



**Matindi & 3 others v The National Assembly of Kenya & 4 others;  
Controller of Budget & 50 others (Interested Parties) (Petition E080,  
E084 & E150 of 2023 (Consolidated)) [2023] KEHC 19534 (KLR) (Constitutional  
and Human Rights) (3 July 2023) (Judgment) (with dissent - HI Ong'udi, J)**

Neutral citation: [2023] KEHC 19534 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E080, E084 & E150 OF 2023 (CONSOLIDATED)  
K KIMONDO, HI ONG'UDI & AA VISRAM, JJ**

**JULY 3, 2023**

**BETWEEN**

**ELIUD KARANJA MATINDI ..... 1<sup>ST</sup> PETITIONER  
LAW SOCIETY OF KENYA ..... 2<sup>ND</sup> PETITIONER  
KATIBA INSTITUTE ..... 3<sup>RD</sup> PETITIONER  
MULTY TOUCH INTERNATIONAL ..... 4<sup>TH</sup> PETITIONER**

**AND**

**PRESIDENT OF THE REPUBLIC OF KENYA ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL ASSEMBLY OF KENYA ..... 2<sup>ND</sup> RESPONDENT  
SALARIES AND REMUNERATION COMMISSION ..... 3<sup>RD</sup> RESPONDENT  
ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT  
PUBLIC SERVICE COMMISSION ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**CONTROLLER OF BUDGET ..... INTERESTED PARTY  
ANN WANJIKU MWANGI ..... INTERESTED PARTY  
NICHOLAS NGABIYA RIOBA ..... INTERESTED PARTY  
EDWIN SUDI WANDABUSI ..... INTERESTED PARTY  
SHARIF ATHMAN ALI ..... INTERESTED PARTY  
ISAAC MWAURA MAIGUA ..... INTERESTED PARTY**



REHEMA HASSAN ..... INTERESTED PARTY  
 SAMUEL KUNTAI TUNAI ..... INTERESTED PARTY  
 MILLICENT NYABOKE OMANGA ..... INTERESTED PARTY  
 MOHAMUD ALI SALEH ..... INTERESTED PARTY  
 ALFRED AGOI MASADIA ..... INTERESTED PARTY  
 KIRUI JOSEPH LIMO ..... INTERESTED PARTY  
 BEATRICE NKATHA NYAGA ..... INTERESTED PARTY  
 JOASH ARTHUR MAANGI ..... INTERESTED PARTY  
 CATHERINE WARUGURU ..... INTERESTED PARTY  
 HUSSEIN TUNEYA DADO ..... INTERESTED PARTY  
 CHARITY NANYAMA KIBABA ..... INTERESTED PARTY  
 BENJAMIN JOMO WASHIALI ..... INTERESTED PARTY  
 NICHOLAS GUMBO ..... INTERESTED PARTY  
 ONESMUS KIMANI NGUNJIRI ..... INTERESTED PARTY  
 VICTOR KIOKO MUNYAKA ..... INTERESTED PARTY  
 DENIS NJUE ITUMBI ..... INTERESTED PARTY  
 SIMON MWANGI KAMAU ..... INTERESTED PARTY  
 JAMES KIMANTHI MBALUKA ..... INTERESTED PARTY  
 KHATIB ABDALLAH MWASHETANI ..... INTERESTED PARTY  
 ELLY STEPHEN LOLDEPE ..... INTERESTED PARTY  
 MARK LOMUNOKOL ..... INTERESTED PARTY  
 ANAB MOHAMED GURE ..... INTERESTED PARTY  
 JACKSON KIPTANUI ..... INTERESTED PARTY  
 DANIEL WAMAHIU KIONGO ..... INTERESTED PARTY  
 EVANS ODHIAMBO KIDERO ..... INTERESTED PARTY  
 VINCENT KEMOSI MOGAKA ..... INTERESTED PARTY  
 LILIAN CHEPTOO TOMITOM ..... INTERESTED PARTY  
 MARGARET WANJIRU ..... INTERESTED PARTY  
 AMOS CHEGE MUGO ..... INTERESTED PARTY  
 WESLEY KORIR ..... INTERESTED PARTY  
 CHARLES NJAGUA KANYI ..... INTERESTED PARTY  
 JACKLINE MWENESI LUKALO ..... INTERESTED PARTY  
 NYAGA JOHN MUCHIRI ..... INTERESTED PARTY  
 WILSON SOSSION ..... INTERESTED PARTY



REHEMA DIDA JALDESA .....	INTERESTED PARTY
CHRISANTUS WAMALWA .....	INTERESTED PARTY
SUNYA ORRE .....	INTERESTED PARTY
MARY YAINA SENETA .....	INTERESTED PARTY
JOHN LODEPE NAKARA .....	INTERESTED PARTY
ELIJAH GITONGA RINTAUGU .....	INTERESTED PARTY
MWANAMAKA AMANI MABRUKI .....	INTERESTED PARTY
RAEL CHEBICHII LELEI .....	INTERESTED PARTY
DAVID KIPKORIR KIPLAGAT .....	INTERESTED PARTY
FREDRICK OTIENO OUTA .....	INTERESTED PARTY
ALLAN KIBET KOSGEY .....	INTERESTED PARTY

**The newly created positions of the Office of Chief Administrative Secretary declared unconstitutional despite public participation having been undertaken for the initial 23 positions of that office**

*The instant matter was a challenge on both the constitutionality and process of establishing the office of the Chief Administrative Secretary (the office of the CAS). The petitioners were aggrieved by the President unilaterally creating additional 27 positions of CASs beyond the 23 that were created on the recommendation of the Public Service Commission (PSC). The majority held it was incumbent upon the PSC to prove that the public participation exercise covered all the additional 27 nominees and that had not been done. The court thus held the process of establishing the extra 27 posts was unconstitutional. The majority further held that whereas the President could establish a State office within the public service, it required approval by the National Assembly and thus the newly created office of CAS did not meet the constitutional threshold. The minority on the other hand held that the requirement for approval of the National Assembly for the CAS position was not provided for in law.*

Reported by Kakai Toili

**Constitutional Law** - national values and principles - public participation - guidelines and components of meaningful public participation - claim that public participation was conducted for the creation of 23 positions of the Office of the Chief Administrative Secretary (office of CAS) - claim that the President nominated 50 people to the office of CAS - whether failure to conduct public participation for the creation of additional posts of the office of CAS rendered the process of establishing the extra posts unconstitutional - of Kenya, 2010, articles 10 and 232; omission Act, No 10 of 2017, section 27.

**Jurisdiction** - jurisdiction of the High Court - jurisdiction of the High Court sitting as a constitutional court - jurisdiction to determine a petition challenging the creation and appointments to the Office of Chief Administrative Secretary - whether the High Court sitting as a constitutional court had the jurisdiction to determine a petition challenging the creation and appointments to the office of chief administrative secretary - of Kenya, 2010, article 165(3)(d).

**Civil Practice and Procedure** - orders - orders of stay - effect of orders of stay - whether the issuance of stay orders against the judgment of the High Court declaring the Office of the Chief Administrative Secretary as then constituted was unconstitutional meant that parties reverted to the position subsisting prior to the judgment - of Kenya, 2010, article 162.

**Constitutional Law** - presidency - powers of the President - powers to create an office in the public service - role of the President vis a vis the Public Service Commission in the creation of an office in the public service - whether



*the President could establish a State office within the ranks of the public service without approval by the National Assembly - of Kenya, 2010, articles 10, 132(4)(a) and 232.*

**Civil Practice and Practice** - *joinder of parties to a suit - misjoinder of parties to a suit - whether the misjoinder of the President in a suit challenging the establishment of the Office of Chief Administrative Secretary was fatal - of Kenya, 2010, article 143.*

**Jurisdiction** - *jurisdiction of courts - jurisdiction to consider issues not contained in pleadings - whether a court could consider new issues that were not contained in the pleadings but were raised through an amended petition which the court had declined to admit for having been filed out of time.*

### **Brief facts**

The 5<sup>th</sup> respondent, the Public Service Commission (PSC) invited members of the public for comments on the proposed establishment of the office of the Chief Administrative Secretary (the office of CAS). That was prompted by a proposal from the 1<sup>st</sup> respondent (the President) to establish the office. On September 21, 2022, the PSC abolished the previous office of the CAS which was declared unconstitutional by the High Court in the case of [2021] eKLR (the case). That decision had been stayed by the Court of Appeal pending the hearing and determination of an appeal challenging it.

The PSC on October 12, 2022 invited applications for 23 positions in the office of CAS. The remuneration and benefits for the office was based on feedback received from the Salaries and Remuneration Commission (SRC). Thereafter, the advertisement was challenged in the Employment and Labour Relations Court (ELRC) and the court found that the PSC had complied with the process required to hire the 23 CASs. The President in his resolution dated March 16, 2023 nominated 50 persons for appointment. It was argued that the President acted unlawfully by nominating the 2<sup>nd</sup> to 51<sup>st</sup> interested parties for the CAS position when there were only 23 posts.

The 1<sup>st</sup> petitioner averred that the offices were intended to be State offices, yet, the same had not been established either by the of Kenya, 2010 (Constitution) or an Act of Parliament. The 2<sup>nd</sup> and 3<sup>rd</sup> petitioners argued that the decision to form and expand the CAS office was not subjected to meaningful public participation. The 4<sup>th</sup> petitioner argued that the appointments would increase the financial burden on citizens and waste public funds.

The 1<sup>st</sup> petitioner prayed for various declarations and orders including nullification of the appointment of all the 50 CASs (the 2<sup>nd</sup> to 51<sup>st</sup> interested parties). The 2<sup>nd</sup> and 3<sup>rd</sup> petitioners sought among other prayers, a declaration that the President was bound by the recommendations of the PSC on creation of an office in the public service; and, a declaration that the recruitment process for the interested parties was in violation of the as well as the (PSC Act). The 4<sup>th</sup> petitioner sought, *inter alia*, for a declaration that the appointment of the CASs was a waste of public funds and resources.

The Attorney General, the 2<sup>nd</sup> respondent and the 19<sup>th</sup> and 22<sup>nd</sup> interested parties lodged preliminary objections to the jurisdiction of the court and asserted that the suit was *res-judicata*.

### **Issues**

- i. Whether failure to conduct public participation for the creation of additional posts of the office of the Chief Administrative Secretary rendered the process of establishing the extra posts unconstitutional.
- ii. Whether the High Court sitting as a constitutional court had the jurisdiction to determine a petition challenging the creation and appointments to the office of Chief Administrative Secretary.
- iii. Whether the issuance of stay orders against the judgment of the High Court declaring that the office of the Chief Administrative Secretary as then constituted was unconstitutional meant that parties reverted to the position subsisting prior to the judgment.
- iv. Whether the President could establish a State office within the ranks of the public service without approval by the National Assembly.



- v. What was the role of the President and the Public Service Commission in the creation of an office in the public service?
- vi. What were the guidelines and components of meaningful public participation?
- vii. Whether the misjoinder of the President in a suit challenging the establishment of the Office of Chief Administrative Secretary was fatal.
- viii. Whether a court could consider new issues that were not contained in the pleadings but were raised through an amended petition which the court had declined to admit for having been filed out of time.

### Held

1. A court's jurisdiction flowed from either the Constitution or legislation or both. Thus, a court of law could only exercise jurisdiction as conferred by the Constitution or other written law. It could not arrogate to itself jurisdiction exceeding that which was conferred upon it by law. The court's mandate had been properly invoked. In particular, the consolidated petition raised numerous and weighty constitutional issues that went beyond employer and employee issues.
2. The primary or core issues before the court were in fact constitutional in nature, and called upon the court to interpret the as a whole in order to reach its conclusions in relation to the issues and reliefs sought. That exercise fell squarely within the confines of article 165(3)(d) of the , the court was properly seized of jurisdiction.
3. The instant dispute had been the subject of litigation in two previous matters over much of the same subject matter, namely, in [2021] eKLR and Petition No E174 of 2022 *Law Society of Kenya v Public Service Commission & others* in the Employment and Labour Relations Court (ELRC) (unreported). *Res judicata* applied to a number of issues in the instant consolidated petition and which had been litigated at length and determined, albeit involving different parties to the instant consolidated petition.
4. Several of the issues had been litigated even if some of the parties to the instant petition were different. Moreover, those issues ought to be *res judicata* on the basis that the issues in the instant matter were more akin to issues *in rem* rather than issues *in personam* because they affected a state of affairs, and the society at large within Kenya, rather than only private interests.
5. A court ought not to relitigate the same issues over and over, each time a new party filed a petition relating to the same subject matter. To do so would lead to an absurd outcome and embarrass the court with contradicting decisions.
6. From a reading of [2021] eKLR (*Okiya* case) and Petition No E174 of 2022 *Law Society of Kenya v Public Service Commission & others* in the Employment and Labour Relations Court (ELRC) (unreported) (*LSK* case), the High Court and the ELRC had already reached different conclusions in respect of a number of issues that were common to the two petitions. In order to avoid creating a third view in relation to the same issues, the court treated some of those issues determined in those cases as *res judicata* for the reason that they had been conclusively dealt with by a court of equal jurisdiction.
7. The judgment in the case was pending appeal in the Court of Appeal. The original office of CAS established on January 24, 2018 and which was the subject in the case was abolished by the PSC on September 21, 2022. That was the office that was the subject of the stay order in the Court of Appeal. The instant court ought not pronounce itself on issues that were pending appeal before a higher court.
8. The following issues relating to reliefs sought as listed below were *res judicata*:
  1. The offices of CAS that the 1<sup>st</sup> respondent created were State offices which could only be lawfully established and designated as State offices by national legislation.
  2. The National Assembly had no constitutional powers to approve for appointment persons nominated to the CAS positions created by the 1<sup>st</sup> respondent, including otherwise than in accordance with the recommendations of the 5<sup>th</sup> respondent, and not established and designated as State offices by national legislation.
  3. A declaration that the President was bound by the recommendations of the PSC on creation of an office in the public service under article 132(4)(a) of the .



The aforementioned issues ought to be excluded from the court's determination on the basis that the same were *res judicata*.

9. The guidelines for public participation were as follows:

1. As a constitutional principle under article 10(2) of the , public participation applied to all aspects of governance.
2. The public officer and or entity charged with the performance of a particular duty bore the onus of ensuring and facilitating public participation.
3. The lack of a prescribed legal framework for public participation was no excuse for not conducting public participation; the onus was on the public entity to give effect to that constitutional principle using reasonable means.
4. Public participation must be real and not illusory. It was not a cosmetic or a public relations act. It was not a mere formality to be undertaken as a matter of course just to fulfill a constitutional requirement. There was need for both quantitative and qualitative components in public participation.
5. Public participation was not an abstract notion; it must be purposive and meaningful.
6. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness would be determined on a case-to-case basis.
7. Public participation was not necessarily a process consisting of oral hearings, written submissions could also be made. The fact that someone was not heard was not enough to annul the process.
8. Allegation of lack of public participation did not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation was to be determined on a case-to-case basis. Components of meaningful public participation included the following;

- i. clarity of the subject matter for the public to understand;
- ii. structures and processes (medium of engagement) of participation that were clear and simple;
- iii. opportunity for balanced influence from the public in general;
- iv. commitment to the process;
- v. inclusive and effective representation;
- vi. integrity and transparency of the process;
- vii. capacity to engage on the part of the public, including that the public must first be sensitized on the subject matter.

10. The initial proposed number for the office of CAS was 23 posts. The process of public participation that was undertaken by the PSC was with reference to the letter from the President to the PSC dated September 19, 2022, which only requested for 23 posts. On the flipside, the sequence and procedure that led to the establishment of the 27 additional posts did not adhere to the constitutional principle under articles 10 and 232 of the and conditions set out under section 27 of the Act.

11. As a guiding principle, public participation must be real and cover all forms of governance. The public submitted comments in the public participation exercise based on creation of the CAS office in each Ministry not each State Department as indicated in the President's letter dated February 23, 2023. It was incumbent upon the PSC to prove that the public participation exercise covered all the additional 27 nominees. That was not done. Based on the record before the court, PSC failed in its mandate. The process of establishing the extra 27 posts was unconstitutional.

12. The principles governing interpretation of the were well settled. The should be interpreted in a holistic manner, within its context, and in its spirit. The should be given a purposive interpretation where all provisions were read as a whole with each provision sustaining the other.

13. The history of the office of CAS was fairly recent having been first established on January 24, 2018. However, on April 20, 2021, the High Court in the case declared the office to be unconstitutional. That decision was stayed by the Court of Appeal in Court of Appeal, Nairobi, Civil Appeal (Application) No



E131 of 2021 [2021] eKLR [2021]. The main appeal was pending. The stay did not reverse the findings or declarations or orders of the High Court, that the office of CAS as then constituted was unconstitutional. The Court of Appeal only granted a stay of execution in the terms of prayers 2 and 3.

14. The court could not review or stand on appeal over a decision of a court of concurrent jurisdiction. However, the court was alive to the fact that it was not bound by the decisions of the High Court in the case and the ELRC in the *LSK* case. The suit before the ELRC was challenging the validity of the advertisement by the PSC dated September 21, 2022 inviting public views on the establishment of a new office for CAS. The petition was dismissed.

15. The ELRC in the *LSK* case interpreted the stay by the Court of Appeal in *Public Service Commission & 72 others v Okiya Omtatah & 4 others* to mean that the PSC took into account the fact that after the Court of Appeal stayed the High Court judgment in the case, parties then reverted to the position subsisting prior to the judgment. The ELRC then went on to find that all the legal parameters for establishment of the office were met. The Law Society of Kenya did not appeal the dismissal of its petition by the ELRC.

16. The courts established under article 162 of the had the same status as the High Court. Whereas the court had no power to review the decision of a judge of concurrent jurisdiction, the court was equally not bound by it. The instant court was of a different view from the position taken by the ELRC in the *LSK* case, especially because the findings by the High Court in the case that the office of CAS was unconstitutional had not been set aside and was pending appeal.

17. Article 132(4)(a) of the expressly granted the President power to create an office in the public service. But in doing so, he and the PSC were bound to follow the requirements of the . Given the nature of the instant dispute, it was imperative for the PSC to file a replying affidavit clarifying the role it played in evaluating the request by the President, and seeking any advice from necessary bodies such as the SRC, and in rendering its final advice to the President.

18. Being a constitutional commission, the PSC was to be guided in its decisions by the principles outlined in article 10 of the for its actions. The failure by PSC to file a replying affidavit answering the specific allegations levelled against it, and to choose instead to rely on the defence by other parties or their depositions was a serious omission. It partly meant that some allegations by the petitioners against the PSC were not sufficiently rebutted.

19. The newly created office of CAS fell somewhere between two constitutional or State offices: that of the cabinet secretary (CS) and that of the principal secretary (PS). Those two officers underwent vetting and approval by Parliament but the CASs had been appointed and sworn into office without parliamentary approval.

20. Not every holder of high or State office underwent parliamentary approval. The CASs were for all purposes assistant cabinet secretaries reporting directly to the CS. The PS was relegated to the position where he reported to the CAS and the CS. Doubt was completely removed by their job description in Gazette Notice No 12432 of October 12, 2022, and duties specified therein, and the fact the CAS would be in a higher job group CSG 3 than the PS.

21. Whereas the President could establish a State office within the ranks of the public service, it required approval by the National Assembly. Such approval could be achieved by enactment of a statute, which provided for the same and further provided an appropriate framework for a cap on the numbers of CASs if necessary. The newly created office of CAS did not meet the constitutional threshold.

22. The initial approved complement rose from 23 CASs to 50. By virtue of their salary and hierarchy, the creation of the offices would come at a substantial cost to the public. The Judicial Service Commission (JSC) had advertised for 6 posts of Court of Appeal judges but hired 7. That was distinguishable from the instant scenario on the basis that at the material time, there was a vacancy; and, JSC did not overshoot the ceiling of 30 judges set for the Court of Appeal.



23. The petitioner in Petition No E167 of 2021, [2021] eKLR challenged the employment of 350 persons by the PSC for the position of accountant II in the National Treasury but when the advertised vacancies were only 250. The petition was dismissed. But that decision could be distinguished for two reasons: firstly, in the instant consolidated petition, the office created was a high public office with substantial salaries and perks; and, secondly, the case was dealing with hiring of lower cadre of public officers, being accountants II.

24. In interpreting the , the court was bound to adopt a purposive approach which sought to give effect to the true purpose of legislation and could examine material that bore upon the background against which the legislation was enacted. Kenya had for many years a cabinet consisting of ministers and assistant ministers whose composition or numbers was largely at the discretion of the President. The public clamour for control of the size of the Executive was reflected in the Draft Constitution of Kenya 2004 by the Constitution of Kenya Review Commission. Therefore, the creation of a similar office to the assistant minister, in name of CASs, could not be created in the manner the President and the PSC proceeded. It was not the intention of the framers of the to have 50 CASs deputizing 22 cabinet secretaries. Public participation on the office of CAS was founded on a complement of 23 CASs.

25. The stay in the Court of Appeal preserved the original office created on January 24, 2018. Once that office was abolished on September 21, 2022, the newly created office and complement of 23 office holders could no longer benefit from that stay. Accordingly, the newly created office and fresh complement of 50 had to comply with the and the criteria set out earlier in the case in order to be lawfully established. They did not comply. The entire complement of 50 CASs was therefore unconstitutional.

26. Article 230(4) of the provided for the powers and functions of the SRC as to set and regularly review the remuneration and benefits of all State officers and to advise the National and County Governments on the remuneration and benefits of all other public officers. The PSC should have consulted the SRC in order for it to ascertain the resultant financial implications.

27. Based on the separation of powers doctrine, budgetary concerns fell within the realm of policy, and rightly belonged to the other relevant arms of Government as may be appropriate. The court thus declined the invitation to delve any deeper into that arena.

