IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 290 OF 2012

BETWEEN

MUMO MATEMU …….....…….APPELLANT

AND

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

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

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

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

THE KENYAN SECTION OF THE

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

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

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

in

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

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JUDGMENT OF THE COURT

1. **Overview**

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

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

2. **Facts and Procedural History**

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

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

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

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

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

(7) The High Court was then moved by the 1st respondent in this appeal, Trusted Society of

Human Rights Alliance, a non-governmental organization based in Nakuru in a Petition dated 15th May, 2012 and supported by an affidavit sworn by one Mr. Elijah Sikona, the chairperson of the society, to issue a declaration that the process and manner in which the appellant herein was appointed was unconstitutional. The petitioner's prayers in the amended petition dated 4thJune, 2012 were as follows:

> ***"(a) A declaration that the process and manner and the decision in which the Government has managed and or intends to appoint or has appointed the interested party is unconstitutional, illegal, embarrassing to Kenyans and a constitutional coup hence null and void.***
>
> ***(b) A declaration that the respondents are escapists and have abdicated their constitutional mandate.***
>
> ***(bb) A declaration that the interested party is not a fit and proper person with due regard to his honesty, dignity, personal integrity, dignity*** *(sic)* ***and suitability and hence his appointment shall be to that*** *(sic)* ***inconsistent with the constitution and invalid.***
>
> ***(cc) An order of review and setting aside the approval and appointment of the interested party.***

(d) The petitioners be paid costs."

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

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

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

> ***(c) Is the Petition moot for failure to complain about the appointment during the appointment process?***

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

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

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

(10) In opposing the petition, the appellant, the 2nd, 3rd and 4threspondents, respectively, submitted that the 1st respondent lacked *locus standi* to institute the case. They argued that the

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

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

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

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

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

> ***"97. All the organs involved in the appointment of the Chairperson of the Commission had the obligation to consider whether the applicants met the qualifications in the Constitution and in the Act. They were required to investigate the background of the applicants and to conclusively consider any information which went to their qualifications. From the record presented to the Court, it is evident that the appointing authorities gave lip service or no consideration at all to the question of integrity or suitability to hold the office. They failed to ascertain for themselves whether the Interested Party met the integrity or suitability threshold. They did not give due attention to all information that was available, and which touched on his integrity or suitability. Because of this failure, none of them makes any conclusive determination on whether***

the Interested Party met the integrity or suitability test set out in the Constitution. We consider this failure – the failure to honour the duty to diligently inquire –coupled with the failure to adequately apply the constitutional test to have rendered the procedure used to appoint the Interested Party to chair the Commission to be fatally defective and to be violative of the spirit and letter of the Constitution. It is, therefore, constitutionally untenable, null and void.

……

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

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

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

C. **Grounds of Appeal**

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

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

……

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

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

contravened in relation to the petitioner.

…….

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

……

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

…….

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

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

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

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

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

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

(19) Learned counsel further submitted that the High Court is subject to the Constitution and must act as such when seized of cases challenging the actions of the Legislature or other constitutional organs. In such cases, as was in the petition, the High Court can neither substitute its decision for the Legislature's choice nor conduct its own inquiry as this would constitute judicial usurpation of functions vested elsewhere. Counsel further urged us to find that the material before the High Court did not warrant a holding that the appellant was not suitable for appointment as chairperson of the Ethics and Anti-Corruption Commission. Instead, they submitted that the High Court shifted the burden of proof from the 1st respondent to the appellant; that the Court went ahead to conduct a merit review, disguised as review of legality of the appointment, despite having warned itself that the proceedings before it were not fit for that purpose. Finally, counsel submitted that in exercising jurisdiction in the petition, the High Court overlooked ***section 41*** of the Leadership and Integrity Act, 2012, which provides the ground for removal of State Officers from office.

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

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

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

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

G. Submissions by *Amici Curiae*

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

H. **Issues for Determination**

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

> ***"(a) Did the 1st respondent have the locus standi to lodge the petition before the High Court?***
>
> ***(b) Did the High Court have jurisdiction to review and set aside the appointment of the appellant?***
>
> ***(c) Was the principle in Anarita Karimi Njeru case requiring that constitutional petitions are pleaded with reasonable precision properly applied by the High Court?***
>
> ***(d) Did the High Court in its rationality test misapply the doctrine of separation of powers thereby usurping the powers and functions of other arms of***

government?

