Katiba Institute v Attorney General & 9 others (Civil Appeal 99 of 2019) [2020] KECA 513 (KLR) (24 July 2020) (Judgment)

Katiba Institute v Attorney General & 9 others [2020] eKLR

Neutral citation: [2020] KECA 513 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 99 OF 2019

W KARANJA, MSA MAKHANDIA & F SICHALE, JJA

JULY 24, 2020

BETWEEN

KATIBA INSTITUTE ..... APPELLANT

AND

THE ATTORNEY GENERAL ..... 1ST RESPONDENT

PUBLIC SERVICE COMMISSION ..... 2ND RESPONDENT

THE REPUBLIC OF KENYA ..... 3RD RESPONDENT

JUDICIAL SERVICE COMMISSION ..... 4TH RESPONDENT

PATRICK GICHOHI ..... 5TH RESPONDENT

OLIVE MUGENDA ..... 6TH RESPONDENT

FELIX KOSKEI ..... 7TH RESPONDENT

DR. GEORGE LUKOYE ..... 8TH RESPONDENT

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS . 9TH RESPONDENT

AFRICA CENTRE FOR OPEN GOVERNANCE ..... 10TH RESPONDENT

(Being an Appeal against the Judgment and Decree of the High Court of Kenya at Nairobi (Mwita, J.) dated and delivered on 6th July 2018inPetition No. 84 of 2018)

JUDGMENT

1. The 5th 6th and 7th respondents were nominated pursuant to Article 171(2)(g) and Article 171(2)(h) respectively for the position of members of the Judicial Service Commission (herein after referred

to as the 4th respondent). On 13th February, 2018 vide a notification of nomination, the President forwarded the three names to the National Assembly (hereinafter referred to as the 3rd respondent) through the Speaker of the National Assembly for vetting by the National Assembly's Departmental Committee on Justice and Legal Affairs (hereinafter referred to as the committee) and subsequent approval by the whole House.

2. Following the committee's report as adopted on 24th February, 2018, the aforementioned nominees were approved by the 3rd respondent on 28th February, 2018 and subsequently appointed as commissioners to the Judicial Service Commission (JSC).

3. Katiba Institute, (hereinafter the appellant), was not pleased with the appointments and so, vide a petition dated 8th March, 2018 filed before the High Court in Nairobi, it challenged the process of nominations and subsequent appointments and sought reliefs as follows:-

> "a. A declaration be and is hereby issued that the nomination, vetting, approval and appointment of the 2nd ,3rd and 4th interested parties as members of the Judicial Service Commission is unconstitutional and invalid
>
> b. A permanent injunction does issue prohibiting; the President, sued through the 1st respondent and his agents or assignees from appointing or gazetting, and the 1st interested party and its agents or assignees from swearing in, the 2nd, 3rd, and 4th interested parties as members of the Judicial Service Commission. By extension, the 2nd, 3rd and 4th interested parties be and are hereby prohibited from taking oath as members of the Judicial Service Commission arising from the impugned nomination, vetting, approval and appointment.
>
> c. A declaration be and is hereby issued in that in so far as section 15 of the Judicial Service Act, 2011 does not provide for diversity, merit or fair competition as the basis for appointment of the one man and one woman under Article 171(2)(h) the same is unconstitutional and invalid.
>
> d. In the alternative to prayer (c) above an Order issue reading into section 15 of the Judicial Service Act the requirement that any nomination/appointment under Article 171(2)(h) be preceded by an open, transparent process that takes into account diversity, merit and fair competition.
>
> e. An order do issue invalidating the nomination, approval and appointment of the 2nd, 3rd and 4th interested parties, as the case may be, as members of the Judicial Service Commission."

4. It was the petitioner's case that the appointment of the 5th respondent was null and void as his nomination was done by the President instead of the Public Service Commission (hereinafter referred to as the 2nd respondent) contrary to Article 171(2)(g) as read together with section 15(2) of the Judicial Service Act. Further, that the 5th respondent had previously held public office hence was not a competent nominee/ appointee.

