REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO 331 OF 2016

KATIBA INSTITUTE……1ST PETITIONER

AFRICA CENTRE FOR OPEN GOVERNANCE……2ND PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL……1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION……2ND RESPONDENT

JUDGMENT

1. The petitioners are non-governmental organizations and public interest litigants. They have filed this petition against the Attorney General, the principal legal adviser to the government and the legal representative of the national government in civil proceedings in which it is a party, the 1st respondent, and the Public Service Commission, herein after, **PSC**, a constitutional commission established under Article 233 of the Constitution with the mandate to establish and abolish offices in the public service,

appoint persons to hold or act in those offices and confirm such appointments, the 2nd respondent.

2. The petition challenges the selection and appointment by the President and members of his cabinet, of persons to the positions of chairpersons and members of boards to various state corporations and parastatals. The basis for this challenge is that the mandate to select and appoint persons to those positions should be exercised by the 2nd respondent, and in accordance with the values and principles in **Articles 10** and **232** of the Constitution.

3. In this regard, it is the petitioners' case that provisions in various statutes that purport to give power to the President and his cabinet secretaries to make such appointments are invalid and should be nullified. The petitioners further seek a declaration that any selection and appointment of persons as chairpersons and members of boards of state corporations and parastatals specified at **paragraph 58** of the Petition, must be based on the principles including; fair competition and merit and that the process be

transparent and accountable as required by **Article 232(1) (e)** to **(f)** and **232(2).**

4. The petitioners also seek to have all appointments made by the President or cabinet secretaries on 11th March 2016 and gazetted in Gazette Notice Vol. CXVIII – No.23; those made on 18th March 2016 and gazetted in Gazette Vol. CXVIII – No.28; those made on 10th June 2016 and gazetted in Gazette No. Vol CXVIII-No. 62**;** 17th June 2016 under Gazette Notice Vol. CXVIII – No.66; those made on 24th June 2016 under Gazette Notice Vol. CXVIII – No. 70; and those made on 1st July 2016 vide Gazette Notice Vol. CXVII – No.72, invalidated.

5. The petitioners' primary argument is that positions of chairpersons and members of boards of state corporations and parastatals are public offices in the public service, and that those appointed to those positions are public officers within the meaning of the Constitution and are, therefore, subject to the constitutional provisions applicable to public service. The

petitioners rely on **Article 260** of the Constitution on the definition of public service.

6. Mr. Ochiel, learned counsel for the petitioners, submitted, highlighting their written submissions dated and filed on 3rd April 2018, that the impugned appointments did not comply with Constitutional requirements on the appointments to public office. Learned counsel argued that there was non-compliance with the principles in **Article 10,** including those of transparency, accountability and good governance, and **Article 232(2)** on the values and principles of public service, namely; high standards of professional ethics, transparency, fair competition, meritocracy, diversity, equal opportunities of all ethnic groups and persons with disabilities.

7. Counsel further argued that the impugned provisions in the **Acts of Parliament** set out at **paragraph 58** of the petition, are unconstitutional for the reason that they expressly take away the authority conferred on the 2nd respondent by **Article 233 (2)(a)** to establish, abolish and make appointments in the public service.

Mr. Ochiel submitted that the impugned appointments did not fall within the exceptions under **Article 234(3)** and **(4).** He relied on several decisions to support his arguments.

8. They included: the Supreme Court decision in ***Fredrick Otieno Outa v Jared Odoyo Okello & 4 others*** [2014] eKLR for the definition of a public officer to mean a state officer, or any other person who holds a public office being an office within the national government, county government or public service; a person holding such office and being sustained in terms of remuneration and benefits from the exchequer.

9. The petitioners also relied on ***Rogers Mogaka Mogusu v George Onyango Oloo & 2 others*** [2015] eKLR for the submission that persons serving in parastatals and state agencies which receive public funds are public officers. In that case, the court held that the 1st respondent, being the chairperson of the Lake Basin Development Authority, a state corporation, was a public officer.

10. The petitioners further relied on ***KUDHEIHA v Salaries and Remuneration Commission*** [2014] eKLR, for the proposition that the criteria for determining whether one is a public officer or not requires a literal meaning, that is; whether the person holds an office either in the national government, county government or public service, and his remuneration and benefits are payable directly from the consolidated fund or out of money provided by Parliament.

11. The 1st respondent opposed the petition through a replying affidavit by Joseph Kinyua, the Chief of Staff and Head of Public Service, sworn and filed on 31st January 2017; grounds of opposition dated 12th October 2016 and filed on 5th January 2017; and supplementary submissions, list and bundle of authorities, all dated 30th January 2019 and filed on 31st January 2019.

12. Mr. Kamau Karori, learned counsel for the 1st respondent, urged the court to note that the petitioners had departed from their pleadings. According to counsel, state corporations and parastatals are not offices in the national or county governments

or Public Service; that they are not offices established under the Constitution and, therefore, **Article 234 (2)** does not apply.

13. Mr. Karori further argued that for the court to arrive at the decision it is being urged to make, the petitioners must place materials before it to demonstrate how many men, women and persons with disabilities had been appointed, in order to show how the process of appointments was skewed, and, in what way.

14. Learned counsel also contended that the court is being asked to make adverse orders against persons some of whom have been serving for about three years. He urged the court to note that the persons whose positions are under challenge are not before it; that they have not been given an opportunity to be heard and demonstrate their competence and or suitability and, therefore, the court should not make adverse orders against any of them.

15. Mr. Karori submitted that the executive has power over state corporations and parastatals which it exercised pursuant to **Article 232**. He argued that to give effect to **Article 232** and the principles therein, the government came up with **Mwongozo,**

(The Code of Governance for State Corporations), and that the principles embodied in **Mwongozo** were intended to ensure accountability.

16. Counsel further submitted that the 1st respondent followed the process set out in **Mwongozo** and that the court should only interfere in the appointments if it is shown that the principles in **Mwongozo** which were applied in those appointments, were contrary to the Constitution. He contended that most of the impugned statutes were in existence before the 2010 Constitution, and that the Constitution provided a solution in section 7 of the Sixth Schedule where such Acts are found not to be in conformity with it. He urged the Court not to invalidate or declare the impugned provisions unconstitutional, as that is not the remedy provided for under the Sixth Schedule.

17. Counsel relied on a number of decisions to buttress his arguments, including; ***Federation of Women Lawyers of Kenya (FIDA-K) v Attorney General & another*** [2018] eKLR for the submission that when interpreting constitutional provisions, close scrutiny should be given to the language of the

Constitution itself in ascertaining the underlying meaning and purpose of the provision in question.

18. The 1st respondent also relied on ***Association of Retirement Benefits Scheme v Attorney General & 3 others*** [2017] eKLR which cited a decision of the Privy Council in ***Minister for Home Affairs and Another v Fischer***(1979) 3 All ER 21, that a constitution is a document ***sui generis*** to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and principles of statutory interpretation.

19. Reliance was also placed on ***Elgeyo Marakwet Civil Society Organisation Network v Ministry of Education, Science and Technology & 2 others***[2016] eKLR, which held that members of university council do not hold office in the public service. In that case the court stated that when it comes to the provisions of the Constitution, the term public office must be interpreted in accordance with the definition assigned to it by the Constitution, and that an Act of Parliament cannot be used or interpreted in such a way as to expand constitutional provisions, unless such expansion is contemplated by the Constitution itself.

20. The 1st respondent also relied on ***John Harun Mwau v Attorney General***[2015]eKLR; ***National Conservative Forum v Attorney General*** [2013] eKLR and the US Supreme Court decision in ***Marbury v Madison*** 1 Cranch. 137, 165 on the interpretation of the Constitution, among other decisions. In particular counsel relied on a decision by the Employment and Labour Relations Court, ***Okiya Omtatah Okoiti v The President of Kenya & 4 others*** [2019] eKLR, (Nairobi, Petition No. 19 of 2016 **(Wasilwa, J),** to argue that the issues raised in this petition were resolved in that decision and, therefore, this petition is moot.

21. We have perused that decision and the determination made by the court in that matter. We do not agree with the 1st respondent's contention that the issues in this petition were resolved in that matter. On the contrary, the court in that petition determined the question whether appointments to state corporations and parastatals should be done competitively and on merit, but not the issue of constitutionality, and the persons or bodies to make the appointments.

