion**

(87) We now set out a summary of our findings and conclusions on the issues that we framed for determination as follows:

(i) The 1st respondent had *locus standi* to institute the petition challenging the constitutionality or legality of the appointment of the appellant as the chairperson of the Ethics and Anti-Corruption Commission before the High Court. This conclusion is based on ***Articles 22*** and ***258*** of the Constitution, read together with the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, which entitle any person seeking the enforcement of the Constitution to institute proceedings in the High Court under its jurisdiction in ***Article 165 (3) (d) (ii)***.

2. The High Court had jurisdiction to review and set aside the appointment of the appellant on grounds of constitutionality or legality. We make this conclusion based on ***Article 165 (3) (d) (ii)*** of the Constitution which grants the High Court jurisdiction to hear any question respecting the interpretation of the Constitution, including the determination of a question regarding whether an appointment by any organ of the Government is inconsistent with, or in contravention of the Constitution.

3. It is our finding that the petition before the High Court was not pleaded with precision as required in constitutional petitions. Having reviewed the petition and supporting affidavit, we have concluded that they did not provide adequate particulars of the claims relating to the alleged violations of the Constitution of Kenya and the Ethics and Anti-Corruption Commission Act, 2011. Accordingly, the petition did not meet the standard enunciated in the ***Anarita Karimi Njeru*** case *(supra).*

4. The High Court is entitled to conduct a review of appointments to State or Public Office to determine the procedural soundness as well as the appointment decision itself to determine if it meets the constitutional threshold. However, such review by the court is not an appeal over the opinion nor does it amount to a "merit review" of the decision of the appointing body. We find that the High Court misapplied the rationality test in adopting a standard of review antithetic to the doctrine of separation of powers.

5. Having reviewed the evidence before us, we have found that the High Court's conclusion of procedural impropriety on the part of the appointing organs and unsuitability on the part of the appellant cannot be upheld.

(88) Much of the emerging jurisprudence on integrity is still in its infancy. To advance the frontiers of that jurisprudence is the function of the courts, other organs of the government, and the people. In particular, this Court notes that the public aspiration towards "cleaning up our politics and governance structures" as noted by the court below remains compelling. However, we would be hesitant to do so in a manner that visits violence to the underlying fundamentals of due process, justice and fairness in our constitutional system. Should we do so, public opinion or popular rhetoric will not soften that violence. Principle, in the form of due process will. It is for that reason that the Constitution envisages the enactment of laws to provide a process for realizing the constitutional aspirations enshrined in Chapter 6 and embedded throughout the charter. The courts may have the highest intentions to hasten this process, but we must remember that the Constitution also protects us from our best intentions: by providing safeguards for due process, justice and fairness. That, extravagant as it appears, is the price of constitutional maintenance.

(89) For all these reasons, therefore, this Court finds for the appellant. The whole of the judgment and orders of the High Court are set aside and vacated.

(90) We wish to thank counsel for all the parties and *amici curiae* for the great diligence and fervor with which you pursued the appeal.

10. **Costs**

(91) This case was instituted as public interest litigation. In exercise of our discretion, we order, in view of the nature of such cases, that costs be borne by the parties.

Dated and delivered at Nairobi this 26th day of July, 2013.

P. KIHARA KARIUKI

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PRESIDENT,

COURT OF APPEAL

W. OUKO

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JUDGE OF APPEAL

P. O. KIAGE

……………………….

JUDGE OF APPEAL

S. GATEMBU KAIRU

………………………..

JUDGE OF APPEAL

A. K. MURGOR

………………………..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

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