5. It was averred that the nominations of the 5th, 6th and 7th respondents were not done on the basis of fair competition and merit contrary to Section 46 of the Public Service Commission Act, 2017 and Articles 10, 232 and 234(2)(c) which champion the values and principles of public service; that since these principles were not put into consideration, the nominations were unlawful, null and void. In addition, that the nominations and subsequent appointments amounted to an unconstitutional

exercise of state authority and violated national values and principles of governance, which is a direct threat to judicial independence enshrined under Article 160(1) and Article 172(1) and in turn the independence of JSC.

6. In respect of the 6th Respondent's appointment, the petitioner argued that despite there being evidence on record, produced vide memoranda during the vetting process following public participation, wherein her character and integrity while acting in other capacities previously holding public office had been put to question, the contents of the memoranda was disregarded.

7. It was also the petitioner's case that section 15(2) of the Judicial Service Act, 2011 is unconstitutional for failing to provide for diversity, merit and fair competition as envisaged under Article 10 and 232(1)(g) of the constitution in considering appointments under Article 171(2)(g) and (h) and this threatens the right to fair administrative action.

8. The 1st and 2nd respondents challenged the petition vide grounds of opposition dated 9th April, 2018 and the 2nd respondent's replying affidavit sworn by its secretary, one Alice A. Otwala. It was their case that the petition was incompetent as it was filed based on claims that the process of the 5th, 6th and 7th respondents' nomination and/or appointment was not transparent yet the petitioner had not sought information on the process as provided for section 9(1) of the Access to Information Act.

9. They argued that since the 5th, 6th and 7th respondents had already been appointed as at the time of the filing of the petition, they could only be removed from office in the manner provided for under Article 251 of the Constitution and not vide a petition and subsequent court order since these involved dealings of Parliament which were not subject to interference by courts; that the courts lack jurisdiction to review the merits or demerits of the approval process for the 5th, 6th and 7th respondents by the National Assembly.

10. It was urged that the 5th, 6th and 7th respondents were lawfully nominated and subsequently appointed in accordance to Article 171(2)(g) and (h) of the Constitution and Section 15(2) of the Judicial Service Act hence Article 232(1)(h) did not apply prior to the nominations as public participation is not required; that public participation is only applicable during approval process in the National assembly which was duly done. In addition, that section 15(2) of the Judicial Service Act, 2011 is not unconstitutional as alleged by the petitioner.

11. The 3rd respondent opposed the petition through a replying affidavit sworn by the Senior Deputy Clerk, one Jeremiah Ndombi. In a nutshell, it reiterated the 1st and 2nd respondents' averments stating that 5th, 6th and 7th respondents' nominations were done as per the law and duly approved by the 3rd respondent following vetting and approval processes by the National Assembly's Departmental Committee on Justice and Legal Affairs and that the approval process was conducted by inviting public participation. Further, that the nominees' requisite qualifications as encompassed under Chapter 6 of the Constitution were considered in their nominations and appointments.

12. It was also its case that before the impugned appointments, there was no memoranda challenging the nominations of the 5th and 7th respondents and that the memoranda challenging the 6th respondent's nomination, on the basis of existing suits questioning her integrity while holding office in another capacity, was put into consideration during the vetting process.

13. The 5th 6th and 7th respondents opposed the petition vide their replying affidavits sworn individually by themselves on 9th April, 2018, 22nd February, 2018 and 26th March 2018 respectively. They reiterated the 1st, 2nd and 3rd respondents' averments stating that they were nominated and appointed in accordance with the law.

14. The petition was canvassed through written submissions. In sum, it was the appellant's and the 8th, 9th and 10th respondents' submissions that: the nomination, approval and appointment of the 5th 6th and 7th respondents were done in violation of the Constitution and the law as the process was not based on competitiveness and merit; that the 5th respondent's nomination was null and void as it was subjected to the approval by the National Assembly which was not a requirement for the nomination and; the 6th and 7th respondents' nominations and appointments were done in total disregard of the requisite test of integrity and qualifications provided for under Chapter 6 of the Constitution.