22. Mr. Mutinda, learned counsel for the 2nd respondent, submitted orally in court. He relied on the affidavit of Joseph Kinyua sworn and filed on 31st January 2017; grounds of opposition filed by the 1st respondent dated 12th October 2016 and filed on 5th January 2017 and the 1st respondent's supplementary submissions dated 30th January 2019 and filed on 31st January 2019. He also associated himself fully with the submissions made on behalf of the 1st respondent.

23. Learned counsel, however, added that the petition is based on a misunderstanding of the law. It was his submission that the functions and powers of the 2nd respondent are subject to both the Constitution and legislation; that appointments by the 2nd respondent must be made in accordance with the Constitution and that they are limited by other statutes.

24. Mr. Mutinda contended that the impugned appointments were made in accordance with the modes of appointment provided by the various statutes establishing those state corporations and parastatals. According to counsel, if the appointments were made in the manner provided for under the relevant statutes, then they met the constitutional threshold and ought not to be interfered

with. He argued that chairpersons and members of boards are not on salary or remuneration, but on sitting allowances and, therefore, are removed from the arena of public office.

25. In counsel's view, appointments of chairpersons and members of boards are unique given that state corporations and parastatals constitute different types of bodies as elaborated at paragraph 35 of Mr. Kinyua's affidavit. He submitted that the state corporations and parastatals in issue are diverse, and that the law prescribes diverse modes of appointment to their membership. He contended that some appointments were pegged on the positions the appointees held, and consequently appointments to such boards could not be global as suggested by the petitioners.

26. Two applications were filed on behalf of two parties who were seeking to be joined as interested parties to this petition. The applications were, however, never prosecuted. The Law Society of Kenya also sought to appear as ***amicus curiae,*** but did not attend at the hearing of the petition, though aware of the date of hearing.

Analysis and determination

27. We have considered this petition; grounds of opposition and the replying affidavit. We have also considered submissions made on behalf of the parties and the decisions relied on by both sides. From all these, we distilled the following issues for determination, namely:

a) Whether positions of chairpersons and members of boards of state corporations and parastatals are offices in the public service;

b) Who should make such appointments;

c) Whether the appointments complied with constitutional values and principles in Articles 10 and 232;

d) Whether statutory provisions on the appointments to such positions are unconstitutional;

e) What reliefs to grant.

28. This petition impugns the constitutionality of various statutory provisions on the appointment of chairpersons and members of boards to various state corporations and parastatals, and appointments made pursuant to those statutes. This therefore requires interpretation of various Articles of the Constitution. It is proper that before determining the issues identified herein above, we briefly consider the principles applicable in constitutional interpretation and how they relate to the impugned statutes and appointments.

29. **Article 259(1)** of the Constitution enjoins this Court to interpret it in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance.

30. Further, the Constitution should be given a purposive, liberal and flexible interpretation. In ***Re The Matter of the Interim Independent Electoral and Boundaries Commission*** [2011] eKLR, the Supreme Court adopted the words of ***Mahomed A J***,

in the Namibian case of ***State v Acheson*** 1991(20 SA 805, 813) where he stated;

> ***"[51]…The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and …aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion".***

31. In the case of The ***Government of Republic of Namibia v Cultura*** 2000, 1994 (1) SA 407 at 418, ***Mahomed, CJ***. Stated;

> ***"A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation."***

32. And in ***Njoya & 6 Others v Attorney General & Another*** [2004] eKLR, the Court observed that:

> ***"Constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the constitution, of necessity, has principles and values embodied in it, that a constitution is a living piece of legislation. It is a living document."***

33. Most importantly, the Supreme Court advocated for a holistic interpretation of the Constitution in ***Re The Matter of Kenya National Human Rights Commission,*** Supreme Court Advisory Opinion Reference No.1 of 2012) [2014] eKLR stating;

> ***"But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation***

does not mean an unbridled extrapolation of discrete constitutional provisions in each other, so as to arrive at a desired result."

34. With these principles in mind, we turn to consider the issues identified in this petition.

Whether positions of chairpersons and members of boards of state corporations and parastatals are offices in the public service

35. The petitioners argued that the positions in state corporations and parastatals are positions in the public service as contemplated by the Constitution. In their view, any appointments to such positions must be made by the 2nd respondent, and in accordance with the principles in **Articles 10** and **232**. The respondents hold a contrary view, contending, that these are not positions in the public service and the appointments made must be in accordance with the applicable statutes.

36. The Constitution establishes various commissions and independent offices. **Article 233** establishes the 2nd respondent, and **Article 234(2)** as read with the Public Service Commission Act, 2017, provides for its functions and mandate. According to the PSC Act, the functions include: to establish and abolish offices

in the public service; appoint persons to hold or act in those offices, confirm appointments; and exercise disciplinary control over and remove persons holding or acting in those offices; promote the values and principles in **Articles 10** and **232** throughout the public service, and report to the President and Parliament on the extent to which the values and principles in **Articles 10** and **232** are complied with in the public service.

37. On the other hand, **Article 232(2)** sets out the principles of public service and states that the values and principles of public service apply to public service in all state organs in both levels of government and all state corporations.

38. The petitioners have argued that the values and principles of public service in **Article 232(2)** apply to all state organs in both levels of governments and all state corporations. They relied on the Public Officer Ethics Act, (No. 4 of 2003) Public Service Commission Act, 2017, Leadership and Integrity Act, (No. 19 of 2012) and Public Service (Values and Principles) Act, (No.1A of 2015) and decisions in ***Fredrick Otieno Outa v Jared Odoyo Okello & 4 others,*** (supra), ***Rogers Mogaka Mogusu v George***

Onyango Oloo & 2 others, (supra) and ***KUDHEIHA v Salaries and Remuneration Commission***,(supra), on the definition of public office and determination on who a public officer is.

39. The 1st respondent on his part argued that state corporations and parastatals are not offices in the public service as defined in **Article 260** of the Constitution. According to him, state corporations are not offices in the public service because they are not established under the Constitution and do not perform functions within a commission, office, agency or other body established under the Constitution. He further argued that it is a canon of constitutional interpretation, that, except where expressly stated or contemplated, an Act of Parliament cannot be used to explain or qualify the Constitution, since the Constitution is a self-contained code and, therefore, an ordinary statute cannot be used to interpret it.

40. In support of the above submission, he relied on ***Federation of Women Lawyers of Kenya (FIDA-K) v Attorney General & another*** (supra), ***Association of Retirement Benefits Scheme v Attorney General & 3 others,*** (supra) and ***Elgeyo***

Marakwet Civil Society Organisation Network v Ministry of Education, Science and Technology & 2 others (supra).

41. The 2nd respondent agreed with the 1st respondent, and added that it was not correct as submitted by the petitioners, that the impugned appointments ought to have been made by the 2nd respondent. It argued that under **Article 234(2) (a),** its functions and powers are subject to the Constitution and legislation and, therefore, where legislation provides for other modes of appointment it cannot interfere.

42. It contended that the modes of appointments to state corporations and parastatals are provided for under various statutes establishing them, considering their functions and management. It further contended that remuneration and benefits are tied together and that chairpersons and members of boards get allowances and not remuneration which is one of the criteria for determining whether one is a public officer or not.

43. We have considered the respective arguments by petitioners and the respondents on the issue together with the decisions relied on.

44. **Section 2** of the Public Officer Ethics Act defines "public officer" to mean:

> "**any officer, employee or member, including an unpaid, part-time or temporary officer, employee or member, of any of the following-**
>
> **(a) the Government or any department, service or undertaking of the Government;**
>
> **(b) the National Assembly or the Parliamentary Service;**
>
> **(c) a local authority;**
>
> **(d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law**
>
> **(e) a co-operative society established under the Co-operative Societies Act, (No. 12 of 1997;**
>
> **Provided that this Act shall apply to an officer of a co-operative society within the meaning of that Act;**
>
> **(f) a public University;**
>
> **(g) any other body described by regulation for the purposes of this paragraph;"**

45. **Section 2** of The Public Service Commission Act defines public officer to mean **"any person other than a state officer who holds a public office."** While **section 2** of both Leadership and Integrity Act, and Public Service (Values and Principles) Act, adopt the definition of **"public officer"** assigned by **Article 260** of the Constitution.