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

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

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

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

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

(27) Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under ***Article 10*** of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for *locus standi* that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the arguments of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the *locus stand* to file the petition. Apart from this, we agree with the superior court below that the standard guide for *locus standi* must remain the command in ***Article 258*** of the Constitution, which provides that:

> ***"258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.***
>
> ***(2) In addition to a person acting in their own interest, court***

proceedings under clause (1) may be instituted by—

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

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

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

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

(28) It still remains to reiterate that the landscape of *locus standi* has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view, the hitherto stringent *locus standi* requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of ***Articles 22*** and ***258*** of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to ***Article 22 (3)*** aforesaid, the Chief Justice has made rules contained in Legal Notice No. 117 of 28th June 2013 – The Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013–which, in view of its long title, we take the liberty to baptize, the ***"Mutunga Rules"***, to *inter alia*, facilitate the application of the right of standing. Like ***Article 48,*** the overriding objective of those rules is to facilitate access to justice for all persons. The rules also reiterate that any person other than a person whose right or fundamental freedom under the Constitution is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under ***Articles 22 (2)*** and ***258*** of the Constitution**.**

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

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

(31) However, we must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting *bona fide* with a view to vindicating the cause of justice. Where a person acts for personal gain or private profit or out of political motivation or other oblique consideration, the Court should not allow itself to be seized at the instance of such person and must reject their application at the threshold. The time is now propitious at this stage of our constitutional development where we can state as was stated by the Supreme Court of India in the case of ***S.P. Gupta v President of India & Others AIR [1982] SC 149*** that:

> ***"The view has therefore been taken by the courts in many decisions that whenever there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the Constitution or the law, any member of the public acting bona fide and having sufficient interest can maintain an action for redressal of such public wrong or public injury. The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial***

redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busy-body or a meddlesome interloper but who has sufficient interest in the proceeding. There can be no doubt that the risk of legal action against the State or a public authority by any citizen will induce the State or such public authority to act with greater responsibility and can thereby improve the administration of justice. Lord Diplock rightly said in Rex v Inland Revenue Commrs. [1981] 2 WLR 722 at p. 740.

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

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

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

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

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

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

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

Integrity Act, 2012.

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

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

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

> ***…***
>
> ***(d) jurisdiction to hear any question respecting the interpretation of this Constitution, including the determination of***
>
> ***…***
>
> > ***(ii) the question whether anything said to be done under the authority of this Constitution or if any law is inconsistent with, or in contravention of, this Constitution."***

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

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

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

perform the functions of his office …

…….

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

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

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

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

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

(42) However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in ***Anarita Karimi Njeru*** *(supra)* underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to ***Article 159*** of the Constitution and the overriding objective principle under ***section 1A*** and ***1B*** of the Civil Procedure Act (Cap 21) and ***section 3A*** and ***3B*** of the Appellate

Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in ***Anarita Karimi Njeru*** *(supra)* that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of ***Thorp v Holdsworth*** ***(1876) 3 Ch. D. 637*** at 639 holds true today:

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

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

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

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

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

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

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

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

> ***"(i) 'unconstitutionality' or 'illegality', i.e., whether Parliament misapplied or misdirected itself under the constitution or in law;***
>
> ***(ii) 'irrationality,' i.e., whether Parliament was outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it (Wednesbury unreasonableness); or***
>
> ***(iii) 'procedural impropriety,' i.e., whether there was departure by Parliament from any procedural rules governing its conduct or a failure to observe the basic rules of natural justice. This is commonly referred to as 'fundamental unfairness,' since in such situations, the absence of justice is conspicuous."***

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

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

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

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

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

> ***"Our reading of Article 89 does not yield or point to authority or jurisdiction of the High Court, while exercising the power of review under that Article to substitute the decision of the IEBC with its own. With due respect to the High Court, we hold that it was in error to substitute its own opinion, as a decision to supplant the decision of the IEBC, which had been lawfully and procedurally arrived at following the public hearings, consideration and adoption by Parliament, all the way to the publication in the Gazette. All that lies within the province of IEBC and no other organ. It has been given that mandate by the Constitution as other organs like the High Court has been given under Article 165, except that the High Court has also been given the power to review the decision of the IEBC. That power of review, according to us, is limited to the prayers in the application under Article 89 (10), if the applicants demonstrate that indeed a fault featured in the manner IEBC went about delimiting electoral boundaries. And as we have stated earlier, in the event the High Court should so find, it should direct the IEBC to get back and do the correct and proper thing….***
>
> ***Article 89 (10) does not give room for the High Court to put its own decision on delimitation of electoral boundaries in place of that made by IEBC. It can only find fault with it and order a fresh exercise. This we say because the High Court cannot and is not mandated to go, meet and consult residents of a given area, take their views on various aspects which go into delimitation before deciding accordingly, be it on boundaries or names. T]hat is the mandate of IEBC. The time to do that, resources, sources of expertise required to carry out that exercise is within the constitutional mandate of IEBC and IEBC alone."*** (emphasis supplied).

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

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

(53) In view of this Court's statement of the general principle above, we are hesitant to approve the High Court's application of the rationality and reasonableness tests in the petition. In our view, the rationality or reasonableness tests are irreducible, as stated by the superior court below, to an inquiry whether a reasonable person would not have reached the determination in question. This would be too simplistic, and subjective a test. It would also render the court an appellate forum

over the opinion of the other branches of government. We further note, as did the Constitutional Court of South Africa in ***Democratic Alliance v The President of the Republic of South Africa & 3 Others*: *CCT 122/11 [2012] ZACC 24***, that:

> ***"[I]t is useful to keep the reasonableness test and that of rationality conceptually distinct. Reasonableness is generally concerned with the decision itself…***
>
> **……**
>
> ***The rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected and given full effect. If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large."***

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

> ***"44. As stated above, we need to keep in mind the difference between judicial review and merit review. As stated above, in this case the judicial determination is confined to the integrity of the decision making process undertaken by the HPC in terms of the proviso to Section 4(1) of the 2003 Act. If one carefully examines the judgment of this Court in Ashok Kumar Yadav's case (supra) the facts indicate that the High Court had sat in appeal over the personal integrity of the Chairman and Members of the Haryana Public Service Commission in support of the collateral attack on the selections made by the State Public Service Commission.***
>
> **……**
>
> ***33… Judicial review seeks to ensure that the statutory duty of the HPC to recommend under the proviso to Section 4(1) is performed keeping in mind the policy and the purpose of the 2003 Act. We are not sitting in appeal over the opinion of the HPC. What we have to see is whether relevant material and vital aspects having nexus to the object of the 2003 Act were taken into account when the decision to recommend took place on 3rd September, 2010."***(emphasis supplied).

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

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

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

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

> ***"Additionally, the Court must review the appointment decision itself to determine if it meets the constitutional threshold for appointment. The test here is one for rationality: can it be said that the appointing authority, after applying its mind to the constitutional requirements, reached a rational conclusion that the appointee met the constitutional criterion? While the appointing authority has a sphere of discretion and an entitlement to make the merit analysis and determination of the question whether the appointee actually meets the constitutional criteria, Courts will review that determination where, rationally, a reasonable person would not have reached that determination. The test, then, is one of reasonableness: substantively, the Court will defer to the reasonable determination of the appointing authority that a proposed appointee has satisfied the constitutional criterion. Where such a determination is unreasonable or irrational, however, the Court will review it. To this extent, therefore, the constitutional review is not for error but for legality."***

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

> ***"[42] It is evident that a rationality standard by its very nature prescribes the lowest possible threshold for the validity of executive decisions: it has been described by this Court as the "minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries." And the rationale for this test is "to achieve a proper balance between the role of the legislature on the one hand, and the role of the courts on the other."***
>
> ***[43] …….***
>
> > ***"The rational basis test involves restraint on the part of the Court. It respects the respective roles of the courts and the Legislature. In the exercise of its legislative powers, the Legislature has the widest possible latitude within the limits of the Constitution. In the exercise of their power to review legislation,***

courts should strive to preserve to the Legislature its rightful role in a democratic society."

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

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

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

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

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

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

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

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

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

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

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

"There is no doubt that, if true, these are serious allegations and they would, ineluctably, affect any reasonable person's assessment of the integrity of the Interested Party or his suitability to head the Commission. We are not in a position to make any findings whether these allegations are proved or not. That will have to await appropriate legal proceedings tailored for that purpose. However, what we are prepared to hold at this point is that the allegations are serious enough and sufficiently plausible to warrant any reasonable person who is charged with the constitutional responsibility of assessing the integrity or suitability of the Interested Party for an appointment to a State or Public Office, especially one which is as sensitive as the Chairperson of the Ethics and Anti-Corruption Commission, to conduct a proper enquiry before such an appointment. We say so on a cursory assessment of the evidence made available to us...

……

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

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

(66) Liberty, it has been said, finds no refuge in the jurisprudence of doubt. A court in doubt is not at liberty to arrive at a conclusion which is unsupported by the material before it. To do so would be to undermine the basic principle that any conclusion of a court must be based on

findings premised on the applicable evidentiary standards otherwise its decision stands impugned. The evidentiary standard in constitutional cases of this nature is a balance of probabilities. In cases involving heightened review, or "intensely fact-based inquiry," as noted by the superior court below, that balance acquires a higher gradation and must be exercised judiciously. Moreover, it does not do to shift the burden of proof to the institutions whose actions are impugned, or the person whose appointment is questioned, to prove procedural propriety or suitability. That would be an absurdity in this type of litigation, and we can almost foresee with certainty all that such an approach may entail were this Court to endorse it.

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

i. **Procedural Impropriety**

(68) It was the High Court's finding, as urged by the 1st respondent, that no proper inquiry on the claims of lack of integrity on the part of the appellant was conducted by the Executive or the Legislature. The 1st respondent argued that the 2nd, 3rd and 4th respondents deliberately ignored public concerns and full information impugning the appellant's integrity. This position was supported by *amici curiae,* who cited a statement by a legislator that the Parliamentary Committee had denied a member of the public the opportunity to make representations on material adverse to the appellant.

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

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

> ***"They [the Petitioners] failed to show any defects in that procedure and process. There was no evidence that all the allegations, complaints and all matters complained of as against the 2nd respondent were not considered by all the organs…***
>
> **…….**
>
> ***…The Constitution vests different functions to different organs and to ask this Court to fault processes by those organs without presenting material to prove any wrong doing is to ask the court to usurp the functions of those organs."***

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

(72) In our view, the 1st respondent did not provide any evidence to show that there was no proper inquiry on the suitability of the appellant in the cumulative process of appointment. There

was no evidence of the alleged denials, but for anecdotal statements to that effect. The said affidavit of the member of the public who had been allegedly denied an opportunity to testify before the Parliamentary Committee was not placed on record. There was no further evidence to prove that the Committee did not comply with the Public Appointments (Parliamentary Approval) Act, 2011.

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

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

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

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

(77) For the avoidance of doubt, we also reiterate that a court reviewing the procedure of a legislature is not a super-legislature, sitting on appeal on the wisdom, correctness or desirability of the opinion of the impugned decision-making organ. It has neither the mandate nor the institutional equipment for that purpose in our constitutional design. Moreover, the process cannot be wrong simply because another institution, for example the courts, would have conducted it differently. It must be accepted that the institutional environment is controlling on

the manner in which an organ disposes of its issues. We note the holding of the High Court in ***Washington Jakoyo Midiwo v Minister, Ministry of Internal Security and 2 Others [2013] eKLR*** where the Court stated:

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

ii. **Unsuitability and Unfitness**

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

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

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

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

(82) These documents, standing alone, do not illuminate any portrait on the 1st respondent's claim. Quite apart from the absence of proof on the claim of irregular award of loans, we have not been able to link the appellant to the alleged complaint. The nakedness of the documents is such that they can support any circumstantial claim, but only if there is more to substantiate the

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

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

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

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

(86) We have examined each of these grounds and our finding is that the evidence before the High Court or before us is not probative of any of the claims. We note that the High Court itself noted the evidentiary shortcomings by stating that it was not in a position to make any findings whether the above allegations had been proved or not. Therefore, we respectfully hold that the court misdirected itself by concluding that the appellant was unsuitable to hold office, despite its own finding that there had been no conclusive proof of the allegations. It is our considered view that in cases seeking review of an appointment on grounds of the integrity of the appointee, the review cannot be half-hearted. It must be conclusive, fair and just. It was not enough for the High

Court to state its commitment to "an intensely fact-based enquiry," and then proceed to declare that only later legal proceedings would determine the "unresolved questions" while still holding the appellant to be unsuitable to hold State Office. To do so would be to drown the imperatives of due process, justice and fairness into tumultuous waters.

I. Summary of Findings and Conclusion

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

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

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

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

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

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

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

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

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

10. **Costs**

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

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

P. KIHARA KARIUKI

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PRESIDENT,

COURT OF APPEAL

W. OUKO

……

JUDGE OF APPEAL

P. O. KIAGE

…….

JUDGE OF APPEAL

S. GATEMBU KAIRU

……..

JUDGE OF APPEAL

A. K. MURGOR

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR