

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO.....OF 2025

IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA

-AND-

IN THE MATTER OF: ENFORCEMENT AND INTERPRETATION OF THE
CONSTITUTION

-AND-

IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 129, 131, 132, 157, 244, 245, 249, 250, AND
259 OF THE CONSTITUTION OF KENYA, 2010

-AND-

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLES 10, 129,
132, 157, 244, 245, , 249 AND 252 OF THE CONSTITUTION OF KENYA, 2010

-AND-

IN THE MATTER OF: THE CONSTITUTIONAL LAW DOCTRINE OF
SEPARATION OF POWERS.

-AND-

IN THE MATTER OF: THE PRESIDENTIAL PROCLAMATION ON THE
ESTABLISHMENT OF THE MULTI-AGENCY TEAM ON THE WAR AGAINST
CORRUPTION (MAT) DATED 18TH AUGUST 2025

-AND-

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF
RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE
RULES, 2013

-BETWEEN-

TRANSPARENCY INTERNATIONAL KENYA.....1ST PETITIONER

KENYA HUMAN RIGHTS COMMISSION.....2ND PETITIONER

INUKA KENYA NI SISI!.....3RD PETITIONER

- VERSUS -

THE ATTORNEY GENERALRESPONDENT

-AND-

ETHICS AND ANTI-CORRUPTION

COMMISSION (EACC).....1ST INTERESTED PARTY

OFFICE OF THE DIRECTOR OF PUBLIC

PROSECUTIONS (ODPP)2ND INTERESTED PARTY

DIRECTORATE OF CRIMINAL

INVESTIGATIONS (DCI)3RD INTERESTED PARTY

NATIONAL INTELLIGENCE SERVICE (NIS)4TH INTERESTED PARTY

ASSET RECOVERY AGENCY (ARA)5TH INTERESTED PARTY

FINANCIAL REPORTING CENTRE (FRC)6TH INTERESTED PARTY

KENYA REVENUE AUTHORITY (KRA)7TH INTERESTED PARTY

CENTRAL BANK OF KENYA (CBK)8TH INTERESTED PARTY

PUBLIC PROCUREMENT REGULATORY

AUTHORITY (PPRA)9TH INTERESTED PARTY

KATIBA INSTITUTE.....10TH INTERESTED PARTY

THE INSTITUTE OF SOCIAL ACCOUNTABILITY.....11TH INTERESTED PARTY


LAW SOCIETY OF KENYA12TH INTERESTED PARTY

CERTIFICATE OF URGENCY

I, **DIANA MWANZIA**, Advocate for the Petitioners who have the conduct of this matter do certify that the Application and the Petition filed herewith are utmost urgency requiring to be placed before the Honorable Vacation Judge at the earliest possible moment for the reason;

1. The Multi-Agency Team (MAT) on the War Against Corruption, established by presidential proclamation dated 18th August 2025, seeks to coordinate and direct the operations of independent constitutional offices and statutory bodies under the control of the Executive Office of the President.
2. The implementation of MAT poses an imminent threat to the independence of these institutions and undermines the constitutional doctrine of separation of powers and checks and balances.
3. Unless this Honourable Court urgently intervenes and grants conservatory orders, there is a real and present danger that actions and decisions taken by MAT will have far-reaching, irreversible effects, including interference with ongoing investigations, prosecutions, and asset recovery proceedings.
4. The issues raised herein affect public interest, the rule of law, and the legitimacy of Kenya's constitutional governance architecture, thus requiring urgent judicial intervention.
5. It is in the interest of justice that the instant application be certified urgent and orders sought herein be granted at the earliest instance.

DATED THIS 20TH DAY OF AUGUST 2025



DIANA MWANZIA
ADVOCATES FOR THE PETITIONERS

DRAWN AND FILED BY: -

Diana Mwanzia

Advocate

P.O. BOX 198-00200

NAIROBI

EMAIL: litigation@tikenya.org

TO BE SERVED UPON:

THE HON. ATTORNEY GENERAL

Attorney-General Chambers

State Law Office, Harambee Avenue

P.O Box 40112-00100 Nairobi
cl@ag.go.ke ; info@ag.go.ke

ETHICS AND ANTI-CORRUPTION COMMISSION (EACC)

Integrity Centre, Valley Road, Nairobi
P.O. Box 61130–00200, Nairobi, Kenya

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS (ODPP)

ODPP Headquarters, Ragati Road, Upper Hill, Nairobi
P.O. Box 30701–00100, Nairobi, Kenya

DIRECTORATE OF CRIMINAL INVESTIGATIONS (DCI)

DCI Headquarters, Mazingira Complex, Kiambu Road, Nairobi
P.O. Box 30036–00100, Nairobi, Kenya

NATIONAL INTELLIGENCE SERVICE (NIS)

NIS Headquarters, Off Thika Road, Ruaraka, Nairobi
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PUBLIC PROCUREMENT REGULATORY AUTHORITY (PPRA)

10th Floor, National Bank Building, Harambee Avenue, Nairobi
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CHAMBER SUMMONS

(Rules 3(1) and 3(2) and Part 1 of the High Court Practice and Procedure Rules and section 10 of the Judicature Act)

LET ALL PARTIES CONCERNED attend the Honourable Judge in chambers on the _____ day of 2025 at 9:00 O'clock in the forenoon or so soon thereafter as Counsel for

the Applicant may be heard for **ORDERS: -**


1. **THAT**, the Applicant's application be certified as urgent and be heard during the current Court Vacation.
2. **THAT**, the costs be provided for.

WHICH APPLICATION is based on the following grounds and upon the Statement filed herewith, the Supporting Affidavit of SHEILA MASINDE and upon such other and further grounds as shall be adduced at the hearing hereof.

1. The MAT violates the independence of institutions as guaranteed under Articles 157, 244, 245, 249 and 252 of the Constitution
2. The MAT also violates the independence of the 1st Interested party contrary to Section 11(6) of the Ethics and Anti-Corruption Commission Act and the 2nd Interested party contrary to Section 6 of the Office of the Director of Public Prosecutions Act.
3. The agencies and commissions enlisted under MAT are constitutionally and/or statutorily mandated to act independently and are only subservient to the law in the execution of their mandate.
4. MAT, being a non-statutory body, lacks any legal foundation and cannot lawfully exercise oversight or coordination over independent constitutional offices.
5. The implementation of MAT poses an imminent threat to the independence of these institutions and undermines the constitutional doctrine of separation of powers and checks and balances.
6. The MAT, unless restrained, will interfere with criminal justice processes, threaten due process rights, and irreparably derail public confidence in the fight against corruption.
7. The Petition raises substantial constitutional questions warranting the Court's urgent attention and interim relief.
8. The issues raised herein affect public interest, the rule of law, and the legitimacy of Kenya's constitutional governance architecture, thus requiring urgent judicial intervention.
9. Unless the conservatory orders sought are granted, there is a real and imminent risk that public funds will be unlawfully expended in the operationalization of the Multi-Agency Team (MAT), noting that the funding module as per the Proclamation is vague. Such disbursement, if allowed to proceed unchecked, would amount to a misuse of public resources and, in the event the Petition succeeds, would result in irreparable loss and wastage of public funds that cannot be recovered or reversed.
10. Unless this Honorable Court grants the conservatory orders sought, the Petitioners and the general public will continue to suffer irreparable harm and violation of constitutional rights and values.

DATED THIS 20TH DAY OF AUGUST

2025



DIANA MWANZIA
ADVOCATES FOR THE PETITIONERS

DRAWN AND FILED BY: -

Diana Mwanzia

Advocate

P.O. BOX 198-00200

NAIROBI

EMAIL: litigation@tikenya.org

TO BE SERVED UPON:

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AFFIDAVIT IN SUPPORT OF THE CERTIFICATE OF URGENCY

I, **DIANA MWANZIA**, of Post Office Box Number 198-00200 Nairobi in the Republic of Kenya
do make oath and state as follows: -

1. **That** I am an adult of sound mind and therefore competent to swear this affidavit.
2. **That** I am the Counsel on record for the Applicants/Petitioners herein and am well
3. versed with this matter and well seized of the proceedings herein.
4. **That** I have been instructed by the Petitioners herein to institute the instant proceedings to ventilate its claim owing to the eminent continued danger of further violation of the Constitution and the law.
5. **That** on 18th August 2025, the President of the Republic of Kenya issued a Presidential Proclamation establishing a body known as the Multi-Agency Team on the War Against Corruption (MAT), to be chaired by the Executive Office of the President and coordinated by the Respondent (*Annexed is the Presidential proclamation marked as DM-1*)
6. **That** the said MAT purports to bring together at least ten (10) independent constitutional and statutory agencies for the purposes of enhancing coordination, strategy development, enforcement, asset recovery and public messaging in the fight against corruption, including;

Constitutional bodies:

- a. Ethics and Anti-Corruption Commission (EACC)- **Article 79**
- b. Office of the Director of Public Prosecutions (ODPP)-**Article 157**

Statutory bodies:

- a. Office of the Attorney General (Secretary)-**Office of the Attorney General Act**
 - b. National Intelligence Service (NIS)-**National Intelligence Service Act, 2012**
 - c. Directorate of Criminal Investigations (DCI)- **National Police Service Act.**
 - d. Financial Reporting Centre (FRC)- **Proceeds of Crime and Anti-Money Laundering Act**
 - e. Asset Recovery Agency (ARA)-**Proceeds of Crime and Anti-Money Laundering Act**
 - f. Kenya Revenue Authority (KRA)-**Kenya Revenue Authority Act**
 - g. Central Bank of Kenya (CBK)- **Central Bank of Kenya Act**
 - h. Public Procurement Regulatory Authority (PPRA)-**Public Procurement and Asset Disposal Act, 2015.**
7. **That** the establishment of MAT has not been backed by any legislation or policy framework, and was created solely through executive fiat, bypassing public participation, parliamentary oversight and the constitutional roles of independent institutions.
 8. **That** unless this Honourable Court intervenes urgently, the said MAT will begin compiling strategies, issuing directives, influencing investigations, and coordinating independent bodies, thereby violating the constitutional principles of institutional independence, separation of powers, and rule of law.

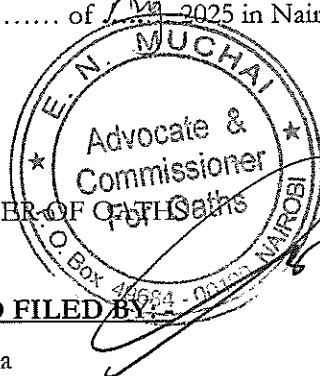
9. **That** the implementation of the MAT directive will also result in the misuse of public funds, as the Proclamation provides for financing of MAT operations through budgetary allocations of member agencies and other unspecified “approved sources.”
10. **That** unless conservatory orders are issued, the MAT may proceed to act, allocate public resources, issue reports or coordinate state agencies unlawfully, which would result in irreparable loss and misuse of public funds, and risk destabilising the independence of key constitutional offices.
11. **That** this matter raises substantial constitutional questions concerning the limits of executive authority, the proper structure of anti-corruption governance, and the protection of the Constitution’s architecture.
12. **That** the application herein is extremely urgent, as the process of operationalizing MAT is ongoing and no other legal remedy exists to halt or suspend its activities other than the intervention of this Honourable Court through conservatory orders.
13. **That**, it is in the interest of justice that this Application and Petition be admitted during the Court’s vacation and prioritized for hearing and determination.
14. **That**, the statements made herein are true to the best of my knowledge, except for those based on information and belief, which have been disclosed along with the grounds upon which they are based.

Sworn at Nairobi by the said Diana Mwanzia

this 20th of Aug 2025 in Nairobi

BEFORE ME:


COMMISSIONER OF FATHS



DRAWN AND FILED BY:

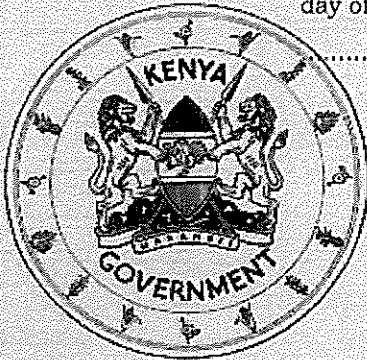
Diana Mwanzia
Advocate
P.O. BOX 198-00200
NAIROBI.
EMAIL: litigation@tikenya.org

}
}
}
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}


.....
Deponent

This is the exhibit marked "DM-1" referred to in the annexed affidavit declaration of Diana Mwanzi sworn declared before me this 20th day of August 2025 at Nairobi
Commissioner for Oaths

EXECUTIVE OFFICE of
THE PRESIDENT



PRESIDENTIAL PROCLAMATION

ON THE ESTABLISHMENT of MULTI-AGENCY TEAM ON WAR AGAINST CORRUPTION

WHEREAS,

The Government of the Republic of Kenya is steadfast in its commitment to reinforcing a "whole-of-government" approach in the fight against corruption. The government aims to implement collaborative strategies that ensure more efficient, synergized, and impactful interventions across all arms of government.

WHEREAS,

The Constitution of Kenya imposes an obligation on all Kenyans to combat corruption. Additionally, Article 156(4)(a) of the Constitution, in conjunction with the Office of the Attorney General Act, Cap 6A, and Executive Order No. 1 of 2025, designates the Office of the Attorney General and the State Department of Justice as the lead institution for providing policy and legal direction on matters of governance, ethics, and integrity.

WHEREAS,

A Multi-Agency Team on War Against Corruption (MAT) was recommended for establishment in 2015 by the Taskforce on the Review of the Anti-Corruption Legal, Policy and Institutional Framework. A multi-agency ad hoc team has already engaged in collaborative anti-corruption operations with a measure of success.

WHEREAS,

Executive Order No. 1 of 2025 envisions the establishment of the MAT under the State Department for Justice, Human Rights, and Constitutional Affairs (SDOJHRCA).



WHEREAS, The enactment of the Conflict of Interest Act, 2025 and the amendments to the Proceeds of Crime and Anti-Money Laundering Act have strengthened the fight against corruption by providing greater impetus and establishing a more robust legal framework.

WHEREAS, Articles 10, 129(2), 131(1)(b), 131(2)(a), and 201 impose on the President the mandate to exercise executive authority in safeguarding and upholding the Constitution and, consequently, in ensuring that public resources are utilized responsibly, in an open and accountable manner;

NOW THEREFORE, I, WILLIAM SAMOEI RUTO, President and Commander-in-Chief of the Kenya Defence Forces, by the authority vested in me by the Constitution, do hereby proclaim **THAT:**

1. ESTABLISHMENT OF A MULTI-AGENCY TEAM ON WAR AGAINST CORRUPTION

A Multi-Agency Team on War Against Corruption (MAT) is hereby established with the strategic objective of creating synergy and inter-agency cooperation in the fight against corruption, economic crimes, and related offenses.

The MAT shall comprise the following entities and any other organs of government that may wish to collaborate:

- i.** Executive Office of the President (EOP) (Chairperson);
- ii.** Office of the Attorney General (Secretary);
- iii.** National Intelligence Service (NIS);
- iv.** Ethics and Anti-Corruption Commission (EACC);
- v.** Office of the Director of Public Prosecutions (ODPP);
- vi.** Directorate of Criminal Investigations (DCI);
- vii.** Financial Reporting Centre (FRC);
- viii.** Asset Recovery Agency (ARA);



- ix.** Kenya Revenue Authority (KRA);
- x.** Central Bank of Kenya (CBK); and
- xi.** Public Procurement Regulatory Authority (PPRA).

The membership is mandated to co-opt additional representation from designated agencies to further enhance its objectives.

2. FUNDING AND COOPERATION

The MAT shall, to the greatest extent possible, foster cooperation, coordination, and collaboration to enhance the effectiveness of the fight against corruption. For this purpose, the team shall be funded from the budgetary allocations of its member entities and other sources.

3. OBJECTIVES

The objectives of the MAT shall, among others, include:

- i.** Enhancing cooperation, coordination, and collaboration among the agencies;
- ii.** Engaging other relevant agencies, organs of government and private sector to enhance the effectiveness of the anti-graft campaign;
- iii.** Identifying resource needs for each agency and collaborating organs and seek support for the same;
- iv.** Sharing best practices and approaches for tackling corruption in Kenya;
- v.** Developing effective communication strategies for awareness creation on the gains and achievements made in the fight against corruption; and
- vi.** Engaging both domestic and international relevant agencies for effectiveness and optimum realization of the fight against



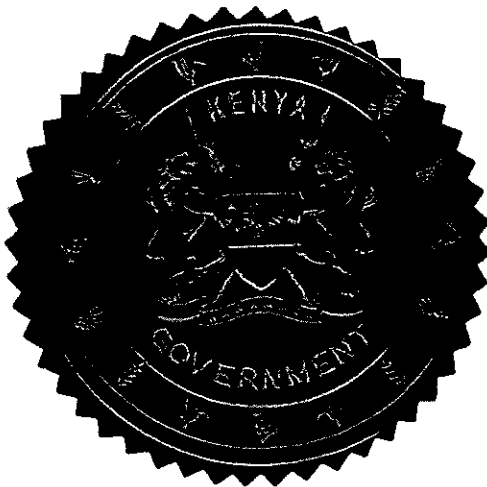
EXECUTIVE OFFICE *of*
THE PRESIDENT

economic crimes, organized crimes and recovery of proceeds of crime.

4. LEADERSHIP STRUCTURE

The Executive Office of the President shall chair the Multi-Agency Team, while the Office of the Attorney General shall head the Secretariat.

IN WITNESS WHEREOF, I hereunto have set my **Hand and caused** the **Public Seal of the Republic** to be affixed unto this Presidential Proclamation on this the^{18th}..... Day of August..... in the **YEAR OF OUR LORD TWO THOUSAND AND TWENTY-FIVE.**



WILLIAM SAMOEI RUTO,
President.

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NOTICE OF MOTION

(Under Articles 20, 22, 23(3), 159(2)(d), 165(3), and 258 of the Constitution of Kenya 2010, Rules 4, 19, and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, and all other enabling provisions of the Law)

LET ALL PARTIES CONCERNED attend the Honourable Judge in Chambers on the _____ day of _____, 2025, at 9.00 O'clock in the forenoon or as soon thereafter for hearing of an Application by the Applicants/Petitioners for ORDERS:

1. THAT this Application be certified urgent and service thereof be dispensed with in the first instance.
2. That pending the hearing and determination of this Application and the Petition, the Honourable Court be pleased to issue a conservatory order suspending the operation of the Multi-Agency Team on the War Against Corruption (MAT) as established by the Presidential Proclamation dated 18th August 2025.
3. That a conservatory order be issued restraining all the Respondents, their agents, officers, or any persons acting under their instructions from implementing, operationalizing, or acting upon the Presidential Proclamation dated 18th August 2025 purporting to establish the Multi-Agency Team on the War Against Corruption (MAT) pending the hearing and determination of this application.
4. That a conservatory order be issued restraining all the Respondents, their agents, officers, or any persons acting under their instructions from implementing, operationalizing, or acting upon the Presidential Proclamation dated 18th August 2025 purporting to establish the Multi-Agency Team on the War Against Corruption (MAT) pending the hearing and determination of the Petition.
5. THAT the costs of this Application be provided for.

THIS APPLICATION is based on the grounds THAT:

1. The MAT violates the independence of institutions such as the EACC and ODPP, as guaranteed under Articles 157, 244, 245, and 249 of the Constitution.
2. This Honourable Court has previously declared similar presidential taskforces unconstitutional, including Benjamin v Attorney General & 6 others; Maraga & 23 others (Interested Parties) [2025] KEHC 4645 (KLR), Law Society of Kenya v Office of the Attorney General & another; Judicial Service Commission (Interested Party) [2021] KEHC 454 (KLR) which sought to usurp or duplicate the role of constitutional organs.
3. The MAT, unless restrained, will interfere with criminal justice processes, threaten due process rights, and irreparably derail public confidence in the fight against corruption.
4. The Petition raises substantial constitutional questions warranting the Court's urgent attention and interim relief.
5. The issues raised herein affect public interest, the rule of law, and the legitimacy of Kenya's constitutional governance architecture, thus requiring urgent judicial intervention.
6. Unless the conservatory orders sought are granted, there is a real and imminent risk that public funds will be unlawfully expended in the operationalization of the Multi-Agency Team (MAT). Such disbursement, if allowed to proceed unchecked, would amount to a misuse of public resources and, in the event the Petition succeeds, would result in irreparable loss and wastage of public funds that cannot be recovered or reversed.
7. Unless this Honorable Court grants the conservatory orders sought, the Petitioners and the general public will continue to suffer irreparable harm and violation of constitutional rights and values.

AND FURTHER SUPPORTED by the affidavit of SHEILA MASINDE and other grounds and reasons to be adduced at the hearing hereof.

DATED THIS 20TH DAY OF AUGUST 2025


DIANA MWANZIA
ADVOCATES FOR THE PETITIONERS

DRAWN AND FILED BY: -

Diana Mwanzia

Advocate

P.O. BOX 198-00200

NAIROBI

EMAIL: litigation@tikenya.org

TO BE SERVED UPON:

THE HON. ATTORNEY GENERAL

Attorney-General Chambers
State Law Office, Harambee Avenue
P.O Box 40112-00100 Nairobi
cl@ag.go.ke ; info@ag.go.ke

ETHICS AND ANTI-CORRUPTION COMMISSION (EACC)

Integrity Centre, Valley Road, Nairobi
P.O. Box 61130–00200, Nairobi, Kenya

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS (ODPP)

ODPP Headquarters, Ragati Road, Upper Hill, Nairobi
P.O. Box 30701–00100, Nairobi, Kenya

DIRECTORATE OF CRIMINAL INVESTIGATIONS (DCI)

DCI Headquarters, Mazingira Complex, Kiambu Road, Nairobi
P.O. Box 30036–00100, Nairobi, Kenya

NATIONAL INTELLIGENCE SERVICE (NIS)

NIS Headquarters, Off Thika Road, Ruaraka, Nairobi
P.O. Box 30091–00100, Nairobi, Kenya

ASSET RECOVERY AGENCY (ARA)

ARA Headquarters, Upper Hill, Nairobi
Rahimtulla Tower, Upper Hill Road
P.O. Box 52404–00200, Nairobi, Kenya

FINANCIAL REPORTING CENTRE (FRC)

UAP Old Mutual Tower, Upper Hill, Nairobi
P.O. Box 10162–00100, Nairobi, Kenya

KENYA REVENUE AUTHORITY (KRA)

Times Tower, Haile Selassie Avenue, Nairobi
P.O. Box 48240–00100, Nairobi, Kenya

CENTRAL BANK OF KENYA (CBK)

CBK Headquarters, Haile Selassie Avenue, Nairobi

P.O. Box 60000–00200, Nairobi, Kenya

PUBLIC PROCUREMENT REGULATORY AUTHORITY (PPRA)

10th Floor, National Bank Building, Harambee Avenue, Nairobi

P.O. Box 58535–00200, Nairobi, Kenya

KATIBA INSTITUTE

House No. 5, The Crescent, Off Parklands Road

PO Box 26586-00100,

Nairobi

litigation@katibainstitute.org

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO.....OF 2025

IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA

-AND-

IN THE MATTER OF: ENFORCEMENT AND INTERPRETATION OF THE
CONSTITUTION

-AND-

IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 129, 131, 132, 157, 244, 245, 249, 250, AND
259 OF THE CONSTITUTION OF KENYA, 2010

-AND-

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLES 10, 129,
132, 157, 244, 245, , 249 AND 252 OF THE CONSTITUTION OF KENYA, 2010

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IN THE MATTER OF: THE CONSTITUTIONAL LAW DOCTRINE OF
SEPARATION OF POWERS.

-AND-

IN THE MATTER OF: THE PRESIDENTIAL PROCLAMATION ON THE
ESTABLISHMENT OF THE MULTI-AGENCY TEAM ON THE WAR AGAINST
CORRUPTION (MAT) DATED 18TH AUGUST 2025

-AND-

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF
RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE
RULES, 2013

-BETWEEN-

TRANSPARENCY INTERNATIONAL KENYA.....1ST PETITIONER

KENYA HUMAN RIGHTS COMMISSION.....2ND PETITIONER

INUKA KENYA NI SISI!.....3RD PETITIONER

- VERSUS -

THE ATTORNEY GENERALRESPONDENT

-AND-

ETHICS AND ANTI-CORRUPTION

COMMISSION (EACC).....1ST INTERESTED PARTY

OFFICE OF THE DIRECTOR OF PUBLIC

PROSECUTIONS (ODPP)2ND INTERESTED PARTY

DIRECTORATE OF CRIMINAL

INVESTIGATIONS (DCI)3RD INTERESTED PARTY

NATIONAL INTELLIGENCE SERVICE (NIS)4TH INTERESTED PARTY

ASSET RECOVERY AGENCY (ARA)5TH INTERESTED PARTY

FINANCIAL REPORTING CENTRE (FRC)6TH INTERESTED PARTY

KENYA REVENUE AUTHORITY (KRA)7TH INTERESTED PARTY

CENTRAL BANK OF KENYA (CBK)8TH INTERESTED PARTY

PUBLIC PROCUREMENT REGULATORY

AUTHORITY (PPRA)9TH INTERESTED PARTY

KATIBA INSTITUTE.....10TH INTERESTED PARTY

THE INSTITUTE OF SOCIAL ACCOUNTABILITY.....11TH INTERESTED PARTY

LAW SOCIETY OF KENYA12TH INTERESTED PARTY

**TO: THE HIGH COURT OF KENYA
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
MILIMANI LAW COURTS
NAIROBI**

PETITIONERS

1. The 1st Petitioner is Transparency International Kenya (TI-Kenya). TI-Kenya is a not-for-profit organization founded in 1999 in Kenya with the aim of developing a transparent and corruption free society through good governance and social justice initiatives, towards establishing a corruption-free world through inter alia advocacy, strategic litigation, research and civic engagements. The address of service for purposes of this petition shall be care of **TRANSPARENCY INTERNATIONAL KENYA of Bishop Magua Building, Ground Floor, Wing B, George Padmore Lane, off Ngong Road P. O. Box 198-00200, Nairobi** and of email address [**litigation@tikenya.org**](mailto:litigation@tikenya.org).
2. The 2nd Petitioner is the Kenya Human Rights Commission (KHRC). KHRC was founded in 1992 and registered in Kenya in 1994 as a national non-governmental organisation. Its mandate is to enhance human rights-centred governance at all levels. The address of service for the purpose of this petition is care of the 1st Petitioner's office.
3. The 3rd Petitioner is INUKA Kenya Ni Sisi!. INUKA is a Kenyan grassroots movement founded in 2009 that seeks to unite Kenyans to forge a collective identity, drive transformation amongst citizens and in leadership to improve the lives of all Kenyans. The address of service for the purpose of this petition is care of the 1st Petitioner's office.

RESPONDENT

4. The Respondent is a public office established under Article 156 of the Constitution of Kenya, 2010 and is sued in this Petition in its capacity as the principal legal advisor and representative of the government in all proceedings other than criminal proceedings. Its

address of service for purposes of this Petition shall be Office of the Attorney General and Department of Justice, (For purposes of this suit service upon the Respondent shall be effected through the 1st Petitioner's office.)

INTERESTED PARTIES

5. The 1st Interested Party is a constitutional commission established under Article 79 of the Constitution and the Ethics and Anti-Corruption Commission Act, 2011. It is mandated to combat and prevent corruption and unethical conduct in Kenya through enforcement, education, and preventive strategies.
6. The 2nd Interested Party is a constitutional office established under Article 157 of the Constitution and further governed by the Office of the Director of Public Prosecutions Act, 2013.
7. The 3rd Interested Party is a directorate within the National Police Service, established under the National Police Service Act, 2011, pursuant to Article 243 of the Constitution.
8. The 4th Interested Party is established under the National Intelligence Service Act, 2012 and is classified as one of the national security organs under Article 239 of the Constitution.
9. The 5th Interested party is a statutory body created under Section 53 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA), 2009 that operates under prosecutorial-like powers and carries out asset recovery actions under judicial supervision, in accordance with court orders.
10. The 6th Interested Party is a body established under the Proceeds of Crime and Anti-Money Laundering Act, 2009 mandated to collect, analyze, and disseminate financial intelligence relating to suspected money laundering and proceeds of crime.
11. The 7th Interested Party is a body established under the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya.
12. The 8th Interested Party is established under Article 231 of the Constitution and the Central Bank of Kenya Act, Cap 491 responsible for formulating and implementing monetary policy, regulating currency issuance, and supervising commercial banks and financial institutions.
13. The 9th Interested Party is a body established under Section 8 of the Public Procurement and Asset Disposal Act, 2015 that oversees, regulate, and monitor public procurement processes to ensure compliance with applicable laws, ethical standards, and transparency.

16. The 12th Interested party is a statutory body established by the Law Society of Kenya Act, 2014 with a statutory mandate under section 4 to assist the Government and the courts in matters relating to legislation, the administration of justice and the practice of law in Kenya; uphold the Constitution of Kenya and advance the rule of law and the administration of justice; and to protect and assist the members of the public in Kenya in matters relating to or ancillary or incidental to the law.

B. STATEMENT OF STANDING AND JURISDICTION

17. Transparency International Kenya and the co-petitioners have standing to bring this petition under Articles 22(1) & (2) and 258(1) & (2) of the Constitution. Article 22(1) states, 'Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened'.
18. Articles 22(2)(a)-(c) authorise Transparency International Kenya to file this petition on behalf of another person who cannot act in their own name, in the interest of a group or class of people, and in the public interest.

C. FACTUAL BACKGROUND OF THE CASE

19. On 18th August 2025, the President of the Republic of Kenya issued a public proclamation establishing a Multi-Agency Team on the War Against Corruption (hereinafter "MAT").
20. According to the proclamation, MAT comprises ten state agencies including the Respondent and the 1st to 9th Interested Parties coordinated by the Executive Office of the President, with the Respondent serving as its secretariat.
21. The MAT has been tasked with coordinating investigations, prosecutions, asset recovery, financial intelligence, and other law enforcement functions.
22. The MAT's mandate includes inter-agency cooperation, strategy development, stakeholder engagement, and reporting on anti-corruption progress.
23. The Constitution separates investigative, prosecutorial, regulatory, and oversight mandates among specific institutions like EACC, ODPP, DCI, KRA, ARA which are designed to function independently and without executive interference.
24. The MAT, by placing these institutions under the coordination of the Executive Office of the President (EOP) and making the Respondent the secretariat, seeks to unconstitutionally direct, oversee, and potentially influence the operations of these bodies.

23. The Constitution separates investigative, prosecutorial, regulatory, and oversight mandates among specific institutions like EACC, ODPP, DCI, KRA, ARA which are designed to function independently and without executive interference.
24. The MAT, by placing these institutions under the coordination of the Executive Office of the President (EOP) and making the Respondent the secretariat, seeks to unconstitutionally direct, oversee, and potentially influence the operations of these bodies.
25. Article 249(2)(b) clearly provides that constitutional commissions and independent offices “are independent and not subject to direction or control by any person or authority.”
26. Article 132 of the Constitution lists the functions of the President, which do not include the power to restructure or centrally coordinate constitutionally independent institutions.
27. The creation of MAT by presidential proclamation is not anchored in any statute and lacks the necessary legal foundation required to confer such sweeping powers.
28. The Constitution distributes anti-corruption, investigative, and prosecutorial mandates across institutions deliberately to avoid concentration of power and abuse.
29. The MAT circumvents this design by centralizing oversight and coordination under the Executive, creating a de facto super-agency without constitutional or legislative legitimacy.
30. This Honourable Court has previously declared unconstitutional similar executive-created bodies that purported to coordinate or direct the work of independent institutions, including Benjamin v Attorney General & 6 others; Maraga & 23 others (Interested Parties) [2025] KEHC 4645 (KLR), Law Society of Kenya v Office of the Attorney General & another; Judicial Service Commission (Interested Party) [2021] KEHC 454 (KLR).

D. PARTICULARS OF CONTRAVENED CONSTITUTIONAL PROVISIONS

Article 1 of the Constitution vests all sovereign power in the people of Kenya, to be exercised only in accordance with the Constitution.

31. The Petitioners aver that the establishment of the MAT by the President, without any constitutional or legislative authority, usurps the sovereign power of the people. It unlawfully consolidates power within the Executive, thereby bypassing established constitutional frameworks and processes through which sovereign power must be exercised.

Article 2(2) prohibits any person from claiming or exercising state authority except as provided for under the Constitution.

32. The Petitioners aver that the President's action in establishing MAT through a proclamation lacks any constitutional or statutory basis, and therefore constitutes an unlawful exercise of state authority in contravention of Article 2(2).

Article 10 outlines the national values and principles that must guide all state organs, including the rule of law, good governance, transparency, accountability, separation of powers, and public participation.

33. The Petitioners aver that the process of establishing MAT failed to adhere to these values. The taskforce was created unilaterally, without public participation, and undermines transparency, separation of powers, and accountability by seeking to coordinate independent constitutional offices under the direction of the Executive.
34. Additionally, the establishment of the MAT was done unilaterally by the Executive without the involvement of Parliament, relevant institutions, or the public. There was no stakeholder engagement, legislative process, or public participation as required under Article 10.
35. Further, MAT's operational structure offends the principle of separation of powers by creating an executive-led body that seeks to coordinate, oversee, or influence institutions that are constitutionally and legally designed to operate independently.

Article 94(5) states that no person or body other than Parliament has the power to make provision having the force of law in Kenya unless that authority is delegated by legislation.

36. The Petitioners aver that the President's proclamation has the effect of creating new legal obligations and mandates for state agencies outside any legislative framework, in violation of Article 94(5). The creation of MAT amounts to backdoor legislation by the Executive.
37. The Petitioners aver that the creation of MAT by Presidential Proclamation has the effect of establishing a new legal and administrative framework through which various independent agencies are coordinated.
38. This constitutes an exercise of legislative power by the Executive without any constitutional or legislative delegation. The proclamation purports to confer duties, powers, coordination roles, and budgetary implications on the agencies involved in MAT, which can only be done through statute passed by Parliament.
39. The President's actions thereby encroach upon the exclusive law-making authority of Parliament, violating Article 94(5) and the broader principle of separation of powers enshrined in the Constitution.

Article 129 provides that executive authority shall be exercised in a manner compatible with the principle of service to the people and in accordance with the Constitution.

40. The Petitioners aver that the purported exercise of executive authority in establishing MAT falls outside the lawful constitutional functions of the President and is neither for the benefit of the people nor compatible with the constitutional structure of governance.
41. The Petitioners aver that the President, in exercising executive authority under Article 129, is constitutionally constrained and must act within the limits of the Constitution. The establishment of MAT, an entity without legal foundation, amounts to executive overreach. It represents the use of executive power to create a governance structure with undefined powers and overlapping mandates over independent institutions.
42. Such actions are not in the public interest but rather risk interfering with institutional independence, weakening democratic accountability, and eroding the proper checks and balances intended by the Constitution. Executive authority cannot be exercised in a vacuum, nor can it override the specific constitutional roles assigned to various independent entities.

Article 132 defines the specific roles of the President.

43. The Petitioners aver that establishing MAT is not among the functions contemplated under Article 132. By purporting to create and oversee an extra-legal structure that coordinates constitutionally independent institutions, the President exceeded his lawful powers.
44. The Petitioners aver that nowhere under Article 132, or any other provision of the Constitution, is the President authorized to create, direct, or coordinate independent commissions, offices, or bodies established by law.
45. The purported establishment of MAT through a Presidential Proclamation arrogates to the President a role not contemplated in the Constitution. By creating a multi-agency team to "coordinate" independent bodies, the Executive is effectively restructuring the accountability framework of the country without legislation or constitutional amendment. This undermines the functional independence of the named institutions and amounts to executive law-making, which is prohibited.
46. The Constitution does not give the President the mandate to establish inter-agency structures that interfere with or override constitutionally independent bodies.

Article 157(10) illustrates that the Director of Public Prosecutions shall not be under the direction or control of any person or authority.

47. The Petitioners aver that by making the 2nd Interested Party a participant in MAT, which is chaired by the Executive Office of the President, the independence of the 2nd Interested Party is directly compromised. This violates the principle of prosecutorial independence and creates a serious risk of executive interference in criminal justice processes.

Article 244 provides for a police service that is professional and accountable, while Article 245 guarantees the independence of the National police service from control or direction by any person except as provided by law.

48. The Petitioners aver that the inclusion of the 3rd Interested party within MAT, a structure controlled by the Executive, undermines its operational independence and unlawfully subjects the police service to executive influence contrary to Article 245(4).

Article 249 mandates that constitutional commissions and independent offices to operate independently and must not be subject to direction or control by any person or authority.

49. The Petitioners aver that by grouping the 1st Interested party, under a coordination framework chaired by the Executive Office of the President, the MAT undermines their constitutionally protected independence and function, violating the express provisions of Article 249(2).

Article 250 provides that commissions shall consist of no more than nine members and outlines how they are to be appointed and operate.

50. The Petitioners aver that the establishment of MAT introduces an extra-legal structure that duplicates or interferes with the mandates of existing independent commissions and offices and creates a parallel authority that is not contemplated by the Constitution.
51. The MAT purports to coordinate, oversee, or unify functions that are expressly designed to be independent and separate under Article 250 and their respective enabling statutes. This offends the constitutional intention behind the creation of independent offices and commissions and creates a risk of undue influence, conflicting mandates, and loss of institutional credibility. It also allows the Executive to bypass formal channels of accountability and oversight by Parliament and the Judiciary.

THE PETITIONER THEREFORE PRAYS FOR:-

The Petitioner humbly prays for the following orders:

1. **A declaration** that the presidential proclamation dated 18th August 2025 establishing the Multi-Agency Team on the War Against Corruption (MAT) is unconstitutional, null and void ab initio.
2. **A declaration** that the coordination of independent offices and commissions by the Executive Office of the President, without express constitutional or legislative authority, violates Articles 1, 2, 10, 129, 132, and 249 of the Constitution.

3. **An order of prohibition** restraining the Respondent and the 1st-9th Interested parties from acting upon, participating in, or operationalizing the directives of the MAT as currently constituted.
4. **An order compelling** the Respondent to uphold the constitutional independence of each institution involved in the fight against corruption, and to act strictly within their constitutional mandates.
5. **Such other or further relief** as this Honourable Court may deem just and expedient in the interest of the Constitution and the rule of law.
6. **Costs** of this Petition.
 - a. Any other orders this Court considers appropriate to protect the Constitution and the interests of justice.

DATED THIS 20TH DAY OF AUGUST 2025



DIANA MWANZIA
ADVOCATES FOR THE PETITIONERS

DRAWN AND FILED BY: -

Diana Mwanzia
Advocate
P.O. BOX 198-00200
NAIROBI.
EMAIL: litigation@tikenya.org

TO BE SERVED UPON:

THE HON. ATTORNEY GENERAL

Attorney-General Chambers
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THE ATTORNEY GENERALRESPONDENT

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OFFICE OF THE DIRECTOR OF PUBLIC

PROSECUTIONS (ODPP)2ND INTERESTED PARTY

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THE INSTITUTE OF SOCIAL ACCOUNTABILITY.....11TH INTERESTED PARTY

LAW SOCIETY OF KENYA12TH INTERESTED PARTY

AFFIDAVIT IN SUPPORT OF THE PETITION AND THE NOTICE OF MOTION

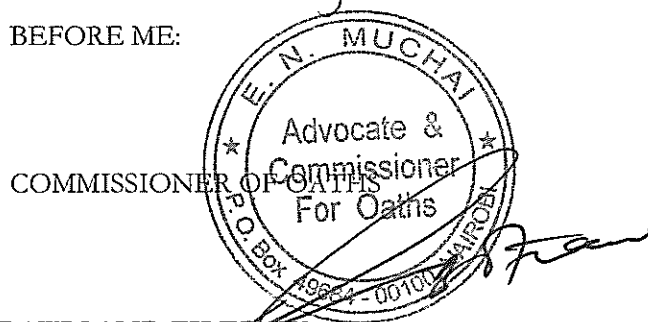
APPLICATION

I, Sheila Masinde, of care of Post Office Box 198-00200, Nairobi in the Republic of Kenya, and make oath and state as follows:

1. **That** I am an adult of sound mind, and the Executive Director at Transparency International Kenya, the 1st Petitioner, competent to swear this affidavit.
2. **That**, I am familiar with the facts in this issue.
3. **That** on 18th August 2025, the President of the Republic of Kenya issued a public proclamation establishing a Multi-Agency Team on the War Against Corruption (hereinafter “MAT”). *Annexed is a copy of the Presidential Proclamation marked as SM-1.*
4. **That** according to the proclamation, the MAT comprises ten state agencies, including the Respondent and the 1st to 9th Interested Parties, and is coordinated by the Executive Office of the President, with the Respondent serving as its secretariat.
5. **That** its stated mandate includes inter-agency cooperation, development of joint strategies, stakeholder engagement, and the coordination of communication and reporting on anti-corruption progress.
6. **That** under the Constitution, investigative, prosecutorial, regulatory, and oversight powers are distributed across specific bodies , all of which are designed to function independently and without influence or control from the Executive.
7. **That** by placing these bodies under the coordination of the Executive Office of the President and making the Respondent the secretariat, the MAT seeks to unconstitutionally direct, oversee, and potentially influence their operations in violation of their institutional independence.
8. **That** Article 249(2)(b) of the Constitution expressly provides that constitutional commissions and independent offices “are independent and not subject to direction or control by any person or authority.”
9. **That** Article 132 of the Constitution outlines the functions of the President and does not include the power to restructure, coordinate, or direct constitutionally independent institutions or commissions.

10. **That** the creation of MAT through a presidential proclamation is not supported by any statute and lacks the legal framework necessary to confer the powers and responsibilities it purports to exercise.
11. **That** the MAT, being a non-statutory body, lacks any legal foundation and cannot lawfully exercise oversight or coordination over independent constitutional offices.
12. **That** the Constitution deliberately separates and distributes anti-corruption, investigative, and prosecutorial mandates across distinct bodies to prevent the centralization of power and guard against abuse.
13. **That** the MAT effectively circumvents this constitutional design by centralizing oversight and coordination under the Executive, thereby creating a de facto super-agency without any constitutional or legislative legitimacy.
14. **That** this Honourable Court has in the past declared unconstitutional similar executive-created taskforces and committees that purported to direct or coordinate independent bodies, including in *Benjamin v Attorney General & 6 others; Maraga & 23 others (Interested Parties)* [2025] KEHC 4645 (KLR), and *Law Society of Kenya v Office of the Attorney General & another; Judicial Service Commission (Interested Party)* [2021] KEHC 454 (KLR). *Annexed is a copy of the respective judgements marked as SM-2.*
15. **That**, what I have deponed to in this affidavit in support of the Application and the Petition is based on facts within my knowledge and belief and in accordance with the Oaths and Statutory Declarations Act, Cap 20.

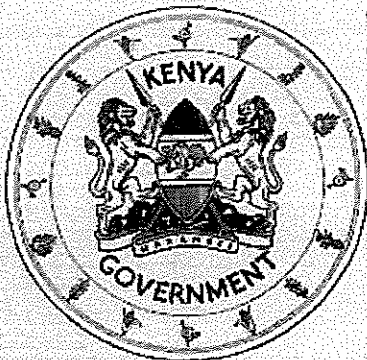
Sworn at Nairobi by the said Sheila Masinde
 this^{20th} of^{August} 2025 in Nairobi
 BEFORE ME:



DRAWN AND FILED BY: -

Diana Mwanzia
 Advocate
 P.O. BOX 198-00200
NAIROBI
 EMAIL: litigation@tikenya.org

}
 }
 }^{Sheila Masinde}
 } Deponent
 }
 }



This is the exhibit marked "SM1"
referred to in the annexed affidavit
of SHEILA MASINDE
sworn before me this 20th
declared August 2025 at Nairobi
[Signature]
Commissioner for Oaths

EXECUTIVE OFFICE of
THE PRESIDENT

PRESIDENTIAL PROCLAMATION

ON THE ESTABLISHMENT of MULTI-AGENCY TEAM ON WAR AGAINST CORRUPTION

WHEREAS,

The Government of the Republic of Kenya is steadfast in its commitment to reinforcing a "whole-of-government" approach in the fight against corruption. The government aims to implement collaborative strategies that ensure more efficient, synergized, and impactful interventions across all arms of government.

WHEREAS,

The Constitution of Kenya imposes an obligation on all Kenyans to combat corruption. Additionally, Article 156(4)(a) of the Constitution, in conjunction with the Office of the Attorney General Act, Cap 6A, and Executive Order No. 1 of 2025, designates the Office of the Attorney General and the State Department of Justice as the lead institution for providing policy and legal direction on matters of governance, ethics, and integrity.

WHEREAS,

A Multi-Agency Team on War Against Corruption (MAT) was recommended for establishment in 2015 by the Taskforce on the Review of the Anti-Corruption Legal, Policy and Institutional Framework. A multi-agency ad hoc team has already engaged in collaborative anti-corruption operations with a measure of success.

WHEREAS,

Executive Order No. 1 of 2025 envisions the establishment of the MAT under the State Department for Justice, Human Rights, and Constitutional Affairs (SDOJHRCA).



WHEREAS,

The enactment of the Conflict of Interest Act, 2025 and the amendments to the Proceeds of Crime and Anti-Money Laundering Act have strengthened the fight against corruption by providing greater impetus and establishing a more robust legal framework.

WHEREAS,

Articles 10, 129(2), 131(1)(b), 131(2)(a), and 201 impose on the President the mandate to exercise executive authority in safeguarding and upholding the Constitution and, consequently, in ensuring that public resources are utilized responsibly, in an open and accountable manner;

NOW THEREFORE, I, WILLIAM SAMOEI RUTO, President and Commander-in-Chief of the Kenya Defence Forces, by the authority vested in me by the Constitution, do hereby proclaim **THAT:**

1. ESTABLISHMENT OF A MULTI-AGENCY TEAM ON WAR AGAINST CORRUPTION

A Multi-Agency Team on War Against Corruption (MAT) is hereby established with the strategic objective of creating synergy and inter-agency cooperation in the fight against corruption, economic crimes, and related offenses.

The MAT shall comprise the following entities and any other organs of government that may wish to collaborate:

- i.** Executive Office of the President (EOP) (Chairperson);
- ii.** Office of the Attorney General (Secretary);
- iii.** National Intelligence Service (NIS);
- iv.** Ethics and Anti-Corruption Commission (EACC);
- v.** Office of the Director of Public Prosecutions (ODPP);
- vi.** Directorate of Criminal Investigations (DCI);
- vii.** Financial Reporting Centre (FRC);
- viii.** Asset Recovery Agency (ARA);



- ix.** Kenya Revenue Authority (KRA);
- x.** Central Bank of Kenya (CBK); and
- xi.** Public Procurement Regulatory Authority (PPRA).

The membership is mandated to co-opt additional representation from designated agencies to further enhance its objectives.

2. FUNDING AND COOPERATION

The MAT shall, to the greatest extent possible, foster cooperation, coordination, and collaboration to enhance the effectiveness of the fight against corruption. For this purpose, the team shall be funded from the budgetary allocations of its member entities and other sources.

3. OBJECTIVES

The objectives of the MAT shall, among others, include:

- i.** Enhancing cooperation, coordination, and collaboration among the agencies;
- ii.** Engaging other relevant agencies, organs of government and private sector to enhance the effectiveness of the anti-graft campaign;
- iii.** Identifying resource needs for each agency and collaborating organs and seek support for the same;
- iv.** Sharing best practices and approaches for tackling corruption in Kenya;
- v.** Developing effective communication strategies for awareness creation on the gains and achievements made in the fight against corruption; and
- vi.** Engaging both domestic and international relevant agencies for effectiveness and optimum realization of the fight against



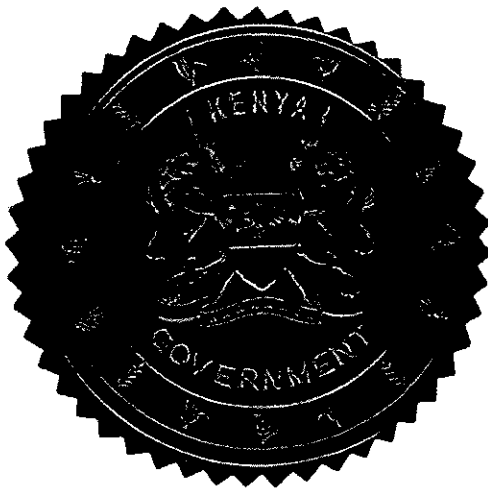
EXECUTIVE OFFICE *of*
THE PRESIDENT

economic crimes, organized crimes and recovery of proceeds of crime.

4. LEADERSHIP STRUCTURE

The Executive Office of the President shall chair the Multi-Agency Team, while the Office of the Attorney General shall head the Secretariat.

IN WITNESS WHEREOF, I hereunto have set my **Hand and caused** the **Public Seal of the Republic** to be affixed unto this Presidential Proclamation on this the 18th Day of August in the **YEAR OF OUR LORD TWO THOUSAND AND TWENTY-FIVE.**



WILLIAM SAMOEI RUTO,
President.



This is the exhibit marked "SM2" referred to in the annexed affidavit declaration of SHEILA MAKINDE sworn declared before me this 20th day of August 2025 at Nairobi. Commissioner for Oaths

Benjamin v Attorney General & 6 others; Maraga & 23 others
(Interested Parties) (Petition E048 of 2023) [2025] KEHC 4645 (KLR)
(Constitutional and Human Rights) (10 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4645 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E048 OF 2023
LN MUGAMBI, J
APRIL 10, 2025

BETWEEN

MAGARE GIKENYI J. BENJAMIN PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

NATIONAL TASK FORCE ON IMPROVEMENT OF THE TERMS
AND CONDITIONS OF SERVICE AND OTHER REFORMS FOR
MEMBERS OF NATIONAL POLICE SERVICE AND KENYA PRISONS
SERVICE 2ND RESPONDENT

NATIONAL POLICE SERVICE COMMISSION 3RD RESPONDENT

KENYA PRISONS SERVICE 4TH RESPONDENT

PUBLIC SERVICE COMMISSION 5TH RESPONDENT

INDEPENDENT POLICING OVERSIGHT AUTHORITY 6TH RESPONDENT

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS . 7TH RESPONDENT

AND

RTD CHIEF JUSTICE DAVID KENANI MARAGA INTERESTED PARTY

CAROLE KARIUKI INTERESTED PARTY

IBRAHIM JILLO GUYO INTERESTED PARTY

MOFFAT MURIITHI KANGI INTERESTED PARTY

JOHN OLE MOYAKI INTERESTED PARTY



IBRAHIM JILLO GUYO	INTERESTED PARTY
RICHARD KIRUNDI	INTERESTED PARTY
ELIZABETH MUENI	INTERESTED PARTY
ROSELINE ODEDE	INTERESTED PARTY
JOASH ODHIAMBO DACHE	INTERESTED PARTY
DOREEN MUTHAURA	INTERESTED PARTY
ALBERT MWENDA	INTERESTED PARTY
TERRY CHEBET MAINA	INTERESTED PARTY
HASSAN SHEIKH MOHAMED	INTERESTED PARTY
SIMIYU WERUNGA	INTERESTED PARTY
MUTUMA RUTEERE	INTERESTED PARTY
ANNE IRERI	INTERESTED PARTY
STEPHEN KAYONGO	INTERESTED PARTY
JAFAR MOHAMED	INTERESTED PARTY
SAMMY CHEPKWONY	INTERESTED PARTY
KHADIJA MIRE	INTERESTED PARTY
OMWANZA OMBATI	INTERESTED PARTY
JOY MDIVO MASINDE	INTERESTED PARTY
ROSEMARY KAMAU	INTERESTED PARTY

JUDGMENT

Introduction

1. The petition dated 16th February 2023 is supported by the sworn affidavit of the petitioner of similar date.
2. The petition assails the decision of the President of Kenya, H.E. Dr. William Samoei Ruto to establish the National Task Force on Improvement of the terms and Conditions of Service and other Reforms for Members of National Police Service and Kenya Prisons Service on the ground that it encroaches on the independent mandate of the 3rd respondent as an independent constitutional commission because the Taskforce roles and those of the 3rd Respondent are duplicative.
3. The petitioner thus contends that the establishment of the said Task Force offends Articles 3, 10, 73, 75, 246, 247, 248 and 249 of the *Constitution*.
4. He seeks the following reliefs:
 - a. A declaration that task forces involving independent commissions and independent offices ought to be established by the institutions themselves and not by the executive or any other persons.



- b. A declaration that the establishment of the National Task Force On Improvement of The Terms and Conditions of Service and other Reforms For Members of National Police Service and Kenya Prisons Service through a gazette notice No-15792 Vol.CXXIV-No-281 dated 21st December 2022 to the extent that it was established by the executive instead of independent commissions(National Police Commission) violates inter alia Article 3, 10, 73, 75, 246, 247, 248 and 249 and other relevant laws is unconstitutional and therefore, invalid, null and void ab initio.
- c. The Court do issue an order of judicial review by way of certiorari, quashing the gazette notice No-15792 Vol.CXXIV-No-281 dated 21st December 2022 or/and any document that established the National Task Force On Improvement of The Terms and Conditions of Service and other Reforms for Members Of National Police Service and Kenya Prisons Service and any other consequential documents and/or policy born out of it.
- d. An order of judicial review by way of prohibition, prohibiting the respondent and interested parties or any other person from acting as members of the National Task Force On Improvement of The Terms and Conditions of Service and other Reforms For Members Of National Police Service and Kenya Prisons Service through a gazette notice No.15792 Vol.CXXIV-No-281 dated 21st December 2022 except as per the law.
- e. An order of judicial review by way of prohibition, barring the respondent and interested parties or any other person from presenting the findings and/or recommendations born out of the National Task Force On Improvement of the Terms and Conditions of Service and other Reforms For Members of National Police Service and Kenya Prisons Service through a gazette notice No-15792 Vol.CXXIV-No-281 dated 21st December 2022 to the president or to any other person.
- f. The Court do issue an order that the recommendations/action points of National Task Force On Improvement of The Terms and Conditions of Service and other Reforms For Members Of National Police Service and Kenya Prisons Service through a gazette notice No-15792 Vol.CXXIV-No-281 dated 21st December 2022 has no force in law, and therefore are null and void.
- g. An order do issue to the respondents and/or interested parties or any other person either by themselves, their agents and/or any other person(s) whatsoever from processing, accepting and/or acting and/or giving effect to the gazette notice No-15792 Vol.CXXIV-No-281 dated 21st December 2022 and/or any document born out of this task force.
- h. Any other order or/and modification of petitioner's prayer(s) which this Court may deem fit so as to achieve objects of justice for majority of Kenyans as a whole.
- i. Costs of this petition to be borne by respondents.

Petitioner's Case

5. The petitioner avers that the President on 21st December 2022 established the impugned Taskforce, the 2nd respondent herein with an aim of identifying the challenges affecting the National Police Service and Kenya Prisons Service, their remuneration among other issues.
6. Particularly, the 2nd respondent's objects were to: identify the legal, policy, administrative, institutional and operational constraints on effective service delivery by the National Police Service (hereafter, NPS) and the Kenya Prisons Service (hereafter, KPS); identify and recommend legal, policy, administrative,



institutional and operational reforms in the NPS and KPS for effective service delivery; review and recommend improvement of the terms and conditions of service; review and recommend improvement of matters relating to welfare of officers in all cadres of the NPS and KPS and all other matters incidental to the optimal service delivery by the NPS and KPS and review and recommend on any other matter incidental to improved terms and conditions of service and other reforms in the NPS and KPS.

7. The petitioner citing Article 246(3) of the Constitution and Section 10 of the National Police Service Commission Act takes issue with the formation of the 2nd respondent as is a replication of the role of the 3rd respondent which is an independent commission. He asserted that the function bestowed on the 2nd respondent is constitutionally and legally a mandate assigned to the 3rd respondent.
8. He faulted the President's action as calculated to direct the 3rd respondent which is an independent commission against the dictates of the Constitution thereby contravening Article 249(2) of the Constitution and thus left unchallenged it threatens to erode the independence of independent commissions and give way to abuse of public power.
9. The Petitioner embraces the need for collaboration among the arms of government but nonetheless asserts that it should be done without usurping the legal mandate of other bodies as is manifest from the 2nd respondents Terms of Reference (TOR).
10. The petitioner further avers that the establishment of the 2nd respondent does not align with the principle of prudent use of the scarce public resources in an already struggling economy. He avers that this fact was also reported by the World Bank in its report dubbed Kenya's GDP Contracts under Weight of COVID-19, Impacting Lives and Livelihoods. He states thus that this is direct contravention to Article 201(d) and 232 of the Constitution.
11. The Petitioner states that Kenyans legitimately expect that the respect for the law by the respondents by ensuring that decision made in establishment of Task Forces do not conflict with the constitutional responsibilities of independent offices or commissions.

Respondents' Case

12. The 2nd, 4th, 5th and 7th respondents' responses and submissions are not in the Court file or Court Online Platform (CTS).
13. In regard to 5th Respondent, it may be for the reason that on the 1st March, 2023; Hon. Lady Justice Mugure Thande discharged the 5th Respondent (Public Service Commission) from the proceedings.
14. As for the 2nd and 4th Respondent, the Hon. Attorney General was appearing on its behalf (1st Respondent) and also, 2nd and 4th Respondents.

1st Respondents' Case

15. In its response to the petition, the 1st respondent filed grounds of opposition dated 3rd March 2023; stating as follows:
 - i. The petitioners herein have not demonstrated before the Court how the 1st respondent has violated his constitutional rights.
 - ii. The present application fails to meet the threshold of a constitutional petition both in form as stipulated in Rule 10 of the Mutunga Rules and in substance as held in the locus classicus



Anarita Karimi Njeri v R (1976-1980) KLR 1272 which requires that a petitioner ought to identify and specify how constitutional provisions have been violated.

- iii. The petitioner herein has misinterpreted the Constitution, specifically with regard to the executive powers of the President.
- iv. The question of whether or not the President has the power to set up a Taskforce was considered in *Thirdway Alliance Kenya & another v Head of the Public Service-Joseph Kinyua & 2 others; Martin Kimani & 15 others (Interested Parties)* [2020] eKLR.
- v. The contention by the petitioner that the 2nd respondent's establishment by the President is a usurpation of the 3rd respondent's constitutional and statutory mandate is an incorrect interpretation of the law, specifically in relation to the 3rd respondent.
- vi. The petitioner does not take issue with the objectives of the 2nd respondent or the Terms of Reference, but he is rather concerned with the appointing authority of its member, a concern stemming from an erroneous interpretation of the law.
- vii. The 2nd respondent was set up with the purpose of identifying the challenges faced by the national police service, whether legal, policy, institutional, operational or otherwise and make recommendations for improvement. The role of the 2nd respondent is fact-finding for a limited term, as well as monitoring and evaluating the uptake of the recommendations in the previous Police Reforms Taskforces.
- viii. There is no mention or indication that the 2nd respondent will be usurping the 3rd respondent's constitutional or statutory mandate.
- ix. Judicial intervention should be limited to acts that are manifestly in breach of the law or where the Court is satisfied that the decision maker reached a wrong decision influenced by other considerations other than the law, evidence and the duty to serve the interest of justice. The petitioner has not adduced evidence of the same.
- x. The claims of unconstitutionality of the appointment of the 2nd respondent are based on a clear misunderstanding of the extent and exercise of the executive powers of the President.
- xi. The petition is defective both in form and in substance and is therefore unmerited and brought in bad faith.
- xii. It is in the public interest and in the interest of justice that the current petition be dismissed with costs as the same is an abuse of court process.

3rd Respondent's Case

16. In reaction to the petition, the 3rd respondent filed its Replying Affidavit by its Chief Executive Officer, Peter Kiptanui Leley sworn on 3rd October 2023.
17. He swore that the President as the Head of the Executive is conferred with power under the Constitution and the Laws to establish a Taskforce to inquire into, review and recommend any improvements on any matters within the executive arm.
18. He stated that the petitioner has misconstrued the mandate of the 3rd respondent by alleging that the 2nd respondent is carrying out its functions particularly because the 3rd respondent does not exercise authority over the 4th respondent. Equally, he asserts that the petitioner's claim that the 2nd respondent's Terms of Reference duplicates the 3rd respondent's role is flawed.



19. He averred that Section 10 of the *National Police Service Act* provides that it is the function of the Inspector General of Police to co-ordinate and audit police operations while the 3rd respondent responsible for their welfare, which is human capital management. As such, he argues that the 3rd respondent cannot purport to establish a Taskforce for the National Police Service as it is not within its mandate to do so.
20. He further avers that Article 239(5) and 245 (4) of the *Constitution* allows policy direction and supervision over the National Police Service by other authorities including the Cabinet Secretary for Police Services (Interior and National Administration) and the President. He informs that the 3rd respondent is represented in the Taskforce by the 5th interested party.
21. It is further asserted that the policy recommendations that will arise as a result of the 2nd respondent's function will also be subjected to public participation. This is since public bodies are bound to comply with the dictates of the Article 10 of the *Constitution*. As such, he contends that the petitioner can present his views on this platform.
22. He further contends that the petitioner is obliged to prove his claims that insinuate that the 3rd respondent has ceded its mandate to the 2nd respondent or failed its constitutional duties. In his opinion, these claims are unfounded and an abuse of the Court process.
23. In addition, he claims that the 3rd respondent in its actions has neither acted illegally, irregularly or irrationally as claimed. Consequently, he contends that the petitioner's case is a gross misrepresentation of facts before this Court and is thus unmerited and brought in bad faith.

6th Respondent's Case

24. The 6th respondent in response filed grounds of opposition dated 6th March 2023. This on the premise that:
 - i. The 6th respondent has been wrongly enjoined in the notice of motion application and petition.
 - ii. The 6th respondent is not a member of the National Task Force on improvement of the terms and conditions and other reforms for members of the National Police Service and the Kenya Prisons Service. (See page 64 of the petitioner's bundle of documents of the Gazette notice on membership of the task force).
 - iii. The petitioner has not demonstrated the violation or threatened violation of his fundamental rights and freedoms and the manner in which his rights have been violated or threatened by the 6th respondent.
 - iv. The notice of motion and petition do not disclose any reasonable cause of action against the 6th respondent as no orders are sought against the 6th respondent.
 - v. The petition is misconceived, mischievous and an abuse of the due process of this Court and should therefore be dismissed against the 6th respondent.

Interested Parties Case

25. The interested parties' responses and submissions are not in the Court file or Court Online Platform (CTS).



Petitioner's Submissions

26. The petitioner on 10th May 2023, filed submissions and highlighted the issues for discussion as: whether the President's actions of purporting to create a task force on behalf and /or whose functions/roles is to be performed by an independent body like the 3rd respondent is legal and does the Constitution envisage control and direction of independent offices by the executive and second, whether the executive (presidential) powers extend to formation of taskforces for independent commissions.
27. On the onset, the petitioner submitted that rule of law should be maintained while interpreting the Constitution. Reliance was placed in Institute of Social Accountability & Another v National Assembly & 4 Others High Court, (2015)eKLR where it was held that:

“ [T]his Court is enjoined under Article 259 of the Constitution to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution.”

28. Like dependence was placed in Entick v Carrington (1965) 2 Wils, Hardware & Ironmongery v Attorney General (E.A) 1972, Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested Parties) [2020] eKLR.
29. The petitioner relying on his averments in the first issue submitted that the independent commissions mandate ought not to be interfered with as is made manifest in this case. Reliance was placed in In the Matter of Interim Independent Electoral Commission [2011] eKLR where it was held that:

“ It is a matter of which we take judicial notice, that the real purpose of the “independence clause”, with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government.”

30. On this premise, the petitioner asserted that the President's and respondents' actions of purporting to create a task force whose functions and role is meant to be performed by an independent body is illegal and also not envisaged in the Constitution.
31. Equally, the petitioner submitted that while the respondents relied on Article 132 of the Constitution to argue that the President has power to establish a Taskforce, Articles 246, 248(2)(j) and 249 of the Constitution in view of the 3rd respondent, does not give power to the President to establish a Taskforce on its behalf. Reliance was placed in Republic v Vice Chancellor Moi University & 2 others Ex parte Benjamin J. Gikenyi Magare [2019] eKLR where it was held that:

“ illegality is when the decision – making authority commits an error of law in the process of taking or making the act, the subject of the complaint acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.....irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural impropriety is when there is a failure to act fairly on the part of the decision – making authority in the process of taking a decision. The unfairness may be its none observance of the Rules of natural justice or to act with



procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

32. Like dependence was placed in Republic v Public Procurement Administrative Review Board & 2 others Ex parte Rongo University [2018] eKLR and Pastoli v kabala District Local Government Council & others (2008) 2 EA 300.
33. According to the petitioner, the respondents’ actions also violated his and the Kenyans legitimate expectations since it was expected that they would honour and uphold the mandate of the independent offices by not interfering with it. In support reliance was placed in Oindi Zaippeline & 39 others v Karatina University & another [2015] eKLR where it was held that:
- “Legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise. An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfill a promise.”
34. The petitioner further submitted that there was no justifiable reason in law why the President would utilize the scarce financial resources to form a Taskforce that essentially is duplicating the 3rd respondent’s mandate. Reliance was placed in Republic v Chief Licensing Officer & another Ex Parte Tom Mboya Onyango (2017)eKLR where it was held that:
- “The law is that in the ordinary way and particularly in cases which affect life, liberty or property, the executive should give reasons and if he gives none the court may infer that he had no good reasons, similarly where the reason given by the executive is not one of the reasons upon which it is legally entitled to act, the court is entitled to intervene since the action by the executive would then be based an irrelevant matter....”
35. Additional dependence was placed in Wanjala v Cleopa Mailu & 4 others [2016] eKLR.
36. In view of the foregoing, the petitioner submitted that the petition is merited and worthy of the reliefs sought.

1st Respondent

37. State Counsel, Jackline Kiramana for the 1st respondent filed submissions dated 2nd July 2023 and set out the issues for consideration as: whether the establishment of the Taskforce is unconstitutional and whether the terms of reference for the Taskforce are a duplication of the 3rd respondent’s constitutional and statutory mandate.
38. On the first issue, Counsel submitted that Article 129 of the Constitution is the legal foundation upon which the President may establish a Taskforce while the authority to do so envisaged under Article 131 of the Constitution. To support this, Counsel relied in Thirdway Alliance Kenya (Supra) where it was held that:

“93. In determining the nature of a power, it is helpful to have regard to how closely the decision is related to the formulation of policy, on the one hand, or its application, on the other. A power that is more closely related to the formulation of policy is likely to be executive in nature and, conversely, one



closely related to its application is likely to be administrative. The President's power to appoint a Taskforce is closely related to his broad, policy-formulating function, hence it is an executive power. It is a mechanism whereby the President can obtain information and advice so as to achieve his desired goal, in this case of promoting and ensuring national unity among the other terms of reference for the Taskforce."

39. Counsel also relied in *Masetlha v President of the Republic of South Africa and Another* (CCT 01/07) [2007] ZACC 20 where a similar position was upheld.
40. Counsel submitted that the plight of the National Police Service and Kenya Prison Service warranted urgent intervention which the President has power to provide under his constitutionally mandated executive power. Counsel additionally asserted that Article 132 (1) (c) of the *Constitution* provides that the President is to once every year, report in an address to the nation, on all measures taken and the progress achieved in the realization of the national values, referred to in Article 10. Accordingly, Counsel submitted that the 2nd respondent's purpose is for the good of the National Police Service and the Kenya Prisons Service pursuant to Article 43 of the *Constitution*.
41. Reliance was placed in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013]eKLR where the Court in paragraph observed as follows:

"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."
42. Equal reliance was placed in *Democratic Alliance v The President of the Republic of South Africa & 3 others*: CCT 122/11 [2012] ZACC 24.
43. On the second issue, Counsel submitted that the petitioner had misinterpreted the law in asserting that there is a duplication of roles as between the 2nd and 3rd respondent's. Counsel submitted that the Terms of Reference of the 2nd respondent are distinct from the mandate of the 3rd respondent. This is because the 2nd respondent's role is fact finding on the objectives set, so as to assist both the Executive and the 3rd respondent to improve the working conditions of the National Police Service and the Kenya Prisons Service. Considering this, Counsel submitted that the 2nd respondent's report will assist the 3rd respondent in the implementation of its constitutional and statutory Mandate.

3rd Respondent

44. Senior Litigation Counsel, Valerie Kasaiyian for the 3rd respondent filed submissions dated 6th November 2023. The issues for determination were identified as: whether the establishment of the National Taskforce on Improvement of the Terms and Conditions of Service and other Reforms for Members of the National Police Service and Kenya Prisons Service by the President as Head of Executive is constitutional and whether the National Taskforce on Improvement of the Terms and Conditions of Service and other Reforms for Members of the National Police Service and Kenya Prisons Service is usurping the role of the National Police Service Commission.



45. Counsel in the first issue submitted that the President's power to establish a Taskforce is provided for under Section 131 and 132 of the Constitution. It was further submitted that the National Police Service and the 4th respondent fall within the ambit of the Executive arm. This point was also buttressed by the opine in the case of Thirdway Alliance Kenya (supra) which was cited in support.
46. In view of this, Counsel submitted that the petitioner is asking the Court to interfere with the Executive mandate which in turn invokes the doctrine of separation of powers. This is because as pointed out in Third way Alliance Kenya (supra), the President has latitude to make executive decisions in a manner that facilitates the discharge of his constitutional functions.
47. On the second point, Counsel submitted that the functions of the 3rd respondent are stipulated under Article 246 of the Constitution and recapped under Section 10(1) of the National Police Service Commission Act. In a nutshell, the 3rd respondent is responsible for the welfare and human resource management of the National Police Service.
48. In addition, Counsel submitted that the 3rd respondent is required to co-operate with other state organs on any matter that the Commission considers necessary and to promote the values and principles referred to in Articles 10 and 232 of the Constitution throughout the Service.
49. Furthermore, Counsel added that the operations of the National Police Service are the constitutional mandate of the Inspector General who exercises independent command of the Service however may receive policy directions from the Cabinet Secretary for Interior and Administration of National Government. On the other hand, the administration and operations of the Kenya Prisons Service is under the Commissioner - General of Prisons subject to the directions of the Cabinet Secretary for Interior and Administration of National Government.
50. Counsel submitted that the 3rd respondent contrary to the petitioner's assertions does not have any mandate over the affairs of the 4th respondent. Counsel argued that the assertion by the petitioner that it is the responsibility of the 3rd respondent to establish a taskforce to perform the Commission's functions is also an absurd interpretation of the Constitution and the Law. To buttress this point reliance was placed in Okoti v Attorney General & 5 others [2021]eKLR where it was held that:

"The principles of interpretation also applied to the construction of statutes. There were other important principles which applied to the construction of statutes as well as to the construction of a constitution such as:

- a. Presumption against absurdity – a court was to avoid a construction that produced an absurd result;
- b. The presumption against unworkable or impracticable result - a court was to find against a construction which produced unworkable or impracticable result;
- c. Presumption against anomalous or illogical result - a court was to find against a construction that created an anomaly or otherwise produced an irrational or illogical result;
- d. The presumption against artificial result – a court was to find against a construction that produced artificial result and,



- e. The principle that the law should serve public interest – the court was to strive to avoid adopting a construction which was in any way adverse to public interest, economic, social and political or otherwise.”
51. Counsel thus contended that the petitioner is urging the Court to interpret the law in an absurd manner that will produce an unworkable and illogical result. Counsel further emphasized that government policies emanate from cabinet not constitutional commissions as they do not have the mandate to do so. Reliance was placed in the Matter of Interim Independent Electoral Commission [2011] eKLR where it was held that:
- “[60] While bearing in mind that the various Commissions and independent offices are required to function free of subjection to “direction or control by any person or authority”, we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. These Commissions or independent offices must, however, operate within the terms of the *Constitution* and the law: the “independence clause” does not accord them carte blanche to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the *Constitution* and the law. For due operation in the matrix, “independence” does not mean “detachment”, “isolation” or “disengagement” from other players in public governance. Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the *Constitution* has instituted the safeguards in question. The moral of this recognition is that Commissions and independent offices are not to plead “independence” as an end in itself; for public-governance tasks are apt to be severely strained by possible “clashes of independences”.
52. To this end, Counsel submitted that the establishment of the 2nd respondent by the President was constitutional as was done in exercise of his executive authority. Correspondingly, Counsel argued that the allegation of usurpation of power was misplaced, as the 2nd respondent’s Terms of Reference are broad and touch on various mandates that do not fall under the ambit of the 3rd respondent.