46. The definitions in the statutes have to be considered alongside that in the Constitution. **Article 260** defines **"public officer"** to mean; **(a) any State officer; or (b) any person, other that a State Officer, who holds a public office.**

47. As to what a public office is, we turn to consider whether the statutes relied upon, define public office in order to determine whether such definitions are in harmony with that in the Constitution. The Public officer Ethics Act, Public Service Commission Act and Public Service (Values and Principles) Act, do not define "public office" but adopt the meaning of public officer in **Article 260**.

48. On the other hand, the Leadership and Integrity Act does not define public office, but defines public entity, thus;

a) the Government, including the national or County government, or

b) any department, State organ, agency, service or undertaking of the national or County government;

(c) the National Assembly or the Parliamentary Service Commission;

(d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to the undertakings of a public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; or

(e) a corporation, the whole or a controlling majority of the shares of which are owned by a person or entity that is a public body by virtue of any of the preceding paragraphs of this definition; and

(f) statutory public bodies;"

49. The Constitution in **Article 260**, defines **"public office"** as;

> **an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament;**

50. What then is an office in the ***public service?*** The Constitution defines **"public service"** as **the collectivity of all individuals, other than state officers, performing a function within a State Organ.** It goes on to define **"state organ"** to mean **a commission, office, agency or other body established under the Constitution**.

51. Going by the above definitions, determination of whether an office is a public office will depend on two tests; first, whether it is an office in the national government, county government or public service; and second, if the remuneration thereof is from the consolidated fund or money directly provided by Parliament.

52. On the first test, we are of the considered view, that state corporations and parastatals are not offices in the public service, because they are neither offices in the national government nor county government as defined by the Constitution. The Constitution is also clear that to be a public service, there must be the collectivity of individuals who are performing a function within a commission, office, agency or other body established under the Constitution, except state officers. More importantly, state corporations and parastatals are not offices established under the Constitution.

53. The next test is that, even if state corporations and parastatals were to be deemed to be offices in the public service, they would still not pass the test, if remuneration and benefits thereof are not payable directly from the Consolidated Fund or out of money provided by Parliament. To resolve the issue, we have to determine whether remuneration and benefits payable to state corporations and parastatals is drawn from the Consolidated Fund or money directly provided by Parliament.

54. **Article 206** establishes the Consolidated Fund and its management in the following words;

(1) **There is established the Consolidated Fund into which shall be paid all money raised or received by or on behalf of the national government, except money that—**

(a) is reasonably excluded from the Fund by an Act of Parliament and payable into another public fund established for a specific purpose; or

(b) may, under an Act of Parliament, be retained by the State organ that received it for the purpose of defraying the expenses of the State organ.

(2)Money may be withdrawn from the Consolidated Fund only—

(a) in accordance with an appropriation by an Act of Parliament;

(b) in accordance with Article 222 or 223; or

(c) as a charge against the Fund as authorised by this Constitution or an Act of Parliament.

(3) Money shall not be withdrawn from any national public fund other than the Consolidated Fund, unless the withdrawal of the money has been authorised by an Act of Parliament.

(4) Money shall not be withdrawn from the Consolidated Fund unless the Controller of Budget has approved the withdrawal.

55. The Consolidated Fund, properly understood, is the main bank account of the national government into which all money

raised by it or received on its behalf is paid. Money from this account can only be withdrawn with the authority of Parliament and such withdrawal approved by the Controller of Budget. In that regard, there was no submission before us that remuneration and benefits of state corporations and parastatals are either drawn or not from this Fund.

56. The second aspect is whether remuneration and benefits are paid from money directly provided by Parliament. The petitioners argued, relying on the Exchequer Act, that the chairpersons and members of boards of these organizations are paid using public funds. The respondents, on their part countered that argument, that, they are not on remuneration but are paid allowances. They did not state where the money paid as allowances comes from.

57. **Section 2** of the Exchequer and Audit Act, cap 412, defines "public moneys" to include:

> **"(a) revenue;**
> **(b) any trust or other moneys held, whether temporarily or otherwise, by an officer in his official capacity, either alone or jointly with any other person, whether an officer or not."**

58. Further, **section 2** of the Public Finance and Management Act, 2012 defines "public money" to include:

> **(a) all money that comes into possession of, or is distributed by, a national government entity and money raised by a private body where it is doing so under statutory authority; and**
> **(b) money held by national government entities in trust for third parties and any money that can generate liability for the Government."**

59. It follows, therefore, that public money is any money in the possession of the national government, either raised on its behalf, or held by it in trust for third parties.

60. According to **section 10** of the State Corporations Act,

> **"(1) The chairman and members of a Board, other than the chief executive and public officers in receipt of salary, shall be paid out of the funds of the state corporation such sitting allowances or other remuneration as the Board may, within the scales of remuneration specified from time to time by the Committee, approve.**
> **(2) A Board may, within the scales specified by the Committee, refund travelling and other expenses incurred by the chairman or members of the Board in the performance of their duties."**

61. Where does money for state corporations come from? **Section 11** of the Act provides that:

> **"Every state corporation shall cause to be prepared and shall, not later than the end of February in every year, submit to the Minister and to the Treasury for approval, estimates of the state corporation's revenue and expenditure for the following financial year accompanied by proposals for funding all projects to be undertaken by the state corporation, or the implementation of which will continue during the financial year to which those estimates relate.**
> **(2) No annual estimates and proposals for funding projects shall be implemented until they have been approved by the Minister with the concurrence of the Treasury."**

62. From our reading of this section, and that on definition of public money, state corporations are funded using public funds by the Treasury through line ministries though this funding is not exclusive, since they also generate their own money from other sources. This is borne by the fact that according to the section, they submit estimates of their revenue and expenditure for the following financial year, accompanied by proposals for funding of the projects to be undertaken.

63. We have found that state corporations and parastatals are not offices in public service, State organs or bodies established under the Constitution. We have also found that remuneration

and benefits of chairpersons and members of boards of those bodies are not drawn from the Consolidated Fund. However, they are funded by public money from the Treasury through line ministries. That funding notwithstanding, and not being state organs or bodies established under the Constitution, they do not qualify as offices in the public service.

64. To buttress this view, we refer to the holding of the Supreme Court in **Fredrick Otieno Outa v Jared Odoyo Okel**lo **& 4 others** (supra). In that case, one of the issues the Supreme Court dealt with was whether a person holding office in CDF was a public officer. The Court observed at paragraph 129, that in ascertaining who a public officer is, it had to take into account the plurality of laws emanating from the Constitution, statutory laws and regulations in relation to public service.

65. The court then considered the definitions ascribed to "public officer" by **section 2** of the Public officer Ethics Act, **section 2** of the Political Parties Act, and **section 2** of the Leadership and Integrity Act, which assign to public officer, the meaning given under **Article 260** of the Constitution, and stated;

> **"[148] Strictly speaking, the proper meaning of "public officer", for purposes of the electoral law, is that embodied in Article 260 of the Constitution as read together with Section 2 of the Elections Act. The different definitions in other statutory provisions, such as those enumerated earlier on, ought not to take precedence over the said constitutional provision. And thus, the proper meaning of "public officer" – currently is; (i) the person concerned is a State officer; or (ii) any other person who holds "public office" – an office within the national government, county government, or public service; (iii) a person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer."**

66. As we have already stated, public service is the collectivity of all individuals, other than state officers, performing a function within a State organ; while State organ is either, a commission, office, agency or other body established under the Constitution. That means, the collectivity of the individuals must be performing a function within a state organ established under the Constitution. It is clear to us that offices in state corporations and parastatals are not commissions, offices, agencies or other bodies established under the Constitution. They are, therefore, not state organs within the meaning of the Constitution.

67. Regarding remuneration and benefits, our reading of the law is that this is not directly drawn from the Consolidated Fund or directly provided by Parliament. Under **section 11** of the State Corporations Act, state corporations are required to prepare and submit to the line minister and the Treasury for approval, yearly estimates of their revenue and expenditure accompanied by proposals for funding of the projects they are to undertake, or implement during the financial year. This is testimony to the fact that state corporations and parastatals generate their own revenue for expenditure, and their funding is not necessarily wholly provided for by Parliament.

68. To answer the first issue in this petition, we find and hold that positions of chairpersons and members of boards of state corporations and parastatals are not offices in the public service.

Who should make the appointments

69. Having determined that positions of chairpersons and members of boards of state corporations and parastatals are not offices in the public service, the next issue then is, who should make the appointments. The petitioners argued that the 2nd respondent is responsible for the appointments. They submitted

that the 2nd respondent is the principal institution responsible for hiring and dismissal of public officers, including chairpersons and board members of state corporations and parastatals, while ensuring that the principles in **Articles 10** and **232,** as well as applicable statutes, are complied with.