15. The 1st, 2nd, 3rd, 5th, 6th and 7th respondents submitted reiterating the averments in their pleadings.

16. The 4th respondent was neutral choosing neither to support nor oppose the petition.

17. Having considered the parties' pleadings, evidence placed before him along with the rival submissions by counsel and parties' lists of authorities, the learned Judge (Mwita, J.) found that there were two issues falling for his determination, that is whether the appointment of the 5th, 6th and 7th respondents as members of the 4th respondent was done in accordance with the Constitution and the law and; whether section 15(2) of the Judicial Service Act is inconsistent with the Constitution.

18. Ultimately the learned Judge rendered judgment expressing himself thus:-

> " 168. Having given due consideration to this petition, the constitution, the law and precedent I agree with the petitioner to the extent only that the 2nd interested party did not require approval by the National Assembly and that the National Assembly was wrong in vetting and approving him. Regarding the appointment of the 3rd and 4th interested parties, there was no violation of the constitution. I am also unable to find constitutional invalidity in section 15(2) of the Judicial Service Act.
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> 169. The upshot is that the petition partially succeeds and I make the following orders.
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> a. A declaration is hereby issued that there is no requirement for approval of the 2nd interested party, the nominee of Public Service Commission under Article 171(2) (g) of the Constitution; and the approval by the National Assembly made in this regard is of no legal effect.
>
> b. The rest of the petition is, however, dismissed with no order as to costs."

19. Aggrieved, the appellant now proffers the instant appeal raising 5 main grounds as follows: that the learned Judge erred: in law by disregarding the appellant's pleadings, evidence and submissions proving that the process of nomination of the 5th, 6th and 7th respondents was flawed; in fact and law by segregating Articles 171(2)(g) and (h) and Article 250 from Articles 10, 73(2)(a), 232 and 234 of the Constitution hence reaching an erroneous finding that nominations to the Judicial Service Commission ought not be based on merit and fair competition; in law by failing to find that section 15(2) of the Judicial Service Act, 2011 is unconstitutional; in law by failing to find that the 3rd respondent's decision to appoint the 5th, 6th and 7th failed the rationality test.

20. The 3rd respondent filed a notice of cross-appeal and submitted on the same during the plenary hearing of the appeal. However, it appears from a perusal of the record that the other parties have neither filed responses to the cross-appeal nor submitted on the same either by way of written submissions or by oral submissions during plenary hearing.

21. The appeal and cross-appeal were canvassed through written and oral submissions. At the plenary hearing, parties were represented by their respective learned counsel. Mr. Ochiel Dudley appeared for the appellant; Senior State Counsel Mr. Maurice Ogosso appeared for the 1st, 2nd and 5th respondents; Mr. Mbarak Awadh Ahmed appeared for the 3rd respondent; Mr. Kibor holding brief for Mr. Wamaasa appeared for the 4th respondent; Ms. Wangui Koech holding brief for Mr. James Nyiha appeared for the 6th respondent, Mr. Charles Dulo appeared for the 7th respondent; Mr. Odongo appeared for the 8th respondent while Senior Counsel Dr. Khaminwa appeared for the 9th and 10th respondents. From the record, only the appellant, 3rd, 6th, 7th and 8th respondents filed their written submissions.

22. Urging the Court to allow the appeal, Mr. Ochiel submitted on five main grounds i.e.: whether the trial court erred in law and fact by disregarding the appellant's pleadings, evidence and submissions on record; whether the trial court erred in law by segregating Articles 171(2)(g) and (h) and Article 250 from Articles 10, 73(2)(a), 232 and 234 of the Constitution; whether the trial court erred in law in failing to find that section 15(2) of the Judicial Service Act is unconstitutional; whether the trial court erred in fact and law in failing to find that the 5th respondent's nomination was ultra vires the Constitution; whether the trial court erred by misapplying the irrationality test with regard to the entire appointment process of the 5th, 6th and 7th respondents and disregarding the integrity concerns against the 6th respondent.