28. Pursuant to article 143 of the , and based on the law, the 1<sup>st</sup> respondent was improperly joined into the consolidated petition. The misjoinder was not fatal to the consolidated petition. The petitioners and future litigants should avoid that practice in light of the unequivocal pronouncement by the Supreme Court on that issue.

29. In a constitutional suit a party that alleged violation of his or her rights must plead with reasonable precision the manner in which the rights had been violated. The mere citing of constitutional provisions was not enough. The petitioners must with some reasonable degree of precision identify the constitutional provisions that were alleged to have been violated, and the manner in which the provisions had been violated from the facts and evidence of the case. In the circumstances of the case and material placed before the court, the threshold had been met by the petitioners.

30. The 2<sup>nd</sup> and 3<sup>rd</sup> petitioners tried to introduce new issues that were not pleaded in the original petitions but were found in their further affidavit, supplementary affidavit, submissions, and found in the amended petition filed out of time, which the court declined to admit. Each party was at liberty to frame his case in his own way while having regard to the rules of pleadings and in the end, was ultimately bound by the manner in which the pleadings were drafted. As such, a party could not be allowed to raise a different or fresh case without an amendment to the pleadings. The court record reflected that the 3<sup>rd</sup> petitioner's request to extend the time within which to file and serve the amended petition was declined. The court confined its decision to only the matters properly pleaded before it.

31. By joining the unrelated causes of action of the constitutionality of section 26 (2) of the Salaries and Remuneration Commission Act and the Salaries and Remuneration Commission (Remuneration and Benefits of State and Public officers) Regulations, 2013, the court may not be able to render a fair and efficient





resolution of that particular issue given that it derogated from the core issues before it. In order to ensure efficient administration of justice, each cause of action ought to be litigated independently to ensure the proper application of law, presentation of evidence, and resolution of disputes. In the instant matter, the court had not had sufficient opportunity to carry out the exercise in relation to that specific issue. Accordingly, the court declined to entertain that issue.

32. The mandate of the 1<sup>st</sup> interested party, Controller of Budget under article 228(4) and (5) of the was to grant approval of withdrawal of funds in accordance with the law and not to effect payments on specific transactions. It was the responsibility of the relevant accounting officers to pay remuneration and benefits to the respective members of staff. The 1<sup>st</sup> interested party ought not to have been joined in to the instant proceedings. No cause of action had been disclosed against the 1<sup>st</sup> interested party. Further, the petitioners had not sought any specific orders against the 1<sup>st</sup> interested party, nor had they set out in detail any specific violations of the law demonstrated by the 1<sup>st</sup> interested party.

### **Dissenting opinion**

#### **Per HI Ong’udi, J (dissenting)**

1. The dissenting opinion was in agreement with most of the issues in the majority judgment. Those issues were the jurisdiction of the court; *res judicata*; public participation; joinder of the President and the Controller of Budgets and lastly the financial budgetary estimates. The dissenting opinion differed with the majority on two issues namely; whether the office of CAS was constitutionally established and whether the 50 CAS’s were appointed in accordance with the law.
2. The contents of the case and the *LSK* case arose from courts of concurrent jurisdiction which legally, did not bind the court as the courts were of equal status. The court could not turn a blind eye to the President’s and PSC’s actions. The President and the PSC owing to the adduced correspondence, in an attempt to comply with the law and the pronouncement of the High Court established a new office of the CAS based on the orders issued. That compliance was given the green light by the ELRC in the *LSK* case which could not be ignored. That act was in line with PSC’s mandate under article 234(2) (a)(i) of the .
3. The regularization of the office of the CAS as proposed by the President in the letter dated September 19, 2022 and recommended by the PSC in the letter dated October 11, 2022 being premised on the rule of law could not be faulted. The process undertaken to establish the new office of the CAS that endorsed 23 posts, as seen from the correspondence, was lawful.
4. The office of the CAS was constituted under article 132 of the which essentially spelt out the functions of the President. One of the facets of a holistic interpretation to be an interrogation of the past. From the historical point of view that Kenyans were keen that the President should have limited reasonable power that was exercised within the confines of the law.
5. Article 132(4)(a) of the provided that the President could create an office in the public service in accordance with the recommendation of the PSC. The intention of article 132(4)(a) was to limit the President’s power to create an office in the public service to the extent that the creation must be done in tandem with the PSC’s recommendation. The recommendation must basically be guided by the edicts of the and the law. Therefore, the two conditions as conceived were intended to be inseparable and work in harmony. That was the intention of the drafters of the and aspirations of the Kenyans.
6. For an office established under article 132(4)(a) of to be properly constituted, the same must satisfy the threshold set out under section 27 of the Act as read with the provisions of articles 10 and 232 of the . The number of persons that could be recommended for that position (or one created under that article) was not expressly stated in the or the . Similarly, the requirement for approval of the National Assembly for the CAS position was not provided. Any post that was established must comply with the principles of the and section 27 as read with section 30 of the Act.
7. From the letter dated February 23, 2023, the nature of the office of CAS varied drastically. In the initial letter dated September 19, 2022 the proposal was ‘one position be established in each Ministry, except



in the Ministry of Interior and Coordination of National Government that would have two positions' while in the letter dated February 23, 2023 the proposal was a review of the complement of CAS within the public service to vary from one in each Ministry to one in every State department.

8. The letter dated February 23, 2023 introduced a new element in the office that was not accounted for in the previous process that was found to be lawful. Furthermore, despite that vital additional aspect the PSC went ahead to make a recommendation without seeking further information and justification as required under section 27 of the Act. Likewise, the sequence and procedure that led to the establishment of the 27 additional CAS posts did not involve adherence to the constitutional principles set out under articles 10 and 232 of the .
9. The manner of establishment of the additional 27 posts in view of article 132(4)(a) of the , section 27 and 30 of the and the necessity of the PSC's recommendation was unconstitutional. On the flipside, the establishment of the CAS office in the public service with 23 posts was constitutional.

*Consolidated petition partly allowed; preliminary objections dated March 21 and 31, 2023 were dismissed.*

### **Orders**

- i. *The current Office of Chief Administrative Secretary created by the President and the PSC and contained in the Kenya Gazette Special Issue Number 12432 dated October 12, 2022 and which announced the vacancies thereof was unconstitutional.*
- ii. *Whereas there was some reasonable public participation on the first complement of 23 Chief Administrative Secretaries, there was no such participation regarding the additional complement of 27 office holders.*
- iii. *The entire complement of 50 Chief Administrative Secretaries, which was to say all the 2<sup>nd</sup> to 51<sup>st</sup> interested parties, was unconstitutional.*
- iv. *For the avoidance of doubt, the notification by the President dated March 16, 2023 appointing the 2<sup>nd</sup> to 51<sup>st</sup> interested parties to the Office of Chief Administrative Secretary was quashed.*
- v. *The prayer that section 26(2) of the be declared unconstitutional was disallowed.*
- vi. *A declaration was issued that the President enjoyed constitutional immunity from suit and was illegally joined into the proceedings.*
- vii. *The petition against the 1<sup>st</sup> interested party was dismissed.*
- viii. *Each party to bear its own costs.*

### **Citations**

#### **Cases**

1. Anarita Karimi Njeru v Republic (Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); (1976-1980) KLR 1272) — Applied
2. Astute Africa Investments & Holding v Spire Bank Kenya Limited & another (Civil Case 455 of 2017; [2018] KEHC 3360 (KLR)) — Explained
3. Attorney-General & 2 others v Ndi & 79 others; Prof Rosalind Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated); [2022] KESC 8 (KLR)) — Explained
4. Attorney General v Law Society of Kenya & 4 others (Civil Appeal 426 of 2018; [2019] eKLR) — Applied
5. Bellevue Development Company Ltd v Francis Gikonyo & 7 others (Civil Appeal 239 of 2018; [2018] KECA 330 (KLR)) — Explained
6. British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) (Petition 5 of 2017; [2019] KESC 15 (KLR)) — Applied
7. Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others (Petition 628, 630 of 2014 & 12 of 2015 (Consolidated); [2015] eKLR) — Explained



8. Commission For Human Rights & Justice v Board of Directors-Kenya Ports Authority & 2 others; Dock Workers Union (Intended Interested Party) (Petition 4 of 2020; [2020] KEELRC 970 (KLR)) — Mentioned
9. Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated); [2014] eKLR) — Applied
10. County Government of Nyeri & another v Cecilia Wangechi Ndungu (Civil Appeal 2 of 2015; [2015] eKLR) — Mentioned
11. ET v Attorney General & another (Petition 212 of 2011; [2012] eKLR; [2012] 1 KLR 129) — Mentioned
12. Gacheru, Irene Wangari & 6 others v Attorney-General (Constitutional Petition 376 of 2014; [2017] eKLR) — Mentioned
13. Gikonyo, Wanjiru & another v National Assembly of Kenya & 4 others (Petition 178 of 2016; [2016] KEHC 4450 (KLR)) — Explained
14. Icea Lion General Insurance Co Ltd v Julius Nyaga Chomba (Civil Appeal 99 of 2016; [2020] KEHC 3639 (KLR)) — Explained
15. Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others (Civil Appeal 219 of 2013; [2014] eKLR) — Explained
16. Institute for Social Accountability & another v National Assembly & 3 others & 5 others (Petition 1 of 2018; [2022] KESC 39 (KLR)) — Explained
17. In the Matter of Interim Independent Electoral Commission (Constitutional Application 2 of 2011; [2011] eKLR) — Mentioned
18. In the Matter of Kenya National Commission on Human Rights (Reference 1 of 2012; [2014] eKLR) — Mentioned
19. John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others (Civil Appeal 42 of 2014; [2015] KECA 472 (KLR)) — Mentioned
20. Karani, Stephen Wachira & another v Attorney General & 4 others (Constitutional Petition 321 & 331 of 2017; [2017] KEHC 2184 (KLR)) — Mentioned
21. Katiba Institute & 3 others v Independent Electoral Boundaries Commission & 3 others; Law Society of Kenya & another (Interested parties) (Constitutional Petitions E540 & E546 of 2021 (Consolidated); [2022] eKLR) — Mentioned
22. Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others (Interested Parties) (Petition 206 of 2020; [2021] KEHC 442 (KLR)) — Mentioned
23. Kenya Commercial Bank Limited v Benjoh Amalgamated Limited (Civil Appeal 107 of 2010; [2017] KECA 98 (KLR)) — Explained
24. Kenya Human Rights Commission v Communications Authority of Kenya & 4 others (Constitutional Petition 86 of 2017; [2018] KEHC 7494 (KLR)) — Mentioned
25. Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others (Petition 42 of 2019; [2021] KESC 35 (KLR)) — Mentioned
26. Kidero, Evans Odhiambo & 4 others v Ferdinand Ndungu Waititu & 4 others (Petition 18 & 20 of 2014; [2014] KESC 11 (KLR)) — Followed
27. Koech, Benjamin v Baringo County Government & 2 others; Joseph C Koech (Interested Party) (Constitutional Petition 3 of 2019; [2019] KEHC 1646 (KLR)) — Mentioned
28. Konchellah, Leina & others v Chief Justice of the Supreme Court of Kenya & others; Speaker of National Assembly & others (Interested Parties) (Petitions E291-E337 & JR E1108 of 2020 (Consolidated); [2021] eKLR) — Applied
29. Law Society of Kenya & 2 others v Attorney General & 2 others; Korir & 50 others (Interested Parties) (Constitutional Petition E186, E189 & E192 of 2022 (Consolidated); [2022] KEELRC 13324 (KLR)) — Explained



30. Law Society of Kenya v Attorney General & another (Petition 4 of 2019; [2019] KESC 16 (KLR)) — Explained
31. Law Society of Kenya v Public Service Commission & 2 others (Petition No E174 of 2022) — Explained
32. Leiyagu, Richard Nchapi v Independent Electoral & Boundaries Commission & 2 others (Civil Appeal 299 of 2013; [2014] KECA 608 (KLR)) — Explained
33. Macharia, Samuel Kamau & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011; [2012] eKLR) — Followed
34. Mate, Justus Kariuki & another v Martin Nyaga Wambora & another (Petition 32 of 2014; [2017] KESC 1 (KLR)) — Mentioned
35. Matem, Mumo v Trusted Society of Human Rights Alliance & 5 others (Civil Appeal 290 of 2012; [2013] KECA 445 (KLR)) — Mentioned
36. Matem, Mumo v Trusted Society of Human Rights Alliance & 5 others (Civil Application 29 of 2014; [2014] KESC 6 (KLR)) — Explained
37. Mount Kenya Bottlers Limited & 3 others v Attorney General & 3 others (Civil Appeal 164 of 2013; [2013] eKLR) — Mentioned
38. Mugendi, Daniel N v Kenyatta University & 3 others (Civil Appeal 6 of 2012; [2013] KECA 41 (KLR)) — Explained
39. Munialo, Jack Mukhongo & 12 others v Attorney General & 2 others (Petition 182 of 2017; [2017] eKLR) — Mentioned
40. Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others (Application 5 of 2014; [2014] eKLR) — Applied
41. Ndichu, Nick Githinji v Clerk Kiambu County Assembly & another (Petition 11 of 2014; [2015] eKLR) — Mentioned
42. Ndichu, Nick Githinji v Clerk, Kiambu County Assembly & another (Petition 11 of 2014; [2014] KEELRC 437 (KLR)) — Explained
43. Njenga, Adrian Kamotho v Attorney General; Judicial Service Commission & 2 others (Interested Party) (Petition 369 of 2019; [2020] KEHC 3905 (KLR)) — Mentioned
44. Odinga, Raila Amolo & another v Independent Electoral and Boundaries Commission & 3 others (Election Petition 1 of 2017; [2017] KESC 27 (KLR)) — Explained
45. Okoiti & another v Public Service Commission & 73 others; Law Society of Kenya & another (Interested Parties) (Petition 33 & 42 of 2018 (Consolidated); [2021] KEHC 464 (KLR)) — Explained
46. Okoiti, Okiya Omtatah v Joseph Kinyua & 2 others (Petition 51 of 2018; [2018] KEELRC 1463 (KLR)) — Mentioned
47. Otuke, Silas Make v Attorney General & 3 others (Petition 44 of 2013; [2014] KEHC 2383 (KLR)) — Explained
48. Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited ([1989] KLR 1) — Mentioned
49. Public Service Commission & 72 others v Okiya Omtatah & 4 others (Civil Appeal (Application) E131 of 2021; [2021] KECA 392 (KLR)) — Explained
50. Republic v County Government of Kiambu Ex Parte Robert Gakuru & another (Judicial Review 30 of 2017; [2019] KEHC 10228 (KLR)) — Mentioned
51. SDV Transami Kenya Limited & 19 others v Attorney General & 2 others & Container Freight Association of Kenya (Constitutional Petition 76 of 2012; [2016] KEHC 571 (KLR)) — Explained
52. Sheria Mtaani Na Shadrack Wambui v Public Service Commission & 2 others (Petition E167 of 2021; [2021] KEELRC 43 (KLR)) — Explained
53. Speaker of the National Assembly v Centre for Rights Education & Awareness & 7 others (Civil Appeal 148 of 2017; [2019] KECA 655 (KLR)) — Explained



54. Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 others (Civil Appeal 196, 195 & 203 of 2015; [2015] KECA 239 (KLR)) — Explained
55. United States International University v Attorney General (Petition 170 of 2012; [2012] eKLR) — Explained
56. Wako, Ali Jarso & another v Ministry of Interior & Coordination of National Government & 5 others; Public Service Commission & 5 others (Interested Parties) (Constitutional Petition 2 of 2020; [2020] KEHC 2971 (KLR)) — Mentioned
57. Tinyefuza v Attorney-General ([1997] UGCC 3) — Mentioned
58. Democratic Alliance v President of South Africa & 3 others ((CCT 122/11) [2012] ZACC 24) — Explained
59. Captain Harry Gandy v Caspar Air Charters Limited ([1956] 23 EACA 139) — Mentioned
60. Kamunve & others v Pioneer General Assurance Society Ltd ([1971] EA 263) — Mentioned

#### Statutes

1. Advocates (Practice) Rules, 1966 (cap 16 Sub Leg) — Rule 8 — Interpreted
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) — Order 3; Rule 5 — Interpreted
3. Constitution of Kenya (2010) — Article 2 (2), 3 (1), 4 (2), 10 (2), 35, 73, 74, 75, 93, 94, 95, 130, 131, 132 (2) (a) (4) (a), 136, 138, 141, 143, 152, 155 (1) (2), 156, 162 (2) (a), 165 (3) (b) (d) (5) (b), 201, 204, 206, 207, 228 (4) (5), 230, 232 (1) (2), 233, 234, 248, 249 (1) (2), 252 (1) (d), 253, 259 (1) (11), 260 — Interpreted
4. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya, 2010 Sub Leg) — In general — Cited
5. Controller of Budget Act, 2016 (Act No 26 of 2016) — In general — Cited
6. Court of Appeal Rules, 2010 (cap 9 Sub Leg) — Rule 5 (2) (b), 47 — Interpreted
7. Employment and Labour Relations Court Act, 201 (Act No 20 of 2011) — Section 12 — Interpreted
8. Evidence Act (cap 80) — Section 107 — Interpreted
9. Law Society of Kenya Act, 2014 (Act No 21 of 2014) — Section 3, 4 — Interpreted
10. Public Appointments (Parliamentary Approval) Act, 2011 (Act No 33 of 2011) — Section 3, 9 — Interpreted
11. Public Service Commission Act, 2017 (Act No 10 of 2017) — Section 4, 27, 28, 29, 30, 47, 58 (2) (3) (c) (e) (5) — Interpreted
12. Salaries and Remuneration Commission Act, 2011 (Act No 10 of 2011) — Section 11 (d), 12, 26 (2) — Interpreted
13. Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013 (Act No 10 of 2011 Sub Leg) — In general — Cited
14. Statutory Instruments Act, 2013 (Act No 23 of 2013) — In general — Cited

#### Texts

1. Constitution of Kenya Review Commission (2010), The Final Report of the Constitution of Kenya Review Commission (Nairobi: Constitution of Kenya Review Commission (CKRC))
2. Constitution of Kenya Review Commission (CKRC) (2005), The Final Report of the Constitution of Kenya Review Commission (Nairobi: Constitution of Kenya Review Commission (CKRC))
3. Mackay, JPH., (Lord of Clashfern) (Ed) (1964), Halsbury's Laws of England (London: Butterworths 3rd Edn para 845)
4. Sihanya, B., (Ed) (2013), Constitutional Commissions in Kenya Experiences, Challenges and Lessons (Nairobi: University of Nairobi)

#### Advocates

*Mr. Matindi (In Person)* for 1st petitioner.

*Mr. Theuri, Mr. Ogada, Mr. Kabata, & Ms. Kagai* for 2nd petitioner

*Mr. Ochiel, Mr. Rapei & Mr. Bosire* for 3rd petitioner



*Mr. Matwele* for 4th petitioner  
*Mr. Bitta* for 2nd respondent.  
*Ms. Nyaberi & Ms. Nganyi* for 3rd respondent.  
*Ms. Wabome* for 4th respondent.  
*Ms. J. Manani* for 5th respondent.  
*Ms. Njiru* for 1st interested party.  
*Mr. Nura & Mr. Somane* for 2nd to 7th; 9th to 18th; 20th, 21st; 23rd to 30th; and, 33rd to 51st interested parties  
*Mr. Wanyama, Mr. obondo & Mr. Kyallo* for 8th and 31st interested parties.  
*Mr. Arwa & Ms. Maina* for 19th interested party.  
*Mr. Kamotho* for 22nd interested party.  
*Mr. Arwa H/B for Ms. Ondieki* for 32nd interested party.

## JUDGMENT

### Introduction

1. The consolidated petition is three-pronged. Firstly, it challenges both the constitutionality and process of establishing the office of the Chief Administrative Secretary (hereafter the office of the CAS or CASs). A related argument is that the office of CAS is a State office which can only be lawfully established through an Act of Parliament. Secondly, the petitioners are aggrieved by HE The President (hereafter the 1<sup>st</sup> respondent) “unilaterally creating additional 27 positions of CASs beyond the 23 that were created on the recommendation” of the Public Service Commission (hereafter the PSC or 5<sup>th</sup> Respondent). Thirdly, it is contended that the additional offices will impose an unreasonable or additional financial burden on the public contrary to constitutional and statutory imperatives on prudent use of public resources.
2. The 1<sup>st</sup> petitioner prays for various declarations and orders including nullification of the appointment of all the 50 CASs (the 2<sup>nd</sup> to 51<sup>st</sup> interested parties); and, declarations that section 26(2) of the *Salaries & Remuneration Commission Act* and the *Salaries & Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations* are unconstitutional.
3. The 2<sup>nd</sup> and 3<sup>rd</sup> petitioners on the other hand seek, among other prayers, a declaration that the President is bound by the recommendations of the Public Service Commission on creation of an office in the Public Service under article 132(4)(a) of *Constitution*; and, a declaration that the recruitment process for the interested parties was in violation of the *Constitution* as well as the *Public Service Act*. They pray that the appointments of the 50 CASs be quashed.
4. They also contend that the PSC abdicated its mandate under article 234 of the *Constitution* by establishing a public office contrary to articles 10 and 232; and, that the process of vetting and approval of the interested parties by the National Assembly would be in breach of articles 2(2),4(2), 10(2), 94, 95, 232(1) and (2) and 259(1) of the *Constitution*.
5. The 4<sup>th</sup> petitioner seeks, *inter alia*, for a declaration that the appointment of the CAS’s is a waste of public funds and resources. He argued that in the face of the high unemployment levels and economic recession facing Kenyans, the appointments offend article 10 of the *Constitution* with specific regard to prudent use of public funds and resources, good governance, transparency, accountability and sustainable development.



6. A short history of the litigation is relevant. Petition No E080 of 2023 is dated March 17, 2023 and was presented to court on March 20, 2023. It was consolidated with Petition No E084 of 2023 dated March 23, 2023 as they were largely founded on identical facts and sought similar reliefs. The two petitions questioned the exercise of the President's power under article 132 (4) (a) of the [Constitution](#) in establishing the office of the CAS; and, the appointment of an additional 27 CASs.
7. On March 31, 2023, the single judge (Ong'udi J) consolidated the two petitions. She also certified the matter as raising substantial questions of law and referred the matter to the Honourable Chief Justice for appointment of an uneven number of judges. The present bench was empaneled on April 19, 2023.
8. Petition No E050 of 2023 was subsequently brought by the 4<sup>th</sup> petitioner on May 5, 2023. On May 23, 2023, the Honourable Chief Justice directed that the petition be heard by this bench. It is imperative to note that on April 28, 2023, we had rendered directions for the disposal of the earlier petitions and set a hearing date. At the hearing on May 25, 2023, the bench consolidated the new petition with the other two and issued fresh directions. The lead petition remained Number E080 of 2023.
9. The consolidated petition is strenuously opposed by all the respondents and all the interested parties through some grounds of opposition, various replying affidavits and notices of preliminary objections that we shall particularize later.
10. We should point out that the President (1<sup>st</sup> respondent) did not file any response to the petitions. However, the Attorney General (2<sup>nd</sup> respondent) raised a preliminary objection that the President was wrongly sued and should be removed from these proceedings. The PSC (the 5<sup>th</sup> respondent) on the other hand did not file a reply but sought to benefit from the affidavit of Felix Koskei filed on behalf of the 2<sup>nd</sup> respondent. We shall deal with the propriety of that matter later.
11. The key objections by the respondents and interested parties are as follows: Firstly, that the issues raised fall squarely within the jurisdiction of the Employment and Labour Relations Court. They thus contend that the High Court lacks jurisdiction to determine the dispute. Secondly, that the issues are res-judicata in view of two earlier decisions of the superior courts rendered by Mrima J in [Okiyah Omtatab & another v PSC & 73 others](#) [2021] KEHC 464 (KLR); and, by Mbaru J in [LSK & 2 others v AG et al](#) [2022] KEELRC 13324 (KLR).
12. Thirdly, it is contended that the petitions are premature and non-justiciable; fourthly, that the petitions are poorly drafted and imprecise; fifthly, that the respondents have not breached the [Constitution](#) or any statute; and, lastly, that the President enjoys immunity from suit and is thus wrongly joined into the suit.
13. On March 23, 2023 the single judge (Ong'udi J) granted a conservatory order barring the interested parties from assuming or continuing to act as the CASs. Those orders were confirmed by the full bench in a considered ruling dated April 28, 2023.
14. The Attorney General (2<sup>nd</sup> respondent), Mr Denis Itumbi and Eng Nicholas Gumbo (the 19<sup>th</sup> and 22<sup>nd</sup> interested parties respectively) had also lodged preliminary objections to the jurisdiction of the court and asserting that the suit is res-judicata. Following directions made by the bench on April 28, 2023, the parties agreed that those matters form part of the reply to the consolidated petition and be determined in our final judgment.
15. On the date of the hearing, the respondents contended that the petitioners had made averments and submitted on matters that had not been raised in the consolidated petitions. In particular, the 19<sup>th</sup> interested party sought to have the offending paragraphs struck out at the preliminary stage. We



directed that the objections be canvassed in the course of the hearing and would be addressed in this judgment.

16. We should also point out that although the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners were granted leave on March 31, 2023 to amend and serve an amended petition, they failed to do so within the prescribed time. On April 28, 2023, and following objections by the respondents, we declined to extend time within which the amended petition dated April 17, 2023 was to be filed and served.
17. All the parties, except the 1<sup>st</sup> respondent, filed final submissions. On 25<sup>th</sup> and May 26, 2023 we heard further arguments from all the disputants.

### **The Parties**

18. Eliud Karanja Matindi (1<sup>st</sup> petitioner) describes himself as an active citizen and a defender of the [Constitution](#). He pleads that the petition is brought in the public interest.
19. The Law Society of Kenya (hereafter the LSK or 2<sup>nd</sup> petitioner) is established under section 3 of the [Law Society of Kenya Act, 2014](#) and mandated to assist the public in matters of public interest.
20. Katiba Institute (3<sup>rd</sup> petitioner) is a constitutional research, education, litigation, and advocacy institute established in 2011 to promote constitutionalism within the Republic.
21. Multy Touch International (4<sup>th</sup> petitioner) is a Non-Governmental Organization which engages in ecological systems conservation.
22. The 1<sup>st</sup> respondent is the HE The President of the Republic of Kenya, an office established under article 130 of the [Constitution](#) as read together with articles 74, 136, 138 and 141.
23. The Attorney General (2<sup>nd</sup> respondent) is an office established by article 156 of the [Constitution](#) and is sued in his capacity as the principal legal adviser to the national government.
24. The National Assembly (3<sup>rd</sup> respondent) is one of the two Houses of Parliament established under article 93 of the [Constitution](#).
25. The Salaries and Remuneration Commission (hereafter the SRC or 4<sup>th</sup> respondent) is a constitutional commission created by article 230, as read with articles 248 and 253 of the [Constitution](#) and the [Salaries and Remuneration Commission Act, 2011](#).
26. The Public Service Commission (5<sup>th</sup> respondent) is a constitutional commission under article 233, as read together with articles 248 and 253 of the [Constitution](#).
27. The Controller of Budget (hereafter the CoB or 1<sup>st</sup> Interested Party) is an independent constitutional office established under article 228 of the [Constitution](#), as read together with articles 248, 249 and 253 and the [Controller of Budget Act, 2016](#).
28. The 2<sup>nd</sup> to 5<sup>th</sup> interested parties are the persons nominated and later appointed by HE The President to the office of Chief Administrative Secretaries.

### **Pleadings and Other Materials**

29. Petition No E080 of 2023 by the 1<sup>st</sup> petitioner is dated March 17, 2023 and predicated on a deposition of even date and supplementary affidavits dated 5<sup>th</sup> & May 12, 2023. His submissions and list of authorities are dated May 12, 2023.





30. Petition No E084 of 2023 by the 2<sup>nd</sup> petitioner is dated March 23, 2023 and supported by the affidavits of Florence Muturi of even date and a further affidavit sworn on May 2, 2023. The submissions and authorities are dated May 12, 2023.
31. The 3<sup>rd</sup> petitioner filed a supplementary affidavit sworn by Lempaa Suyianka on May 5, 2023, submissions and authorities on May 14, 2023 and a further rejoinder on May 25, 2023.
32. Petition No E150 of 2023 by the 4<sup>th</sup> petitioner is dated April 5, 2023 and is supported by the affidavit of Christine Gachege sworn on April 5, 2023 and amended on May 12, 2023. Its submissions and authorities are dated May 25, 2023.
33. As we mentioned earlier, the 1<sup>st</sup> respondent did not file any response. The 2<sup>nd</sup> respondent lodged grounds of opposition and a notice of preliminary objection all dated March 21, 2023, a replying affidavit by Felix Koskei sworn on March 24, 2023 and submissions dated May 22, 2023.
34. The 3<sup>rd</sup> respondent filed a replying affidavit sworn by Samuel Njoroge on May 3, 2023 and submissions and authorities dated May 18, 2023.
35. The 4<sup>th</sup> respondent's grounds of opposition are dated March 17, 2023 and accompanied by a replying affidavit of Anne Gitau of even date and submissions and precedents dated May 22, 2023.
36. The 5<sup>th</sup> respondent filed submissions and authorities dated May 19, 2023.
37. The 1<sup>st</sup> interested party's replying affidavit is sworn by Stephen Masha on May 23, 2023 as well as submissions and authorities dated May 23, 2023.
38. The 2<sup>nd</sup> to 7<sup>th</sup>; 9<sup>th</sup> to 18<sup>th</sup>; 20<sup>th</sup>, 21<sup>st</sup>; 23<sup>rd</sup> to 30<sup>th</sup>; and, 33<sup>rd</sup> to 51<sup>st</sup> interested parties relied on a deposition of Allan Kibet Kosgey sworn on May 5, 2023 and submissions dated May 23, 2023. The 8<sup>th</sup> and 31<sup>st</sup> interested parties lodged grounds of opposition dated March 27, 2023 as well as submissions and authorities dated May 19, 2023.
39. The 19<sup>th</sup> interested party filed grounds of opposition dated May 5, 2023 and submissions and authorities dated May 23, 2023.
40. The 8<sup>th</sup> and 31<sup>st</sup> interested parties relied grounds of opposition dated March 27, 2023 and submissions dated May 19, 2023.
41. The 22<sup>nd</sup> interested party filed a Preliminary Objection on March 31, 2023, replying affidavit by Denis Itumbi sworn on May 2, 2023 and submissions and authorities dated May 23, 2023.
42. The 32<sup>nd</sup> interested party filed a replying affidavit dated April 27, 2023 sworn by Vincent Mogaka and submissions and authorities dated May 18, 2023.
43. The 2<sup>nd</sup> respondent together with the 22<sup>nd</sup> interested party filed preliminary objections dated March 21, 2023 and March 31, 2023 respectively objecting to the High Court's jurisdiction on the basis that the dispute falls within the purview of the Employment and Labour Relations Court pursuant to article 162(2)(a) and Section 12 of the [ELRC Court Act, 2011](#).
44. We shall now briefly highlight the substance of the parties' cases.

### **The 1st Petitioner's Case**

45. He avers that in a press statement dated September 21, 2022, the PSC invited members of the public for comments on the proposed establishment of the office of CAS. This was prompted by a proposal from HE The President to establish the office in accordance with article 132(4)(a) of the [Constitution](#).



46. On September 21, 2022, the PSC abolished the previous office of the CAS established on January 24, 2018 which was declared unconstitutional by the High Court in the case of *Okuya Omtatab Okoiti & another v Public Service Commission & 73 others; Law Society of Kenya & another (Interested parties)* [2021] eKLR Neutral citation: [2021] KEHC 464 (KLR). That decision was stayed by the Court of Appeal pending the hearing and determination of *Public Service Commission & 72 others v Okuya Omtatab Okoiti & 4 Others* [2021] eKLR in Civil Appeal (Application) No E131 of 2021.
47. He argues that the creation of the 23 CAS positions and the additional 27 positions is unlawful. He states that section 3 of the *Public Appointments (Parliamentary Approval) Act, 2011* provides that such appointments must be approved by Parliament in accordance with the said Act. He however notes that in creating the new offices PSC tried to comply with the condition spelt out in the decision of the High Court in *Okuya (supra)*.
48. He states that PSC on October 12, 2022 invited applications for 23 positions in the office of CAS vide Gazette Notice No 12432. The position was for a term of five years and was job grade CSG 3 in the Public Service.
49. The remuneration and benefits for the office was based on feedback received from the SRC which is mandatory in such cases. SRC on May 10, 2022 submitted the draft Salaries and Remuneration Commission [Remuneration and Benefits of State and Public Officers] Regulations, 2022, to the National Assembly. The Committee on Delegated Legislation recommended to the House to reject the draft regulations. The final report from the House was still under consideration at the time of filing this suit.
50. Thereafter, the advertisement was challenged by the Law Society of Kenya in the Employment and labour Relations Court under *Law Society of Kenya v The Public Service Commission and the Hon Attorney-General (supra)*. The Court found that the PSC had complied with the appropriate process required to hire the 23 CASs. The PSC thereafter shortlisted 240 candidates for interview. The interviews were conducted between March 1, 2023 to March 7, 2023. The President in his resolution dated March 16, 2023 nominated 50 persons for appointment, which action is impugned in this petition.
51. He argues that the President acted unlawfully by nominating the 2<sup>nd</sup> to 51<sup>st</sup> interested parties for the CAS position when there were only 23 posts. He contends that it was a unilateral decision contrary to the *Constitution* and the law. He avers besides that, the nature of the irregular and additional CAS offices, their profile, purported functions and the decision to subject them to approval by the National Assembly, demonstrates that the offices are intended to be State offices, yet, the same have not been established either by the *Constitution* or an Act of Parliament.
52. He argues that the requirement for vetting/approval by the National Assembly is contrary to the *Constitution* and the law because the National Assembly has no such power to undertake an approval process.
53. He also argues that by enacting section 26(2), *SRC Act, 2011* and the Legal Notice No 2 of 2013, the respondents violated the *Constitution* since the advice sought by and given to PSC by SRC was based on the procedure and factors set out in the impugned Legal Notice No 2 of 2013.
54. He argues that the 1<sup>st</sup> respondent violated the following Constitutional provisions, namely, articles 3(1), 73, 74, 75, 131, 132, 201 and 228(5), 232 and 259. He stressed that the President does not have any power to create offices outside of those prescribed by the *Constitution*.



55. He contended that the list of the 240 shortlisted candidates was dominated by political allies, who were selected on the basis of political patronage, reward and political favour of the President.
56. He argued that the conduct of the President is an affront to the independence of the Judiciary because the 23 recommended CAS posts were created following the pronouncements by the High Court and the Employment and Labour Relations Court.
57. He argued that the PSC had failed to properly advise the President contrary to their duty under articles 132(4)(a), 201, 232(1) and (2), 234 and 249(1) and (2) of the Constitution and the Public Service Commission Act, 2017.
58. He contends that the National Assembly interfered with the independence of the SRC by enacting section 26 of the SRC Act, by requiring prior approval of draft regulations made by SRC, before they could take effect. He also blames SRC for failing to undertake public participation before enacting the regulations, Legal Notice No 2 of 2013, which violated article 10 of the Constitution.

### **The 2nd and 3rd Petitioners' Case**

59. The 2<sup>nd</sup> to 3<sup>rd</sup> petitioners' case is premised on the same facts as outlined by the 1<sup>st</sup> petitioner. Their case was supported by the 2<sup>nd</sup> petitioner's affidavit in support of even date sworn by Florence Wairimu Muturi and a further affidavit in response to the respondents' case dated May 2, 2023.
60. The 2<sup>nd</sup> and 3<sup>rd</sup> petitioners aver that the list of the 50 CASs was transmitted to the National Assembly for approval. The Speaker of the National Assembly *vide* a letter dated March 22, 2023 declined to vet the nominees and referred the matter back to the appointing authority. The PSC on the same date, *vide* a special Gazette Notice, appointed the 50 nominees. In any case, the vetting and approval of the 27 positions by the National Assembly would have been in breach of articles 2(2),4(2),10(2),94,95,232(1) and (2) and 259(1) of the Constitution.
61. The 2<sup>nd</sup> and 3<sup>rd</sup> petitioner contend that the Employment and Labour Relations Court only has jurisdiction to interpret and apply the Constitution in the context of disputes on employment and labour relations. They opine that the present petition is properly before this court.
62. Likewise, the 3<sup>rd</sup> petitioner argues that the decision to form and expand the CAS office was not subjected to meaningful public participation which is offensive to article 10 and 201(d) of the Constitution. In an attempt to participate meaningfully, the 3<sup>rd</sup> petitioner's in response to the advertisement *vide* an email communication wrote to PSC on October 6, 2022 seeking information.
63. In particular, the communication sought to know the basis of creating the role, the financial implication and how the new posts would relate to the existing posts which are also live in the instant petition. These concerns were also appreciated by the Justice Mrima in the case of *Okoiti & another v Public Service Commission (supra)*. This was followed up by a letter dated October 14, 2022. Both correspondences were never responded to. It is averred in consequence that the President and the PSC expanded the CAS office illegally from 23 to 50 posts.
64. The 2<sup>nd</sup> and 3<sup>rd</sup> petitioners submitted that the office of CAS will be in conflict with the role of Principal Secretary as established under article 155(1) of the Constitution for the reason that the same usurps the duties and roles of the latter.
65. Finally, that the early morning swearing in of the CASs on March 23, 2023 violated the *lis pendens* doctrine.



### The 4th Petitioner's Case

66. The 4<sup>th</sup> petitioner supports the 1<sup>st</sup> to 3<sup>rd</sup> petitioners' case save to add that the appointments will increase the financial burden on citizens and waste public funds. These funds should be used to reduce unemployment and create jobs for the youth. The 4<sup>th</sup> petitioner referred to a concept paper titled 'the creation of one million youth jobs per year project' which was submitted to State House on February 17, 2006.
67. The 4<sup>th</sup> petitioner avers that the salary of a single CAS can employ 50 youth at a salary of Ksh 15000 per person. It avers that the said salaries and packages ought to be channeled to the 4<sup>th</sup> petitioner under the supervision of the relevant agencies to implement the creation of the one million jobs.

### The 2nd Respondent's Case

68. The 2<sup>nd</sup> respondent filed grounds of opposition dated March 21, 2023, to the petition. The grounds are that:
- a. The petition to the extent that it challenges the process for appointment of Chief Administrative Secretaries is premature hence non-justiciable.
  - b. That the 1<sup>st</sup> respondent enjoys constitutional immunity from the current proceedings and has been illegally joined in the proceedings.
  - c. That questions arising from a process for employment of public officers into public office fall within the jurisdiction of the Employment and Labour Relations Court, hence outside the jurisdiction of the honourable court by dint of the provisions of article 165(5), (b) of the Constitution.
69. The 2<sup>nd</sup> respondent relied on the affidavit of Mr Felix Koskei, Chief of Staff and Head of Public Service in the Office of the President sworn on April 24, 2023. He deposed that this court lacks jurisdiction to hear and determine the consolidated petition because the matter was determined by the ELRC. He averred that the establishment of the office of the CAS was preceded by an elaborate participatory process in compliance with the Constitution and the Public Service Commission Act.
70. He stated that initially the plan was to have one CAS per ministry but after further reflection within government, it was realized that there was need to increase the number to cover each department. Further, there is no legislation limiting the number of persons to be appointed as CAS. In any event, he reckons that, the current administration was elected on the basis of a transformative plan for the nation espoused as the bottom up economic transformation agenda 2022-2027 which constitutes a political contract with the Kenyan people.
71. He averred that, on February 23, 2023, the presidency wrote to the PSC seeking a review of the complement of CASs within the public service as evidenced by the letter marked FK1. Subsequently, the PSC wrote to the National Treasury seeking concurrence on availability of funds to meet the resultant expenditure of additional employment of CASs before approving the complement of 50 as evidenced by the letter dated February 23, 2023 and marked FK2.
72. He deposed that the Principal Secretary to the National Treasury advised the PSC that he had no objection and that in light of the fiscal framework the effective date for engaging the CASs should be from April 1, 2023. Therein, the PSC acceded to the variation of the complement of CASs as requested by the President as evidenced by the letter dated February 27, 2023 and marked FK3.



73. Subsequently, the President increased the complement of CASs with the additional posts to 50. Further, the President asked the PSC to recommend persons to be appointed. On receipt of the list of persons recommended for appointment by the PSC, the President then nominated the 2<sup>nd</sup> to 51<sup>st</sup> interested parties.
74. He deposed that prior to the President seeking for variation of the complement of CASs, the PSC had not undertaken interviews for the persons shortlisted and at the time of establishment of the office of CAS the PSC Act, which is the applicable legislation absent a ruling to the contrary by a court of competent jurisdiction, served as the guiding law.
75. According to him, employers may recruit additional persons into the public service over and above advertised vacancies. He referred to ELRC Petition No E167 of 2021, Sberia Mtaani na Shadrack Wambui where the court upheld the recruitment of additional persons by the PSC over and above the number of advertised vacancies for accountants to the National Treasury and Planning.
76. He also referred to the fact that the Judicial Service Commission advertised six vacancies for the office of Judge of the Court of Appeal in Gazette Notice No 2529 dated 11th March of 2022 and marked FK4 but nevertheless recommended 7 persons for appointment.

### **The 3rd Respondent's Case**

77. The 3rd respondent relied on the replying affidavit sworn on May 3, 2023 by the Clerk of the National Assembly, Samuel Njoroge. He asserted that it is the ELRC which has jurisdiction to resolve the dispute herein. He further deposed that according to article 165(5)(b) of the Constitution, the High Court cannot make decisions on matters that should be handled by specialized courts under article 162(2).
78. He further deposed that the case of *Okoiti & another v Public Service Commission & 73 others (supra)* sets out the criteria to be followed in the establishment of the new office of CAS, to include competitive recruitment exercise, with successful candidates being nominated and, upon approval by National Assembly, is to be appointed to the office by His Excellency the President of Kenya. However, there is no constitutional or statutory obligation or legal framework which mandates the National Assembly to vet or approve nominees for appointment to the office of the CAS.
79. He denied the petitioners' claim that section 26(2) of the SRC Act and the regulations is unconstitutional. In his view, article 94(5) and (6) of the Constitution gives Parliament the exclusive role of legislating. Parliament may however delegate such power to other entities but the ultimate power to approve such regulations.
80. He deposed that the President of Kenya has the power to request the PSC to recommend establishment of offices in the public service, as outlined in both section 30 of the PSC Act and article 132(4) of the Constitution.
81. He averred that the petitioners have failed to demonstrate the unconstitutionality of the conduct of the 3rd Respondent.

### **The 4th Respondent's Case**

82. The 4<sup>th</sup> respondent filed grounds of opposition dated March 17, 2023 and a replying affidavit by Anne Gitau sworn on March 17, 2023. She avers that the 4<sup>th</sup> respondent is required by article 230(5) of the Constitution and section 12 of the SRC Act to consider five principles in the discharge of its powers and functions, which include ensuring fiscal sustainability of the public compensation bill, attracting



and retaining skilled public service workers, recognizing productivity and performance, promoting transparency and fairness, and ensuring equal pay for equal work.

83. She deposed that the 4<sup>th</sup> respondent provided guidance on the pay and benefits for the role of CAS to the 5<sup>th</sup> respondent, as authorized by the Constitution under article 230(4)(b). A copy of the letter with the information was annexed and marked as ARG-1.
84. She further deposed that the advice on payment and benefits for the CAS position was given by the 4<sup>th</sup> respondent in response to a request from the 5<sup>th</sup> respondent dated October 18, 2022. She asserted that pursuant to the provisions of article 252(1)(d) of the Constitution, the 4<sup>th</sup> respondent has the power and duty to conduct comparative surveys on labor markets and trends in remuneration to determine the monetary worth of public office jobs under section 11(d) of the SRC Act. They also undertake job evaluations to determine the comparable and relative worth of jobs for classification and a rationalized, harmonized, and equitable job grading structure. That following the request for advice on the remuneration and benefits, the 4<sup>th</sup> respondent evaluated the CAS job to determine its value based on constitutional and statutory principles.
85. She averred that the advice on remuneration and benefits for the CAS position was based on the powers and functions of the 4<sup>th</sup> respondent provided under the Constitution article 230(4)(b), the principles set out under article 230(5) of the Constitution and section 12 of the SRC Act, provisions of article 259 (11) of the Constitution and section 11(d) of the SRC Act, and job evaluation results undertaken by the 4<sup>th</sup> respondent.
86. She further stated that the legislative authority at the national level is only vested in and exercised by Parliament according to article 94(1) of the Constitution. Therefore, the 4<sup>th</sup> respondent has no power or authority to create legislation at the national level, including the Salaries and Remuneration Commission Act.
87. She said that contrary to the allegations by the petitioners, the 4<sup>th</sup> respondent engaged in significant public participation from May to September 2012 when developing the Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013.
88. She asserted that Legal Notice No 2 of 2013 outlines the procedure for submitting and reviewing remuneration and benefits proposals for state and public officers, setting and reviewing remuneration and benefits for state officers, and advising on remuneration and benefits for all other public officers. She stated that the advice provided by the 4<sup>th</sup> respondent regarding the remuneration and benefits for the CAS was not based on Legal Notice No 2 of 2013, as alleged by the petitioner.
89. Lastly, she averred that the petitioners have not proved their claims. She argued that the burden of proof rests with the petitioners, that the case lacks merit, and should be dismissed with costs.

### **The 5th Respondent's Case**

90. The 5<sup>th</sup> respondent did not file an affidavit but sought to rely on the replying affidavit of the Chief of Staff and Head of Public Service, Felix Koskei, sworn on April 24, 2023, filed by the 2nd respondent.

### **The 1st Interested Party's Case**

91. The 1<sup>st</sup> interested party relied on the affidavit of Stephen Masha, the Deputy Controller of Budget sworn on May 23, 2023. He deposed that the functions of the CoB pursuant to the relevant laws are: oversight, control, reporting, advisory, investigation, dispute resolution, public sensitization, monitoring, and enforcement of budget ceilings.



92. Further, he deposed that with regard to overseeing budget implementation, the CoB has two distinct functions to oversee the implementation of the budgets of the national and county governments by authorizing withdrawals from public funds as established under articles 204, 206 and 207 of the Constitution and not to approve any withdrawals from public funds unless satisfied that such withdrawals are authorized by law in line with article 228 (5) of the Constitution.
93. He averred that there are no orders or violations or breach of statutory or constitutional duties have been sought against the 1st interested party. Therefore, the petition against the 1<sup>st</sup> interested party lacks merit and should be dismissed with costs.

**The 2<sup>nd</sup> to 7<sup>th</sup>; 9<sup>th</sup> to 18<sup>th</sup>; 20<sup>th</sup>, 21<sup>st</sup>; 23<sup>rd</sup> to 30<sup>th</sup>; 33<sup>rd</sup> To 51<sup>st</sup> Interested Parties' Case**

94. The above interested parties relied on the replying affidavit of the 51<sup>st</sup> interested party, sworn on May 5, 2023. He avers that the President appointed the interested parties to the CAS position on March 22, 2023, however on the premise of the conservatory orders issued on March 24, 2023 by this Court, the interested parties were barred from assuming the office and receiving salary, remuneration and benefits pending the hearing and determination of the application.
95. He asserts that this court lacks jurisdiction on the basis that the petition involves questions that revolve around the process of employment of public officers and their respective employment contracts. This falls within the ELRC court pursuant to article 162(2)(a) of the Constitution. Secondly, he contends that the matter is *res judicata* since LSK had filed a similar matter in court over the CAS position against the PSC under ELRC Petition No E174 of 2022.
96. He added that the petitioners had filed the matter against the President contrary to the law and Supreme Court decision in Attorney-General & 2 others v Ndi & 79 others; Prof Rosalind Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) where it was held that civil proceedings cannot be instituted against the President during his tenure.
97. He asserted that the Gazette Notice dated October 12, 2022 calling for applications has not been invalidated by any court and the petitioners have not challenged its constitutionality. Considering this, he argues that it remains lawful and so the petitioners cannot challenge appointment of the 2<sup>nd</sup> to 51<sup>st</sup> interested parties.
98. He contended that the President has the power to nominate any number of persons to the office under article 131(1)(b) of the Constitution and the principle of separation of powers.
99. He averred that had the Constitution sought to limit the number of persons, it would have expressly stated so. He cited the case of Nairobi ELRC Petition No E167 of 2021 Sheria Mtaani and Shadrack Wambui v PSC and others (supra).
100. In his view, the PSC followed the prescribed procedure under article 134(2)(a) of the Constitution and section 30 of the PSC Act. He urged the court to find that the appointment of the 2<sup>nd</sup> to 51<sup>st</sup> interested parties is lawful.
101. The 8th and 31st interested party's case
102. The 8<sup>th</sup> and 31<sup>st</sup> interested party's relied on their grounds of opposition dated March 27, 2023 and submissions and authorities dated May 19, 2023.
103. The 19th interested party's case



104. The 19<sup>th</sup> interested party relied on its grounds of opposition dated May 5, 2023 and submissions and authorities dated May 23, 2023.
105. 22<sup>nd</sup> interested party's case
106. The 22<sup>nd</sup> interested party relied on his preliminary objection dated March 31, 2023 and replying affidavit sworn on May 2, 2023. He deposed that pursuant to section 30 of the PSC Act, the PSC is by law mandated to give recommendations to the President on the establishment of the offices in the public service in accordance with article 132(4)(a) of the Constitution.
107. He referred to Gazette Notice No 12432 published on October 12, 2022, in Vol CXXIV No 210 which advertised for the positions of the CAS. He argued that the said Notice has never been suspended or invalidated. Out of the 5,183 applications, PSC shortlisted 240 candidates. The interviews of those candidates and dates were published. Furthermore, the PSC invited members of the public to avail any credible information of interest relating to any of the shortlisted candidates to the Secretary/CEO of the PSC on or before February 28, 2023.
108. He deposed that upon completion of the interviews, the PSC recommended 50 persons for the position of CAS. Pursuant to this recommendation, the President, through a Notification of Presidential Action dated March 16, 2023 nominated the 2<sup>nd</sup> to the 51<sup>st</sup> interested parties to the position of the CAS.
109. The National Assembly declined to vet the nominees. Soon after, vide Gazette Notice No 3664 of 2023, Volume CXXV- No 68 and dated March 22, 2023, the 2<sup>nd</sup> to 51<sup>st</sup> interested parties were appointed as CAS. He asserted that this the said gazette notice had not been suspended by any court of law and was valid.
110. He asserted that the 2<sup>nd</sup> to 51<sup>st</sup> interested parties were appointed through a robust process that involved public participation. The issue was further considered by the Court in ELRC Petition No E174 of 2022 and no appeal has been preferred. He deposed that there is no law that caps the number of CAS at 23 and the same is within the province of the PSC based on a comprehensive workload analysis among other relevant considerations.
111. It was further deposed that contrary to article 143 of the Constitution and the binding Supreme Court order in Attorney-General & 2 others v Ndiu & 79 others; Prof Rosalind Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) the petitioners had unlawfully joined the President as a party to the proceedings, which is fatally defective. He averred that the petitions are an abuse of court process.
112. He deposed that upon the appointment of the 2<sup>nd</sup> to 51<sup>st</sup> interested parties, they relinquished their previous responsibilities, and as such are in a state of limbo, and without a source of livelihood.

### **The 32<sup>nd</sup> Interested Party's Case**

113. The 32<sup>nd</sup> interested party relied on his replying affidavit sworn on April 27, 2023. He deposed that his removal from the CAS position without good reason would go against his inherent human dignity and the right to fair labour practices and fair remuneration. Therefore, he is apprehensive that he would suffer irreparable losses and damage if the petition against him is allowed.
114. We shall now turn to the written and oral submissions by the parties. We thank all counsel and parties for their comprehensive submissions. Because of the number of parties and the volume of those submissions we shall only highlight some key points.





## 1st Petitioner's Submissions

115. The 1<sup>st</sup> petitioner submitted that any increase beyond 23 positions required a fresh, substantive process in accordance with section 30 of the PSC Act. He relied on the decision of the High Court in *Okiya Case (supra)* and the decision of the High Court in ICEA Lion General Insurance Co Ltd v Julius Nyaga Chomba [2020] eKLR, where it was held that according to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation on the same matter. By reopening the matter, it violated the citizen's legitimate expectation.
116. In support of the above, the 1<sup>st</sup> petitioner cited the Supreme Court case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR where the court set out the principles of legitimate expectation as
- “There must be an express, clear and unambiguous promise given by a public authority; the expectation itself must be reasonable; the representation must be one which it was competent and lawful for the decision-maker to make; and lastly there cannot be a legitimate expectation against clear provisions of the law or the Constitution.”
117. He contended that it would not be practical to differentiable who would remain between the original 23 CASs and the remainder of the 27 out of all 50 appointments. Accordingly, all the appointments were tainted.
118. Relying on *Okiya case (supra)* he submitted that a PS and CAS would both report directly to the Cabinet Secretary, which would put both positions at par. He submitted that the only way a state office could be established was under a national legislation as provided under article 260 of the Constitution. No such legislation has been enacted and the nominees could not be subjected to the mandatory vetting by the National Assembly as provided under section 3 of the Public Appointments (Parliamentary Approval) Act, 2011.
119. He submitted that the positions had been created to reward political allies in violation of the national values and principles under articles 10, 232(1) & (2), 234(1) & (2), 249(1) & (2) of the Constitution. He relied on the Supreme Court's holding in the case of Institute for Social Accountability & another v National Assembly & 3 others & 5 others (Petition 1 of 2018) [2022] KESC 39 (KLR) and submitted that all State and public officers should avoid conflict of interest in the discharge of their mandate.
120. As regards the constitutionality of section 26 of the SRC Act, he relied on Law Society of Kenya v Attorney General & another [2019] eKLR and submitted that the purpose and effect test was relevant to determine the legislation's object and ultimate impact. He argued that the National Assembly violated the independence of the SRC by insisting on its initial approval of draft regulations prior to publication of the regulations. He cited the authority of In the Matter of Interim Independent Electoral Commission [2011] eKLR and Katiba Institute & 3 others v Independent Electoral Boundaries Commission & 3 others; Law Society of Kenya & another (Interested parties) [2022] eKLR.
121. As regards the role of the SRC, he relied on *Okiya case (supra)* and submitted that its mandate is to ensure that the total public compensation bill remains fiscally sustainable. He further submitted that SRC was not involved in this case, and particularly, in relation to the additional 27 positions. He submitted that the SRC unlawfully advised vide its letter dated March 14, 2023 for a higher gross monthly salary for the position of CAS than for a PS, as notified in the Kenya Gazette Notice No 8792 of 2022.



122. As regards costs, he submitted that a private party who is successful should have their costs paid by the state and if unsuccessful, each party should bear their own costs. He relied on [\*Kenya Human Rights Commission V Communications Authority of Kenya & 4 others\*](#) [2018] eKLR.

## 2nd Petitioner's Submissions

123. Counsel submitted that this court ought to interpret the [\*Constitution\*](#) in a holistic manner. He relied on article 259 of the [\*Constitution\*](#) and [\*Tinyefuza v Attorney-General\*](#), Const Pet No 1 of 1996 (1997 UGCC3) and [\*In the Matter of Kenya National Commission on Human Rights\*](#) [2014] eKLR.
124. Counsel submitted that this court has jurisdiction to entertain this suit pursuant to article 165 3(b) & (d) of the [\*Constitution\*](#). Further, that this matter is not *res judicata* because the issues raised in *LSK vs AG (supra)* in the ELRC only focused on PSC's advert dated September 21, 2022, whereas this petition is challenging the appointment of the interested parties and the creation of an extra 27 CASs positions by the respondents.
125. As regards joinder of the 1<sup>st</sup> respondent, counsel relied on the [\*Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules 2013\*](#) and the decision in [\*Speaker of the National Assembly v Centre for Rights Education & Awareness & 7 others\*](#) [2019] eKLR, for the proposition that a petition for enforcement of fundamental rights cannot be defeated merely because of a misjoinder or non-joinder of a party.
126. Counsel reiterated that a CAS office is in job group CSG-3 and was directly answerable to Cabinet Secretary. This points to the fact that the office was state office and that the PSC has no constitutional or legal power to establish it.
127. Counsel likened the CAS position to that of the principal secretaries under article 155 of the [\*Constitution\*](#) in view of the job description for the position. He asserted that the duties of the CAS were a duplication and usurpation of the roles of the PS and equally, minimized the role of a CS contrary to section 27(f) and (g) of the [\*PSC Act\*](#). Counsel further contended that the SRC elevated the office of the CAS above that of the PS thereby violating the principles of good governance, accountability and transparency. He was of the view that this offended article 3 of the [\*Constitution\*](#).
128. Counsel argued that the appointment of the 50 CASs was a violation of article 132(4)(a) of the [\*Constitution\*](#) which requires the PSC to recommend in the first instance. Under article 249(2)(a) the President is bound by the recommendation of the PSC. Counsel argued that section 30 of the [\*PSC Act\*](#) is unconstitutional because it gives the President power to request the PSC for recommendation which is contrary to the [\*Constitution\*](#).
129. Counsel submitted that there was no public participation in relation to the additional 27 posts in violation of article 10 and 201(d) of the [\*Constitution\*](#). He argued that the additional posts were created in total disregard of the original recommendation by PSC for 23 CAS posts. Further, no documentation was provided contrary to section 27 of the [\*PSC Act\*](#). He relied on the case of [\*Republic v County Government of Kiambu Ex parte Robert Gakuru & another\*](#) [2016] eKLR.
130. Regarding financial implications for the office, and failure to consult the SRC, counsel relied on [\*Teachers Service Commission \(TSC\) v Kenya Union of Teachers \(KNUT\) & 3 others\*](#) [2015] eKLR in support of his submission that recommendation of the SRC are binding.



### 3rd Petitioner's Submissions

131. Counsel submitted that PSC had not filed an affidavit in reply to the consolidated petition. Accordingly, the same was uncontroverted. He relied on [\*Irene Wangari Gacheru & 6 others v Attorney-General\*](#) [2017] eKLR.
132. As regards the question of jurisdiction and *res judicata*, and misjoinder of the 1<sup>st</sup> respondent, counsel associated himself with the submissions of the 1<sup>st</sup> and 2<sup>nd</sup> petitioner.
133. Counsel submitted that there was no adequate or meaningful public participation contrary to articles 10 and 201(a) of the [\*Constitution\*](#). He relied on the case of [\*British American Tobacco Kenya, PLC \(formerly British American Tobacco Kenya Limited\) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another \(interested parties\); Mastermind Tobacco Kenya Limited \(The affected party\)\*](#) [2019] eKLR and submitted that the criteria set out in the above case had not been met.
134. Regarding the appointment of the additional 27 CASs and whether the office of CAS is a state office, the 3<sup>rd</sup> petitioner made similar submissions to those of the 1<sup>st</sup> and 2<sup>nd</sup> petitioners. The same may be said of the position taken by the 3<sup>rd</sup> petitioner regarding the role of PSC in the creation of the office of CAS. Reliance was made on the [\*Final Report of the Constitution of Kenya Review Commission \(CKRC\)\*](#) and the case of [\*Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others\*](#) [2021] KEHC 442 (KLR); and [\*Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others \(interested parties\)\*](#) [2020] eKLR.
135. Counsel submitted that the intention of the [\*Constitution\*](#) was to professionalize the public service. He cited Prof Ben Sihanya in: [\*Constitutional Commissions in Kenya Experiences, Challenges and Lessons\*](#). Regarding the independence of commissions, and the constitutionality of section 30 of the [\*PSC Act, 2017\*](#), he made the same arguments as the 1<sup>st</sup> and 2<sup>nd</sup> petitioners and further cited [\*Law Society of Kenya v Attorney-General \(supra\)\*](#) and [\*Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others\*](#) [2012] eKLR.

### The 4th Petitioner's Submissions

136. The 4<sup>th</sup> petitioner relied on article 201 on the principles of public finance, which demand openness and accountability including public participation in financial matters. In his view, public money ought to be utilized in a prudent manner. The 1<sup>st</sup> respondent had not complied with the above article in the creation of the office of CAS and had not met the criteria required under the [\*PSC Act\*](#) and article 10 of the [\*Constitution\*](#), specifically with reference to good governance, inclusiveness, accountability and sustainable development.

### 2nd Respondent's Submissions

137. The 2<sup>nd</sup> respondent submitted that this court should confine its judgments to only the issues pleaded by the petitioners. He cited the case of [\*Captain Harry Gandy V Caspar Air Charters Limited\*](#) [1956] 23 EACA 139. He challenged paragraphs: 40, 44 to 55 of the further affidavit dated May 5, 2023 and submissions thereof. He further submitted that the 3rd petitioner's supplementary affidavit was not admissible in law as it was deposed to by counsel. He cited [\*Halsbury's Laws of England\*](#), 3rd Edition, paragraph 845 with regards to affidavit and rule 8 of the [\*Advocates \(practice\) Rules, 1966\*](#). The 2<sup>nd</sup> respondent thus limited his arguments to the issues raised in the petitions dated March 23, 2023 and March 17, 2023.



138. The 2<sup>nd</sup> respondent submitted that the 1<sup>st</sup> respondent is immune to suit and has been wrongly joined into the proceedings. He relied on the case of *Attorney-General & 2 others v Ndi & 79 others; Prof Rosalind Dixon & 7 others (amicus curiae)* (Petition 12, 11 & 13 of 2021 (Consolidated) 2022) KESC 8 (KLR) (the BBI case).
139. Counsel argued that the office of CAS is not listed as a state office in article 260 of the *Constitution* and therefore cannot be a state office. He further submitted that the petitions only challenge the appointment of 27 additional CASs and not the creation of the office itself. Therefore, the petitioners cannot broaden their case beyond their pleadings.
140. Counsel further argued that the 1<sup>st</sup> respondent has power under article 132(4)(a) of the *Constitution* to establish the office of CAS. He contended that there was no law limiting the number of individuals who can be appointed to that office unlike the case in the National Assembly, Senate, Cabinet Secretaries, Supreme Court Judges, and members of independent Constitutional Commissions.
141. He submitted that the exchange of correspondence between the then Head of Public Service Dr Joseph Kinyua and the 5<sup>th</sup> respondent show that the review of the complement for the position of CAS was procedural. He gave examples where other organizations had hired more staff than the advertised positions. He relied on Nairobi Employment and Labour Relations Court Petition No E167 of 2021 between *Sheria Mtaani na Shadrack Wambui v Public Service Commission & 2 others* [2021] eKLR.
142. Counsel submitted that the case is *res judicata* in view of the decision in *Law Society of Kenya v Public Service Commission & 2 Others* ELRC Petition No E174 of 2022 before the Employment and Labour Relations Court. He cited the cases of: *John Florence Maritime Services Ltd and Another vs Cabinet Secretary for Transport and Infrastructure & Others* (2015) 2EA 236, *Kamunve & Others vs the Pioneer General Assurance Society Ltd* [1971] EA 263 at 265, *ET vs Attorney General and Another* [2021] eKLR, *Law Society of Kenya v Public Service Commission & 2 Others* ELRC Petition No E174 of 2022 and *Benjamin Koech v Baringo County Government & 2 others; Joseph C Koech (interested party)*.
143. He submitted that the doctrine of separation of powers applies, and accordingly the 1<sup>st</sup> respondent was entitled to create the office and make the appointments. He relied on the case of *Mumo Matemo v Trusted Society of Human Rights alliance* [2014] eKLR. Further, that it is parliament's role to oversee public expenditure, and not the court.
144. The 2<sup>nd</sup> respondent submitted that the court lacks jurisdiction, which in this case is conferred upon the Employment and Labour Relations Court. Further, that there was sufficient public participation in the establishment of the office. He cited the cases of *Okoiti Supra* and *Commission for Human Rights & Justice v Board of Directors, Kenya Ports Authority & 2 others; Dock Workers Union (Interested Party)* [2020] eKLR.
145. Counsel submitted that the burden of proof was not discharged by the petitioners and the consolidated petition should be dismissed with costs.

### 3rd Respondent's Written Submissions

146. Counsel for the 3<sup>rd</sup> respondent associated herself with the submissions of the 2<sup>nd</sup> respondent on issues of jurisdiction, *res judicata*, and misjoinder of the 1<sup>st</sup> respondent, and the power of the 1<sup>st</sup> respondent to create the office of CAS, or whether or not, they should be vetted by parliament. She cited the cases of *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Limited* [1989] eKLR and *Samuel Kamau Macharia v Kenya Commercial Bank & 2 others* [2011] eKLR.



147. As regards the constitutionality of section 26(2) of the *SRC Act*, counsel submitted that article 94(5) and (6) of the *Constitution* gives parliament power to delegate and review draft regulations to ensure compliance with the *Statutory Instruments Act*. She submitted that the above section and the regulations made thereunder were lawful and the petitioner has not discharged the burden to prove otherwise. She relied on the case of *Mount Kenya Bottlers Limited & 3 others v AG & others* [2019] eKLR.

#### 4th Respondent's Submissions

148. Counsel relied on the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR and order 3 rule 5 of the *Civil Procedure Rules*, for the proposition that unrelated causes of action should not be joined into a single petition. The issue of the constitutional validity of section 26(2) of the *SRC Act* and *SRC Regulations, 2013* should be raised as a separate action.
149. Counsel contended that there was extensive public participation on the enactment of the *SRC Regulations 2013* as evidenced by annexure ARG-3. She argued further that the petitioners failed to prove that the same were unconstitutional. She cited section 107 of the *Evidence Act*.
150. Counsel submitted that the 4<sup>th</sup> respondent duly advised the PSC in accordance with its mandate, and that its advice was based on an objective and fair process that took into account the principles outlined in article 230(5) of the *Constitution* and the job descriptions provided by the 5<sup>th</sup> respondent.
151. He argued that the office of CAS is a public office within the meaning of article 260 of the *Constitution*. SRC may only advise on remuneration and benefits for the holder of the office.

#### 5th Respondent's Submissions

152. The 5<sup>th</sup> respondent relied on the affidavit of the Chief of Staff and Head of Public Service, Felix Koskei, sworn on April 24, 2023 and filed by the 2<sup>nd</sup> respondent and the notice of preliminary objection and submissions dated March 21, 2023.
153. Counsel argued that there was no need for the 5<sup>th</sup> respondent to file another affidavit repeating the same facts. She cited the case of *Irene Wangari Gacheru & 6 others v Attorney-General* [2017] eKLR.
154. Her submissions on jurisdiction, *res judicata*, misjoinder, constitutionality of the office and complement of office holders of CAS are largely similar to those of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents, set out above. She relied on the cases of *United States International University v Attorney General* [2012] eKLR and *Prof Daniel N Mugendi v Kenyatta University & 3 others* [2013] eKLR in support of her argument relating to jurisdiction.
155. Relying on the case of *Astute Africa Investments Holding v Spire Bank Kenya Limited & another* [2018] eKLR, counsel submitted that a supplementary or further affidavit ought not raise new issues or plead a new cause of action not pleaded in the petitions. Counsel thus urged the court to disregard the offending paragraphs.
156. Counsel made reference to the affidavit of Simon Rotich sworn on October 19, 2022 in response to Nairobi ELRC Petition No E174 of 2022 annexed to the affidavit of the 1<sup>st</sup> petitioner in this suit to demonstrate that there was public participation in the creation of the office of CAS.
157. Counsel submitted that under article 234(2)(a)(i) of the *Constitution*, the 5<sup>th</sup> respondent has constitutional power to establish offices in the public service and recommend the establishment of such offices to the 1<sup>st</sup> respondent as per article 132(4)(a) and sections 27, 29 and 30 of the *PSC Act*. She



associated herself with the position of the 2<sup>nd</sup> to 4<sup>th</sup> respondents with regard to the lawfulness of the office and variation of number of appointees by the 1<sup>st</sup> respondent based on the provisions of sections: 27, 28, 29, 30, 58(2), (3)(c) & (e), (5) of the PSC Act. She submitted that an office in public service is established only once but the number of employees can change.

158. Counsel submitted that offices in the public service are established as needed through evaluation and reorganization by the President. It is unrealistic and expensive to continuously seek public participation for additional positions in already established offices. The public has an opportunity to participate in the budget-making process to question any additional costs for personnel emoluments.
159. Counsel contested the assertion by the petitioners that the office of CAS is a state office. She submitted that the absence of an advisory by the SRC was not fatal at the time of establishment of the office. Counsel submitted that the government had already budgeted for the creation of the position of CAS and the complement requested. She relied on the case of Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others [2021] eKLR Neutral citation: (2021) KESC35 (KLR).
160. Counsel submitted that the office of CAS would not usurp the functions of a PS. The role of a PS was provided for in article 155(2) of the Constitution and was distinct from that of a CAS. In any event, this issue was not pleaded in the petitions and was only introduced by the petitioners in the Supplementary and Replying Affidavits.
161. As regards the challenge to section 30 of the PSC Act, counsel submitted that the said section was constitutional and had not been proved otherwise. She relied on the case of Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others [2015] eKLR, and submitted that the criteria set in this case had not been met by the petitioners.

### **1st Interested Party's Submissions**

162. Counsel submitted that the 1<sup>st</sup> interested party is not responsible for paying remuneration and benefits to the CASs or any other state or public officers. The mandate of the CoB under article 228(4) and (5) of the Constitution is to grant approval of fund withdrawals in accordance with the law and not to effect payments on specific transactions.
163. She submitted that it is the responsibility of the relevant Accounting Officers to pay remuneration and benefits to the respective members of staff. Accordingly, no case has been made out against the CoB and the petition against it should be dismissed.

### **The 2<sup>nd</sup> to 7<sup>th</sup>; 9<sup>th</sup> to 18<sup>th</sup>; 20<sup>th</sup> & 21<sup>st</sup>; 23<sup>rd</sup> to 29<sup>th</sup> and 33<sup>rd</sup> to 51<sup>st</sup> Interested Parties' Submissions**

164. Counsel's submissions on jurisdiction, *res judicata*, doctrine of separation of powers, unpleaded issues raised in the further affidavits, and the creation of the 27 additional positions are largely similar to those of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> respondents, and the 1<sup>st</sup> interested party as set out above.
165. As regards *res judicata*, counsel relied on the Court of Appeal case of Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR and in relation to constructive *res judicata*, he relied on the case of Silas Make Otuke v Attorney General & 3 others [2014] eKLR. Counsel submitted that a state officer's remuneration is charged on the consolidated fund while a public officer's remuneration goes through appropriation. Accordingly, the office of CAS could not be state office.



### 8th and 31st interested parties' submissions

166. Counsel's submissions on jurisdiction, *res judicata*, doctrine of separation of powers, unpleaded issues raised in the further affidavits, and the creation of the 27 additional positions are largely similar to those of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> respondents, and all interested parties as set out above.
167. Counsel submitted that the issues in this suit fall squarely within the ambit of the Employment and Labour Relations Court. He relied on the case of *Nick Gitbinji Ndichu v Clerk Kiambu County Assembly & another* [2015] eKLR and *Ali Jarso Wako & another versus Ministry of Interior & Coordination of National Government & 5 others: Public Service Commission & 5 others (Interested Parties)* [2020] eKLR.
168. Counsel relied on the case of *Democratic Alliance v the President of the Republic of South Africa & 3 others*, CCT 122/11 /2012) ZACC 24 in support of the test for separation of powers. He further cited the cases of *SDV Transami Kenva Limited and 19 others v Attorney General & 2 others & another* [2016] eKLR; *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR and *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] eKLR.
169. In his conclusion, counsel submitted that the 8<sup>th</sup> and 31<sup>st</sup> interested parties were lawfully appointed and have a legitimate expectation of fair labour practices since they were appointed after a rigorous process, including advertising, shortlisting, interviewing, and recommendation for nomination. Therefore, it was his submission that the recruitment of the 50 CASs was lawful and constitutional.

### 19th Interested Party' Submissions

170. Counsel's submissions on jurisdiction, *res judicata*, doctrine of separation of powers, unpleaded issues raised in the further affidavits, and the creation of the 27 additional positions are largely similar to those of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> respondents, and all interested parties as set out above.
171. Counsel submitted that under article 132(4)(a) the 1<sup>st</sup> respondent can originate the proposal to create an office and thereafter seek the endorsement of the same from the PSC. Regarding the additional CASs, he submitted that the Judicial Service Commission hired 7 judges of appeal, when it had only advertised for six vacancies. He relied on *Sheria Mtaani Na Shadrack Wambui (supra)*.
172. Counsel submitted that the consolidated petition does not challenge Gazette Notice no 3664 of 2023 (Vol CXXV-No68) dated March 22, 2023 on the appointment of the CASs. In effect therefore, counsel claimed that determination of the instant petition was an academic exercise since the appointing Gazette Notice has not been challenged by the petitioners.

### 22nd Interested Party's Submissions

173. Counsel's submissions on jurisdiction, *res judicata*, doctrine of separation of powers, unpleaded issues raised in the further affidavits, and the creation of the 27 additional positions are largely similar to those of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> respondents, and all interested parties as set out above.
174. Counsel submitted that pursuant to article 132(4)(a) of *Constitution*, it is the discretion of the President to restructure the executive in a manner that will enable effective running of the government and efficient service delivery. In his view, the President and PSC had acted in accordance with the dictates of the *Constitution*. He relied on the case of *Okiya Omtatah v Joseph Kinyua & another* [2018] eKLR.



175. Counsel submitted that the LSK in bringing its petition had contravened section 4 of the [Law Society of Kenya Act, 2014](#) by fighting against its members, a number of whom were appointed as CASs. Regarding the 3<sup>rd</sup> petitioner's requests for information from the PSC, counsel submitted that it had not exhausted its rights under article 35 of the [Constitution](#).

### 32nd Interested Party's Submissions

176. Counsel's submissions on jurisdiction, *res judicata*, financial implications, and the creation of the 27 additional positions are largely similar to those of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> respondents, and all interested parties as set out above.

177. Counsel referred to section 3 of the [Public Appointment \(Parliamentary Approval\) Act, 2011](#) which provides:

"An appointment under the Constitution or any other Law for which the approval of Parliament is required, shall not be made unless the appointment is approved or deemed to have been approved by Parliament in accordance with this Act."

178. He referred further to section 9 of the said Act which states:

"If after expiry of the period for consideration specified in section 8, Parliament has neither approved nor rejected a nomination of a candidate, the candidate shall be deemed to have been approved."

179. Based on the above, he submitted that the CAS position is a constitutionally created office as it is made by the recommendation of the President to the PSC and there is no provision for approval by the Parliament.

### Issues for Determination.

180. From the pleadings, evidence and submissions, the following are the main seven issues arising for our determination:

- i. Whether the High Court has Jurisdiction?
- ii. Are any of the issues *res judicata*?
- iii. Was there adequate public participation in the creation of the office of CAS, and in the appointment of the CASs?
- iv. Did the President and the PSC have the power to create the present office of CAS in the manner in which it was created?
- v. What are the financial implications of the creation of the office of CAS, and is it a waste of public funds contrary to article 10 the [Constitution](#)?
- vi. Was the President improperly joined as a party to the consolidated petition?
- vii. Who should pay the costs?

181. We also found that the following supplementary issues call for our determination:

- i. What is the constitutionality of section 26(2) of the [SRC Act](#) and the Regulations thereunder?





- ii. Was the 1<sup>st</sup> interested party improperly joined as a party to the consolidated petition?
- iii. Was the consolidated petition drawn with sufficient precision?
- iv. Should the court consider matters that were not properly pleaded?

### **Does the High Court have Jurisdiction?**

182. We have considered the written submissions of counsel as summarized above, together with the numerous authorities cited in support of the said preliminary objections, including: *Nick Githini Ndichu v Clerk Kiambu County Assembly and Another* [2014] eKLR; *Ali Jarso Wako & another v Ministry of Interior & Coordination of National Government & 5 others: Public Service Commission & 5 others (interested parties)* [2020] eKLR.; and *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR.

183. Having carefully considered the above authorities, and submissions of counsel, in particular, the argument that the ELRC has unique competencies in the areas of employment and labour relations law, and that this court ought to defer to it on that basis; respectfully, we find otherwise.

184. We are guided by the decision of the Supreme Court of Kenya in *Samuel Kamau Macharia (supra)*, where the Supreme court held as follows:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

185. The jurisdiction of this court flows from the *Constitution of Kenya*. Article 165(3)(d) of the *Constitution* reads as follows:

- “(3) Subject to clause (5), the High Court shall have—
- (a) unlimited original jurisdiction in criminal and civil matters;
  - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
  - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under article 144;
  - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
    - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
    - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;



- (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
- (iv) a question relating to conflict of laws under article 191; and
- (e) any other jurisdiction, original or appellate, conferred on it by legislation"

186. Based on the law as set out above, and looking at the various issues raised in the consolidated petition, we are of the view that our mandate has been properly invoked. In particular, the consolidated petition raises numerous and weighty constitutional issues that go beyond employer and employee issues.
187. The primary or core issues before this court are in fact constitutional in nature, and call upon this court to interpret the Constitution as a whole in order to reach its conclusions in relation to the issues and reliefs sought. This exercise falls squarely within the confines of article 165(3)(d) as set out above and we find that this court is properly seized of jurisdiction.
188. Based on our reasons as set out above, we find that the preliminary objections dated 21<sup>st</sup> and 31<sup>st</sup> of March, 2023 are without merit and the same are dismissed.

**Are any of the issues raised in the Consolidated Petition res judicata?**

189. The 1<sup>st</sup> to 4<sup>th</sup> petitioners sought the following consolidated reliefs in the consolidated petition:
- a. The 1<sup>st</sup> respondent violated the Constitution and the law by creating the office of CAS and, specifically, the additional twenty-seven positions and nominating fifty (50) persons (the 2<sup>nd</sup> to 51<sup>st</sup> interested parties) to be approved by the National Assembly for his appointment to the nominated positions.
  - b. The offices of CAS that the 1<sup>st</sup> respondent created are State offices which can only be lawfully established and designated as State offices by national legislation.
  - c. The National Assembly has no constitutional powers to approve for appointment persons nominated to the CAS positions created by the 1<sup>st</sup> respondent, including otherwise than in accordance with the recommendations of the 5<sup>th</sup> respondent, and not established and designated as State offices by national legislation.
  - d. The 5<sup>th</sup> respondent failed to discharge its constitutional mandate, including its duties under articles 10, 232, 234 and 249, by facilitating and superintending over the creation of the additional twenty-seven offices by the 1<sup>st</sup> respondent.
  - e. The 1<sup>st</sup> and 5<sup>th</sup> respondents unconstitutionally colluded with each other by pretending that there were only twenty-three positions of CAS that were being recruited for when, in fact, the number of positions created was unlimited and at the absolute discretion of the 1<sup>st</sup> respondent. The purpose and/or intention of creating the office of CAS was to enable the 1<sup>st</sup> respondent to unconstitutionally reward his close political allies with positions in the public service rather than for the purpose of ensuring service to the people of Kenya in accordance with the Constitution.



- f. The advice given by the SRC to the PSC with regards to the remuneration and benefits for persons appointed to the office of CAS was unconstitutional, null and void as it was based on inaccurate information as to how many positions would be created, thereby concealing their true impact on binding constitutional principles, particularly the impact on the fiscal sustainability of the country's total public compensation bill.
- g. Parliament, including the National Assembly, has no constitutional powers to approve a draft of proposed Regulations, made by a regulation-making authority in pursuance of powers granted to the regulation-making authority, before such regulations are published in the Kenya Gazette and become provisions having the force of law in Kenya.
- h. Section 26[2], *Salaries and Remuneration Act, 2011*, which requires prior approval by the National Assembly of draft regulations made by SRC, pursuant to the powers granted by section 26[1] of the same Act, before those Regulations have been published in the Kenya Gazette and become provisions having the force of law in Kenya, is unconstitutional, null and void.
- i. SRC failed to carry out the mandatory public participation exercise prior to making of The *Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013* - Legal Notice No 2 of 2013 [Kenya Gazette Supplement No 6 (Legislative Supplement No 2)].
- j. The *Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013* - Legal Notice No 2 of 2013 (Kenya Gazette Supplement No 6 (Legislative Supplement No 2)), are unconstitutional, null and void.

An order:

- k. Nullifying the decision by the 1<sup>st</sup> respondent to unilaterally create an additional twenty-seven positions in the claimed public office of CAS and nominating for his appointment fifty persons (the 2<sup>nd</sup> to 51<sup>st</sup> interested parties).
- l. Quashing the notification of Presidential dated March 16, 2023 notifying the nomination of fifty persons (the 2<sup>nd</sup> to 51<sup>st</sup> interested parties) – for appointment to the office of CAS, subject to the approval of those nominations by the National Assembly.
- m. Nullifying section 26(2), *Salaries and Remuneration Act, 2011*.
- n. Nullifying the *Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013* - Legal Notice No 2 of 2013 (Kenya Gazette Supplement No 6 (Legislative Supplement No 2)).
- o. A declaration that HE The President is bound by the recommendations of the Public Service Commission on creation of an office in the Public Service under article 132(4)(a) of the *Constitution*.
- p. A declaration that the recruitment process for the interested parties was in violation of the *Constitution* as well as the *Public Service Act*.
- q. A declaration that the appointments of the interested parties to the relevant CAS positions do not meet the mandatory constitutional and statutory requirements.



- r. An order quashing the decision by the 1<sup>st</sup> respondent to unilaterally create an additional 27 positions in the claimed public office of CAS and nominating for his appointment fifty persons (2<sup>nd</sup> to 51<sup>st</sup> interested parties) after their approval by the National Assembly.
  - s. A declaration that the recruitment, nomination and appointment of the 2<sup>nd</sup> to 51<sup>st</sup> interested parties herein was contrary to the provisions of the Constitution and therefore null and void for all intents and purposes.
  - t. A declaration that the proposed appointment of the said CASs is a waste of public funds and resources in the face of the high unemployment levels and economic recession facing Kenyans. Since the funds intended to be applied towards paying the salaries and other packages that come with the offices to be occupied by the appointed persons runs counter to the provisions of article 10 of the Constitution with specific regard to prudent use of public funds and resources, good governance, transparency, accountability and sustainable development.
  - u. An order quashing:
    - i. The decision by the 1<sup>st</sup> respondent to create an additional 27 positions in the office of the CAS
    - ii. The appointment of the interested parties herein as CASs.
190. All the parties prayed for costs and the 1<sup>st</sup> to 4<sup>th</sup> petitioners prayed for any further relief that this court may deem fit to grant.
191. Having set out the issues and various reliefs sought by the petitioners above, this court, and all the parties are well aware, that the present dispute has been the subject of litigation in two previous matters over much of the same subject matter. Namely, in Okoya Omtatab Okoiti & another v Public Service Commission & 73 others; Law Society of Kenya & another (Interested parties) [2021] eKLR and Petition No E174 of 2022 Law Society of Kenya v Public Service Commission & others in the Employment and Labour Relations Court (unreported).
192. A reading of the above decisions by the High Court and the ELRC reveals that each court heard and determined the matters conclusively, and reached various conclusions in relation to numerous issues that are presently before this court. Accordingly, several of the petitioners, respondents, and interested parties, rightly submitted that those issues determined by the said courts are accordingly *res judicata*.
193. We are of the view that *res judicata* applies to a number of issues in the present consolidated petition and which have been litigated at length and determined, albeit involving different parties to the present consolidated petition.
194. We do however note that LSK was the petitioner in Petition No E174 of 2022 (*supra*) in the Employment and Labour Relations Court and was also an interested party in the *Okoya* (*supra*) decision.
195. Considering the above, this court is of the view that several of the issues have been litigated even if some of the parties to the present petition are different. Moreover, those issues ought to be *res judicata* on the basis that the issues in the present matter are more akin to issues *in rem* rather than issues *in personam* because they affect a state of affairs, and the society at large within the Republic, rather than only private interests.



196. We do not think that a court ought to re litigate the same issues over and over, each time a new party files a petition relating to the same subject matter. To do so would lead to an absurd outcome and embarrass the court with contradicting decisions.
197. Having read the above said decisions, this court notes that already the High Court and the ELRC reached different conclusions in respect of a number of issues that were common to the two petitions. In order to avoid creating a third view in relation to the same issues, this court will treat some of those issues determined in the above cases as *res judicata* for the reason that they have been conclusively dealt with by a court of equal jurisdiction.
198. Moreover, we emphasize that the judgement in *Okiya* (*supra*) is presently pending appeal in the Court of Appeal. That said, we note that the original office of CAS established on January 24, 2018 and which was the subject in *Okiya* case (*supra*) was abolished by the PSC on September 21, 2022. That was the office that was the subject of the stay order in the Court of Appeal. One of the issues now raised in the consolidated petition is whether the new office established vide a gazette notice dated October 12, 2022 is constitutional and whether the complement of office holders appointed on March 16, 2023 is lawful.
199. Based on the above reasoning, we take the view that this court ought not pronounce itself on issues that are presently pending appeal before a higher court.
200. We find that the following issues relating to reliefs sought in (b), (c), and (o) as listed in paragraph 189 above are Res Judicata: We refer to the following paragraphs in the *Okiya* (*supra*) decision in respect of the same.
201. Issue (b), namely, the offices of CAS that the 1<sup>st</sup> respondent created are State offices which can only be lawfully established and designated as State offices by national legislation, was dealt with at paragraph 154 in the following terms:
- “Having said so, it is without any doubt that the position of CAS in every ministry was finally created. These are senior Government positions in the public service. The holders of such positions are State officers. There is no doubt that such positions have a significant impact on the national compensation bill. As said, the input of the SRC was mandatory.” (emphasis ours)
202. Again, at paragraph 166:
- “It is the impugned recommendation that yielded the establishment of the office of the CAS. As demonstrated above, the office of the CAS is a senior office in public service and was created in all the Government ministries in Kenya. The office was graded in Group U and the holders are State officers who are well remunerated and enjoy an array of other State benefits.” (emphasis ours)
203. Further to the above, the court partly addressed the question of whether or not legislation is required to underpin the appointment process. The learned judge was particularly concerned with legislation for the purpose of approval of the candidate by the National Assembly and to enable public participation, as opposed to legislation to replace the appointment process. Quoting with approval the decision of our brother Justice Rika, the court referred to the appointment process relating to the Managing Director of KPA and stated as follows:
- “In the respectful view of this Court, appointment of the Managing Director, KPA, is a highly specialized undertaking, which is best discharged by the technocrats comprising the



Board, assisted by human resource expert committees as the Board deems fit to appoint. The existing law governing the process of appointment of the Managing Director KPA leans in favour of technocratic decision-making. Democratic decision-making, involving full-blown public participation may be suitable in the processes of legislation and related political processes, such as the Makueni County Experiment and the BBI, subject matter of Dr Mutunga’s case studies. But technocratic decision-making suits the appointment of CEOs of State Corporations. Even as we promote democratic [people-centric] decision-making processes, we must at the same time promote technocracy, giving some space to those with the skills and expertise to lead the processes, and trusting them to provide technical solutions to society’s problems. The Board and the Committees involved in the process are in the view of the court, well - equipped to give the Country a rational outcome. The court agrees with the respondents, that the 1<sup>st</sup> respondent is sufficiently representative of stakeholders of the KPA, and the appointment of the Managing Director, is more of a technocratic decision-making process, than a democratic- decision making process. “

204. As regards issue (c), relating to the role of the National Assembly in the appointment process, the court found as follows at paragraph 235:

“It is, therefore, the finding of this court that the persons who are appropriately appointed to the positions of PSs and CASs are only those who: -

- (i) apply for such positions once PSC advertises vacancies;
- (ii) are shortlisted by the PSC;
- (iii) are interviewed by the PSC;
- (iv) are recommended for nomination for appointment by the PSC;
- (v) are nominated by the President for such positions;
- (vi) are approved by the National Assembly; and
- (vii) are appointed into the offices of the PSs and CASs by the President” (emphasis ours)

205. As regards issue (k), in relation to whether or not HE the President is bound by the recommendations of the Public Service Commission in the creation of an office in the Public Service under article 132(4) (a) of the Constitution; at paragraph 235 (above) and 142 (below) the court stated as follows:

“The recommendation by the PSC for the establishment of the position of the CAS in the public service is one of the most central steps in the process. I say so because the President cannot on his own motion create any office in the public service without the recommendation from the PSC. The recommendation is hence a formal decision of the PSC.” (emphasis ours)

206. We are therefore of the opinion that the above stated issues ought to be excluded from our determination on the basis that the same are *res judicata*.



**Was there adequate public participation in the creation of the office of CAS in respect of the additional 27 posts?**

207. One of the key contentions in this petition is that the creation of the office of the CAS did not adhere to the principle of public participation for the 27 additional posts. The Supreme Court in the case of *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* [2019] eKLR outlined the guidelines for public participation as follows:

- a. As a constitutional principle under article 10(2) of the *Constitution*, public participation applies to all aspects of governance.
- b. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- c. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
- d. Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- e. Public participation is not an abstract notion; it must be purposive and meaningful.
- f. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
- g. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
- h. Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
- i. Components of meaningful public participation include the following:
  - i. clarity of the subject matter for the public to understand;
  - ii. structures and processes (medium of engagement) of participation that are clear and simple;
  - iii. opportunity for balanced influence from the public in general;
  - iv. commitment to the process;
  - v. inclusive and effective representation;
  - vi. integrity and transparency of the process;



- vii. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.
208. The sequence of events that led up to the establishment of the office of the CAS are captured in the affidavit of Simon K Rotich, the PSC's Chief Executive Officer's response in the ELRC Petition No E174 of 2022 and relied upon by the LSK in the instant petition and the affidavit of Felix K Koskei, the Head of Public Service.
209. The PSC on September 19, 2022 received a letter from the then Head of Public Service, Joseph K Kinyua informing it of the President's proposal on the establishment of the office of the CAS in the public service. The correspondence set out the history of the office and the justification for its establishment. Considering this, the President proposed that the office of the CAS be ranked in the public service within job group CSG 3. Further that one position be established in each Ministry, except in the Ministry of Interior and Coordination of National Government that would have two positions in light of the scope and significance of the portfolio mandate. The letter also listed the job description for the CAS and relevant qualifications.
210. The PSC at its weekly meeting on September 21, 2022 discussed the proposal where it was observed that the office had been established in January 2018. However, the process of establishing the office was declared unconstitutional in the *Okiya (supra)* case for lack of compliance with articles 10, 47, 132(4) (a), 201(a), 232(1) and 234(2)(c) of the Constitution. In view of this pronouncement, the PSC resolved to abolish the CAS office established on January 24, 2018; comply with the dictates of the Judgement in light of the President's request and conduct public participation.
211. In this regard, the PSC *vide* a press advertisement on its website and the local dailies dated September 21, 2022 invited the members of the public to submit their views on the proposed establishment of the position of the CAS and to do so by October 6, 2022.
212. The PSC in its response dated October 11, 2022 to the President's letter dated September 19, 2022 through its Chairperson, Anthony M Muchiri divulged that following the public participation exercise the PSC received 498 views. Out of this, 3 were requests for particulars, 108 were applications for appointment to the position of CAS, 161 (41.8%) were in support of the establishment of the office and 226 (58.2%) were opposed to the establishment of the office.
213. In a nutshell, the reason for opposition was that the office had been declared unconstitutional; a bloated wage bill; the resultant economic burden to tax payers; and, that the role was a duplication of the CS and PS. The PSC considered and analyzed the responses. In the end, PSC noting that the conditions of section 27 of the PSC Act and public participation had been complied with, recommended establishment of the office as proposed.
214. Following this conclusion, the office of the CAS was established *vide* a letter dated October 11, 2022 as communicated by Joseph K Kinyua the then Head of Public Service to the PSC Chairperson, Anthony M Muchiri.
215. It is revealed further through the affidavit of Felix Koskei, the Head of Public Service dated April 24, 2023 that on February 23, 2023 the President wrote to PSC seeking a review of the complement of CASs within the Public Service to vary from one in each Ministry to one in every state department. On the same day PSC's CEO, Simon Rotich wrote to the PS, Chris Kiptoo, seeking concurrence on the availability of funds to meet the resultant expenditure of the additional 27 posts of CASs.
216. The PSC in response to the President's letter consented to this variation in its letter dated February 27, 2023. In the letter, PSC noted that the consent was based on workload attendant to the role of





CAS and National Treasury's confirmation of funds. Following this communication, the President increased the complement of the office with additional posts. The PSC was then asked by the President to recommend persons to be appointed, which it did.

217. Moreover, in response to a letter dated October 18, 2022 and two letters dated March 10, 2023 by PSC, SRC wrote a letter dated March 14, 2023 to the PSC advising it on the Job evaluation, grading and remuneration and benefits structure for the position of CAS in the Public Service. Soon after, the 2<sup>nd</sup> to 51<sup>st</sup> interested parties were nominated on March 16, 2023 and appointed by the President on March 23, 2023.
218. Two things are clear from the foregoing account. First the initial proposed number for the office was 23. It is discernible that the process of public participation that was undertaken by the PSC was with reference to the letter from the President to the PSC dated September 19, 2022, which only requested for 23 posts.
219. On the flipside, the sequence and procedure that led to the establishment of the 27 additional posts did not adhere to the constitutional principle under articles 10 and 232 of the *Constitution* and conditions set out under section 27 of the *PSC Act*. This process in our opinion did not satisfy the guiding principles set out by the Supreme Court in the *BAT* case (*supra*).
220. We say so because as a guiding principle, public participation must be real and cover all forms of governance. It is noted that the public submitted comments in the public participation exercise based on creation of the CAS office in each Ministry not each State Department as indicated in the President's letter dated February 23, 2023.
221. It was incumbent upon the PSC to prove that the public participation exercise covered all the additional 27 nominees. This was not done in accordance with the *BAT* (*supra*) case. In essence, based on the record before us it is evident that PSC failed in its mandate. The undeniable conclusion is that the process of establishing the extra 27 posts was unconstitutional.

**Did the President and the PSC have the power to create the current office of CAS in the manner in which it was created?**

222. The consolidated petition requires us to interpret a number of articles in the *Constitution*. We are well guided by article 259 which provides-
  - "(1) This Constitution shall be interpreted in a manner that— promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance.
  - (2) .....
  - (3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things....."
223. The principles governing interpretation of the *Constitution* are well settled. The Supreme Court in *Communication Commission of Kenya & 5 others v Royal Media Services & 5 others*, Consolidated Petition 14, 14A, 14B and 14C of 2014 [2014] eKLR, stated that the *Constitution* should be interpreted in a holistic manner, within its context, and in its spirit.



224. In *Leina Konchellab & others v Chief Justice of the Supreme Court of Kenya & Others*, High Court Nairobi, Consolidated Petitions E291-E337 & JR E1108 of 2020 [2021] eKLR, the court restated the principle that the *Constitution* should be given a purposive interpretation where all provisions are read as a whole with each provision sustaining the other.
225. The following passage appears in *Gatirau Peter Munya v Dickson Mwenda Kitinji & 2 others*, Supreme Court Petition No 26 of 2014 [2014] eKLR:
- “In *Pepper v Hart* [1992] 3 WLR, Lord Griffiths observed that the ‘purposive approach to legislative interpretation’ has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the court is not to be held captive to such phraseology. Where the court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:
- The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted”.
226. This principle was restated by the Court of Appeal in *Attorney General v Law Society of Kenya & 4 others*, Court of Appeal, Civil Appeal 426 of 2018 [2019] eKLR. See also *Jack Mukhongo Munialo & 12 others v Attorney General & 2 Others*, Nairobi, High Court Petition 182 of 2017 [2017] eKLR; *County Government of Nyeri & another v Cecilia Wangechi Ndungu*, Court of Appeal, Nyeri, Civil Appeal 2 of 2015 [2015] eKLR; *Stephen Wachira Karani & another v Attorney General & 4 others*, Nairobi, High Court Petition 321 of 2017 [2017] eKLR; *Institute of Social Accountability & Another v National Assembly & 4 others*, Nairobi, High Court Petition No 71 of 2014 [2015] eKLR.
227. The Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others* held as follows:
- “At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way a Constitution may and does embody retrospective provisions, or a provision with retrospective ingredients.”
228. Applying those principles to the matter at hand we find further as follows. The history of the office of CAS is fairly recent having been first established on January 24, 2018. However, on April 20, 2021, the High Court in *Okiya Omtatab Okoiti & another v Public Service Commission & 73 others; Law Society of Kenya & another (Interested parties)* [2021] eKLR [2021] KEHC 464 (KLR) declared the office to be unconstitutional. That decision was stayed by the Court of Appeal in *Public Service Commission & 72 others v Okiya Omtatab & 4 others* Court of Appeal, Nairobi, Civil Appeal (Application) No E131 of 2021 [2021] eKLR [2021]. The main appeal is still pending.



229. In granting the stay, the learned judges of the Court of Appeal found that-
- “Public interest underpinning the substratum of the intended appeal would demand that we affirm the interim orders in terms of prayer 2 and 3 of the application issued on 15th June, 2021 and which we hereby do. Costs of the application to abide the outcome of the intended appeal”.
230. To fully appreciate the terms of the order of stay, we looked at the wording of prayers 2 and 3 of appellant’s notice of motion dated April 29, 2021 brought under rules 5(2)(b) and 47 of the [Court of Appeal Rules](#). They were coached in the following terms-
- i. Pending hearing and determination of this application, there be a stay of the judgment and order of the High Court (Mrima J) made on April 20, 2021 in High Court Constitutional Petition No 33 of 2018 as consolidated with High Court Constitutional Petition No 42 of 2018. For the avoidance of doubt, pending the hearing and determination of this application, the offices and the individuals currently holding the offices of Chief Administrative Secretary, Cabinet Secretary and Principal Secretary shall not in any manner be affected by the judgment and order, and the Hon. Attorney General shall not be required to file an affidavit in the matter within 30 days of the judgment or at any time.
  - ii. Pending the hearing and determination of this application, the High Court shall not take any steps in enforcing the judgment or order made on April 20, 2021 in High Court Constitutional Petition No 33 of 2018 as consolidated with High Court Constitutional Petition No 42 of 2018. For the avoidance of doubt, pending the hearing and determination of this application, there be a stay of proceedings before the High Court and an order do issue that the Hon. Deputy Registrar shall not schedule the matter for mention and the High Court shall not mention the matter to issue any further orders.”
231. It is our considered opinion that the above stay did not reverse the findings or declarations or orders of Mrima J, that the office of CAS as then constituted was unconstitutional. The learned judges only granted a stay of execution in the terms of prayers 2 and 3 that we have set out above. Furthermore, the main appeal is pending.
232. We have then closely studied the decision of the Employment and Labour Relations Court in *Law Society of Kenya v The Public Service Commission and the Hon Attorney-General*, Petition 174 of 2022 (unreported). The respondents have relied on that decision for their proposition that the learned judge (Mbaru J) found the advertisement calling for public comment and the creation of the office and be lawful. We fully appreciate that we cannot review or stand on appeal over a decision of a court of concurrent jurisdiction. However, we are also alive to the fact that we are not bound by the decisions of Mrima, J and Mbaru, J above.
233. The suit before the ELRC was challenging the validity of the advertisement by the PSC dated September 21, 2022 inviting public views on the establishment of a new office for CAS. The petition was dismissed. For the avoidance of doubt, the prayers as set out in the face of the judgment were-
- a) A declaration that the advert of the 1<sup>st</sup> respondent dated September 21, 2022 is illegal and irregular for violation of section 27(1) of the Public Service



Commission Act, 2017 in so far as it fails to include fundamental details under the said section 27(1) to enable the public to make meaningful and informed contributions towards the establishment of the office of Chief Administrative Secretary.

- b) A declaration that the advert of the 1<sup>st</sup> respondent dated September 21, 2022 is illegal, irregular and unconstitutional for violating article 201(d) of the Constitution as it seeks to establish an office in the public service with duplicity of roles as that of the Principal Secretary contrary to the principles of public finance.
- c) An order that the said advert of September 21, 2022 be declared a nullity as it fails to provide crucial information that enables the public to make informed contributions in the establishment of the office of Chief Administrative Secretary.
- d) An order that the 1<sup>st</sup> respondent be required to provide information provided for under section 27(1) of the Public Service Commission Act in any public participation before the establishment of Public Office.
- e) Each party to bear own costs."

234. The learned judge of the ELRC interpreted the stay by the Court of Appeal in *Public Service Commission & 72 others v Okiya Omtatah & 4 others* [supra] as follows:

“The 1<sup>st</sup> respondent (PSC) took into account that after the Court of Appeal stayed the High Court judgment addressed above, parties then reverted to the position subsisting prior to the judgment.”

235. The learned judge then went on to find that all the legal parameters for establishment of the office were met. It is imperative to note that the Law Society of Kenya did not appeal the dismissal of its petition by the ELRC.

236. We are cognizant that the courts established by article 162 of the *Constitution* have the same status as the High Court. As we have stated earlier, whereas we have no power to review the decision of a judge of concurrent jurisdiction, we are equally not bound by it. Having set out the approach taken by Mbaru, J above, we are of a different view, especially because the findings by Mrima J that the office of CAS is unconstitutional have not been set aside and are pending appeal.

237. For instance, Mrima J found that that the procedure in section 47 of the *PSC Act* recommending appointment of PSs applied *mutatis mutandis* to CASs. He held as follows-

“(235) It is, therefore, the finding of this court that the persons who are appropriately appointed to the positions of PSs and CASs are only those who: -

- (i) apply for such positions once PSC advertises vacancies;
- (ii) are shortlisted by the PSC;
- (iii) are interviewed by the PSC;
- (iv) are recommended for nomination for appointment by the PSC;
- (v) are nominated by the President for such positions;



- (vi) are approved by the National Assembly; and
- (vii) are appointed into the offices of the PSs and CASs by the President”

238. Following the above judgment, and on September 21, 2022, the PSC resolved to abolish the office of CAS altogether and to commence the process of creating a new one. The record shows that PSC was prompted by a proposal from HE The President to establish the office in accordance with Article 132(4)(a) of the *Constitution*. To be precise, on September 19, 2022, the Head of State and Government through the Head of Public Service wrote to PSC “to establish the office of Chief Administrative Secretary within the ranks of the Public Service”.
239. PSC concurred with the proposal on October 11, 2022. On the same day, the Head of Public Service acknowledged receipt of the letter and requested the PSC to advertise for 23 positions of CASs. A copy of that letter is attached to the affidavit of the 1<sup>st</sup> petitioner marked EKM-001. We have set out in another part of this judgment the timelines up to the point the new CASs took their oath of office.
240. According to the affidavit of Henry Rotich sworn on October 19, 2022, the PSC resolved “to comply” as much as it could with the findings of Mrima J in the *Okiya* case (*supra*) notwithstanding the order of stay and the pending appeal. The PSC placed an advertisement on September 22, 2022 in the local dailies calling for comments from the public on the proposal to establish the office. The comments were to be received on or before the October 6, 2022. As we have mentioned earlier, that was the advertisement that was challenged in the ELRC in *Law Society of Kenya v The Public Service Commission and the Hon Attorney-General* (*supra*).
241. We have no doubt that article 132(4)(a) of the *Constitution* expressly grants HE The President power to create an office in the public service. But in doing so, he and the PSC are bound to follow the requirements of the *Constitution*. We agree with Mrima J in the *Okiya* case (*supra*) where he stated-
- “(121) The procedure for establishing an office in public service has its basis in the Constitution and law. Article 132(4)(a) of the Constitution provides that ‘the President may perform any other executive function provided for in this Constitution or in national legislation and, except as otherwise provided for in this Constitution, may establish an office in the public service in accordance with the recommendation of the Public Service Commission’.
- (123) In undertaking such duties, the President and the PSC must comply with the Constitution. That is the calling in articles 3 and 10 of the Constitution”
242. Given the nature of the present dispute, it was imperative for the PSC to file a replying affidavit clarifying the role it played in evaluating the request by HE The President, and seeking any advice from necessary bodies such as the SRC, and in rendering its final advice to the HE The President. Being a constitutional commission, it was to be guided in its decisions by the principles outlined in article 10 for its actions. Granted that background, the failure by PSC to file a replying affidavit answering the specific allegations levelled against it, and to choose instead to rely on the defence by other parties or their depositions was a serious omission. It partly means that some allegations by the petitioners against the PSC were not sufficiently rebutted. See generally *Irene Wangari Gacheru & 6 others v Attorney-General* [2017] eKLR.
243. We are however alive to the fact that the PSC is not the sole respondent here; and, that the affidavit of Mr Felix Koskei, Chief of Staff and Head of Public Service in the Office of the President sworn on



April 24, 2023 and filed by the Attorney General (2<sup>nd</sup> respondent) is useful to the PSC's case. But it certainly cannot provide a full answer to all the allegations made against it by the four petitioners.

244. The PSC in its submissions before us also sought to rely on the affidavit of Simon Rotich sworn on October 19, 2022 in response to Nairobi ELRC Petition No E174 of 2022 annexed to the affidavit of the 1<sup>st</sup> petitioner in this consolidated petition. That affidavit sheds some light on the process of creation of the new office of CAS and the public participation. It is not lost on us however that events were then at preliminary stages, and in fact, the advertisement seeking public views on the proposed office became the subject of the suit in the ELRC above.
245. We have closely analyzed the newly created office of CAS. The office falls somewhere between two constitutional or state offices: that of the Cabinet Secretary (CS) and that of the Principal Secretary (PS). Those two officers undergo vetting and approval by Parliament but the CASs have been appointed and sworn into office without Parliamentary approval. According to the opinion of the Speaker of the National Assembly there was no statutory or legal framework for parliament to vet the new 50 CASs under the [\*Public Appointment \(Parliamentary Approval\) Act 2011\*](#).
246. We are aware that not every holder of high or state office undergoes parliamentary approval. But the problem here is that the CASs are for all purposes Assistant Cabinet Secretaries reporting directly to the CS. The PS is relegated to the position where he reports to the CAS and the CS. Doubt is completely removed by their job description in gazette notice No 12432 of October 12, 2022, and duties specified therein, and the fact the CAS will be in a higher job group CSG 3 than the PS.
247. The gazette notice gave particulars of the office as follows-

“Duties and Responsibilities-

A Chief Administrative Secretary will be responsible to the Cabinet Secretary in the performance of his/her duties. Specific duties and responsibilities shall include—

- (a) responding to issues/questions touching on the portfolio assigned to the office;
- (b) providing liaison with the National Assembly and Senate;
  - (a) providing liaison with County Governments on matters of concurrent mandate;
  - (b) providing inter-ministerial/sectoral co-ordination;
  - (c) representing the Cabinet Secretary at any meeting as instructed by the Cabinet Secretary; and
  - (d) executing any other duties and responsibilities specifically assigned to the office by the Cabinet Secretary in furtherance of the interest of the Ministry.

Terms of Service-

- (a) a Chief Administrative Secretary will serve on contract as determined by the appointing Authority.
- (b) this position is graded at CSG 3 in the Public Service - the remuneration and



benefits commensurate to this level will be applicable.” [Underling added]

248. We also find that whereas HE The President can establish a state office within the ranks of the public service, it requires approval by the National Assembly. Such approval may be achieved by enactment of a statute, which provides for the same and further provide an appropriate framework for a cap on the numbers of CASs if necessary. In the end, we are not satisfied that the newly created office of CAS meets constitutional threshold.
249. Having reached the above conclusion, we are nevertheless still minded to address the issue of numbers. We note that the initial approved complement rose from 23 CASs to 50. By virtue of their salary and hierarchy, we agree with the 4<sup>th</sup> petitioner that the creation of the offices would come at a substantial cost to the public. The respondents urged us to find that the office is separate from numbers and that once the office was legally in place, it was beyond the court to look into the numbers or the accompanying wage bill and that the task fell to other bodies such as Parliament, CoB or SRC. We have addressed that issue in a separate part of this judgment.
250. The respondents and interested parties urged us to find that once the office of CAS was established, the complement or number of officers was at the discretion of either the PSC or HE The President. Our attention was drawn to the case of the Judicial Service Commission (JSC) which recently advertised for 6 posts of Court of Appeal judges but hired 7. We distinguish the above example from the present scenario on the basis that at the material time, there was a vacancy; and, JSC did not overshoot the ceiling of 30 Judges set for the Court of Appeal.
251. The respondents and interested parties also relied on the decision in *Sheria Mtaani na Shadrack Wambui (supra)*. The petitioner in that case challenged the employment of 350 persons by the PSC for the position of Accountant II in the National Treasury but when the advertised vacancies were only 250. The petition was dismissed. But that decision can be distinguished for two reasons: firstly, in the instant consolidated petition, the office created is a high public office with substantial salaries and perks; and, secondly, the *Sheria Mtaani* case was dealing with hiring of lower cadre of public officers, being Accountants II.
252. As we pointed out earlier, in interpreting the *Constitution*, this court is bound to adopt a “purposive approach which seeks to give effect to the true purpose of legislation” and may examine “material that bears upon the background against which the legislation was enacted”. *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (supra)*.
253. Kenya had for many years a cabinet consisting of Ministers and Assistant Ministers whose composition or numbers was largely at the discretion of the President. The public clamour for control of the size of the executive was reflected in the Draft Constitution of Kenya 2004 by the Constitution of Kenya Review Commission.
254. In the Proposed Constitution of Kenya 2005, adopted at the Bomas Constitutional Conference on March 15, 2004, it was provided as follows-

“The President, in accordance with this Constitution, shall appoint and may dismiss-

- (a) the Cabinet consisting of –
  - (i) the Prime Minister;
  - (ii) the two Deputy Prime Ministers nominated by the Prime Minister;



- (iii) not less than fifteen and not more than twenty Ministers nominated by the Prime Minister.
- (b) not less than fifteen and not more than twenty Deputy Ministers nominated by the Prime Minister... [underlining added]
255. The number of Assistant Ministers in the Proposed Constitution thus matched that of the Ministers. Mrima J in the *Okiya* case (*supra*) had this to say on the matter.
- “(8) Chapter II of the repealed Constitution provided for the Executive which was comprised of the President, the Vice-President, the Prime Minister, two Deputy Prime Ministers, Ministers and Assistant Ministers. Section 19(1) of the repealed Constitution permitted the President to appoint Assistant Ministers from among the members of the National Assembly to assist the President, Vice-President and Ministers in the performance of their duties.
- (9) During constitution-making process that led to the promulgation of the Constitution of Kenya, 2010, the composition of the Executive was a hotly contested matter. The people's cry was that the Executive was too bloated with unnecessary offices including the office of Assistant Minister” [underlining added]
256. The *Final Report of the Committee of Experts* dated October 11, 2010 notes that Kenyans wanted “that there be a clear distinction between offices of State and offices of Government”. Following public debates, the position of the Assistant Minister was abolished altogether and did not make it to the *Constitution of Kenya 2010*.
257. It is thus not surprising that the size of the cabinet secretaries is now capped at 22. Article 152 (1) of the *Constitution*, provides that the Cabinet shall comprise of-
- “(a) the President;
- (b) the Deputy President;
- (c) the Attorney-General; and
- (d) not fewer than fourteen and not more than twenty-two Cabinet Secretaries.” [underlining added]
258. It is therefore our considered view, that the creation of a similar office to the Assistant Minister, now in name of CASs, cannot be created in the manner the 1<sup>st</sup> respondent and the 5<sup>th</sup> respondent proceeded. Based on the reasoning set out above, we do not think that it was the intention of the framers of the *Constitution* to have 50 CASs deputizing 22 Cabinet Secretaries. Furthermore, public participation on the office of CAS was founded on a complement of 23 CASs. Doubt is erased by the following other facts. In the letter of October 11, 2022 by Dr Joseph Kinyua, Head of Public Service to the PSC, the Head of State requested the PSC to declare 23 vacancies for CASs. We note however that the Special Issue of Kenya Gazette Notice Number 12432 dated October 12, 2022 and the media advertisement the following day calling for applications from suitable candidates did not set the number of vacancies.
259. Furthermore, the stay in the Court of Appeal preserved the original office created on January 24, 2018. Once that office was abolished on September 21, 2022, the newly created office and complement of 23 office holders could no longer benefit from that stay. Accordingly, the newly created office and fresh





complement of 50 had to comply with the Constitution and the criteria set out earlier in *Okiya's* case (*supra*) in order to be lawfully established. They did not comply. For the avoidance of doubt, the entire complement of 50 CASs is therefore unconstitutional.

**What are the financial implications of the creation of the office of CAS, is the same a waste of public funds contrary to article 10 the Constitution?**

260. We have already considered the submissions of the 1<sup>st</sup> and 4<sup>th</sup> petitioners on this issue as set out above as well as the responses by the 2<sup>nd</sup> and 4<sup>th</sup> respondents and the 1<sup>st</sup> interested party.
261. We take note of the 1<sup>st</sup> petitioner's argument that the advice given by the 4<sup>th</sup> respondent to the 5<sup>th</sup> respondent in respect of the remuneration and benefits for persons appointed to the office of CAS was inaccurate and misleading. This was due to lack of information as to how many positions would be created. On the other hand, the 4<sup>th</sup> petitioner argued that the appointment of CAS is a waste of public funds and resources in the face of the high unemployment levels and economic recession facing Kenyans. That the payment of such salaries run counter to the provisions of Article 10 of the Constitution with specific regard to public funds, resources, good governance, transparency accountability and sustainable development.
262. The 1<sup>st</sup> petitioner argued that the 4<sup>th</sup> respondent did not give advice on the financial implications in creating the office of the CAS with a complement of 50. The 4<sup>th</sup> respondent therefore failed to exercise its exclusive constitutional mandate under article 230 (4) (a). Further that the 4<sup>th</sup> respondent in its letter dated March 14, 2023 had advised for a higher gross monthly salary to that of the PS with no justification as is clear from the Kenya Gazette Notice No 8792 of 2022.
263. The 2<sup>nd</sup> respondent submitted that the legislature has the power over public finance and the independent offices of the CoB and the Auditor General report to it. These are the offices that should determine the issue of wasteful spending.
264. The 4<sup>th</sup> respondent submitted that the advice by the 4<sup>th</sup> respondent on remuneration and benefits for the CAS was issued within their constitutional mandate under Article 230(4) (b) of the Constitution and section 11 of the SRC Act and not the SRC Regulations 2013. The advice was thus based on an objective and fair process which took into account the principles outlined in article 230(5) of the Constitution and the job descriptions by the 5<sup>th</sup> respondent.
265. The 1<sup>st</sup> interested party submitted that under article 228(4) & (5) of the Constitution, it was not responsible for paying remuneration and benefits to the CASs or any other state or public officers following their mandate under article 228(4) & (5) of the Constitution. We also note that the initial CAS office as established in 2018 was graded under Job Group 'U' and the appointed persons were to enter at the mid-point of the salary scale. After this office was abolished and a new one established on October 11, 2022, the position was graded under Job Group CSG 3 in the public service. The gross salary is above Kshs 700, 000 plus other emoluments as seen from the letter from the 4<sup>th</sup> respondent. The 2<sup>nd</sup> respondent with reference to the 27 additional CASs, made known that their financial provision was given the green light by the National Treasury which indicated that there were sufficient funds to cater for the additional numbers.
266. Article 230(4) of the Constitution provides for the powers and functions of the SRC as follows:
- i. set and regularly review the remuneration and benefits of all State officers; and



- ii. advise the national and county governments on the remuneration and benefits of all other public officers.
267. Further to the above, Mrima J, in *Okiya* (supra) found that failure to involve the 4<sup>th</sup> respondent on the financial matters of the CAS office was a serious omission rendering the establishment of the said office unconstitutional.
268. It is therefore clear to us that the 5<sup>th</sup> respondent should have consulted the SRC in order for it to ascertain the resultant financial implications.
269. A related issue arising within the context of the various financial implications, is the question of whether this court can make a decision on budgetary issues? The court in the case of *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR expounding on this issue opined as follows:
- “By justiciability it is meant a matter “proper to be examined in courts of justice” or “a question as may properly come before a tribunal for decision”: see Black’s Law Dictionary 9<sup>th</sup> Ed, pp 943-944. In other words, courts should only decide matters that require to be decided.”
270. The court went on further to state that:
- “(97) A court must satisfy itself that the case before it is not caught up by the bar of non-justiciability. The concept of non-justiciability is comprised of three doctrines: Firstly, the Political Question Doctrine; secondly, the Constitutional-Avoidance Doctrine; and, thirdly, the Ripeness Doctrine...”
271. With reference to the matter in question, the court held as follows:
- “[99]. The political question doctrine focuses on the limitations upon adjudication by courts of matters generally within the area of responsibility of other arms of Government....
- [100] According to the political question doctrine, certain sets of issues categorized as political questions, even though they may include legal issues, are considered to be external to the Judiciary as an arm of Government. Such issues are handed over to other branches of Government for adjudication. The political question doctrine therefore focuses on limiting of adjudication of disputes by courts in favour of the legislative and the executive interventions. It is underpinned by the concept of separation of powers. All that the courts are doing in such situations is assigning discretion on the issue to another branch of Government.”
272. It is our considered view that based on the separation of powers doctrine, budgetary concerns fall within the realm of policy, and rightly belong to the other relevant arms of government as may be appropriate. We thus decline the invitation to delve any deeper into that arena.



### Was the President improperly joined as a party to the proceedings?

273. The 2<sup>nd</sup> to 5<sup>th</sup> respondents submitted that the 1<sup>st</sup> respondent was improperly joined to the present consolidated petition. The petitioners, on their part did not oppose the said prayer, but contended that the misjoinder was not fatal to the consolidated petition.

274. Having considered the submissions of the parties on this issue as set out above, we are guided by article 143 of the *Constitution* and the decision of the Supreme Court in *Attorney-General & 2 others v Ndiu & 79 others; Prof Rosalind Dixon & 7 others (Amicus Curiae)* (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) more commonly known as ‘the BBI case’, where at the following paragraphs the court stated as follows:

“(282) Consequently, this leads to the inescapable conclusion that the immunity of the President is unlike that of the other state actors. The President not only enjoys functional immunity like all public officials who perform state duties, which protects them from civil liability for official functions, they further enjoy sovereign immunity as the Head of State and the single representation of the sovereignty of the Republic. Indeed, it is only sovereign immunity that can immunize anyone against both proceedings and criminal liability...

(288) With respect to legal accountability, the protection of the President from legal proceedings under article 143(2) does not mean that a President’s actions or omissions cannot be challenged in court. Anybody or party aggrieved by the President’s actions or failures can initiate proceedings against the Attorney General who by virtue of being the legal representative of the government in legal proceedings also represents the President, who is the Head of Government. The immunity on the other hand offers protection that shields the President from civil suits being filed against them in their personal capacity. As rightly conceded by the President in his written submissions before this court... (emphasis ours)

As such, pursuant to article 156(4) of the Constitution, the exercise of public power by the President can be challenged in a court of law by suing the Attorney General through an action of judicial review or constitutional petition wherein the court may issue appropriate remedies... (emphasis ours)

(292) This leads me to the conclusion that the learned Judges unfortunately fell in error in their interpretation and application of article 143(2) of the Constitution by holding that civil proceedings can be instituted against the President or a person performing the functions of the office of President during their tenure of office in respect of anything done or not done contrary to the Constitution”

275. Pursuant to article 143 of the *Constitution*, and based on the law as set out above, we find that the 1<sup>st</sup> respondent was improperly joined into the consolidated petition.

276. We further find that the misjoinder is not fatal to the consolidated petition but take the opportunity to urge the petitioners and future litigants to avoid this practice in light of the unequivocal pronouncement by the Supreme Court on this issue.



### **Was the consolidated petition drawn with sufficient precision?**

277. In a constitutional suit a party that alleges violation of his or her rights must plead with reasonable precision the manner in which the rights have been violated. This principle was established in the case of *Anarita Karimi Njeru v Republic* (1976-1980) KLR 1272. The Court of Appeal while affirming this decision in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR observed as follows:

“(42) ...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, MR 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.”

278. Our interpretation of the above provision is that for a constitutional petition to be sustainable it must satisfy the threshold set out in the authorities above. It therefore follows that the mere citing of constitutional provisions is not enough. The petitioners must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated, and the manner in which the said provisions have been violated from the facts and evidence of the case.

279. In the circumstances of this case and material placed before this court, we find that the above threshold has been met by the petitioners.

### **Un pleaded issues raised in submissions and supplementary affidavits**

280. The 2<sup>nd</sup> and 5<sup>th</sup> respondents and some interested parties opposed the introduction of new issues and new prayers as raised by 3<sup>rd</sup> petitioner in its supplementary affidavit dated May 5, 2023 and 2<sup>nd</sup> petitioner's further affidavit dated May 2, 2023.

281. The 2<sup>nd</sup> respondent submitted that new issues were also added in the submissions of the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners in paragraphs 39, 54 and 56. The 5<sup>th</sup> respondent challenged paragraphs 14-20; 29-31; and 43-50 of 3<sup>rd</sup> petitioner's supplementary affidavit and paragraph 29 and 33 of the 2<sup>nd</sup> petitioner's further affidavit.



282. The 2<sup>nd</sup> to 7<sup>th</sup>; 9<sup>th</sup> to 18<sup>th</sup>; 20<sup>th</sup>, 21<sup>st</sup>; 23<sup>rd</sup> to 30<sup>th</sup>; 33<sup>rd</sup> to 51<sup>st</sup> interested parties also challenged the admissibility of evidence in paragraphs 13 to 17 and 33 of the 2<sup>nd</sup> petitioner’s further affidavit and paragraphs 18-33 and 36 in the supplementary affidavit of the 3<sup>rd</sup> petitioner.
283. The 19<sup>th</sup> interested party challenged the admissibility of the evidence in paragraphs 14-20; 29-31; 33; 43-50; 59-61 of the 3<sup>rd</sup> petitioner’s supplementary affidavit. Counsel emphasized that the record should reflect that they had no opportunity to reply to the new allegations and had not admitted to the contents of the impugned paragraphs.
284. The Supreme Court in the case of *Raila Amolo Odinga & Stephen Kalonzo Musyoka v Independent Electoral and Boundaries Commission, Chairperson Independent Electoral and Boundaries Commission & Uhuru Muigai Kenyatta* (Election Petition 1 of 2017) [2017] KESC 31 (KLR) (Election Petitions) (28 August 2017) (Order) affirmed that parties are bound by their pleadings. The court opined as follows:
- “(62) Having addressed our minds to the above issues, it is our view that first, we note that as correctly argued by counsel for the 3<sup>rd</sup> respondent, a party must be bound by its pleadings... Any prayer in the application that would seem to be an expansion of the case for the Petitioners or which would in effect be a fishing exercise to procure fresh evidence not already contained in the petition would and must be rejected.”
285. Correspondingly, the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR citing the Nigerian Supreme Court with approval observed that:
- “First, in *Adetoun Oladeji (NIG) Ltd vs Nigeria Breweries PLC SC 91/2002*, Judge Pius Aderemi JSC expressed himself, and we would readily agree, as follows;
- “...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”
- Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell JSC rendering himself thus;
- “In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.” ....
- As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce.
286. Likewise, the Court of Appeal in the case of *Richard Nchapi Leiyagu v Independent Electoral & Boundaries Commission & 2 others* [2014] eKLR held that:
- “There are many decisions of our courts, including those cited by the 3<sup>rd</sup> respondent’s counsel, to the effect that parties cannot raise matters that are not in their pleadings. Way back in 1930, Scrutton LJ in *Blay vs Pollard & Morris* (1930) 1 KB, 628 at 634 stated that:



“Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings and in my opinion he was not entitled to take such a course.”

In *Gandy vs Caspair*, (1956) 23 EACA 139, Sinclair V-P reiterated that principle when he stated that: “as a rule relief not founded on the pleadings will not be given”.

287. We are satisfied that the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners tried to introduce new issues that were not either pleaded in the original petitions but were found in their further affidavit, supplementary affidavit, submissions, and found in the amended petition filed out of time, which the court declined to admit.
288. Evidently, each party is at liberty to frame his case in his own way while paying regard to the rules of pleadings and in the end, is ultimately bound by the manner in which the pleadings were drafted. As such, a party cannot be allowed to raise a different or fresh case without an amendment to the pleading. The court record reflects that the 3<sup>rd</sup> petitioner’s request to extend the time within which to file and serve the amended petition was declined. Taking this into consideration, we have confined our decision to only the matters properly pleaded before this court and as captured in the issues we framed above.

**What is the constitutionality of section 26 (2) of the SRC Act and the SRC (Remuneration and Benefits of State and Public officers) Regulations, 2013?**

289. Having considered the submissions of the parties as set out above, we take note that the central arguments made by the petitioners in relation to the above issue are as follows: first, that the 4<sup>th</sup> respondent refused to discharge its constitutional duties and defend its independence, on behalf of the people of Kenya, from the unconstitutional encroachment and interference by the National Assembly as evidenced by the enactment of section 26(2) of the *SRC Act*.
290. Second, that the 4<sup>th</sup> respondent failed to undertake compulsory public participation in the process that resulted in the enactment of the *SRC (Remuneration and Benefits of State and Public officers) Regulations, 2013*.
291. In response to the above, the 4<sup>th</sup> respondent submitted that it undertook extensive public participation relating to the impugned provisions, and that the same is evidenced in its annexure collectively marked as “ARG-3” in the replying affidavit of Ms Anne R Gitau.
292. However, and more importantly, it submitted that while the provisions of order 3 rule 5 of the *Civil Procedure Rules* and the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* do permit the joinder of causes of action, the issue of the creation of the position of CAS and the subsequent appointment of the 2<sup>nd</sup> to 51<sup>st</sup> interested parties as CASs; and the issue of the constitutional validity of Section 26(2) of the *SRC Act* and *SRC Regulations, 2013* and SRC’s advice on the remuneration and benefits of CASs are independent and distinct causes of action.
293. Further to the above, the issues do not arise out of the same act or transaction, or series of acts or transactions, and no common question of law or fact would arise should the two issues be considered together. The two causes of action joined in the petition are fundamentally disparate in nature, both legally and factually. Each cause of action carries distinct elements, legal standards, and remedies, necessitating separate and individual consideration.
294. The 4<sup>th</sup> respondent contended, and we agree, that by joining these unrelated causes of action, this court may not be able to render a fair and efficient resolution of that particular issue given that it derogates from the core issues before this court. This court is of the view that in order to ensure efficient



administration of justice, each cause of action ought to be litigated independently to ensure the proper application of law, presentation of evidence, and resolution of disputes. In the present matter, this court has not had sufficient opportunity to carry out the above exercise in relation to that specific issue.

295. Accordingly, based on the reasons set out above, we decline to entertain this issue and find that the same is an unrelated cause of action within the context of the consolidated petition. The petitioner is at liberty to raise the issue as a separate cause of action should it wish to pursue the same.

### **Was the Controller of Budget improperly joined as a party to the consolidated petition?**

296. Having considered the submissions of the parties as set out above, we note that the crux of the 1<sup>st</sup> petitioners' case with respect to the 1<sup>st</sup> interested party is as follows:

- a. That the 1<sup>st</sup> interested party oversees the implementation of the budgets of the national and county governments by authorizing withdrawals from public funds under articles 204, 206 and 207 of the Constitution.
- b. That the 1<sup>st</sup> interested party is prohibited from approving any withdrawal from a public fund unless satisfied that the withdrawal is in accordance with the law.
- c. That the 1<sup>st</sup> interested party would be required to approve any withdrawal of public funds to pay remuneration and benefits of persons appointed in the office of CAS for which there is currently no lawful authority.

297. Based on the above, the petitioners made the 1<sup>st</sup> interested party, a party to the suit presumably because they were concerned that it may make payments of remuneration and benefits to the CASs which are not authorized by the law.

298. In response to the above concerns, and regarding the assertions made by the petitioners, the 1<sup>st</sup> interested party clarified that its responsibilities do not involve paying remuneration and benefits to the CASs or any other state or public officers. The mandate of the CoB under article 228(4) and (5) of the Constitution is to grant approval of withdrawal of funds in accordance with the law and not to effect payments on specific transactions. It is the responsibility of the relevant accounting officers to pay remuneration and benefits to the respective members of staff.

299. The 4<sup>th</sup> respondent accordingly submitted, and we agree, that it ought not to have been joined in to the present proceedings. We have looked at the consolidated petition and we find that no cause of action has been disclosed against the 1<sup>st</sup> interested party. Further, the petitioners have not sought any specific orders against the 1<sup>st</sup> interested party, nor have they set out in detail any specific violations of the law demonstrated by the 1<sup>st</sup> interested party.

300. Before we conclude our judgment, we are constrained to comment about the conduct of counsel for the 3<sup>rd</sup> petitioner, Mr Ochiel Dudley. On June 19, 2023, he authored a letter addressed to the Deputy Registrar titled Professional Duty to Disclose requesting the Deputy Registrar to bring to our attention a recent decision of the Supreme Court whose findings would "aid" us to deal with the present consolidated petition. At the time of the letter, the proceedings had been closed and a date for judgment set. We thus found the conduct of Mr Ochiel inappropriate. For obvious reasons, we did not refer to the decision he referred to and it was not necessary to do so.

### **Disposition and Final Orders**

301. Having answered all the issues that we framed in the consolidated petition, we now make the following final orders-



- a. That the current Office of Chief Administrative Secretary created by the 1<sup>st</sup> and 5<sup>th</sup> respondents and contained in the Kenya Gazette Special Issue Number 12432 dated October 12, 2022 and which announced the vacancies thereof is unconstitutional.
  - b. That whereas there was some reasonable public participation on the first complement of 23 Chief Administrative Secretaries, there was no such participation regarding the additional complement of 27 office holders.
  - c. That the entire complement of 50 Chief Administrative Secretaries, which is to say all the 2<sup>nd</sup> to 51<sup>st</sup> interested parties, is unconstitutional.
  - d. For the avoidance of doubt, the notification by the 1<sup>st</sup> respondent dated March 16, 2023 appointing the 2<sup>nd</sup> to 51<sup>st</sup> interested parties to the office of Chief Administrative Secretary is hereby quashed.
  - e. That the prayer that section 26(2) of the *Salaries & Remuneration Commission Act and the Salaries & Remuneration Commission (Remuneration and Benefits of State and Public officers) Regulations, 2013* be declared unconstitutional is disallowed.
  - f. A declaration is hereby issued that the 1<sup>st</sup> respondent enjoys constitutional immunity from suit and was illegally joined into the proceedings.
  - g. That the petition against the 1<sup>st</sup> interested party is hereby dismissed.
302. The last issue relates to costs. Costs ordinarily follow the event and are at the discretion of the court. We find that the consolidated petition raised constitutional issues in the public interest. The order that commends itself to us is that each party shall bear its own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 3<sup>RD</sup> DAY OF JULY 2023.**

**KANYI KIMONDO**

**JUDGE**

**ALEEM A. VISRAM**

**JUDGE**

**Judgment of Lady Justice Hedwig Ong’udi**

1. I have read in detail the majority decision in this consolidated petition. The factual background, the summary of the submissions advanced by the parties as well as the issues for consideration and determination as framed. I do not therefore intend to reiterate them here in detail save in limited aspects for the points I will be making.
2. I am in agreement with most of the issues in the majority judgment. These issues are the jurisdiction of this court; *res judicata*; public participation; joinder of the President and the Controller of Budgets and lastly the financial budgetary estimates. I however differ with the majority on two issues namely:
  - i. Whether the office of CAS was constitutionally established; and
  - ii. Whether the 50 CAS’s were appointed in accordance with the law.





3. The office of the CAS was first established in Kenya on January 24, 2018 by the Former president, Uhuru Kenyatta. He subsequently nominated and appointed the CASs, alongside the CS and the PS. This decision was soon after challenged in the case of *Okuya Okoiti & another v Public Service Commission & 73 others; Law Society of Kenya & another (Interested Parties)* (Petition 33 & 42 of 2018 (Consolidated) [2021] KEHC 464 (KLR) (Constitutional and Human Rights) (20 April 2021) (Judgment).
4. On April 20, 2021, Justice Mrima rendered his judgement in which he declared the establishment of the CAS office unconstitutional. The orders issued are found at Paragraph 309 of the said judgement.
5. A perusal of the 5<sup>th</sup> respondent's Chief Executive Officer, Simon K Rotich's response in the ELRC Petition No E174 of 2022 as relied upon by the 1<sup>st</sup> petitioner in the instant consolidated petition indicates that a while later, on September 19, 2022 PSC received a letter from the then Head of Public Service, Joseph K Kinyua informing it of the President's proposal on the establishment of the office of the CAS in the public service.
6. In brief, the letter set out the history of the office and the justification for its establishment. Equally, the President proposed that the office of the CAS be ranked in the public service within job group CSG 3. Further that one position be established in each Ministry, except in the Ministry of Interior and Coordination of National Government that would have two positions in light of the scope and significance of the portfolio mandate. The letter as well listed the job description for the CAS and relevant qualifications.
7. Based on this, the 5<sup>th</sup> respondent at its weekly meeting on September 21, 2022 discussed the proposal, and observed that the office had been established in January 2018. However, the process of establishing it had been declared unconstitutional in the *Okuya* case (*supra*) for its lack of compliance with articles 10, 47, 132(4)(a), 201(a), 232(1) and 234(2)(c) of the *Constitution*.
8. Considering the court's decision in the said case the 5<sup>th</sup> respondent resolved to: abolish the CAS office established on January 24, 2018; comply with the orders of the Judgement in light of the President's request and conduct public participation. The 5<sup>th</sup> respondent vide a press advertisement on its website and the local dailies dated September 21, 2022 invited members of the public to submit their views on the proposed establishment of the office of the CAS.
9. Following the call for the public to issue its views on creation of the office of the CAS, the 2<sup>nd</sup> petitioner filed ELRC Petition No E174 of 2022 (*Law Society of Kenya versus The Public Service Commission and the Hon Attorney-General*) (unreported) against the PSC for the reason that the advertisement was illegal for violation of section 27(1) of the *PSC Act* in so far as it failed to include fundamental details to enable the public to make meaningful and informed contributions towards the establishment of the office of CAS. Further that the advertisement was unconstitutional for violating article 201(d) of the *Constitution* as it seeks to establish an office in the public service with duplicity of roles as that of the Principal Secretary contrary to the principles of public finance.
10. Justice Mbaru in the said matter, satisfied that the 5<sup>th</sup> respondent had complied with the orders issued in the *Okuya* case (*supra*) and the dictates of the *Constitution* held as follows in the Judgment dated February 16, 2023 while dismissing the petition:

“Upon being satisfied that the creation of the office of CAS is justified, upon being satisfied that the financial implications of creating such office is indicated, and that the office so created relates to or supports the core functions of the public body requesting for its creation, such satisfaction is sufficient for the 1<sup>st</sup> respondent. It is its core function under



section 27(1) of the PSC Act in this regard. The internal processes for levels for grading, designation, qualifications and remuneration cannot be faulted.”

11. The 5<sup>th</sup> respondent in its response dated October 11, 2022 to the President’s proposal, informed of the outcome of the public participation exercise, steps taken to comply with section 27 of the PSC Act and after making all these considerations, recommended establishment of the office as proposed. Following this conclusion, the office of the CAS was established vide a letter dated October 11, 2022 as communicated by Joseph K Kinyua the then Head of Public Service to the PSC Chairperson, Anthony M Muchiri.
12. With this contextual background in mind, it is my considered view that the petitioners in both petitions (*Okiya* case (*supra*) and ELRC No E174 of 2022) were concerned about the legality of the actions of the former and current Presidents’ in establishment of the office of the CAS in light of the dictates of the Constitution. The High Court as discussed found that the claim that the processes towards the establishment of the Office of the CAS was in contravention of articles 10, 47, 132(4)(a), 201(a), 232(1) and 234(2)(c) of the Constitution as well as Sections 27 and 30 of the PSC Act succeeded. The Court as such declared the office of the CAS unconstitutional. (See: Paragraph 310(b) of the judgment.) This decision in the end formed the basis of abolition of this office and establishment of the new office whose creation process was affirmed by the ELRC.
13. Appreciating all these factors, this court will now make a determination on this issue as presented by the petitioners and defended by the respondents and interested parties.
14. It is worthy to note and emphasize that the decision in the *Okiya* case (*supra*) as pronounced by Justice A Mrima was stayed by the Court of Appeal in Public Service Commission & 72 others v Okiya Omtatah & 4 others [2021] eKLR (Civil Appeal (Application) No E131 of 2021). The outcome of the same is a matter that remains unresolved and will inevitably affect the outcome with reference to the office of the CAS in general.
15. On the other hand, the decision in ELRC Petition No E174 of 2022 *Law Society of Kenya – versus – The Public Service Commission and the Hon Attorney-General* (unreported) as determined by Justice Mbaru was the basis of the PSC’s decision to either complete the process of establishing the new office of the CAS or end the same all together. I say so because from the chronological timelines it is clear that the 5<sup>th</sup> respondent did not call for interviews for the CAS position until the ELRC delivered its judgment on February 16, 2023. It is further noted that this judgment has not to date been appealed against.
16. Manifestly, the contents of the two decisions arise from courts of concurrent jurisdiction which legally, do not bind this court as we are of equal status. This was underscored by the Court of Appeal in the case of Bellevue Development Company Ltd v Francis Gikonyo & 7 others [2018] eKLR (Civil Appeal No 239 of 2017) where it held as follows:

“I have no difficulty upholding the learned Judge’s holding that as a judge of the High Court he had no jurisdiction to enquire into or review the propriety of the decisions of the Judges, who were of concurrent jurisdiction as himself. In our system of courts, which is hierarchical in nature, judges of concurrent jurisdiction do not possess supervisory jurisdiction over each other. No judge of the High Court can superintend over fellow judges of that court or of the superior courts of equal status. That much is plain common sense. It has, moreover, been expressly stated in article 165(6) of the Constitution in these terms;



“The High Court has supervisory jurisdiction over the subordinate courts and over any other person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

17. Be that as it may, this court cannot turn a blind eye to the 1<sup>st</sup> and 5<sup>th</sup> respondents’ actions. It is clear that the 1<sup>st</sup> and 5<sup>th</sup> respondents herein owing to the adduced correspondence, in an attempt to comply with the law and the pronouncement of the High Court established a new office of the CAS based on the orders issued. This compliance was given the green light by the ELRC in its judgment by Justice Mbaru which cannot be ignored. This act was in line with PSC’s mandate under article 234(2)(a)(i) of the Constitution which makes known that one of its powers and functions is as follows:

“The Commission shall--subject to this Constitution and legislation--establish and abolish offices in the public service.”

18. My opinion on the preceding point is informed by the Supreme Court observation in the case of Attorney-General & 2 others v Ndiu & 79 others; Prof Rosalind Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) where it held as follows:

- “58. Common law doctrines like the stare decisis doctrine had to be interpreted in a manner that promoted and gave effect to the values and principles of the Constitution. In the instant case, the two superior courts below did not take into account the value and principle of the rule of law enshrined in article 10(2)(a) of the Constitution that commanded compliance with court orders before making a decision that had the effect of penalizing IEBC for relying on a declaratory finding by a High Court. IEBC could not be faulted as its actions then were supported by the *Isaiah Biwott Kangowny v Independent Electoral Boundaries Commission & Attorney General, Constitutional Petition No 212 of 2018 (Isaiah Biwott case)*. Although that decision was not binding on the High Court or the Court of Appeal, it created a legitimate expectation in the IEBC that carrying out business with three commissioners complied with the law.
59. The value and principle of the rule of law under article 10(2)(a) of the Constitution demanded that public bodies and private individuals comply with court decisions. Where a State organ or private individual acted in compliance with a court decision, like the IEBC did in the instant case, it ought not be punished by a subsequent court’s decision declaring such actions illegal based on a differing interpretation of the law.
60. In circumstances where a High Court in a later case, like in the instant case, disagreed with an earlier finding by another bench of the High court, the best approach was for the court to craft and mount appropriate remedies taking into account contextual considerations like the reliance placed by public bodies and private individuals on earlier court decisions. In such instances, the High Court ought to opt for the remedy of prospective overruling or suspending the declaration of invalidity and stipulate that the effect of its decision would apply prospectively.”



19. Evidently, the regularization of the office of the CAS as proposed by the HE the President in the letter dated September 19, 2022 and recommended by the 5<sup>th</sup> respondent in the letter dated October 11, 2022 being premised on the rule of law cannot be faulted. The unavoidable conclusion that I come to is that the process undertaken to establish the new office of the CAS that endorsed 23 posts, as seen from the correspondence, was lawful. For that reason, the ensuing determination will only speak to the constitutionality of the additional 27 CAS posts.
20. The office of the CAS as submitted by the parties was constituted under article 132 of the Constitution which essentially spells out the functions of the President. With reference to this case article 132(4) (a) provides as follows:
- "(4) The President may--
- (a) perform any other executive function provided for in this Constitution or in national legislation and, except as otherwise provided for in this Constitution, may establish an office in the public service in accordance with the recommendation of the Public Service Commission."
21. Unquestionably an answer to this question involves interpretation of this sub-article by applying the pertinent principles of constitutional interpretation. As has been discussed time and again by the courts, it is imperative that the spirit of the Constitution presides and permeates the process of judicial interpretation. These principles which are anchored under article 259 of the Constitution direct this Court as follows:
- "1) This Constitution shall be interpreted in a manner that--
- a) promotes its purposes, values and principles;
- b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- c) permits the development of the law; and
- d) contributes to good governance."
22. The Supreme Court defined constitutional interpretation in the case of Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others [2014] eKLR as follows:
- “(142) For our purposes, interpretation of the Constitution involves revealing or clarifying the legal content, or meaning of constitutional provisions, for purposes of resolving the dispute at hand (call it the hermeneutic aspect). The basic reference-point in constitutional interpretation is the text. Application of the Constitution is a more dynamic notion. It comes into play when the provision of the Constitution remains in some vital respects (even after the jural process of content-ascertainment) indeterminate, or ambiguous, or vague, or contradictory. In other instances, a constitutional text may be quite clear on paper, but when applied to a dispute, it leads to absurd consequences. In such a situation constitutional application ceases to be a simple exercise in interpretative syllogism. It takes on the character of “creative interpretation” (see Jeffrey Goldsworthy, German Law Journal, Vol 14 No 08, pp 1279-1295(August 2013)), or what some American theorists have



called “constitutional construction” (see Randy E Barnett, Interpretation and Construction, 34 Harv JL and Pub Policy 65 [2010].”

23. The Supreme Court further highlighted and summarized the principles to be adhered to when interpreting the *Constitution* in the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR.

24. Guided by the law and opine above, I find one of the facets of a holistic interpretation to be an interrogation of the past. Fundamentally the question is what informed the description of the functions of the President before the promulgation of the *Constitution, 2010*. The *Final Report of the Constitution of Kenya Review Commission* (2005) states that on the attributes of the President they envisioned, the citizens averred as follows:

- "b) With respect to the office of the President, that
  - i. the President should not be above the law, a majority asserted; their concerns were that it should be possible to prosecute him/her for offence while in office. In this regard, it was also suggested that the Constitution provide for the President's removal for misconduct.
  - ii. the powers of the President should be curtailed; Kenyans felt the President should not have the exclusive power to appoint senior government officers; it was suggested that for many of the appointments be vetted by Parliament; that the President should not have the power to determine the election dates was a specific concern of many Kenyans."

25. The Commission on this point concluded as follows at page 199:

"The Presidency: The Head of State, must be more than ceremonial. He/she should have reasonable powers. However, those powers should be limited. Excess powers upset the internal balance within the Executive. The principal function of the presidency would be to symbolize national unity and promote national integration, security of State and the protection of the Constitution, and to provide an element of administration stability."

26. It is clear from the historical point of view that Kenyans were keen that the President should have limited reasonable power that is exercised within the confines of the law. Turning to the attributes of the 5<sup>th</sup> respondent which was categorized under the organs of the Government, the Committee at paragraph 13.6.5 under Chapter 13 revealed as follows:

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



demands were justifiably being made for security of tenure, adequate remuneration, and strict neutrality."

27. Naturally out of this conclusion one of the first recommendations made by the Committee was the establishment of an independent PSC (See: Paragraph 13.6.6 (a)(i) in the Report).
28. Article 132(4)(a) of the Constitution provides that the President can create an office in the Public Service in accordance with the recommendation of the 5<sup>th</sup> respondent. To my mind, the intention of this sub - article was to limit the President's power to create an office in the Public Service to the extent that the creation must be done in tandem with the 5<sup>th</sup> respondent's recommendation. The recommendation must basically be guided by the edicts of the Constitution and the law. It is apparent therefore that the two conditions as conceived were intended to be inseparable and work in harmony. This in my view was the intention of the drafters of the Constitution and aspirations of the Kenyans.
29. With this background in mind and principles of constitutional interpretation, the question that crystallizes is whether the additional 27 posts in the office of the CAS were properly constituted in light of the Constitution and the law. To answer this question, I will first examine how a public office under this Article is established. With reference to article 132(4) (a) of the Constitution, the PSC Act under section 30 provides as follows:

"Recommendation to the President

- (1) Where the President, under article 132 (4) (a) of the Constitution, requests the Commission to recommend the establishment of an office in the public service, the Commission shall act in accordance with the conditions provided for in this Part.
  - (2) Where the President considers it necessary to establish an office in the public service under article 132 (4) (a) of the Constitution, a request to the Commission for recommendation for establishment of an office shall be in writing."
30. The conditions of establishment of an office in the Public Service under section 27 are prescribed as follows:

"Conditions for establishment of offices

- (1) The Commission may establish an office in the public service after receipt of a written request by an authorized officer of a public body if the Commission is satisfied that—
  - a) the request is based on comprehensive plans informed by the public body's workload analysis;
  - b) the financial implications of creating the office are indicated;
  - c) the office to be created relates to or supports the core functions of the public body;
  - d) the office to be created is to be domiciled in the requesting public body;



- e) information on the current authorized establishment, level of grading, designation, extra posts required and evidence of optimum utilization of existing posts has been submitted;
- f) the office including its level of grading, qualification and remuneration shall not disadvantage similar offices in the public service or occasion unfair competition for staff among public bodies; and
- g) the functions of the office to be established are consistent with the Constitution or any other legislation.

(2). The written request for establishment of an office shall include a statement by the respective authorized officer verifying that the conditions in subsection (1) have been met."

31. Of essence to note is that the 5<sup>th</sup> respondent in performance of its mandate under the Act is to be guided by the principles provided under section 4. This section provides as follows:

"The Commission shall in fulfilling its mandate, be guided by the national values and principles of governance in article 10 of the Constitution and the values and principles of public service in article 232 of the Constitution."

32. Fundamentally for an office established under article 132(4)(a) of Constitution to be properly constituted, the same must satisfy the threshold set out under section 27 of the PSC Act as read with the provisions of articles 10 and 232 of the Constitution. The number of persons that can be recommended for this position (or one created under this Article) is not expressly stated in the Constitution or the PSC Act. Similarly, the requirement for approval of the National Assembly for the CAS position is not provided. What is clear is that any post that is established must comply with the principles of the Constitution and section 27 as read with section 30 of the PSC Act.

33. A look at the material before this court reveals through the affidavit of Felix Koskei, the Head of Public Service dated April 24, 2023 that on February 23, 2023, the President wrote to the 5<sup>th</sup> respondent seeking a review of the complement of CAS within the Public Service to vary from one in each Ministry to one in every state department. On the same day the 5<sup>th</sup> respondent's CEO, Simon Rotich wrote to the PS, Chris Kiptoo seeking concurrence on the availability of funds to meet resultant expenditure of the additional 27 posts of CAS.

34. The 5<sup>th</sup> respondent in response to the President's letter consented to this variation in its letter dated February 27, 2023. In the letter, the 5<sup>th</sup> respondent noted that the consent was based on workload attendant to the role of CAS and National Treasury's confirmation of funds. Following this communication, the President increased the complement of the office with additional posts, and asked the 5<sup>th</sup> respondent to recommend persons to be appointed which it did.

35. Additionally, in response to a letter dated October 18, 2022 and two letters dated March 10, 2023 by the 5<sup>th</sup> respondent, SRC wrote a letter dated March 14, 2023 to the 5<sup>th</sup> respondent advising it on the Job valuation grading and remuneration and benefits structure for the position of CAS in the Public Service. Soon after the 2<sup>nd</sup> to 51<sup>st</sup> interested parties were nominated on March 16, 2023 and appointed by the President on March 23, 2023.

36. From the letter dated February 23, 2023 it is discernible that the nature of the office of CAS varied drastically. In the initial letter dated September 19, 2022 the proposal was 'one position be established



in each Ministry, except in the Ministry of Interior and Coordination of National Government that would have two positions’ while in the letter dated February 23, 2023 the proposal was ‘a review of the complement of CAS within the Public Service to vary from one in each Ministry to one in every state department.’

37. This letter introduced a new element in the office that was not accounted for in the previous process that was found to be lawful. Furthermore, despite this vital additional aspect the 5<sup>th</sup> respondent went ahead to make a recommendation without seeking further information and justification as required under section 27 of the *PSC Act*. Likewise, the sequence and procedure that led to the establishment of the 27 additional CAS posts did not involve adherence to the constitutional principle under articles 10 and 232 of the *Constitution*.
38. I therefore find that the manner of establishment of the additional 27 posts in view of article 132(4) (a) of the *Constitution*, section 27 and 30 of the *Public Service Commission Act* and the necessity of the 5<sup>th</sup> respondent’s recommendation was unconstitutional. On the flipside I find the establishment of the CAS office in the Public Service with 23 posts to be constitutional.
39. The orders will be as proposed in the majority judgment.

**DELIVERED, DATED AND SIGNED THIS 3RD DAY OF JULY 2023 IN OPEN COURT.**

**H. I. ONG’UDI**

**JUDGE**

**Judgment read in open court in the presence of-**

**Mr. Matindi (In Person) for the 1<sup>st</sup> petitioner.**

**Mr. Theuri, Mr. Ogada, Mr. Kabata, & Ms. Kagai for the 2<sup>nd</sup> petitioner.**

**Mr. Ochiel, Mr. Rapei & Mr. Bosire for the 3<sup>rd</sup> petitioner.**

**. Matwele for the 4<sup>th</sup> petitioner.**

**Mr. Bitta for the 2<sup>nd</sup> respondent.**

**Ms. Nyaberi & Ms. Nganyi for the 3<sup>rd</sup> respondent.**

**Ms. Wahome for the 4<sup>th</sup> respondent.**

**Ms.J. Manani for the 5<sup>th</sup> respondent.**

**Ms. Njiru for the 1<sup>st</sup> interested party.**

**Mr. Nura & Mr. Somane for the 2nd to 7th; 9th to 18th; 20th, 21st; 23rd to 30th; and, 33rd to 51<sup>st</sup> interested parties.**

**Mr. Wanyama, Mr. Obondo & Mr. Kyallo for the 8th and 31st interested parties.**

**Mr. Arwa & Ms. Maina for 19<sup>th</sup> interested party.**

**Mr. Kamotho for the 22<sup>nd</sup> interested party.**

**Mr. Arwa H/B for Ms. Ondieki for the 32<sup>nd</sup> interested party.**

**Mr. Ombuna, Ms. Cheruto & Ms. Yattani Court Assistants.**