6th Respondent

53. The 6th Respondent’s Counsel, Mercy Waitherero filed submissions dated 6th November 2023 and outlined the key issues as: whether the petitioner has raised a reasonable cause of action against the 6th respondent and whether the 6th respondent should remain as a respondent in the petition.
54. According to Counsel, the petitioner in his petition failed to establish a reasonable cause of action against the 6th respondent. Counsel also pointed out that the 6th respondent is not a member of the 2nd respondent. This was evident from the attendant Gazette Notice which outlined the persons and bodies who would be in the Taskforce. Counsel relying in Emmanuel Mustime v Uganda Electrical



Transmission Company Ltd (High Court Civil Suit No 581 of 2012) noted that the Court observed that ‘a cause of action can only be disclosed where it is established that the plaintiff has a right; the said right has been violated and the defendant is responsible or liable for the breach’.

55. Like dependence was placed in *Investment and Mortgages Bank Limited v Nancy Thumari & 3 others* (2015)eKLR.
56. In view of this, Counsel stressed that the petitioner had failed to specifically identify the right that had been infringed by the 6th respondent and the manner in which the infringement had occurred. Likewise, that the petitioner had not sought any relief against it. Reliance was placed in *S W M v G M K* [2012] eKLR where it was held that:

“It is an established principle that where a party alleges a breach of fundamental rights and freedoms, he or she must state and identify the right infringed and how it is infringed in respect to him. (See the case of *Anarita K Njeru v Republic* (No. 1) KLR 154 [1979]). This principle is well founded and was explained in *John Kimani Mwangi v Town Clerk Kangema* Nairobi Petition 1039 of 2007 (Unreported) the court said this about the requirement of specificity, “Our courts have over the years enforced specific rights which are defined by each section of the bill of rights. It is not a general jurisdiction to enforce all rights known to man but specific rights defined and protected by the *Constitution*. It is not sufficient to rely on a broad notion of unconstitutionality but rather point to a specific provision of the *Constitution* that has been abridged”.

57. Additional dependence was placed in *Skair Associates Architects v Evangelical Lutheran Church of Kenya and 4 others* (2015) eKLR.
58. Given the circumstances, Counsel urged that the 6th respondent ought to be struck out from the petition. Reliance was placed in *Investment and Mortgages Bank Limited* (supra) where it was held that:

“a court can strike out from the proceeding a party who is wrongly enjoined where there is clear evidence that that party ought not to have been sued in the first instance or where it is apparently clear that there are other parties to the suit who are properly sued and the liability attributed to them is not to be shared with the party who is complaining to have been wrongly enjoined.....The summary procedure of striking out suits can only be adopted when it can be clearly seen that a claim or answer on the face of it is obviously unsustainable and further, that there is no triable issue. Triable issue is not necessary one that the defendant would ultimately succeed on. It need only be bona fide.”

59. Similar dependence was placed in *Diamond Trust Bank Kenya Limited v Richard Mwangi Kamotho & 2 others* [2017] eKLR.

Analysis and Determination

60. Taking into consideration the parties’ case, it is my opinion that the issues that arise for determination are as follows:
- Whether the President’s decision of establishing the National Task Force on Improvement of The Terms and Conditions of Service and Other Reforms for Members of National Police Service and Kenya Prisons Service was unconstitutional.
 - Whether the petition raises any cause of action against the 6th Respondent.



- iii. Whether the petitioner is entitled to the relief sought.

Whether the President's impugned decision was unconstitutional

61. The High Court under Article 165 (3) (d) (ii) has the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of whether anything said to be done under the authority of the Constitution or any law is inconsistent with, or is in contravention of the Constitution. Article 2 (4) expressly declares that any law, act or omission in contravention of the Constitution is invalid. The determination of constitutionality is a responsibility vested on the High Court by the Constitution itself. This Court thus has authority to determine the constitutionality and validity of any laws, decisions, policies, actions every organ of the State inclusive of executive decisions made by the President as under Article 2(1) of the Constitution, all persons and all State organs at both levels of government are bound by the Constitution while Article 2 (2) emphasizes that no person may claim or exercise State authority except as authorized by the Constitution. Indeed, Article 131 (2) obliges the President to respect, uphold and safeguard the Constitution.
62. In this Petition, it was alleged that the President overstepped his constitutional mandate by establishing the National Taskforce on Improvement of Terms and Conditions of Service and other reforms for Members of the National Police Service and Kenya Prisons Service which he assigned the responsibilities of an Independent Commission, namely, the National Police Service Commission. The 1st respondent vehemently opposed this position taken by the Petitioner contending that the President's action fell within the broad executive authority vested on him by the Constitution.
63. An examination of the President's executive mandate vis-vis his decision as well as a review of the relevant constitutional and statutory provisions in relation to the functions of the National Police Service Commission is thus necessary in determining the issues raised in this Petition.
64. Article 131 defines the authority of the President. It provides:
- Article 131 (1) The President-
- a. is the Head of State and Government.
 - b. exercises the executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries
 - c.
 - a. declare war.
65. Article 129 of the Constitution acknowledges that executive authority springs from the peoples and lays out guideline on how the same manner is to be exercised. It states:
- 1. Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution.
 - 2. Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.
66. In determining matters relating to discharge of functions by various organs of State, Courts must take cognisance of the doctrine of separation of powers and avoid any unjustified incursions into affairs that properly fall within the realm of another arm or organ of government. This was the



holding of the Court in *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11 where the Court observed as follows:

“Courts have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of the *Constitution*.”

67. Where it is clear that the President’s has exceeded the authority vested by the *Constitution* or makes a decision that is in violates the constitutional principles, the Court is obligated by the *Constitution* to uphold it and declare any action that is inconsistent with the *Constitution* or the law invalid. That is also the essence of the rule of law principle which is part of the values and principles of governance that are binding on all persons and state organs under Article 10 of the *Constitution*. The principle was discussed by the constitutional Court of South Africa in *Masetbla v President of the Republic of South Africa* 2008 1 BCLR 1 (CC) where the Court stated:

“Legality is an implicit principle in our constitutional ordering, requires the President, to act “in accordance with the law and in a manner consistent with the *Constitution*.” This means that the power conferred “must not be misconstrued”

68. In *Coalition for Reforms and Democracy (CORD) v Attorney General; International Institute for Legislative Affairs & Katiba Institute (Interested Parties)* [2019] KEHC 10892 (KLR) it was held as follows:

“The executive powers, authority and functions of the President are also specifically provided for in the *Constitution* under Articles 129 to 133. The primary duty of the court in this regard is to uphold the *Constitution* and the law, which we must apply impartially and without fear, favour or prejudice...”

69. Further, in applying the principle of legality, the Court in *Republic v Fazul Mahamed & 3 others Ex-Parte Okiya Omtatah Okoiti* [2018] KEHC 9435 (KLR) stated:

“7. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decision to be allowed to stand, it must be demonstrated that the decision is grounded on law. As such, the Respondents’ actions must conform to the doctrine of legality. Put differently, a failure to exercise power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the Rule of Law. Guidance can be obtained from the South African case of *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another* where the court held as follows:-

“(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law”



8. Courts are similarly constrained by the doctrine of legality, i.e. to exercise only those powers bestowed upon them by the law.[21] The concomitant obligation to uphold the Rule of Law and, with it, the doctrine of legality, is self-evident. In this regard, the Respondent's are constrained by that doctrine to enforce the law by ensuring that its decisions conform to the relevant provisions of the law governing its exercise of power. The Respondent's have a statutory and a moral duty to uphold the law and to comply with the law governing their operations."
70. the Constitution has created independent constitutional commissions and offices and assigned them specific mandates to secure adherence to constitutional principles and values. It deliberately guarded those mandates by providing in Article 249 (2) (a) of the Constitution that the Commissions and holders of Independent Offices are subject only to the Constitution and the law. Underscoring the significance of this protection, the Supreme Court in Advisory Opinion Reference no. 2 of 2014, *in the Matter of the National Land Commission* (2015) eKLR explained:

"It is a matter of which we take judicial notice, that the real purpose of the "independent clause," with regard to the Commissions and Independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or Offices, by other persons, or institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency, since independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of individual. the Constitution established the several independent Commissions alongside the judicial branch, entrusting to them special governance mandates of critical importance in the new dispensation: they are the custodians of fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights and public participation. The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear, favour: this indeed, is the purpose of the independence clause."
71. It is against the above constitutional principles; I now turn to consider the Petitioner's case vis-à-vis the respondents' responses to the Petition.
72. The Petitioner argued that the terms of reference assigned by President to the Task Force is a duplication of roles that are Constitutionally and statutorily vested on the National Police Service Commission (3rd Respondent).
73. The National Police Service Commission is established under Article 246 (1). Article 246 (3) specifies its roles as follows:
 - a. recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service
 - b. observing the due process, exercise disciplinary control over and remove persons holding or acting in offices within the Service; and
 - c. perform any other functions prescribed by national legislation.
74. In view of paragraph (c) above, I now proceed to consider the relevant provisions of the National Police Service Commission Act Cap. 85 where the additional functions are provided.



75. The preamble states that it is 'An Act of Parliament to make further provisions for the functions and powers of the National Police Service Commission; the qualifications and procedures for appointment, and for connected purposes.'
76. It is also important to point out that under the Act, the following definitions under Section 2: "Commission" means the National Police Service Commission established under Article 246 of the Constitution.
77. Section 10 enumerates further functions of the Commission as follows:
- (1) In addition to the functions of the Commission under Article 246(3) of the Constitution, the Commission shall—
 - (a) on the recommendation of the Inspector-General develop and keep under review all matters relating to human resources policies of members of the Service;
 - (b) with the advice of the Salaries and Remuneration Commission, determine the appropriate remuneration and benefits for the Service and staff of the Commission;
 - (c) approve applications for engagement by police officers in trade and other businesses, in accordance with the law relating to matters of leadership and integrity under Article 80 of the Constitution;
 - (d) co-operate with other State agencies, departments or commissions on any matter that the Commission considers necessary;
 - (e) provide for the terms and conditions of service and the procedure for recruitment and disciplinary measures for civilian members of the Service;
 - (f) develop fair and clear disciplinary procedures in accordance with Article 47 of the Constitution;
 - (g) investigate and summon witnesses to assist for the purposes of its investigations; Provided that-
 - i. the Commission shall not undertake investigations on criminal matters;
 - ii. where, in the course of disciplinary investigations the Commission identifies violation of any written law, whether civil liability or criminal offence, the Commission shall recommend the prosecution of the offender in accordance with the law: Provided that disciplinary proceedings by the Commission or the Inspector-General shall not be affected by any criminal or civil action commenced under paragraph (ii).
 - (h) exercise disciplinary control over persons holding or acting in office in the Service;
 - (i) promote the values and principles referred to in Articles 10 and 232 of the Constitution throughout the Service;(j)deleted by *Act No. 3 of 2014*, s. 3(b);
 - (k) hear and determine appeals from members of the Service on disciplinary matters relating to transfers, promotions and appointments;
 - (l) develop policies and provide oversight over training in the Service;
 - (m) approve training curricula and oversee their implementation;



- (n) investigate, monitor and evaluate personnel practices of the Service;
 - (o) receive and refer civilian complaints to the Independent Policing Oversight Authority, the Kenya National Human Commission on Human Rights, the Director of Public Prosecutions or the Ethics and Anti-Corruption Commission, as the case may be, where necessary;
 - (p) review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the Service;
 - (q) evaluate and report to the President and the National Assembly on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the Service;(r)deleted by *Act No. 3 of 2014*, s. 3(b);
 - (s) receive complaints and recommendations from police associations registered in accordance with the applicable law;
 - (t) perform such other functions as are provided for by the Constitution, this Act or any written law.
- (2) Subject to the provisions of the Constitution or any written law, the Commission may delegate to the Inspector-General the recruitment, appointment and promotion of police officers under the rank of superintendent: Provided that the Inspector-General shall, during such recruitment, appointment or promotion, take into account gender, county and ethnic balancing.
- (3) Notwithstanding subsection (2), the Commission shall not delegate any of the following functions-
- (a) the making of any regulations, rules, code of conduct or subsidiary legislation under this Act or any other written law;
 - (b) the making and submitting of any report to the President and the National Assembly; and
 - (c) the performance of any function the delegation of which would amount to unjustified delegation of the Commission's discretion.
- (4) The disciplinary control envisaged under Article 246(3)(a) of the Constitution shall mean-
- a. the development and prescription of fair and clear disciplinary procedures in accordance with Article 47 of the Constitution;
 - b. development, and prescription of disciplinary procedures and mechanisms;
 - c. monitoring compliance by the Inspector-General with the prescribed disciplinary procedures and guidelines issued by the Commission;
 - d. monitoring compliance with the due process in disciplining members of the Service;
 - e. receiving regular reports from the Inspector-General on disciplinary matters handled by the National Police Service;
 - f. reviewing or ratification of disciplinary actions taken by the Inspector-General;
 - g. hearing and determining appeals on disciplinary matters from members of the Service.



- (5) A delegation under this Act shall—
- h. be in writing;
 - i. be subject to any conditions the Commission may impose; and
 - j. not divest the Commission of the responsibility concerning the exercise of its powers or the performance of the duty delegated.
78. I now move to examine in great detail the terms of reference of the Task Force. The broad objectives that the appointing authority defined for The National Task Force on Improvement of the Terms and Conditions of Service and Other Reforms for Members of National Police Service and Kenya Prisons Service appointed vide gazette notice number 157792 Vol. CXXXIV of 21st December, 2022 were five in number, namely:
- a. identify the legal, policy, administrative, institutional and operational constraints on effective service delivery by the National Police Service (hereafter, NPS) and the Kenya Prisons Service (hereafter, KPS);
 - b. identify and recommend legal, policy, administrative, institutional and operational reforms in the NPS and KPS for effective service delivery; review and recommend improvement of the terms and conditions of service;
 - c. review and recommend improvement of terms and conditions of service
 - d. review and recommend improvement of matters relating to welfare of officers in all cadres of the NPS and KPS and all other matters incidental to the optimal service delivery by the NPS and KPS
 - e. review and recommend on any other matter incidental to improved terms and conditions of service and other reforms in the NPS and KPS
79. As I embark on evaluation this Petition, I must remind myself that the Constitution in Article 259 (1) guides on how it should be interpreted, which is: in a manner that promote its purposes, values and principles; advances the rule of law, permits the development of the law and contributes to good governance.
80. This is what should guide this Court in considering the effect of the President's action.
81. Looking at the stated objectives for the Task Force vis-à-vis the provisions of Article 246 (3) as read with Section 10 of the National Police Service Commission Act that have set out detail; what captures by attention are the objectives the appointing authority set out for the Task Force in paragraphs (c), (d) and (e); namely:
- d. review and recommend improvement of the terms and conditions of service;
 - e. review and recommend improvement of matters relating to welfare of officers in all cadres of NPS and KPS and all other matters incidental to optimal service delivery by NPS and KPS;
 - f. review and recommend on any other matter incidental to improved terms and conditions of service in the NPS and KPS.
82. The effect of the above three objectives is simple, the President direction to the Task Force to go out there, inquire into the stated subject matter and make specific recommendations in reference to the same.



83. Article 246 (1) of the Constitution creates the National Police Service Commission and assigns it functions. For purposes of this analysis, I will focus on Article 246 (3) (c) which provides that the National Police Service Commission shall perform any other functions prescribed by national legislation thereby giving these Statutory provisions constitutional backing. Reading Section 10 of the National Police Service Act that gives additional functions to the National Police Service Commission, one finds expanded mandate that includes the following provisions that I have singled out as I find them germane in this case:

10

(1)(a) on the recommendation of the Inspector-General develop and keep under review all matters relating to human resources policies of members of the Service;

10

(1)(b) with the advice of the Salaries and Remuneration Commission, determine the appropriate remuneration and benefits for the Service and staff of the Commission;

10

(1)(e) provide for the terms and conditions of service and the procedure for recruitment and disciplinary measures for civilian members of the Service;

10

(1)(l) develop policies and provide oversight over training in the Service;

10

(1)(p) review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the Service;

84. Putting the legislated functions side by side with the stated objectives of the Task Force especially c, d and e; one cannot fail to notice the obvious overlap yet these functions specifically belong to the National Police Service Commission in so far as the members of the national police service are concerned. That is as per provisions of the National Police Service Act which is given constitution backing under Article 246 (3) (c).

85. Indeed, reading the further detailed scope of work assigned to the Task Force by the President, this becomes even more glaring especially where it expounds on the objective relating to welfare of the members of NPS and KPS. I picked out the following:

e) recommend review of remuneration of members of NPS and KPS and consideration of new and applicable allowances to the NPS and KPS to enhance professionalism, efficiency and effectiveness of NPS and KPS

f) assess the adequacy or otherwise of the current medical scheme for NPS and KPS recommend comprehensive reform or revision of the same with a view to improving it

h) Assess and recommend improvement of working and living conditions of NPS and KPS

j) Examine capacity building measures including training curriculum, syllabus, continuous development training, reward measures and recommend reforms including incorporation incentives for police and prison officers especially lower cadres to address professionalism, motivation and retention.



86. In my view the above responsibilities squarely fall under the express mandate of the National Police Service Commission in relation to members of the police Service hence is a gross interference for the President to divest, through an executive fiat, and assign such functions as are constitutionally and statutorily vested on the National Police Service Commission to a Task Force.
87. In assigning the Task Force the specific responsibilities reserved for a Constitutional Commission, the President's actions were violation of the rule of law principle under Article 10 (2) (a) and 246 (3) of the Constitution to extent of the incursion made in respect of the mandate assigned to the National Police Service Commission.
88. Nevertheless, it is important to note that the Task Force was not limited to the functions that overlapped with those of National Police Service Commission. There were other terms of reference that were quite broad, expansive and thus not tied to the specific functions of the National Police Service Commission.
89. For instance, the Task Force was also tasked to deal with a broad spectrum of issues such as identifying legal, policy, administrative, institutional and operational constraints that were considered a hindrance to service delivery and to make recommendation for reforms thereof. It was also to review the uptake of recommendations by the previous Task Forces, the titling processes of the land belonging to NPS and KPS, the guidelines on formation of special police units all which constitute broad policy issues requiring policy formulation to guide governmental action either through enactment of laws, regulations or programmes. Such matters are definitely beyond the functions of the Commission and rightfully and perfectly belong to the Executive branch to coordinate and lead. They properly fell within the general executive authority of the President exercisable under Article 132 (4) (a) and 131 (1) (b) of the Constitution.
90. While therefore there are aspects of the gazette notice that are constitutionally and legally objectionable for usurping the express functions of an independent Commission, that is, the National Police Service Commission; I am also persuaded that there also certain aspects of the what was mandated to the Task Force that perfectly fell within the scope of the President to deal.
91. Consequently, apart from what I have singled out as encroaching on the mandate of the National Police Service Commission; by and large, the Court observes that the Task Force could deal with the broad policy matters such as the emerging constraints, existing laws, regulations and policies to guide in the development of the governmental action pertaining to the same.
92. Be that as it may, the President cannot under the guise of exercising executive Authority under Article 129 (1) & (2) or 131 (1) (b) or 132 (2) (a) assign specific functions of an Independent Constitutional Commission to any other body or person. He has no constitutional authority to divest a specific responsibility assigned to an independent constitutional commission to any other person or body. That is an abrogation of the Constitution and sovereignty of the people.

Whether the Petitioner has cause of action against the 6th Respondent

93. The Court in Isaiab Ondiba Bitange v 3 others v Institute of Engineers of Kenya another [2017] KEHC 7565 (KLR) discussed cause of action as follows:

“A cause of action was defined by Obi Okoye — *Essays on Civil Proceedings*, [1] thus — “By a cause of action is meant any facts or series of facts which are complete in themselves to



found a claim or relief.”[2] In the case of *Drummond Jackson v British Medical Associations & Ors.*,[3] Lord Pearson stated as follows:-

“..... the expression “reasonable cause of action”[4]No exact paraphrase can be given, but I think “reasonable cause of action” means a cause of action with some chance of success when..... only the allegations in the pleading are considered, if it is found that the alleged cause of action is to fail, the statement of claim should be struck out.”

The Supreme Court of Nigeria in the case of *Oshoboja v Amuda & Ors.*[5] held that a reasonable cause of action means a cause of action with some chances of success, when only the allegations in the Statement of Claim are considered. Our law is the law of the practitioner rather than the law of the philosopher. Decisions have to draw their inspiration and their strength from the very facts which framed the issues for decisions.”

94. The Court went further to state as follows:

“The purpose of pleadings is to enable the defendant to know the case he had to meet so that he could properly plead his defence with the result that the issues would be sufficiently defined to facilitate the appropriate questions for decision to be resolved. This purpose cannot be achieved unless the words are pleaded with sufficient particularity. Pleadings do not only define the issues between the parties for the final decision of the court at the trial; they manifest and exert their importance throughout the whole process of the litigation. They contain the particulars or the allegations of which further and better particulars may be requested or ordered, which help still further to narrow the issues or reveal more clearly what case each party is making. They act as a measure for comparing the evidence of a party with which he has pleaded. They determine the range of admissible evidence which the parties should be prepared to adduce at the trial.

The pith and marrow of it is that where on a consideration of only the allegations in the pleading the court concludes that a cause of action with some chance of success is shown then that pleading discloses a reasonable cause of action. Person, J in *Drummond Jackson v British Medical Association*, the definition of a cause of action was determined as an act on the part of the Defendant which gives the Plaintiff his cause of complaint.”

95. In the same way, the Court in *Njunge v Ministry of Interior & Coordination of National Government & 3 others* [2024] KEHC 4676 (KLR) citing a number of authorities with approval noted as follows:

“That the application discloses no reasonable cause of action or defence in law. In *DT Dobie & Co. (Kenya) Limited v Muchina & Another* [1982] KLR, the Court of Appeal defined reasonable cause of action to mean “an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer...” The court went further to define what constitutes a cause of action and held that a cause of action referred to an act on the part of the defendant which gave the plaintiff a cause of complaint. Up to this point the plaintiff has failed to disclose a reasonable cause of action which would enable him to seek a legal remedy against the 3rd Defendant. It is on this basis that we humbly invite the court to strike out the Plaintiff’s application...

...



That in the case of *Karl Webner Claasen v Commissioner of Lands & 4 others* [2019] eKLR the Court further defined a cause of action as follows:

A cause of action denotes a combination of facts which entitles a person to obtain a remedy in court from another person and includes a right of a person violated or threatened violation of such right by another person. The applicant did not disclose any such fact which is sufficient ground for the Court to strike out the application.

...

In answering the question: “what is considered to be a cause of action?” the court borrows from the decision in *Anne Jepkemboi Ngeny v Joseph Tireito & another* [2021] eKLR where the Court of Appeal succinctly stated the following:

“In the Court of Appeal case of *Attorney General & another v Andrew Maina Githinji & Another* [2016] eKLR Waki JA. held that,

“A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.”

That definition was given by Pearson J. in the case of *Drummond Jackson v Britain Medical Association* (1970) 2 WLR 688 at pg 616. In an earlier case, *Read v Brown* (1889), 22 QBD 128, Lord Esher, M.R. had defined it as: -

“Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court.”

Lord Diplock, for his part in *Letang v Cooper* [1964] 2 All ER 929 at 934 rendered the following definition: -

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

96. After carefully going through the Petition, I am persuaded by the contention by the 6th Respondent that the present Petition does not disclose the legal harm capable of being attributed to the 6th Respondent having regard to the facts of this case. Indeed, none of prayers sought in the Petition is directed to the 6th Respondent. In the circumstances, I would thus find that no cause of action was disclosed in this Petition against the 6th Respondent whom I thus find was improperly joined as a Party in the Petition. The case against the 6th Respondent is thus dismissed for the reasons aforesaid.
97. Consequently, I grant the following reliefs:
- a. A declaration is hereby issued that the decision by the President by the President of Kenya to establish the National Task Force on Improvement of the Terms and Conditions of Service and Other Reforms for Members of the National Police Service and Kenya Prison Service and conferring it specific roles that are within the mandate of the National Police Service Commission as reflected of the terms of reference of the Task Force namely; c, d, and e; to wit, review and recommend improvement of the terms and conditions of service; review and recommend improvement of matters relating to welfare of officers in all cadres of National Police Service(hereinafter, NPS) and Kenya Prison Service (hereafter, KPS) and all other matters incidental to optimal service delivery by National Police Service; review and



recommend on any other matter incidental to improved terms and conditions of service in the NPS and KPS; is to the extent that the members of the National Police Service are included a usurpation of the mandate of the National Police Service Commission and thus in violation Articles 10 (2) (a), 246 (3) (c) as read with Sections 10 (1) (a), (b), (e), (l) and (p) of the National Police Service Commission Act.

- b. Any resultant recommendation deriving from above-three detailed specific terms of reference of the Task Force is unconstitutional, null and void.
- c. Each Party shall bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH APRIL, 2025.

.....

L N MUGAMBI

JUDGE





This is the exhibit marked "SM2"
referred to in the annexed affidavit
of CHOLA MAINDE
sworn declared before me this 20th
day of August 2021 at Nairobi
[Signature]
Commissioner for Oaths

**Law Society of Kenya v Office of the Attorney General & another; Judicial
Service Commission (Interested Party) (Constitutional Petition 203 of 2020)
[2021] KEHC 454 (KLR) (Constitutional and Human Rights) (10 June 2021) (Judgment)**

*Law Society of Kenya v Office of the Attorney General &
another; Judicial Service Commission (Interested Party) [2021] eKLR*

Neutral citation: [2021] KEHC 454 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION 203 OF 2020
JA MAKAU, J
JUNE 10, 2021
IN THE MATTER OF ARTICLES 2(4), 3, 10, 129(1) & (2), 156, 159, 160, 171, 172, 173, 248,
249(1) & (2), 250, 51, 252, 253, 254 & 255 OF THE CONSTITUTION OF KENYA 2010
AND
IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 2(4), 3, 10, 129(1) &
(2), 156, 159, 160, 171, 172, 248, 249(1) & (2) & 255 OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF EXECUTIVE ORDER NUMBER NO.1
OF 2020 BY THE PRESIDENT OF THE REPUBLIC OF KENYA
AND
IN THE MATTER OF SECTION 4 OF THE LAW SOCIETY OF KENYA (ACT NO. 21 OF 2014)
AND
IN THE MATTER OF ENFORCEMENT AND INTERPRETATION OF THE CONSTITUTION
UNDER ARTICLES 258, 259 AND 260 OF THE CONSTITUTION OF KENYA 2010
AND
IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013
AND
IN THE MATTER OF THE JUDICIAL SERVICE COMMISSION
ACT; THE JUDICATURE ACT; AND ALL SUCH
OTHER RELEVANT AND RELATED LEGISLATION



AND
IN THE MATTER OF ARTICLE 26 OF THE AFRICAN CHARTER ON HUMAN
AND PEOPLES RIGHTS; AND PRINCIPLE 12 OF THE UNITED NATIONS
BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY AND
ALL SUCH OTHER RELEVANT INTERNATIONAL LAWS AND PRINCIPLES

BETWEEN

LAW SOCIETY OF KENYA PETITIONER

AND

OFFICE OF THE ATTORNEY GENERAL 1ST RESPONDENT

JOSEPH KINYUA, HEAD OF PUBLIC SERVICE 2ND RESPONDENT

AND

JUDICIAL SERVICE COMMISSION INTERESTED PARTY

Unconstitutionality of Executive Order 1 of 2020 to the extent that it purports to reorganize the Government and set out the Judiciary and its tribunals, commissions, and independent offices as institutions under the functions of ministries and Government departments and other constitutional bodies.

Reported by Beryl Ikamari

Constitutional Law - Executive - President - powers of the President - coordination of Government organs and entities - whether the President had powers to transfer and place various tribunals and constitutional commissions under various Ministries and State departments - Constitution of Kenya 2010, articles 131 and 132.

Constitutional Law - constitutionality of Executive Orders - constitutionality of Executive Order No. 1 of 2020 titled 'Organization of the Government of the Republic of Kenya' - claim that the Executive Order purported to reorganize the Government and set out the Judiciary and its tribunals, commissions and independent offices as institutions under the functions of Ministries and Government departments and other constitutional bodies - claim that the Executive Order interfered with the independence of the Judiciary - whether the Executive Order was constitutional - Constitution of Kenya, 2010, articles 10, 27(1), 47, 160, 171, 172, 173 and 249.

Civil Practice and Procedure - parties - misjoinder of parties - whether the misjoinder of parties in a constitutional petition was fatal - Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, rules 5(b) and 5(d)(iii).

Civil Practice and Procedure - pleadings - contents of pleadings - failure by a party to raise an issue in the pleadings - whether a party could raise an issue that was not in the pleadings through submissions.

Brief facts

Executive Order No. 1 of 2020 titled 'Organization of the Government of the Republic of Kenya' sought to re-organize the Government and it set out the Judiciary and tribunals, commissions and independent offices as institutions under the functions of ministries and Government departments and other constitutional bodies. In particular, the petitioner averred that the restructuring of the Judiciary and the placing of various tribunals and the Judicial Service Commission (JSC) under various ministries and State departments was a threat to judicial financial independence and it was therefore contrary to articles 160, 161, 169, 171 and 173 of the Constitution of Kenya, 2010 (Constitution). The petitioner further stated that the impugned Executive



Order was unconstitutional in as far as it purported to transfer or assign functions and roles to the JSC or its chairperson or any other constitutional commission.

The 1st respondent argued that there was no claim against or relief sought from the Head of Public Service and therefore there was no basis for his joinder in the proceedings. The 1st respondent denied that the Executive Order provided that any constitutional commission or independent office would be under the direction or control of any ministry on behalf of the presidency. The 1st respondent also stated that the Executive Order had not restructured the Judiciary.

The 1st respondent asserted that the President had the overall responsibility for the coordination of all Government organs and entities as provided under articles 131 and 132 of the Constitution. He added that the Constitution set out an elaborate budgetary process with the ultimate decision-making authority being vested in the Legislature.

Issues

- i. Whether the President had powers to transfer and place various tribunals and constitutional commissions under ministries and State departments.
- ii. Whether Executive Order No 1 of 2020 (Revised) was unconstitutional to the extent that it purported to reorganize the Government and set out the Judiciary and its tribunals, commissions and independent offices as institutions under the functions of ministries and Government departments and other constitutional bodies.
- iii. Whether the misjoinder of parties in a constitutional petition was fatal.
- iv. Whether a party could raise an issue that was not contained in the pleadings through submissions.

Held

1. Article 259 of the Constitution provided that the Constitution had to be interpreted in a manner that promoted its purposes, values and principles, advanced the rule of law, human rights and fundamental freedoms in the Bill of Rights, permitted the development of the law and contributed to good governance. In determining the constitutionality of any matter complained of, the court would be guided by that provision.
2. Article 249 of the Constitution set out the objects, authority and funding of commissions and independent offices. The commissions and the holders of independent offices were subject only to the Constitution and the law and were independent and not subject to direction or control of any person or authority.
3. Considering the powers of the President as well as the powers of the independent commission, it was clear that the President had no power to transfer functions of constitutionally established institutions.
4. Pursuant to article 10 of the Constitution, all State organs that exercised power had to bow to the will of the people as expressed in the Constitution. Further, as provided under article 3(1) of the Constitution, every person had an obligation to respect, uphold and defend the Constitution and no person could claim or exercise State authority except as authorized under the Constitution. Further, article 2 of the Constitution was to the effect that any law, including customary law, that was inconsistent with the Constitution was void to the extent of the inconsistency and any act or omission in contravention of the Constitution was invalid.
5. Article 161 of the Constitution established the Judiciary as an independent arm of the Government and not a department or a State office falling under any such ministries or State departments. The Constitution provided that the Judiciary consisted of judges of superior courts, magistrates, other judicial officers and staff. Article 173 of the Constitution provided for the Judiciary Fund and ensured that the Judiciary enjoyed financial independence.
6. The petitioner demonstrated that the intended restructures of the Judiciary, an arm of Government, by the Executive arm of the Government, and placing of the various Tribunals and the Judicial



Service Commission under various ministries and State departments was a threat to judicial financial independence.

7. It was unconstitutional for the President to purport to re-organize Government and set out the Judiciary, commissions, and independent offices as institutions under or functions of ministries, Government departments and other constitutional bodies. The President did not have power to do so and the making of the impugned Executive Order impaired or interfered with the independence of the Judiciary, commissions and independent offices.
8. The continued implementation of the Executive Order was unconstitutional, illegal and an impediment to the rule of law, right to equal application and protection of the law and judicial independence. The re-organization of the Judicial arm of Government by the Executive interfered with the institutional and structural independence of the Judiciary and it was contrary to the Constitution and the doctrine of separation of powers.
9. The Constitution provided for the Judiciary and the Judicial Service Commission as independent constitutional organs which were distinct from the Executive, State departments and ministries. Their roles and mandates were also provided for by the Constitution and the Judicial Service Act and those roles and functions were not assignable either by the President or the Executive arm of Government.
10. From a perusal of the pleadings and court proceedings, there were no grounds affecting the *sub judice* principle nor could the *sub judice* issue be raised through submissions, having not been pleaded, as a party was bound by its pleadings. Further the court record did not support the respondents' contention, that the petitioner informed the court, there existed a similar matter, which was pending determination in Nairobi Constitutional Petition No 228 of 2018 between the same petitioner and the 1st respondent. The alleged petition had not been produced and the court was not able to deal, as such with the issue of *sub judice*.
11. Independent commissions were designed under the Constitution with specific purposes and they were not accountable to other arms of Government and they secured the separation of powers principle. The independent offices and commissions created under the Constitution were to be viewed as the fourth arm of Government, created to cater for a specific need and they were independent of Government.
12. The Judiciary, the independent offices and the commissions, just like the Executive were created by the Constitution and they were not to be taken as subservient to the Executive and they should not be reorganized or restructured by the Executive or any other arm of Government to an extent that it would interfere with delivery of its functions..
13. The independence clause, which was applicable to independent offices and commissions created by the Constitution, provided a safeguard against undue interference with such commissions or offices, by other persons, or other institutions of Government.
14. Article 160(1) of the Constitution dealt with independence and functions of the Judiciary. It was provided that in the exercise of judicial authority, the Judiciary should be subject only to the Constitution and the law and should not be subject to the control or direction of any person or authority. The principle of supremacy of the Constitution, as provided in article 2 of the Constitution, meant that the court was obligated to invalidate an act, omission or any law which contravened the Constitution. The Executive Order No 1 of 2020 contravened the Constitution and therefore should be struck out to the extent of its inconsistency.
15. The making of the Executive Order had the effect of impairing and interfering with the independence of the Judiciary, commissions and independent offices. An Executive Order could not be used to broaden or limit a constitutional mandate.
16. Article 249 of the Constitution was the source of the independence of the various commissions and that was in terms of appointment, operation and security. Independence in decision-making was at the core of the matter. Decisions that were appropriate had to be made by them without any influence from those to whom decision-making power was not given.



17. Article 255(1) of the Constitution made it mandatory that any amendment relating to the independence of the Judiciary, the independence of the commissions and independent offices had to be done through a referendum. The only way to restructure, reorganise or amend any of the independent commissions was by way of a referendum and not gazettment of an Executive Order.
18. The petitioner's claim against the 2nd respondent, the Head of Public Service, was that he wrote to various Government departments, informing them of the Executive Order and directing the National Treasury to take note of the changes introduced by the Executive Order. The letter also requested for budgetary changes to be made. The petition sought declaratory orders and orders of judicial review against the respondents. It was therefore not correct that there was no basis for the joinder of the Head of Public Service in the petition.
19. Rule 5(d)(iii) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, was to the effect that where the petitioner was in doubt as to the person from whom redress was sought, the petitioner could join two or more respondents so that the question on extent of liability as between all parties could be determined. Further rule 5(b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provided that a petition would not be defeated by reason of misjoinder or non-joinder of parties.

Petition allowed with costs to the petitioner.

Orders

- i. *A declaration was issued that the Executive Order Number 1 of 2020, issued on January 14, 2020, (Revised) purporting to organize the Government and set out the Judiciary and its tribunals, commissions and independent offices as institutions under the functions of ministries and Government departments and other constitutional bodies, specifically, paragraphs (1), (3), (5), (7), (10), (11), (16), (18), (21), (22), (27), and (28) were unconstitutional, null and void and contrary to articles 10, 27(1), 47, 159, 160, 161, 169, 171, 172, 173 and 249 of the Constitution of Kenya, 2010.*
- ii. *An order of judicial review by way of an order of certiorari was granted pursuant to article 23(3)(f) to remove into the court for purposes of quashing portions of the Executive Order Number 1 of 2020 issued on January 14, 2020 (Revised) May 2020 that purported to organize the Government and set out the Judiciary, and its tribunals, commissions and independent offices as institutions under the functions of ministries and Government departments and other constitutional bodies, specifically paragraphs (1), (3), (5), (7), (10), (11), (16), (18), (21), (22), (27), and (28).*

Citations

Cases

Kenya

1. *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another* Petition 628 & 630 of 2014; [2015] KEHC 6984 (KLR) - (Explained)
2. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] 2 KLR 32 - (Explained)
3. *Kamami, Michael Maina & another v Attorney General* Civil Appeal 189 of 2017; [2019] KECA 437 (KLR) - (Explained)
4. *Mati, Jayne & another v Attorney General & another* Petition 108 of 2011; [2011] KEHC 4292 (KLR) - (Explained)
5. *National Land Commission v Attorney-General & 5 others; Kituo Cha Sheria & another (Amicus Curiae)* Advisory Opinion No 2 of 2014; [2015] KESC 3 (KLR) - (Explained)
6. *Ndeda, Bernard James & 6 others v Magistrates and Judges Vetting Board & 2 others* Petition 230, 236, 262, 259, 270, 272 & 323 of 2016; [2018] KEHC 9249 (KLR) - (Explained)
7. *Republic v Paul Kihara Kariuki & 3 others ex parte Law Society of Kenya* Judicial Review 45 of 2020; [2020] KEHC 10142 (KLR) - (Explained)



8. *Wambora & 3 others v Speaker of the Senate & 6 others* Constitutional Petition 7 of 2014; [2014] KEHC 7498 (KLR); [2014] 4 KLR 559 - (Explained)

South Africa

1. *Affordable Medicines Trust and others v Minister of Health and others* (CCT27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC) - (Explained)
2. *Glenister v President of the Republic of South Africa and others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) - (Explained)

Texts

Sihanya, B., (Prof) (2011), *The Presidency and Public Authority in Kenya's New Constitutional Order* Society for International Development, Constitution Working Paper No 2 pp 12-3

Statutes

Kenya

1. Constitution of Kenya articles 1, 2, 3(1)(23)(f); 10; 23(3); 27(1); 47; 131(1)(a)(e)(2)(c); 132(3)(b); 135; 159; 160; 161; 165; 169; 171; 172; 173; 248; 249(2)(b); 252; 255 - (Interpreted)
2. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya Sub Leg) rule 5(b)(iii) - (Interpreted)

Instruments

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981 article 26
2. Basic Principles on the Independence of the Judiciary, 1985 Principle 12

Advocates

None Mentioned

JUDGMENT

Petition

1. The petitioner, Law Society of Kenya, by way of a petition dated June 17, 2020 prays for the following orders:-
 - i. A declaration that the Executive Order, Number 1 of 2020, issued on January 14, 2020 (Revised) purporting to organize the government and set out Judiciary and its tribunal, Commissions and Independent offices as institutions under the functions of ministries and government departments and other constitutional bodies, specifically, paragraphs (1), (3), (5), (7), (10), (11), (16), (18), (21), (22), (27), and (28) are unconstitutional, null and void and contrary to articles 10, 27 (1), 47, 159, 160, 161, 169, 171, 172, 173 and 249 of the Constitution of Kenya, 2010.
 - ii. An order of Judicial Review by way of an order of *certiorari* pursuant to article 23 (3) (f) to remove into the court for purposes of quashing portions of the Executive Order Number 1 of 2020 issued on January 14, 2020 (Revised) May 2020 that purports to organize the government and set out the Judiciary, and its Tribunals, Commissions and Independent offices as institutions under the functions of ministries and government departments and other constitutional bodies, specifically paragraphs (1), (3), (5), (7), (10), (11), (16), (18), (21), (22), (27), and (28).
 - iii. An Order awarding costs of the petition to the petitioner.



- iv. Any other or further orders, writs, directions this court considers appropriate and just to grant for the purpose of the enforcement of the petitioners fundamental rights and freedoms; the enforcement and defence of the Constitution pursuant to article 23 (3) of the Constitution.

Petitioner's Case

2. It is the petitioner's case that the Executive Order No 1 of 2020 titled 'Organization of the Government of the Republic of Kenya'. The petitioner protests to the inclusion of the Judiciary arm of Government, Commission and Independent Offices in the said Executive Order.
3. The petitioner avers that the restructuring of the Judiciary and placing of the various Tribunals and Judicial Service Commission under various Ministries and State Departments is a threat to the judicial financial independence and therefore contrary to articles 160, 161, 169, 171 and 173 of the Constitution of Kenya, 2010.
4. It is further asserted that the Executive Order is thus unconstitutional as far as it purports to restructure and/or organize and/or transfer and/or assign functions and roles to the Judicial Service Commission (JSC) or its Chairman or any such other Constitutional Independent Commission.
5. The petitioner contends that the President of the Republic of Kenya does not have the power to organize the Government and set out the Judiciary, Commissions and Independent Office as institutions under the functions of Ministries, government departments and other constitutional bodies.
6. It is contended that the continued implementation of the Executive Order is therefore unconstitutional and illegal and an impediment to the Rule of Law; the right to equal application and protection of the law; the judicial independence; and the dictates and principles of the Constitution as enshrined under article 10. It is further averred that the Executive Order contravenes articles 26 of the African Charter on Human and People's Rights; Principle 12 of the United Nations Basic Principles on the Independence of the Judiciary as read with various international laws and principles.
7. The petition is supported by the affidavit of Mercy K Wambua, the Chief Executive Officer of the petitioner, sworn on June 17, 2020.

1st Respondent's Case

8. The 1st respondent filed a replying affidavit sworn by Kennedy Ogeto, the Solicitor General in the Office of the Attorney General, dated July 13, 2020. The respondent argues that there is no basis for the joinder of the Head of Public Service in the present proceedings as there is neither any claim made against him nor is any relief sought against him in the petition.
9. It is the 1st respondent's case that nowhere in the Executive Order is it provided that any Constitutional Commission or Independent Office shall be subject to the direction or control of any Ministry on behalf of the Presidency. The Deponent asserts that the allegation that the Executive Order has organised and restructured the judiciary is fallacious and is intended to mislead the court, and the petitioner has failed to demonstrate the same.
10. The 1st respondent contends that the private perception of an individual cannot be the basis for the declaration that the Executive Order is unconstitutional. Moreover, it is argued that the President has overall responsibility and coordination of all government organs and entities as provided under article 131 (1) (a) (e), (2) (c), 132 (b) of the Constitution. The 1st respondent asserts that there are elaborate



budgetary processes set out in law with the ultimate decision-making authority on the same vesting upon the legislature and to that extent, the petitioner's assertions are spurious, far-fetched and remote.

Petitioner's Response

11. The petitioner filed a further affidavit sworn by Mercy K. Wambua dated July 16, 2020, in response to the 1st respondents replying affidavit. The petitioner asserts *inter alia*; that although the President is the Head of the State and Government, that in itself is not a blanket cheque for the President to purport to exercise powers not conferred on him by the Constitution or any such legislation and neither is it a cheque for the President to purport to restructure; reorganise and interfere with the mandate, hierarchical arrangement and organisation of independent constitutional offices and other Arms of Government such as the Judiciary and its various Tribunals.
12. Moreover, it is the petitioner's case that this court has been consistent on the *dictum* that the Executive must function within the limits prescribed by the Constitution and in cases where it has stepped beyond what the law and the Constitution permit it to do, it cannot seek refuge in illegality and hide under the twin doctrines of parliamentary privilege and separation of powers to escape judicial scrutiny.
13. The petitioner argues that the joinder of the Head of Public Service to these proceedings is necessary as he authored the letter whose effect is to notify Treasury of various changes as introduced by the Executive Order and hence to effect budgetary allocations and planning. It is further contended the petition before this court cannot be defeated by reason of misjoinder or non-joinder of parties as the court is required to deal with the proceedings in the matter in dispute.

Petitioner's Submissions

14. The petitioner by way of its Written Submissions dated October 16, 2020, submits that the first issue to be determined is whether the President of the Republic of Kenya has powers to transfer and place various Tribunals and Constitutional Commissions under various Ministries and State Departments.
15. The petitioner submits that the President has no powers to transfer functions of constitutionality-established institutions and that the President must respect, uphold and defend the Constitution as stipulated under article 3(1) of the Constitution. In support of this proposition the petitioner sought reliance in the decisions in Coalition for Reform and Democracy (CORD) & another v the Republic of Kenya & another, and Affordable Medicines Trust and others v Minister of Health and others [at para 18] [2005] ZACC 3; 2006 (3) SA 247 (CC) at paras 49, 75 and 77.
16. The petitioner further states that the restructuring of the Judiciary and placing of the various Tribunals and the Judicial Service Commission under various Ministries and State Department is a threat to the judicial financial independence and hence is contrary to articles 160; 161; 169; 171; and 173 of the Constitution.
17. The second question to be answered as per petitioner's submissions is whether Executive Order No 1 of 2020 (Revised) is unconstitutional, null and void to the extent that it purports to organise the government and set out the Judiciary and its tribunals, commissions and Independent Offices as institutions under the functions of ministries and government and other Constitutional bodies.
18. The petitioner urges that Executive Order offends the principle of separation of powers and the independence of the Judiciary, Commissions and independent offices created under the Constitution. In support whereof reference is made to article 249(2)(b) of the Constitution on the independence of the Commissions listed in chapter 15 of the Constitution. Reliance is placed on the decision in Advisory Opinion Reference No 2 of 2014, In the Matter of the National Land Commission [2015] eKLR;



Jayne Mati & another v Attorney General and another- Nairobi Petition No. 108 of 2011; Glenister v President of the Republic of South Africa and others (CCT 48/10) [2011] ZACC 6; Martin Nyaga Wambora v Speaker County Assembly of Embu & 5 others [2014] eKLR.

19. The petitioner submits that the Executive Order does not have powers to broaden nor limit a constitutional mandate. By allowing such amendments, the Judiciary will be perceived by the public to be an appendage of the Executive, which in effect is unconstitutional because it usurps the powers of an independent constitutional commission and/or interferes with the independence of the Judiciary and other Commissions provided for by the Constitution.

Respondents' Submissions

20. The respondents filed written submissions dated February 24, 2021 submitting that the issue of structure and proper interpretation of executive orders issued by the President on the organisation of government is *sub judice* as the same is pending determination before the honourable court in Nairobi Constitutional Petition No 228 of 2018 between the petitioner and the 1st respondent. Reliance is placed on the decision in Republic v Paul Kihara Kariuki, Attorney General & 2 others ex parte Law Society of Kenya [2020] eKLR.
21. The 1st respondent further complains that the entire petition has been premised on the deliberately erroneous private interpretation of the petitioner who for ulterior purposes has sought to read into the Executive Order and issue its own fabricated facts with a view to misrepresent its contents. This is buttressed by the holding by Hon Justice Mativo in Bernard James Ndeda & 6 others v Magistrates and Judges Vetting Board & 2 others [2018] eKLR. The respondent asserts that the Executive Order as stated was to inform the public on the catalogue of government services and which office, department or ministry was responsible for the same.
22. It is the respondents' case that the Executive Order issued pursuant to the provisions of article 132(3) (b) and article 135 of the Constitution is, therefore, *intra vires*. Furthermore, nowhere in the executive order are state departments detailed to superintendent over independent offices and commissions as misrepresented by the petitioner. Moreover, it is submitted on the issue of separation of powers that each arm of government may have distinct roles and functions but are interdependent and ought to coordinate and work with other arms and organs. This is supported by the decision of the Supreme Court In the Matter of Interim Independent Electoral Commissions [2011] eKLR.
23. The respondents aver that the petitioner has failed to adduce evidence of similar executive orders having been construed to infringe on the constitutional and statutory mandate of independent commissions, tribunals and state organs disentitles the petitioner. Reliance is placed on the decision in Michael Maina Kamami & another v Attorney General [2019] eKLR.

Analysis and Determination

24. I have carefully considered the petitioner's and respondents pleadings; the rival submission and authorities in support of rival submissions and from the above the following issues arise for consideration:-
- Whether the President of the Republic of Kenya has powers to transfer and place various Tribunals and Constitutional Commissions under various Ministries and State Departments.
 - Whether the *Executive Order No 1 of 2020* (Revised) is unconstitutional, null and void to the extent that it purports to reorganize the government and set out the judiciary and its tribunals,



commissions and independent offices as institutions under the functions of ministry and government departments and other constitutional bodies.

- c) Whether Head of Public Service is properly joined and should have been joined as a party.

A. Whether the President of the Republic of Kenya has Powers to Transfer and Place Various Tribunals and Constitutional Commissions under various ministries and State Departments.

25. In the *Executive Order No 1 of 2020* titled Organization of Government of Republic of Kenya it is urged by the Petitioners purports to “organize” and “restructure” the Judiciary, the Public Service Commission, Teachers Service Commission, the National Police Service Commission, Parliamentary Service Commission, Judicial Service Commission, Independent Boundaries and Electoral Commission, Office of the Director of Public Prosecutions, Ethics and Anti-Corruption Commission; Commission on Administrative Justice, the National Land Commission; the Office of Controller of Budget, Commission on Revenue allocation; Salaries and Remuneration Commission, Kenya National Commission on Human Rights and National Gender and Equality commission. It is urged by the Petitioner the effect of the said order is thus:-
- i) That the Government shall be organized as set out in the order.
 - ii) That the order contains portfolio responsibilities and changes made in the Structure of Government.
 - iii) That the order assign functions and institutions among ministries and State Departments and
 - iv) That the order superseded executive order No 1 of 2018 (Revised) issued in July 2018.
26. This honourable court in considering the Constitutionality of any issue before it, is alive that it should always interpret the Constitution in accordance with the provisions of article 259 of the Constitution, which provides that Constitution shall be interpreted in a manner that:-
- a) Promotes its purposes, values and principles
 - b) Advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights
 - c) Permits the development of the law and
 - d) Contributes to good governance.
27. The authority of the President is set out under article 131 of the Constitution and functions of the President under article 132 of the *Constitution of Kenya*. Article 249 of the *Constitution* sets out the objects, authority and funding of commission and independent offices among which is to protect the sovereignty of the people and promote Constitution. The commissions and the holders of independent offices are subject only to this constitution and the law and are independent and not subject to direction or control of any person or authority. Article 252 of the *Constitution* sets out the general functions and powers of each commission.
28. Looking at the powers of the President and function, as well as, powers of the Independent commissions, it is clear that the President, has no power to transfer functions of constitutionally established institutions. This proposition was enunciated in the case of *Coalition for Reform and Democracy (CORD) & another v the Republic of Kenya & another* where the court stated *inter alia*; at paragraph 125 that:-

“Under article 1 of the *Constitution* sovereign power belongs to the people and it is to be exercised in accordance with the Constitution. That sovereign power is delegated to



Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. There is however a rider that the said organs must perform their functions in accordance with the constitution. Our constitution having been enacted by way of a referendum, is the direct expression of the people's will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the Constitution... Article 2 of the Constitution provides for the binding effect of the Constitution on State Organs and proceed to decree that any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid..."

29. Our Kenyan Constitution 2010, having been enacted by way of a referendum, it is the direct expression of people's will. Under article 10 it is provided, that National values and Principles of Governance in this article, binds all state organs, state officers, public officers and all person whenever any of them:-
 - a) Applies or interpret this Constitution.
 - b) Enacts, applies or interprets any law or
 - c) Makes or implements public policy decision.
30. It therefore follows that all state organs in exercising their delegated powers must bow to the will of the people as clearly expressed in the constitution It is further expressly provided under article 3(1) of the Constitution, that every person has an obligation to respect, uphold and defend this Constitution and, that no person may claim or exercise state authority except as authorized under this Constitution.
31. It is therefore correct to note that article 2 of the Constitution provides for binding effect of the Constitution on state organs and proceeds to decree that any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of this Constitution is invalid. By virtue of provisions of article 3(1) of the Constitution, it clearly follows that every person including the President of the Republic of Kenya has an obligation to respect, uphold and defend the Constitution.
32. In the case of Affordable Medicines Trust and others v Minister of Health and others [at para 18] (2005) ZACC 3; 2006 (3) SA 247 (CC) at paras 49, 75 and 77, Ncgobo CJ held as follows:-

“The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the Constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.” In this sense the constitution entrenches the principle of legality and provides the foundation for the control of public power.” (emphasis added)
33. In the instant petition, it is noted that by virtue of placing the Tribunals and Constitutional Independent offices, under various departments and ministries, is clear the intention is to have the said offices adopted under various departments and ministries and further, that they shall be overruled by respective ministries and Departments in charge and that such budgetary allocations and financial desires among others, shall be done pursuant to in line with direction and criteria to be set by respective ministries and Departments involved. I do not agree with the respondents contention that to the contrary that is not the intention.



34. It is noted that the impugned Executive Order herein was made pursuant to the Constitution of Kenya 2010, is only limited to Ministries and Government Departments as contemplated under article 132(3) (b) of the Constitution and not to the other arms of Government, including the Judiciary, the legislature or any such independent constitutional commissions and offices.
35. Article 161 of the Constitution establishes the Judiciary as an independent arm of the Government and not a department or a state office falling under any such ministries or State Departments. The Constitution clearly provides that Judiciary consists of judges of superior courts, magistrates, other judicial officers and staff.
36. Article 169 of the Constitution establishes subordinate courts which include:-
- a) The Magistrates' Courts
 - b) The Kadhis' Courts
 - c) The Courts Martial and
 - d) Any other courts or local tribunals as may be established by an Act of Parliament, other than the courts established as required by article 162(2) of the Constitution.
37. Judiciary fund is provided for under article 173 of the Constitution. Under this article the Judges enjoys financial independence where it is stipulated as follows:-
- “a) There is established a fund to be known as the Judiciary Fund which shall be administered by the Chief Registrar of the Judiciary;
 - b) The Fund shall be used for administrative expenses of the Judiciary and such other purposes as may be necessary for the discharge of the functions of the Judiciary.
 - c) Each financial year, the Chief Registrar shall prepare estimates of expenditure for the following year, and submit them to the National Assembly for approval.
 - e) On approval of the estimates by the National Assembly, the expenditure of the Judiciary shall be a charge on the Consolidation Fund and the funds shall be paid directly into the Judiciary Fund.”
38. The respondents contend that the petition is premised on a lack of appreciation of the purpose and effect of the Executive Order in issue. They further contend that there has never been any allegation or instance of the Executive Order or Organization of government being a basis of enactment of any constitutional function of any agency. Indeed they contend none of the commissions and independent offices mentioned in the Petition have ever alleged or alleges the same. It is however insisted in this Petition that Petitioner has clearly set out the effect of the Executive Order issued, which include changes made in the structure of the Government, assigning functions and institutions among ministries and state departments and which Order suspends Executive Order No 1 of 2018. Further a threat of violation of the Constitution is sufficient justification for taking up constitutional action.
39. I find that the petitioner has demonstrated that the intended restructures of the Judiciary, an arm of government, by Executive arm of the government, and placing of the various Tribunals and the Judicial service Commission under various Ministries and state department is a threat to the judicial financial independence. This has not been shown by the respondents to be based on any Constitutional



provisions save respondents denying such an intention. I find the Executive Order herein is contrary to the clear provisions of article 160, 161, 169, 171 & 173 of the Constitution of Kenya 2010. I find, further that it is unconstitutional for the President of the Republic of Kenya to purport to organize Government and set out Judiciary, Commissions, and Independent offices as institutions under or functions of ministries, government departments and other constitutional bodies. I am satisfied as per Constitutional provisions referred to herein-above, that the president does not have any such powers, and therefore the making of the impugned Executive Order herein impairs or interferes with the Independence of the Judiciary; Commissions and Independent Offices.

40. I further find and hold that further and/or continued implementation of the Executive Order herein is accordingly unconstitutional; illegal and impediment of the Rule of Law; the right to equal application and protection of the law and judicial independence.
41. Article 2(4) and 165(3)(d)(1) of the Constitution is clear and gives this court the power to invalidate any law, act or omission that is inconsistent with the Constitution.
42. The petitioner in this petition has demonstrated, that His Excellency the president of the Republic of Kenya has unilaterally purported to restructure and re-organize the Judicial arm of the Government and other constitutional offices, thus altering and / or interfering with the provisions of the Constitution, 2010 and thus offending the doctrine of separation of powers and further interfering with the institutional and structural independence of the Judicial arm of Government and various Constitutional independent offices.
43. I find that His Excellency the president of the Republic of Kenya by purporting to restructure and to organize and or transfer functions and or direct and or co-ordinate the functions of the Judiciary, through the Executive Order, the Executive Order is unconstitutional, null and void and contrary to articles 10, 27(1), 47, 160, 171, 172, 173 and 249 of the Constitution of Kenya 2010.
44. The Constitutional provisions are clear that the Judiciary and the Judiciary Service Commission are Independent constitutional organs as established under the Constitution and are clearly distinct from the Executive, state departments and Ministries, and their roles and mandates are specifically provided for pursuant to the Constitution and the Judicial Service Commission Act, and therefore their roles and functions are not assignable to them by either the president or Executive Arm of the Government.

B. Whether the executive order No 1 of 2020 (revised) is Unconstitutional, null and void to the extent that it purports to reorganize the government and set out the judiciary and its tribunals, commissions and independents offices as institutions under the functions of ministry and government departments and other constitutional bodies.

45. The respondents in opposition of this petition field grounds of opposition dated July 7, 2020 setting out 8 grounds of opposition. Looking at the grounds none of them mentions existence of Petition No 228 of 2018, now mentioned in the respondents submissions.
46. The respondents submit that the issue of structure and proper interpretation of Executive Order issued by the President on organization of government is *sub judice* as the same is pending determination before the honourable court in Nairobi constitutional Petition No 228 of 2018 between the petitioner and the 1st respondent, which petition the respondent contended, that Petitioner informed the honourable court of it, in urging for issuance of conservatory orders. The respondent urges that the effect is that there is active litigation between the very same parties over the same subject matter in previously instituted proceedings.



47. I have perused the pleadings and court proceedings, and contrary to respondents submissions, I have not found the grounds being said to be affecting the *sub judice* principle nor can *sub judice* issue be raised through submissions, having not been pleaded, as a party is bound by its pleadings. Further the court record do not support the respondents' contention, that the petitioner informed the honourable court, there existed similar matter, which was pending determination in Nairobi Constitutional Petition No 228 of 2018 between the same petitioner and 1st respondent. The alleged petition has not been produced and this court is not able to deal, as such with the issue of *sub judice*. For the above reasons I decline to proceed to consider the issue as it is not pleaded and each party is bound by its own pleadings.
48. The petitioner contends that the Executive Order No 1 of 2020 (Revised) offends the principle of separation of powers and the independence of the Judiciary, Commissions, and independence offices created under the Constitution of Kenya 2010. The Executive Order has introduced various changes to the structure of the executive and further charges have been introduced in the structures of the Judiciary, as an arm of government and other independent commissions. Article 248 of the Constitution sets out several commissions and independent offices. Article 249(2)(b) of the Constitution clearly stipulates that the commissions and independent offices, are independent and not subject to direction or control by any person or authority. It is further provided, that the duty of the commissions and independent offices is to protect the sovereignty of the people, ensure that all state organs adhere to and observe the democratic values and principles as well as promoting constitutionality.
49. To buttress the aforesaid the petitioner sought to rely on the Supreme Court Advisory Opinion Reference No 2 of 2014, in the Matter of the National Land Commission [2015] eKLR, in its opinion, it quoted number of scholars Where the Court stated;-
- “(Prof Bruce Ackerman, ‘The New Separation of Powers’ (2000) 113(3) Harvard Law Review 633[9]; Prof BM Sihanya ‘Constitutional Implementation in Kenya 2010-2015: Challenges and Prospects’, FES Occasional Paper No 5(2011), at page 38] have advanced the argument that contemporary Constitutions have constituted a fourth arm of Government, in the form of independent bodies Which they refer to as the ‘integrity branch’, ‘constitutional watchdogs’ or ‘democracy branch’. Prof Sihanya has argued that the Constitution of 2010 creates a fourth arm of Government in the form of commissions and independent offices, with express provisions outlining their independence from other arms of Government.
- (163) The perception of commissions as a fourth arm of Government is canvassed by Professors PLO Lumumba and LG Franceschi in their work, *The Constitution of Kenya, an Introductory Commentary*, 2014 (page 19); they observe that the newly formed commissions and independent offices carry out functions which were previously performed by the traditional arms of Government; and hence the framers of the Constitution must have deliberately intended that certain Government functions be separated from the familiar arms of Government, in order to promote transparency, fairness and objectivity.”
50. The Independent Commission were redesigned under the Constitution with specific purpose, thus to make them not accountable to other arms of the Government and accordingly secured the separation of powers principle. It therefore follows that all independent offices and commissions created by the



Constitution are to be viewed as a fourth arm of the Government, which is created to cater for a specific need, but ultimately Independent of Government. It follows that the Judiciary and these Commissions as well as Independent offices, are created by Constitution, just like the Executive, and should therefore not be treated or taken as being subservient to the Executive and should not be recognised or restructured by the Executive and / or any other arm of the government to an extent that it will interfere with delivery of its functions.

51. The court in laying down the purpose of independence clause when it pertains to commissions and independent offices address itself in (*In Re IIEC*) *supra* thus:-

“The real purpose of the ‘independence clause’, with regard to Commissions and independent offices established under the constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of Government. Such a provision was incorporated in the Constitution as antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of Government, even as it irreparably trespassed upon the fundamental rights and freedoms of the Individual. The Constitution established the several independent Commissions alongside the Judicial Branch, entrusting to them special governance – mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as ‘people’s watchdogs’ and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the ‘independence clause’. While bearing in mind that the various Commissions and independent offices are required to function free of subjection to direction or control by any person or authority’, we hold that this expression is to be accorded its ordinary and natural meanings; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. ...For due operation in the matrix, ‘independence’ does not mean ‘detachment’, ‘isolation’ or ‘disengagement’ from other players in public governance.” (Emphasis added)

52. [*In Re IIEC*] (*supra*) confirms our Constitutional provision for separation of power by holding in paragraph 53 thus:

“Separation of powers is an integral principle in Kenya’s Constitution: for instance, Chapter 8 is devoted to the Legislature; Chapter 9 to the Executive; and Chapter 10, on the Judiciary, provides (article 160(1) that:

In the exercise of judicial authority the judiciary as constituted by article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.”

53. It is clear from the above-quoted authorities and provisions of the *Constitution of Kenya 2010*, that the impugned acts by the President through the Executive Order No 1, purporting to restructure the Judiciary and Independent Commissions by setting them out as independent offices, institutions under the Ministries and government departments is unconstitutional. I find the making of the Executive Order has the effect of impairing and interfering with the independence of the Judiciary, Commissions and independent offices. I find further that an Executive Order does not have any powers to broaden nor limit a constitutional mandate. I find by upholding such an amendments, the Judiciary,



an arm, of Government, will be perceived by the public as a whole to be an appendage of the Executive, which in effect is unconstitutional, as it would usurp the powers of an independent Constitutional Commission and / or interfere with the independence of the Judiciary and other Commissions, provided for by the Kenya Constitution 2010.

54. Article 160(1) of the Constitution deals with independence and functions of the Judiciary. It is clearly provided that in the exercise of Judicial authority, the Judiciary shall be subject only to the Constitution and the law and shall not be subject to control or direction of any person or authority. I find and hold, that the principle and supremacy of Constitution, as provided in article 2 of the Constitution, means that this court is obligated to invalidate an act, omission or any law which contravenes the Constitution. I find that the Executive Order No 1 of 2020 contravenes the Constitution and therefore should be struck out to the extent of its inconsistency.
55. The Constitution of Kenya 2010, has clearly established provisions on independence of Judiciary. Articles 1(3); 160(10; 161; 166(1)(a); 172 and 248(2) of the Constitution, provides, that the Constitutional Commissions and holders of Independent offices are independent and are not subject to direction or control by any person or authority. The petitioner in buttressing on this critical role of the Judiciary and independent Commissions in the Constitutional Order referred to article 255(1) of the Constitution, which provides, if an amendment relates to the independence of the Judiciary and the Commission, it must be passed by way of a referendum. The petitioner further placed reliance in a South African Constitutional Court in Glenister v President of the Republic of South Africa and other (CCT 48/10) [2011] ZACC 6, where it was held that, the Constitution should be the court's "starting point" on an inquiry on what type/extent of separation of powers is, in an instant case. Reliance was similarly placed on Prof Ben Sihanya's The Presidency and Public Authority in Kenya's New Constitutional Order (Society for International Development, Constitution Working Paper No 2, 2011) pp 12-3 where it was stated thus:-

"Article 248 of the 2010 Constitution establishes nine Commissions and independent offices... These Commissions differ from Commissions in the 1969 Constitution because they have an express provision outlining their independence from other arms of government and they are administratively and financially delinked from the executive.

The Commissions and independent offices check presidential and public authority at two levels. The first is that the general Constitutional mandates of all Commissions under article 249 are to protect the sovereignty of the people, secure the observance by all state organs of democratic values and principles, and promote Constitutionalism. Second, the Constitutional Commissions have been mandated with specific Constitutional powers that under 1969 Constitution were presidential powers, or were statutory powers commandeered, usurped or abrogated by the President." (Emphasis Added)

56. Upon considering the above-authority and the Constitution, I find that article 249 of the Kenya Constitution 2010 is the source of the Independence of the Various Commissions and this is in terms of appointment, operation and security, which is to mean, that the independence of decision making is the core of the matter. The decisions that are appropriate must be made by them and by them without any influence from those to whom the decision making power is not given. To buttress this proposition the petitioner rely in the case of Martin Nyaga Wambora v Speaker County Assembly of Embu & 5 others [2014] eKLR where the court expressed itself at page 5 thus:

"...In this case, this court is acutely aware that the three arms of Government that is to say the Executive, the Legislature and the Judiciary have their respective mandates clearly set



out in the Constitution and that as far as possible, each arm of government must desist from encroaching on the functions of the other arms of Government. In fact, the court's position has always been that it can only interfere with the exercise of the Executive and the Legislature's mandates, if it is alleged and demonstrated that they have threatened to act or have acted in contravention of the letter and spirit of Constitution....”

57. Further to the aforesaid article 255(1) of the *Constitution of Kenya 2010*, makes it mandatory, that any amendment relating to the independence of the Judiciary, the Independence of the Commission and Independent offices shall be through a referendum. I therefore find and hold that the only way to restructure, re-organise or amend any of the independent commissions is by way of a referendum and not gazetting of an Executive Order.
58. It should also be noted, that the making of such Executive Orders by the Executive, constitute administrative action as it amounts to implementing administrative policies, which fully require full adherence to the spirit and letter of the applicable laws. I find the Executive Order purporting to re-organize government structures, including independent commissions, is illegal and unconstitutional, in so far as any amendment or restructuring to independent commissions are concerned, as it should be carried out by way of a referendum. I find that the Executive Order, has not conformed to the constitution; and as such the Constitution must overrule the Executive Order. I find the Executive Order No 1 of 2020 (revised titled “organization of Government of Republic of Kenya”) is a blatant violation of the *Constitution of Kenya 2010* and the same ought to be struck out.

C. Whether head of public service is properly joined and whether should have been joined as a party.

59. The respondents through a replying affidavit by Kennedy Ogeto, dated July 13, 2020, under paragraph 3 deponed, that there is no basis for the joinder of the Head of Public Service in the present proceedings, as there is neither any claim made against him nor is there any relief sought against him in the petition.
60. The petitioner through further affidavit by Mercy K Wambua, sworn on July 16, 2020, states under paragraph 5, that contrary to the assertions by Solicitor General, that the joinder of the Head of Public Service, to these proceedings, is necessary as he authorised the letter, whose effect is to notify the Treasury of various changes as introduced by the Executive Order and therefore to effect budgeting allocations and planning.
61. Upon perusal of the petition, under paragraph 43 of the petition, it is averred that the 2nd respondent wrote to various Government Departments, informing them of the Executive Order, and further directing the National Treasury, to take note of the various changes as introduced by the Executive Order. The letter requested for making of necessary changes in the Budgetary allocations. The order sought in the petition are declaratory orders and Judicial Review against the respondents. It is not correct therefore to urge that there are no basis for joinder of the Head of Public Service and that there is no claim made against him.
62. Further rule 5(d)(iii) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, (otherwise referred to as “The *Mutunga* Rules”) provides that the following procedure shall apply with respect to addition, joinder, substitution and striking out of parties; that where the petitioner is in doubt as to the person from whom redress should be sought, the petitioner may join two or more respondents in order, that the question as to whom of the respondents is liable, and to what extent may be determined as between all parties. Further rule 5(b) of the *Mutunga* Rules, provides that no petition shall be defeated by reason of the mis-joinder or non-joinder of parties and the court may in any proceedings deal with the matter in dispute. In view of the aforesaid whether



the 2nd respondent was properly joined or not do not in my view, defeat the petition nor is it fatal. I find no basis on this issue. I dismiss the same.

63. The petitioner's petition is meritorious and I proceed to grant the following orders:-

- a) A declaration be and is hereby issued that the Executive Order Number 1 of 2020, issued on January 14, 2020, (Revised) purporting to organize the government and set out Judiciary and its Tribunals, Commissions and Independent offices as institutions under the functions of ministries and government departments and other constitutional bodies, specifically, paragraphs (1), (3), (5), (7), (10), (11), (16), (18), (21), (22), (27), and (28) are unconstitutional, null and void and contrary to articles 10, 27 (1), 47, 159, 160, 161, 169, 171, 172, 173 and 249 of the *Constitution of Kenya, 2010*.
- b) An order of Judicial Review by way of an order of *certiorari* be and is hereby granted pursuant to article 23(3)(f) to remove into the Court for purposes of quashing portions of the Executive Order Number 1 of 2020 issued on January 14, 2020 (Revised) May 2020 that purports to organize the government and set out the Judiciary, and its Tribunals, Commissions and Independent offices as institutions under the functions of ministries and government departments and other constitutional bodies, specifically paragraphs (1), (3), (5), (7), (10), (11), (16), (18), (21), (22), (27), and (28).
- c) Costs of the petition to the petitioner.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF JUNE, 2021.

J. A. MAKAU

JUDGE