23. On the 1st ground, citing the case of Julius Lekakeny Ole Sunkuli v. Gideon Sitelu Konchellah & 2 Others (2018) eKLR, Mr. Ochiel submitted that the learned Judge in arriving at his decision disregarded the following issues which were crucial to the determination of the suit despite the same having been pleaded, evidence produced and submissions made: that Article 73(2)(a) requires all appointments to state office to be based on competition and merit; the President nominated the 7th respondent on 9th February, 2018, even before the office became vacant on 12th February, 2018; the 5th respondent's nomination lacked transparency as it lacked public participation and was ultra vires section 46 of the Public Service Commission Act, 2017, Section 10 of the Public Service (Values and Principles) Act 2015 and Regulation 3 of the Public Service Commission Regulations(Revised), 2005 as it was not based on fair competition and merit.

24. On the 2nd ground Mr. Ochiel, citing among other cases, Center for Rights Education and Awareness & Another v. John Harun Mwau & 6 Others, Nairobi Civil Appeal No. 74 of 2012, submitted that the learned Judge erred by segregating Articles 171(2)(g) and (h) and Article 250 from Articles 10, 73(2)(a), 232 and 234 of the Constitution hence reaching a conclusion which was against the Constitution's principles and purpose with regard to good governance.

25. Counsel faulted the learned Judge for finding that the 2nd respondent and the President have unfettered discretion in determining who to nominate under Article 171(2)(g) and (h) of the Constitution respectively. He maintained that any power bestowed by the Constitution ought to be justified. Placing reliance on Law Society of Kenya & Another v. National Assembly of the Republic of Kenya & 3 Others (2018) eKLR he maintained that such finding was inconsistent with the courts' previous position as to nominations to the JSC that free and fair election was complete mode of membership to the JSC under Article 171 of the Constitution.

26. On the 3rd ground, citing Article 2(4) of the constitution and R v. Big M Drug Mart Ltd (1985) 1 S.C.R. 295 and Olum & Another v. Attorney General (2002) 2 E.A. 508, Mr. Ochiel contended that section 15(2) of the Judicial Service Act, 2011 is unconstitutional for failing to provide for the consideration of diversity, merit and fair competition in JSC nominations and/or appointments.

27. Further, that the said provision was also unconstitutional for giving the President powers exceeding those bestowed upon him by Constitution by allowing him to make appointments under Article 171(2)(h) of the Constitution.

28. On the 4th ground Mr. Ochiel submitted that Article 171(2)(g) of the Constitution contemplates that a member nominated to the 4th respondent under the said provision, such as the 5th respondent, is to be nominated by the 2nd respondent. Further, that Articles 10, 73(2)(a), 232(g) of the Constitution, section 36, 37 and 46 of the Public Service Commission Act, 2017, and section 10 of the Public Service (Values and Principles) Act 2015 require that such a nomination calls for fair competition and merit as the basis of appointment of promotion to any public office.

29. He maintained that since the 5th respondent's appointment was not based on fair competition and merit, the learned Judge ought to have found that it was ultra vires the constitution hence unlawful. Further, that the lack of advertisement and/or public participation process in the said appointment did not give adequate and equal opportunities to all Kenyans. In addition, that despite the fact that Regulation 3 of the Public Service Commission Regulations (Revised), 2005 requires any decision by the Public Service Commission to be made by circulation of papers, the same was not done hence the nomination was flawed in law.

30. On the 5th ground Mr. Ochiel submitted on the need of a rationality test arguing that as envisaged under section 7 of the Public Appointments (Parliamentary Approval) Act, the National Assembly ought to have applied a strict scrutiny in approving any action of the executive and where the action involves appointment to public posts all relevant factors must be considered by the National Assembly. (See: Marilyn Muthoni Kamuru & 2 Others v. Attorney General & Another (2016) eKLR and Democratic Alliance v. President of South Africa (2012) ZACC 24).

31. Counsel submitted that the 3rd respondent disregarded the fact that the 7th Respondent's nomination was made before his predecessor resigned from office hence that such nomination was purposely designed to interfere with the independence of the Judiciary by replacing a commissioner before the end of his term. He urged the Court to allow the appeal.

32. Supporting the appeal, Mr. Odongo and Senior Counsel, Dr. Khaminwa fully associated themselves with the appellant's counsel's submissions. They urged the Court to allow the appeal.

33. Opposing the appeal, Mr. Ogosso submitted on the issue of fair competition and merit stating that the nomination of the 5th respondent was by the 2nd respondent and was done pursuant to Regulation 5 of the Public Service Commission Regulations, 2005 which provides that the 2nd respondent is to nominate a candidate who is appointed by the President upon approval, therefore, this is not a position which requires advertising. He maintained that the trial Court's findings that fair competition and merit were not necessary in the nomination was proper.

34. He contended that the appellant's allegations that lack of transparency attributed to the nomination of the 5th respondent by the 2nd respondent threatened the independence of the Judiciary was unfounded as the JSC and the Judiciary are two distinct institutions.

35. Mr. Ogosso maintained that the 5th respondent's nomination was done in accordance with the law and was duly approved by the National Assembly vide the appointed committee and that public participation was done through the parliamentary vetting.

36. Urging the Court to dismiss the appeal, Mr. Mbarak submitted that the approval/vetting mandate of the 3rd respondent is circumscribed by the Constitution, section 15 of the Judicial Service Act, 2011 and the Public Appointments (Parliamentary Approval) Act, No. 2 of 2011. Further, that

the parameters guiding the 3rd respondent's approval hearings with regard to nominees forwarded to it by the respective appointing authorities, are set out in section 7 of the Public Appointments (Parliamentary Approval) Act, No. 2 of 2011.

37. Counsel submitted on the appointments of the 6th and 7th respondents under Article 171(2)(h) citing the case of Marilyn Muthoni Kamuru & 2 Others v. Attorney General & Another (2016) eKLR. He argued that the Judicial Service Act does not set out any criteria for the appointment of the two persons to represent the public in the JSC. Further, that the Constitution does not define the manner in which the 3rd respondent is to operate its endeavors to fulfill its obligations. Therefore, it has a lee way to determine how best to carry out its constitutional mandate.

38. Counsel maintained that the appellant's argument that the appointment and/or approval of the 5th, 6th and 7th respondents ought to have been done with regard to Article 232 of the constitution, which provides for the values and principles of public service, is unfounded for reasons that Article 232 sets out the values and principles of public service, which as per Article 260 does not include state officers such as members of the JSC, and not the criteria governing appointments of persons serving in commissions such as the 4th respondent and that the drafters of the Constitution intended for the appointments of commissioners be distinct from ordinary employment in the Public Service.

39. On the appointment of the 5th respondent under Article 171(2)(g) counsel submitted that section 46 of the Public Service Commission Act provides for nominations or recommendations for appointment of persons to the public service and not persons to be appointed as commissioners to the 4th Respondent. He maintained that nomination and appointment of the 5th respondent as a member of the 4th respondent is governed by Article 171(2)(g) and the Judicial Service Act.

40. Mr. Mbarak contended that the trial court lacked jurisdiction to determine the petition because the petition; was an invitation to the Court to conduct a fresh vetting exercise of the 5th, 6th and 7th respondents by raising matters and material not initially raised during the approval process by the 3rd respondent and; was filed in bad faith as there was non-disclosure of material facts and was against public interest.

41. Counsel contended that the petitioner lacked locus standi having failed to appear before the 3rd respondent during the approval process to raise the issues it was raising in it's petition before the trial court.

42. On the cross-appeal, Mr. Mbarak submitted that the 3rd respondent vide its notice of cross-appeal dated 21st March, 2019, prays that the judgment and decree of the trial court be reversed and varied to the extent that the learned Judge issued a declaration that there is no requirement for approval of the 5th respondent by the 3rd respondent hence the approval made by the 3rd respondent in that regard has no legal effect.

43. Urging us to dismiss the appeal and allow the cross appeal, counsel maintained that the appellant did not invite the trial court to determine whether the 3rd respondent could vet and approve the nomination of the 5th respondent hence that the learned Judge overstepped his mandate by introducing issues not raised by the parties. (See: Adetoun Oladeji (NIG) v. Nigeria Breweries PLC SC 91/2002 and Dakianga Distributors (K) Ltd. v. Kenya Seed Company (2015) eKLR).

44. On his part, Mr. Kibor submitted that the 4th respondent did not participate in the matter before the High Court and in the circumstances and therefore neither supported not opposed the appeal.

45. In support or opposition of the appeal, Ms. Wangui submitted that the issues falling for the determination of this Court were whether Section 15 of the Judicial Service Act is unconstitutional and whether the nomination of the 6th respondent was valid.

46. Counsel reiterated the 1st to 5th respondents' submissions save for that the 6th respondent was qualified for the nomination based on her background and her academic qualifications. Further, that the 6th respondent met the criteria stipulated under the Constitution which did not require a competitive process.

47. Ms. Wambui contended that in raising the issue that the 6th respondent was facing pending cases before a court concerning allegations against her integrity in the carrying out her duties in other capacities not before the trial court, the appellant was in the primary suit attempting to invite the trial court to inquire into issues not within its jurisdiction.

48. Relying on Justus Kariuki Mate & Another v. Martin Nyaga Wambora (2017) eKLR. Ms. Wambui submitted that courts should not conduct merit review of the entire process or act on appeal over the decision of an independent body. Further, that courts can only act where there is clear violation of the Constitution and the applicable laws. She urged the Court to dismiss the appeal.

49. On his part, Mr. Dulo submitted that the issues falling for the determination of this Court are whether this Court has jurisdiction to determine the instant appeal and whether matters not canvassed before the trial court can be determined by this Court.

50. On the first issue counsel submitted that by virtue of Article 215 and Article 164 of the Constitution, this Court lacked jurisdiction to entertain the appeal before it. (See: Republic v. Karisa Chengo & 2 Others Supreme Petition No. 5 of 2015). Further, that the removal from office of a member of the 4th respondent is provided for under Article 251(1) of the Constitution therefore since the 7th respondent was already in office as at the time the petition was being filed, he could only be removed through such procedure. He maintained that Article 159(2)(e) necessitates that the exercise of judicial authority be undergirded by the principle that the purpose and principles of the Constitution are safeguarded.

51. He maintained that in filing the appeal, the appellant was attempting to expand the jurisdiction of the Court. (See: In the Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011.)

52. On the second issue, citing among other cases Securicor (K) Ltd v. E.A. Drapers Limited & Another (1987) KLR 338 Mr. Dulo submitted that this Court ought not sit on appeal on issues not canvassed, pleaded and/or raised before the trial court. He posited however that the Court has jurisdiction to raise grounds not pleaded but such jurisdiction must be exercised sparingly and only where the issue is not at variance with the facts of the case.

53. He maintained that the appellant's argument that the 5th respondent was nominated before his predecessor resigned was not raised before the trial court hence the same ought not to be addressed by this Court.

54. Lastly, Mr. Dulo submitted that the 7th respondent met all qualifications envisaged under Article 171(2)(h) of the Constitution and that he was duly vetted and approved by the committee as a member of the Judicial Service Commission. He urged the Court to dismiss the appeal.

55. We have reconsidered the evidence on record in entirety along with the rival submissions of counsel and the law. This being a first appeal this Court's mandate is as was reaffirmed by this Court in PIL Kenya Ltd Vs. Oppong [2009] KLR 442 as follows:-

> " It is the duty of the Court of Appeal, as a first appellate court, to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing

in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanor and giving allowance for that."

56. With the above in mind, we discern the issues that fall for our determination to be:-

a) Whether Courts have the jurisdiction to review the merits or demerits of decisions made by the National Assembly.

b) Whether section 15(2) of the Judicial Service Act is unconstitutional.

c) Whether Articles 10, 232 and 234 of the Constitution applied to 5th, 6th and 7th respondents' nominations and/or appointments.

d) Whether the 5th respondent's appointment required vetting and approval by the National Assembly.

57. On the first issue, on the one hand, the appellant and the 8th and 9th respondents faulted the learned Judge for failing to delve into issues challenging the 6th respondent's integrity. On the other hand, the 1st, 2nd 3rd, 5th, 6th and 7th respondents opposed this argument arguing that the issue of the 6th respondent's integrity was not within the ambit of the Court's determination, it having been conclusively dealt with by the 3rd respondent.

58. The learned Judge addressed that issue at length and expressed himself extensively as follows:

> " 152. Looking at the material on record, the National Assembly dealt with the issues and determined them. The respondents and the 3rd interested party contend and rightly so, in my view, that it is not for the Court to determine the integrity of the 3rd interested party at this stage since the National Assembly had considered the issue and cleared her. The Court recognizes the doctrine of separation of powers and the fact that it is not sitting on appeal over the decision of the National Assembly. The mandate of the Court at this stage is to check and be satisfied that the National Assembly acted in accordance with the Constitution and the law, but not to substitute the decision of the National Assembly with its own. However, where the National Assembly fails, and the court determines so, the Court has jurisdiction under Article 165(3) (d) (ii) to determine 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 and may annul the appointment. (Emphasis supplied)
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> 153. This issue has been dealt with in a number of cases including Kenya Youth Parliament & 2 Others v AG & Another, Constitutional Petition No. 101 of 2011,where the court observed; "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."
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> 154. In the case of Judicial Service Commission v. Speaker of the National Assembly & 8 Others [2014] eKLR the Supreme Court stated that "The Constitution disperses powers among various constitutional organs. Where it is alleged that

any of these organs has failed to act in accordance with the Constitution, then the Courts are empowered by Article 165 (3)(d)(ii) to determine 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."

155. In Mumo Matemu v Trusted Society of Human Rights Alliance & 2 Others, [2013] eKLR the Court of Appeal stated 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..."

156. And in Justus Kariuki Mate & another v Martin Nyaaga Wambora & another [2017] eKLR the Supreme Court, after analyzing various decisions on the subject, stated at paragraph[62] that"A clear inference to be drawn is that, it was the Supreme Court's stand that no arm of Government is above the law. This being a constitutional democracy, the Constitution is the guiding light for the operations of all State Organs. The Court's mandate, where it applies, is for the purpose of averting any real danger of constitutional violation."

157. The jurisprudence flowing from the above decisions is that the duty of the Court, when considering a challenge to decisions of other constitutional organs, is to ensure that state organs comply with the Constitution, its values and principles and the law, with the aim of averting a real danger of constitutional violation but not to venture into the arena of other constitutional organs without justifiable or constitutional compulsion. With that in mind and considering the facts of this petition and the materials placed before me, I am unable to hold that the National Assembly failed to comply with the Constitution and the principles it espouses when it approved the appointment of the 3rd interested party." (Emphasis added)

See also Supreme Court of Kenya's decision in In the Matter of the Speaker of the Senate & Another Supreme Court Advisory Opinion Reference No. 2 Of 2013.

59. From the above analysis, it is axiomatic that courts have a Constitutional duty to point out laws which are not consistent with the Constitution and to strike them down where the circumstances so demand. The courts must nonetheless be careful not to overreach this mandate and must remain accountable to the Constitution and the law which they must apply honestly, independently and with integrity. Undoubtedly, the law in this area is well settled. What we need to ask ourselves is whether the National Assembly flouted any provisions of the Constitution or indeed their own standing orders during the process of vetting the 6th respondent. If they did not do so, then we would have no business venturing into its decision to approve the 6th respondent's nomination as that would amount to interference with its constitutional mandate and attempting to replace its decision with our own.

60. The issues of the integrity of the 6th respondent were not issues that would be determined by the Court as what was before the Court was a petition citing the violation of certain constitutional provisions and was not an appeal against the decisions reached by the institutions before which the 6th respondent had previously appeared to answer questions pertaining to her integrity. A close reading of the learned Judge's decision shows that the Judge was well aware of the parameters of the Court's jurisdiction

and did not go beyond his mandate, and the appellant and the 8th and 9th respondents have failed to demonstrate that the issue of the 6th respondent's integrity was an issue that could be determined by the trial Court.