70. The petitioners also argued, relying on **section 3(3)** of the Public Officer Ethics Act, that the 2nd respondent is responsible for the public officers in respect of which it exercises disciplinary control and those described in paragraphs (d) and (e) of **section *107* (4)** of the repealed Constitution, and for public officers, employees or members of state corporations that are public bodies**.** In their view, the various statutory provisions under which the impugned appointments were made contravene **Article 233(2) (a) (ii)**. It is the petitioners' case that the 2nd respondent is constitutionally mandated to make all other appointments in the public service except those in **Article 234(3)(4).**

71. The 1st respondent submitted that the President has executive power under **Article 132 (4)(a)** to perform executive functions provided for under the Constitution or national legislation. In his view, the powers given to the President under

the Constitution are not exhaustive and that national legislation could grant additional authority to the President to perform other functions.

72. It is the 1st respondent's case that the fact that national legislation grants the President and or members of his cabinet powers and functions not expressly provided for in the Constitution, is not a derogation from the Constitution. He argued that provisions in the State Corporations Act and other statutes giving power to the President and members of his cabinet to make appointments are statutes envisaged under **Article 132(4)(a)** and, therefore, the persons empowered by those statutes to make appointments are the proper appointing authorities.

73. The 2nd respondent agreed with the 1st respondent that the impugned appointments were made under statutes establishing the state corporations and parastatals which also provide for the modes of appointments and, therefore, it had no role to play. It also argued that the petitioners did not demonstrate how the appointments contravened the statutory provisions under which they were made. In its view, if the appointments were made in the manner provided for by statute, they met the constitutional

threshold. According to the 2nd respondent, state corporations are diverse with different modes of appointments, and cannot have a uniform mode of appointment.

74. We have considered the arguments of parties on this issue. We also have perused the Constitution and the various statues on this argument. The appointments under challenge were made by the President and members of his cabinet under various statutory provisions in statutes that establish the various state corporations and parastatals.

75. We have already held that positions in state corporations and parastatals are not positions in the public service. That being our view, we are not persuaded by the petitioners' argument that the impugned appointments should have been made by the 2nd respondent. Whereas the 2nd respondent is the institution responsible for establishing and abolishing offices in the public service; appointing persons to hold or act in those offices, and to confirm the appointments or dismiss holders thereof, appointments to positions in state corporations and parastatals, can only be made pursuant to provisions in the statutes establishing those bodies.

76. We are cognizant of the fact that the Constitution confers on the President in **Article 132(4)(a)**, powers to perform any other executive function provided for in the Constitution or in national legislation. The impugned provisions are national legislations which give the President power to appoint persons to positions of chairpersons or members of boards in respective state corporations and parastatals. Where national legislation provides that an appointment be made by the President, the appointment can only be made as provided for and not as the petitioners urged.

77. Our view is also buttressed by the decision of the Court of Appeal in **Attorney General v Law Society of Kenya & 4 others** [2019] eKLR, that:

> **"The Constitutional architecture creates room under Article 132 for the President to perform some duties as a Head of State, which is a noble thing in a constitutional democracy. One of the noble tasks given to the President is to make state and public appointments, even where he has no other role to play in the process of appointment."**

78. The petitioners' argument that cabinet secretaries could not make the impugned appointments must suffer the same fate. The

appointments were made pursuant to statutory provisions in statutes establishing those state corporations and parastatals. It is difficulty to agree with the petitioners that the appointments could only be made by the 2nd respondent when the law requires they be made by cabinet secretaries.

79. In that regard, the accusation leveled against the 2nd respondent, of its inaction or omission, to appoint chairpersons and board members to state corporations and parastatals is unjustified. In our view, the 2nd respondent cannot be blamed for not appointing persons to those positions, given that the laws in place are clear on the appointing authorities. We do not find any justifiable cause to accuse the 2nd respondent as having committed dereliction of duty. The 2nd respondent could not purport to act where the law dictated otherwise which would result into unwarranted antagonism. We therefore find no fault on the part of the 2nd respondent in that regard.

80. In short, the answer to the second issue is, that the President and cabinet secretaries have the statutory mandate to make the impugned appointments.

Whether the appointments complied with constitutional values and principles in Articles 10 and 232

81. The next issue is whether the appointments complied with the constitutional values and principles in **Articles 10** and **232,** as well as Public Service (Values and Principles) Act. The petitioners argued that principles and values of public service apply to the process of appointment of chair persons and members of boards in state corporations and parastatals. It was their case, that the Constitution and applicable law specifically require that appointments to those offices be done in a manner that respects the values and principles of public service under the Constitution and the law.

82. They submitted that a person exercising power of selection, recruitment or appointment must ensure there is open, fair and competitive recruitment, whilst safeguarding diversity and equal opportunities for all. They argued that the appointing authority must adhere to the minimum safeguards such as transparency, fair competition, merit, integrity, and affording equal opportunity to men, women, members of all ethnic groups and persons with disabilities.

83. The 1st respondent submitted that the appointments complied with the Constitution and the law. He contended that in compliance with constitutional requirements of fair competition and merit in the appointment to the various state corporations and parastatals, deliberate and progressive reforms have been undertaken. He also contended that in determining the level of compliance with constitutional requirements, one must consider the laws establishing the state corporations and parastatals, and the procedure for appointment of chairpersons and members of the boards provided under respective statutes.

84. According to the 1st respondent, the appointment procedure is subject to internal processes whose outcome and contribution to the overall character of the board is not under the control of the appointing authority. It is his case that it is impracticable to manoeuvre the legal processes in order to accommodate the principle of inclusivity, fair competition and merit.

85. The 1st respondent further argued that the State Corporations Act and various legal regimes do not provide elaborate procedures on the appointments. For that reason, he contended, the government has taken measures to ensure

compliance with **Article 10** and affirmative action principle under **Article 27**. He relied on various circulars issued between 2006 and 2008 and **Mwongozo** of January 2015 to support his argument.

86. The 2nd respondent agreed with the 1st respondent. He maintained that where the appointments are made as provided for by statute, they meet constitutional threshold. In its view state corporations and parastatals have different modes of appointments and, therefore, there is nothing unconstitutional about the appointments.

87. We have considered respective parties' arguments on this issue. In order to resolve that question, we must begin with the Constitution. In the Preamble to the Constitution the people aspired a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. Further **Article 4(2)** states that the Republic of Kenya is a multi-party democratic State founded on the national values and principles of governance in **Article 10**.

88. **Article 10** provides that national values and principles of governance bind all state organs, state officers, public officers and

all persons, whenever any of them, applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.

89. The national values and principles of governance in **Sub Article (2)** include: the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised, good governance, integrity, transparency and accountability.

90. The Supremacy of the Constitution is emphasized in **Article 2(1)** which states that the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

91. The petitioners' argument is that the impugned appointments did not comply with constitutional principles in **Articles 10** and **232. Article 10 (2)** is on the national values and principles of governance, while **Article 232** is on values and principles of public service. **Article 232** provides that fair competition and merit is the basis of appointments and promotions in the public service. This is subject to ensuring

representation of Kenya's diverse communities; and affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service of men and women, members of all ethnic groups and persons with disabilities. Values and principles of public service apply to public service in all state organs in both levels of government and all state corporations.

92. Parliament was mandated to enact legislation to give full effect to this Article. In compliance with this mandate, it enacted Public Service (Values and Principles) Act. **Section 10** of the Act provides that the public service, a public institution or an authorised officer, shall ensure that public officers are appointed and promoted on basis of fair competition and merit. This should, however, be subject to affirmative action as demanded by both the Constitution and the Act. **Subsection (3)** requires that each public institution or authorised officer develops a system for the provision of relevant information that promotes fairness and merit in appointments and promotions.

93. There is no doubt in our mind, that values and principles of public service in **Article 232** and the Public Service (Values and

Principles) Act, apply to state corporations and parastatals. Similarly, the founding values and principles in **Article 10** bind all state organs, state officers, public officers and all persons whenever they apply or interpret the law or make or implement public policy decisions. The question is; did the impugned appointments comply with the constitutional values and principles?

94. The appointments under challenge affect over one hundred persons and were made vide various gazette Notices as follows; on 11th March 2016, Gazette Notice Vol. CXVIII – No.23; on 18th March 2016, Gazette Vol. CXVIII – No.28; 10th June 2016, Gazette No. Vol CXVIII-No. 62; on 17th June 2016, Gazette Notice Vol. CXVIII – No.66; on 24th June 2016, Gazette Notice Vol. CXVIII – No. 70 and on 1st July 2016, Gazette Notice Vol. CXVII – No.72. The appointments varied from chairpersons to members of boards of various state corporations and parastatals, and were made either by the President or respective cabinet secretaries.

95. The petitioners argued that the appointments were not made in accordance with the Constitution and applicable principles. They maintained that there was no openness in the

process, no advertisement of the positions or record of the criteria used in the appointments.

96. The respondents held a contrary view, contending that the appointments were properly made, and in accordance with, the Constitution and the law. They submitted that the guidelines in **Mwongozo** were applied in the process of appointment and, therefore, there was compliance with the constitutional principles.

97. We have considered this issue and carefully perused the petition, the responses and submissions made by the parties. From the petition, the respondents were put on notice that the appointments did not meet constitutional requirements. Put differently, the petitioners' case is that the appointments failed the constitutional test of transparency, openness, meritocracy and competitiveness. The respondents did not show at all that the appointments were made transparently, openly and competitively. In the replying affidavit sworn on behalf of the 1st respondent, it was deposed that;

> **"[15.iii] The selection procedure in each nominating entity is subject to internal processes whose outcome and contribution to the overall character of the board is not under the control of**

the appointing authority. It is therefore impracticable to manoeuvre the legal processes in order to accommodate the principles of inclusivity, fair competition and merit."

98. With great respect, we take this to be clear admission that there was no attempt at all to ensure compliance with the constitutional principles of public service, which apply to state corporations and parastatals. This view is further reinforced by the 1st respondent's further argument in the affidavit that;

"[13]…[C]ompliance with constitutional ethos particularly, fair competition and merit should be considered in light of the deliberate and progressive reforms that have been undertaken by the government for a merit based, inclusive and competitive state corporations over the years, which reforms have been necessitated by the values and principles embedded in the Constitution."

99. Our Constitutional scheme does not require deliberate or progressive reforms. It is the supreme law and binds all persons, state and public officers. Compliance with constitutional principles of public service entails putting in place mechanisms that guarantee enforcement of those requirements. When the Constitution speaks to **transparency, fair competition** and

merit, it means just that. The Constitutional principles of public service are not mere suggestions. They are commands that must be complied with and obeyed without exception.

100. We emphasize that the Constitution also requires appointments be subject to affirmative action. That is, the marginalized, gender and persons with disabilities be considered and adequately represented. This, in our respectful view, confers a guaranteed right to those groups, which right is protected by the Constitution.

101. While dealing with the essence and application of the Bill of Rights in **Article 20** in **Attorney General v Kituo Cha Sheria & 7 others** [2017] eKLR, the Court of Appeal stated;

> **"The [constitutional] theme is maximization and not minimization; expansion, not constriction; when it comes to enjoyment and, concomitantly facilitation and interpretation. What is more, courts, all courts, are required to apply the provisions of the Bill of Rights in a bold and robust manner that speaks to the organic essence of them ever-speaking, ever-growing, invasive, throbbing, thrilling, thriving and disruptive to the end that no aspect of social, economic or political life should be an enclave insulated from the bold sweep of the Bill of Rights."**

102. The above statement is true of the values and principles under the Constitution. That is why the public institution or authorised officer concerned must ensure that public officers are appointed and promoted on the basis of fair competition and merit, and demonstrable transparency, subject to affirmative action. The 1st respondent was required to demonstrate that there was indeed an open and transparent process, leading to the impugned appointments, in compliance with the constitutional command.

103. We associate ourselves with the views expressed in ***Community Advocacy and Awareness Trust and Others v*** **Attorney General** Nairobi Petition No 243 of 2011, that:

> **"[73] 27th August 2010 ushered in a new regime of appointments to public office. Whereas the past was characterised by open corruption, tribalism, nepotism, favouritism, scrapping the barrel and political patronage, the new dispensation requires a break from the past. The Constitution signifies the end of 'jobs for the boys' era. Article 10 sets out the values that must be infused in every decision making process including that of making appointments."**

104. We are not persuaded that the respondents discharged their noble duty. The Constitution provides for compliance with the principles of good governance and values and principles of public service. It does not provide that these principles be progressively realized. The respondents' argument that the appointments followed **Mwongozo**, is not demonstration that there was compliance with the Constitution. They had an obligation to show to the satisfaction of the court that the appointments were made as demanded by the constitution and not otherwise.

105. The respondents argued that the court cannot invalidate the appointments because that would amount to making adverse orders against persons who are not parties to the petition. This argument cannot stand in the face of clear constitutional provisions. The petitioners have not challenged the competence of the persons whose appointments have been questioned. What is challenged is the process through which the appointments were made. Even if those persons were made parties to the petition, they could not argue that their appointments complied with the Constitution. Moreover, some were joined in the petition but did

not attend at the hearing. Their failure to participate in this petition cannot in anyway affect the outcome of the petition.

106. We must state at the risk of repeating ourselves that the people of Kenya desired that appointments be made in an open, transparent and inclusive manner taking into account, the marginalized and people with disabilities. They deserve no less. They are entitled to their wish as a matter of right and not privilege. It is a constitutional compulsion.

107. In view of the foregoing, our answer to this issue is, the impugned appointments did not comply with constitutional values and principles in **Articles 10** and **232,** and the Public Service (Values and Principles) Act.

Whether statutory provisions on the appointments are unconstitutional

108. We now turn to consider the constitutionality of the statutory provisions on the appointments. The petitioners argued that the various provisions under which the appointments were made contravene **Article 233(2)(a) (ii)**. They further argued that the provisions do not require observance of the values and principles of public service in **Articles 232** and **233.** They set out the

impugned provisions at paragraph 58 of the petition. According to the petitioners, the provisions also contradict **section 22** of the Public Officer Ethics Act, as well as **section 10** of the Public Service (Values and Principles) Act, given that they contemplate a process of appointment that is inimical to the requirements of those Acts. They also argued that the provisions should have been read to conform with **section 7** of the **Sixth Schedule** to the Constitution.

109. They submitted that a statute can be unconstitutional because of its purpose or effect. They relied on **Institute of Social Accountability v National Assembly & 4 others** [2015] eKLR; **R v Big M Drug Mart Ltd** (1985) 1SCR 295 and **Coalition for Reforms and Democracy (CORD) & 2 others v Republic of Kenya & 2 others** [2015] eKLR.

110. The 1st respondent disagreed with the petitioners' arguments. He stated that lack of clear procedure on the appointment process as required by **Article 232** and **233** is not a ground for declaring the provisions constitutionally invalid. He contended that in considering constitutionality of the provisions, the court is enjoined to consider the fact that the law governing

a specific subject matter overrides a law that governs general matters. In his view, the Public Officer Ethics Act and the Public Service (Values and Principles) Act, should be read in harmony with the law governing state corporations, so as to contribute to good governance.

111. He urged that there is presumption of constitutionality of statutory provisions and the burden lies on the petitioner to prove otherwise. He relied on **Federation of Women Lawyers Kenya (FIDA) v Attorney General & another** [2018] eKLR. He also argued that the court should consider the purpose for which the law was enacted and that the statutes were saved by **section 7** of the **Sixth Schedule** to the Constitution. He relied on **Communication Commission of Kenya & 5 others v Royal Media Services & 5 others** [2014] eKLR. The 2nd respondent associated itself with the 1st respondent's submissions.

112. We have considered respective parties' arguments on this issue. The petitioners have asked this court to invalidate all the provisions on which appointments to state corporations and parastatals were made, on grounds that they are inconsistent

with **Articles 232** and **233** of the Constitution and the principles embodied therein.

113. **Article 2(4)** provides that any law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. Courts have developed general principles on which to test constitutionality of statutes.

114. First, there is a general but rebuttable presumption that a statute or statutory provision is constitutional and the burden is on the person alleging unconstitutionality to prove that a statute or its provision is constitutionally invalid.

115. In **Charanju Lal v Union of India** [1950] SCR 869, the Supreme Court of India stated that it must be assumed that the legislature understands and appreciates the need of the people and that the laws it enacts are directed to the problems which are made manifest by experience and that the elected representatives assembled in a legislature, enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of constitutionality

of an enactment. (See also **Hamdard DawaKhana v Union of India & others [1960] AIR 554**).

116. In **Ndynabo v Attorney General of Tanzania** [2001] EA 495, it was also held that an Act of Parliament is constitutional, and that the burden is on the person who contends otherwise to prove the contrary.

117. The second principle for determining constitutional validity of a statute, is by examining its purpose or effect. The purpose of enacting a legislation, or the effect of its implementation, may lead to nullification of the statute or its provision, if found to be inconsistent with the Constitution.

118. In **Olum & another v Attorney General** [2000] UGCC 3; [2002] EA, **Okello, JA.** stated;

> **"To determine the constitutionality of a section of a statute or Act of Parliament, court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the court has to go further and examine the effect of its implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional"**

119. Similarly, in **The Queen v Big M. Drug Mart Ltd,** 1986 LRC (Const.) 332, the Supreme Court of Canada stated that;

> **"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity."**

120. Further, in **Centre for Rights Education and Awareness(CREW) & another v John Harun Mwau & 6 others**[2012] eKLR, the court observed that in determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned Act, which can be discerned from the intention expressed in the Act itself.

121. We have considered arguments by respective parties. We have already held that the impugned positions are not positions in the public service and that the appointments should be made

by the respective persons authorized by the statutes. The petitioners' argument, as we understand it, is that because the various provisions on the appointment of chairpersons and members of boards of state corporations and parastatals do not state that appointing authorities comply with the principles in **Article 232,** they are unconstitutional**.**

The impugned provisions

122. The petitioners have challenged several provisions in various statutes as set out at paragraph 58 of the petition. Paragraph 5 of the Regional Centre on Groundwater Resources Education Training and Research in Eastern Africa Order, 2015, provides that (1) The Centre shall be managed by a board, which shall consist of (a) a chairperson, appointed by the President. Paragraph 16 of the Investment Authority Act (Now the Investment Promotion Act No. 6 of 2004) provides that; (2)(a) the board of the Authority shall consist of a chairman appointed by the President and Paragraph 6 (1) (a) of the State Corporations Act is to the effect that (1) unless the written law by or under which a state corporation is established or the articles of association of a state corporation otherwise require, a board

should, subject to subsection (4), consist of (a) a chairman appointed by the President who shall be non-executive unless the President otherwise directs.

123. Subsection 7 (3) of the State Corporations Act states that, notwithstanding the provisions of any other written law or the articles of association establishing and governing a board, the President may, if at any time it appears to him that a board has failed to carry out its functions in the national interest, revoke the appointment of any member of the board and may himself nominate a new member for the remainder of the period of office of that member or he may constitute a new board for such period as he shall, in consultation with the Committee, determine.

124. The other impugned provisions include; Paragraph 6 (1)(a) of the Kenya Water Towers Agency Order, 2012, which states that there shall be a board of directors of the agency which shall consist of a non-executive chairperson appointed by the President; paragraph 3 (1)(a) of the Kenya Meat Commission Act, which establishes the commission which should consist of a chairman appointed by the President; Paragraph 6 (1)(a) of the Kenya School of Government Act, 2012, which establishes a

council of the school to consist of a non-executive chairperson, who shall be a person with considerable experience in executive management, appointed by the President, and section 6 (1) (f) of the Act which states that the council of the school shall consist of three renowned leaders and managers from the private sector.

125. The petitioners further impugned; paragraph 3 (a) of the National Water Conservation and Pipeline Corporation Order, which establishes a board of the corporation which, subject to section 6(4) of the State Corporations Act, shall consist of a non-executive chairman appointed by the President; Subsection 2(2) of Gazette Notice No. 1386 of 2009, which establishes the Vision Delivery Board, and states that all appointments under subparagraphs (a), (d) and (f) shall be made by the President; and Paragraph 4 (1) (a) of the National Hospital Insurance Fund Act, which established the National Hospital Insurance Fund Board of Management, which consists of a chairman to be appointed by the President by virtue of his knowledge and experience in matters relating to insurance, financial management, economics, health or business administration.

126. The petitioners again challenged; paragraph 4 (1) (a) of the Ewaso Ng'iro North River Basin Development Authority Act, which provides that the Authority shall consist of a chairman who shall be appointed by the President; Paragraph 5 (1) (a) of the Konza Technopolis Development Authority Order, 2012 which states that the Authority shall be managed by a board comprising of a non-executive chairperson appointed by the President.

127. Similarly challenged is; subparagraph 5 (2) (e) (i), (ii) of the Youth Enterprise Development Fund Order, 2007 which states that the board is to consist of four persons, not being public officers, appointed by the minister in consultation with the minister for the time being responsible for matters relating to finance, by virtue of their knowledge or experience in matters relating to financial management, venture capital fund management or youth development; paragraph 3B(1) (a) of the Insurance Act which states that the management of the Authority shall vest in the board of directors of the Authority to comprise of a chairperson to be appointed by the President on the recommendation of the minister.

128. Also challenged is; subsection 6(3) of the Forests Act, which states that one of the members appointed under subsection 1(i) shall be appointed by the President to be the chairman of the board; paragraph 2(2) (a) of the Kenyatta National Hospital Board Order, which states that the board shall consist of a non-executive chairman appointed by the President; paragraph 6(1) (a) of the Kenya Film Commission Order, 2015, which vests the management of the commission in a board which consists of a non-executive chairperson appointed by the President; and, section 5(IA) of the Local Authorities Provident Fund Act, which provides for a chairman and vice-chairman appointed by the minister.

129. The petitioners also challenged; paragraph 49(1)(a) of the Proceeds of Crime and Anti-Money Laundering Act, which establishes a board consisting of a chairperson appointed by the minister; subsection 4(3) of the Agricultural Finance Corporation Act, which provides for a chairperson and a deputy chairperson appointed by the minister, in consultation with the minister for the time being responsible for finance; paragraph 4(1) (a) of the Non-Governmental Organizations Co-ordination Act, which

establishes a board consisting of a chairman appointed by the President; paragraph 5(2)(a) of the National Council for Population and Development Order; and, subparagraph 3(2)(a) and (i) of the Brand Kenya Board Order, which establishes a board consisting of a non-executive chairperson appointed by the President, and at least seven persons appointed by the minister.

130. Also challenged is; paragraph 10(1)(a) of the Energy Act, which states that the management of the commission shall vest in the Commissioners to consist of a chairperson appointed by the President; paragraph 4 (1) (a) of the Ewaso Ng'iro South River Basin Development Authority Act, which provides that the Authority shall consist of a chairman appointed by the President; paragraph 35(1) (a) of the Sports Act, 2013, which states the management of the Academy shall vest in a council consisting of a chairperson, a person knowledgeable in sports, finance or commerce, appointed by the President; and, Paragraph 5 (1) (a) of the Kenya Literature Bureau Act which establishes a board of management, consisting of a chairman appointed by the President.

131. The petitioners further challenged; section 32(1) (a) of the Tourism Act establishing a board of directors of the Tourism Board which consists of a chairperson appointed by the President; subparagraph 43 (1) (f) (ii) of the Act which provides that a board of the convention centre to consist of five other members, not being public officers, appointed by the minister through a competitive process, taking into account regional balance and gender parity, of whom three should be persons with knowledge or experience in matters relating to business management or marketing; paragraph 54(1) (a) of the Act which establishes the board of the institute to consist of a chairperson appointed by the President; and, subparagraph 54 (1) (h) (ii) and (iii) of the Act, which states that six other members are to be appointed by the minister, taking into account regional balance and gender parity, of whom; two are to represent institutions of higher learning and two to be persons qualified and competent in multi-disciplinary research; and, subparagraph 54(1) (h) (iii) of the Act on the appointment of the board of the institute to consist of six other members appointed by the minister through a competitive process, taking into account regional balance and gender parity,

two of whom shall be persons qualified and competent in multi-disciplinary research.

132. Further still, the petitioners impugned the constitutionality of; Paragraph 67 (4) (a) of the same Act which establishes the board of trustees to consist of a chairperson appointed by the President, who should have competence in finance matters; Paragraph 77 (1) (a) of the Act which establishes the board of the corporation to consist of a chairperson appointed by the President and who should be a person qualified in banking and financial matters; Paragraph 20 (2) (a) of the Act, which provides that the council should consist of a chairperson appointed by the President; and, subparagraph 20(2) (g) (ii) of the Act which provides that the council should have six other members, not being public officers, appointed by the minister, taking into account regional balance and gender parity, of whom, four should be persons who have knowledge or experience in matters relating to curriculum development, or teaching in the tourism and hospitality industry.

133. The other impugned provisions are; paragraph 5 (2) (a) of the Pest Control Products Act, which states that the board shall

consist of a chairman appointed by the President; subsection 4(1) of the National Youth Service Act which states that there shall be a national youth leader appointed by the President, acting on the advice of the minister, and for avoidance of doubt the section declares that, for the purposes of section 41(1) (f) of the Constitution, the office of national youth leader is not to be a public office.

134. We must point out here that the impugned provision, and indeed the entire Act, was repealed by the National Youth Service Act, 2018, whose **section 4** provides that the service shall observe and uphold the national values and principles of governance set out in **Article 6(3)**, **Article 10**, the Bill of Rights enshrined in Chapter Four, the values and the principles of Public Service set out in **Article 232(1)** of the Constitution, thus making it compliant with the Constitution.

135. The petitioners further took issue with; paragraph 8(2) (a) of the Public Finance (National Government Affirmative Action Social Development Fund) Regulations, 2016 which states that the board is to consist of a chairperson appointed by the cabinet secretary for the time being responsible for matters relating to

gender affairs from among persons appointed under subparagraphs (e), (f) or (g); paragraph 5 (1) (g) of the National Youth Council Act, which states that the council shall consist of eight youths elected by the youth in such manner as may be prescribed, and appointed by the minister; paragraph 5(1) (h), which states that the council shall consist of not more than eight other youths, of whom, at least three shall be of the female gender and one shall be a youth with disability, nominated by the National Youth Congress in such manner as may be prescribed, and appointed by the minister; and, paragraph 16(2) (a) of the Act, which states that the board shall be an unincorporated body comprising of a chairperson appointed by the President.

136. Also impugned is; Paragraph 3 (d) of the National AIDS Control Order; paragraph 9(1) (j) of the Kenya Medical Training College Act, relating to appointment of boards of management appointed by the minister; paragraph 9 (1) (a) of the Kenya Medical Training College Act; subparagraphs 6 (a) and (d) (iii) and 8 of the National Social Security Fund Act, which gives power to the cabinet secretary to appoint chairperson of the board from

amongst the Trustees appointed under paragraph (d) (iii) and that the board shall comprise of seven persons appointed by the cabinet secretary, three persons, one of whom, shall be of opposite gender, not being public officers nor employees or directors of any public company, appointed by the cabinet secretary by virtue of their knowledge and experience in matters relating to administration of scheme funds, actuarial science, insurance, accounting and auditing or law, and section 8(1) which states that a trustee appointed under section 6(d) 9i), (ii) and (iii), shall hold office for a term of three years and shall be eligible for re-appointment for one further and final term.

137. There is a requirement that the cabinet secretary shall appoint one third of the members of the board under section 6(d) (i), (ii) and (iii) in a staggered manner separated by two months so that the respective expiry dates of their terms shall fall at a different time.

138. Further still, the petitioners challenged the constitutionality of; paragraph 4(1) (a) of the Industrial Training Act, which establishes a board known as the National Industrial Training Board to consist of one other member appointed by the cabinet

secretary and Paragraph 4 (1) (a) of the Act, which provides that there shall be a board to be known as the National Industrial Training Board which shall consist of a chairperson appointed by the cabinet secretary.

139. There was also challenge to: subsection 51 (2) of the Water Act, and paragraph 2 of the First Schedule, 51(2). The members are to be appointed by the minister and, on publication of a notice under subsection (1), the water services board shall by force of the section be constituted a corporation with perpetual succession and a common seal, with the corporate name specified in the notification; (2) that in making an appointment to a board or committee, the person making the appointment shall have regard to the educational qualifications, experience, expertise, character and integrity of potential candidates for membership; and the degree to which water users, or water users of particular kinds, are represented on the board or committee at the time the appointment is made.

140. Paragraph 5(1) (f) of the Kenya Airports Authority Act was also challenged. It establishes a board of directors of the Authority consisting of not more than five other members not being public officers or employees of the Authority, to be appointed by the minister by virtue of their knowledge of civil aviation, aerodromes management and operation or commerce, industry, finance or administration generally; paragraph 6(1) (e) of the Postal Corporation of Kenya Act which vests the management of the corporation in a board of directors consisting of not more than five other persons, not being public officers, appointed by the minister by virtue of their knowledge and experience in matters relating to communications, commerce, industry or finance.

141. The petitioners also took issue with; section 6(1) (a) of the National Museums and Heritage Act which establishes a board of directors, consisting of a chairman appointed by the minister in consultation with the President, and subsection 3 (1) of the Kenya Cultural Centre Act, which provides that the council shall consist of not less than five nor more than twelve persons, appointed by the minister.

142. Further challenge was on; subsection 4(1) of the Industrial and Commercial Development Corporation Act, which states that the corporation's board shall consist of a chairman and not less than five nor more than nine other directors, to be appointed by the minister, from among persons appearing to him to have had experience and shown capacity in industry, trade or administration; subsection 9 (1) of the Science, Technology and Innovation Act, and paragraph 2 (b) of the Third Schedule to the Act, which states that the commission may establish advisory research committee for the scheduled sciences, set out in the Second Schedule and Paragraph 2. A Research Committee shall consist of members appointed by the cabinet secretary.

143. They also impugned; paragraph 6(1) (a) and (e) of the Sacco Societies Act, which provides that the oversight function and management of the Authority shall vest in a board of the Authority comprised of a chairman appointed by the minister from amongst the members appointed under paragraph (c), four members, not being public officers, appointed by the minister by virtue of their knowledge and possession of a minimum of ten

years' experience in co-operative practice and management, law, finance or economics.

144. Further still, they challenged; paragraph 4 (1) (k) of the Veterinary Surgeons and Veterinary Paraprofessionals Act, 2011 which requires that the board consists of two persons, not being veterinary surgeons or veterinary paraprofessionals, appointed by the cabinet secretary from the animal resource industry; Subsection 5 (1) of the Kenya Animal Generic Resource Center Order, 2011; Subsections 5(1), 5(2) (a) and 5(4) of the Dairy Industry Act which provides that the board shall consist of twelve members appointed by the minister; paragraph 6 (f) of the Retirement Benefits Act, which states that the management of the Authority shall vest in a board of directors of the Authority, comprising five members, not being public officers, appointed by the minister by virtue of their knowledge or experience in matters relating to the administration of scheme funds, banking, insurance, law or actuarial studies, and section 6 (a) of the Act which states that a chairman is to be appointed by the minister from amongst the members appointed under paragraph (f).

145. The petitioners also took issue with; paragraph 5(3) (b) of the Capital Markets Authority Act, which states that the Authority shall consist of six other members appointed by the minister; subsection 169(2) of the Insurance Act, which provides that the Tribunal should consist of a chairman and not less than two and not more than four other members appointed by the Minister; and, paragraph 5(1) (a) of the National Youth Council Act, which provides that the council shall consist of a chairman nominated by the council and appointed by the minister; Paragraph 6 (1) (a) of the Kenya National Commission for UNESCO Act, 2013, which establishes a board to consist of a chairperson to be appointed by the President; paragraphs 5(1) (a) of the Kenya Tsetse and Trypanosomiasis Eradication Council Order, 2012, which establishes a board to consist of a chairperson appointed by the President; and paragraph 3 (2) (a) of the Kenya Yearbook Order, 2007 with a board consisting of a non-executive chairman appointed by the President.

146. The other provisions challenged were; paragraph 8(1) (a) of the Kenya Plant Health Inspectorate Service Act, which establishes a board of directors to consist of a non-executive

chairperson appointed by the President; paragraph 5 (1) (g) of the LAPSSET Corridor Development Authority Order, 2013, with a board comprising five other members appointed by the President by virtue of their knowledge and expertise in the fields of finance, law, management, project management and international trade; paragraph 6(1) (a) of the State Corporations Act; and, paragraph 3(a) of the National AIDS Control Council Order.

147. Further challenge was directed at; paragraph (1) 2 of the Schedule to the Kenya National Library Services Board Act, which provides that the President may, on the advice of the minister appoint any member to be chairman of the board. So is Subsection 3 (2) and Paragraph 3 (1) (e) of the Schedule to the Act, which states that the board shall consist of members appointed by the minister with the approval of the President;

148. The petitioners again questioned; paragraph 5(1) (a) of the Agricultural Development Corporation Act, for providing that the corporation shall consist of a chairman appointed by the President; and section 30(1) (j) of the Micro and Small Enterprises Act.

149. We have considered the above provisions as challenged by the petitioners. The common denominator in all these provisions, save for, the Tourism Act, The National Youth Service Act, 2018 (which repealed the National Youth Service Act) and the National Youth Council Act, is that they confer discretion on the President and his cabinet secretaries to appoint chairpersons and members of boards of state corporations and parastatals, in a manner other than as contemplated by the Constitution and Public Service (Values and Principles) Act, in that they do not require the appointments to be open, transparent or competitive.

150. According to the petitioners, the impugned provisions also contradict **section 22** of the Public Officer Ethics Act, as well as **section 10** of the Public Service (Values and Principles) Act, because they contemplate a process of recruitment and appointment that is inimical to the requirement in those Acts.

151. **Section 22** of the Public Officer Ethics Act provides that a public officer shall practice and promote the principle that public officers should be selected on the basis of integrity, competence and suitability, or elected in fair elections. On the other hand,

section 10(1) of the Public Service (Values and Principles) Act, a normative derivative of **Article 232**, provides that the public service, institutions or authorised officers should ensure that public officers are appointed and promoted on the basis of fair competition and merit, subject to affirmative action.

152. The petitioners maintained that the provisions are unconstitutional for failure to comply with the requirements of **Section 7** of the **Sixth Schedule** to the Constitution, which requires that laws enacted prior to the 2010 Constitution, be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with it.

153. As to whether the impugned provisions are constitutionally invalid, we have considered the arguments by both sides on this issue, and perused the provisions as shown above. It is true that some of the assailed sections do not require that appointments be made in a transparent and competitive manner. The provisions simply confer discretion on the appointing authorities to make such appointments as they deem fit.

154. The people of Kenya told the **Constitution of Kenya Review Commission, (CKRC),** that they wanted merit based

appointments and promotions in the public offices. Their views were captured at Paragraph 13.6.5 of the Final Report, thus;

> **"It is clear that what the people were asking for was the re-establishment of the principles of public service, neutrality, impartiality and independence. The people of Kenya wanted to see appointment processes that are transparent and offices that are not only accountable to the people but also capable of guarding public wealth and resources. There was considerable disquiet about the apparent inability of public officers to exercise powers independent of political pressure, and of the fact that appointment procedures even where clearly set out in the law, were often subordinated to demands of patronage. The clear impression being projected was that public service appointments were often based on criteria other than merit, competence or relevant experience"**

155. These views were adopted by the **Committee of Experts (COE),** and that is what gave birth to **Article 232** of the Constitution on the values and principles of public service. It is also clear to us that most of the provisions do not require that vacancies be advertised; that applicants be subjected to interviews and that only the best should be appointed. Some of the sections merely lay down qualifications without demanding that there be transparency, and that appointments be based on

fair competition and merit. They confer discretion on the President and his cabinet to make appointments without regard to the Constitution and applicable values and principles. This, in our view, violates the founding values of transparency and accountability in **Articles 10,** and the values and principles of public service in **Article 232(1),** which are also emphasized in **section 10** of the Public Service (Values and Principles) Act.

156. Ordinarily, a statute or its provision should be declared constitutionally invalid for going against the Constitution. However, we note that the challenge is directed to statutes, some of which were enacted prior to the Constitution, 2010. **Section 7** of the **Sixth Schedule** demands that laws enacted prior to 2010, be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the Constitution. That is, we should read the impugned provisions on appointment, as requiring that the appointments be made as required by **Article 232,** as amplified in **sections 10** and **22** of the Public Service (Values and Principles) Act, and Public Officer Ethics Act, respectively. This is the bare minimum institutions and authorised officers must meet when making appointments to

state corporations and parastatals, not only those of chairpersons and members of boards, but also all appointments within these institutions.

157. Regarding the post 2010 statutes, we wish to state without equivocation, that even though the statutes may not expressly state that appointments be made in an open, transparent, and based on fair competition and merit, the institutions and authorised officers responsible for making the appointments, have no excuse for not complying with the Constitution and the law.

158. We say this, well aware that Parliament in compliance with the constitutional command in **Article 232(3)**, enacted Public Service (Values and Principles) Act in 2015. The long title to the Act, states that; it is **"An Act of Parliament to give effect to the provisions of Article 232 of the Constitution regarding the values and principles of public service and for connected purposes."** The Act came into force on **4th June 2015.**

159. In that case therefore, any appointments whether made under the pre or post 2010 statutes, must be in tandem with this

Act. This, in our respectful view, is the best way to read the impugned provisions, so as to be in conformity with the Constitution, rather than invalidating them.

160. Our view is guided by the general principle of interpretation of statutes, that a law or regulation should as much as possible be read to be consistent, and be declared unconstitutional or void, only where it is impossible to rationalize or reconcile it with the Constitution or the Act. In this regard, the Constitutional Court of South Africa emphasized in ***re Hyundai Motor Distributors (Pty) Ltd v Smit No*** ***[2000] ZALC12:2001 (1) SA545 (CC), 200(10) BCL1079 CC*** ZALC12:2001(1), that it is the duty of a judicial officer to interpret legislation in conformity with the Constitution, so far as this is reasonably possible, while on the other hand, the legislature is under a duty to pass legislation that is reasonably clear.

161. That being our view, it will not be prudent to invalidate the provisions when the appointments can be made in conformity with **Articles 10** and **232**, as read with **section 10** of the Public Service (Values and Principles) Act. The appointments must

however be transparent, accountable, competitive and merit based, subject to affirmative action.

162. We are in total agreement with position taken in ***Benson Riitho Mureithi v J.W Wakhungu and 2 Others*** Petition No. 19 of 2014, that:

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

163. Needless to say, in order to achieve this, Parliament has a duty to ensure that legislations are aligned with the Constitution and Public Service (Values and Principles) Act, when it comes to appointments in state corporations and parastatals.

164. The answer to the third issue is; that for the reasons stated above, we are unable to declare the impugned provisions unconstitutional. However, we must emphasize that all appointments to state corporations and parastatals must comply

with the principles in **Article 10, 232** and Public Service (Values and Principles) Act.

Reliefs

165. Having reached the conclusions we have on each of the issues above, the reliefs that commends themselves to us for granting are as follows:

1. **A declaration is hereby issued that all appointments made by the President or cabinet secretaries on 11th March 2016 and gazetted in Gazette Notice Vol. CXVIII – No.23; 18th March 2016 and gazetted in Gazette Vol. CXVIII – No.28; 10th June 2016 and Gazetted in Gazette No. Vol CXVIII-No. 62; 17th June 2016 under Gazette Notice Vol. CXVIII – No.66; 24th June 2016, Gazette Notice Vol. CXVIII – No. 70; and 1st July 2016 vide Gazette Notice Vol. CXVII– No.72, are unconstitutional for violating Articles 10, 232 and the Public Service (Values and Principles) Act, and therefore invalid.**

2. **An order is hereby issued quashing the appointments made on 11th March 2016 gazetted in Gazette Notice Vol. CXVIII – No.23; 18th March 2016 gazetted in Gazette Vol. CXVIII – No.28; 10th June 2016 Gazetted in Gazette Vol CXVIII-No. 62; 17th June 2016 under Gazette Notice Vol. CXVIII – No.66; 24th June 2016, under Gazette Notice Vol. CXVIII –**

No. 70; and 1st July 2016 under Gazette Notice Vol. CXVII–No.72.

3. ***This being a constitutional petition and costs being discretionary, we order that each party bear their own costs.***

Dated, Signed and Delivered at Nairobi this 4th day of December, 2020.

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J. W. LESIIT
JUDGE

.....
E. C. MWITA
JUDGE

.....
L.M. NJUGUNA
JUDGE

In the Presence of:

Mr. Ochiel ……..for the Petitioners

Ms. Wahinya h/b for Mr. Karori ……..for the 1st Respondent/Applicant

Mr. Mutinda ……..for the 2nd Respondent

Court.

The court wishes to thank all the counsel to the parties for the courtesy extended to this court and to all the parties, together with their very able arguments and authorities cited.

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J. W. LESIIT
JUDGE

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E. C. MWITA
JUDGE

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L.M. NJUGUNA
JUDGE