61. The appellant's complaint is that the memoranda containing the complaints against the 6th respondent were not considered. From our reconsideration of the record, we are satisfied that the said complaints were considered; the 6th respondent was called upon to defend herself, which she did and her explanation appears to have convinced the committee vetting her, and so they endorsed the nomination. We are not told the procedural or constitutional safeguards that were ignored or violated by the National Assembly in arriving at the said conclusion. The decision of the National Assembly may not have been acceptable to the appellant and others, but the Court cannot be called upon to replace that decision with one preferable to the appellant or even to the court.

62. The issue of competitiveness is not an imperative under Article 171 (2)h of the Constitution. The only merit required for nomination under this Article is the sex of the candidate, and the qualification of not being lawyers. The appointing authority is only restricted to those constitutional requirements. The Constitution is replete with qualification requirements for other commissioners and constitutional office holders. If Kenyans desired to attach other merit qualifications for appointees under Article 171 (2) h, they would have expressly so stated in the Constitution.

63. In the same vein, on the challenge by the appellant, and 8th and 9th respondents that section 15(2) of the Judicial Service Act is unconstitutional for failing to provide for diversity, fair competition and merit as a basis for nominations of members of the Judicial Service Commission under Article 171(2) (g) and (h), we hold the view that a statute cannot be enacted to fetter or qualify what the Constitution has not allowed. In this case, the Judicial Service Act cannot restrict the power of nomination and appointment given to the President under Article 172(2) (supra).

64. The general principle of interpretation of statutes is that a law or regulation should as much as possible be read to be consistent with the Constitution and be declared unconstitutional or void only where it is impossible to rationalize or reconcile it with the Constitution or the Act respectively. See: re Hyundai Motor Distributors (Pty) Ltd v Smit No [2000] ZALC12:2001(1) SA545(CC), 200(10) BCL1079 CC ZALC12:2001(1).

65. In the case of U.S v Butler 297 U.S. 1 (1936) the Supreme Court held as follows:

> " When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends." (Emphasis supplied)

66. Bearing in mind the above principles, it cannot be said that a statutory provision is inconsistent with the constitution for replicating what the Constitution provides as is the case here. The test of constitutionality is whether the provision blatantly contradicts the Constitution or if it is impossible to rationalize or reconcile it with the Constitution. The appellant, 8th and 9th respondents have not proved this alleged unconstitutionality to the required threshold. We are not persuaded that section 15 (2) of the Judicial Service Act is unconstitutional.

67. Similarly, as far as the nomination of the 5th Respondent was concerned, Article 171(2)g requires that he be nominated by the Public Service Commission. He was nominated as such. His nomination in our view did not call for public participation. The competitiveness and merit provided for under the relevant provisions of the Public Service Act is within the Public Service Commission itself. The commissioners are best placed to determine which one of them passes the test as to merit as opposed to members of public. The members of the Commission decided to nominate the 5th respondent having found him qualified for such nomination. They were best placed to make the said decision and not the courts or members of public. Additionally, the fact that the nomination was made 3 days before expiry of the term of 5th respondent's predecessor, is neither here nor there and was not prejudicial to anybody. In any event, by the time he was appointed the office was already vacant.

68. From the totality of the foregoing, it is clear that we find no merit in this appeal and the same therefore fails. On the cross appeal we have confirmed that the vetting of the 5th respondent by the 3rd respondent was not pleaded and was never canvassed before the learned Judge. The Judge appears to have raised it himself and went on a tangent to discuss it at length and make a determination without having been addressed on the issue by any of the parties. Even though the finding does not seem to have prejudiced anyone, it behooves this court to address the issue as it has been raised and also reiterate the law. If the learned Judge thought the issue, though not raised, was germane and needed to be determined, he should have invited the parties to address him on it before making a determination on the same.

69. Ultimately, we find the appeal devoid of merit and dismiss it. The cross appeal is nonetheless allowed. On costs, as this is a public interest matter, we order that each party bears its own costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY, 2020.

W. KARANJA

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JUDGE OF APPEAL

ASIKE - MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR