REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Petition 229 of 2012

TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

MINISTER FOR JUSTICE NATIONAL

COHESION & CONSTITUTIONAL AFFAIRS.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

AND

MUMO MATEMU.....INTERESTED PARTY

WITH

KENYA HUMAN RIGHTS COMMISSION.....AMICUS CURIAE

ICJ-KENYA.....AMICUS CURIAE

JUDGMENT

OVERVIEW

1. This is a Petition questioning the constitutionality of the appointment of Mr. Mumo Matemu as the Chairperson of the Ethics and Anti-Corruption Commission (the Commission). The Petition was filed by the Trusted Society of Human Rights Alliance, a human rights society registered under section 10 of the Non-Governmental Organizations Coordination Act with the mandate to promote human rights and constitutionalism (*hereinafter* "**Petitioner**") against the Attorney General, the Minister for Justice and Constitutional Affairs and the

Director of Public Prosecutions (**"DPP")** as the 1st, 2nd and 3rd Respondents respectively. Mr. Mumo Matemu is listed as the Interested Party, and duly appeared as such for it is his appointment that is the subject of the Petition. On 12th July, 2012 the Kenya Human Rights Commission and the Kenya Section of the International Commission of Jurists were admitted into the Petition as *amici curiae*

2. The Petition dated 15th May 2012 is supported by an affidavit sworn by one Elijah Sikona who is the Chairperson of the society. The Petition was later amended on 4th June, 2012. In the Amended Petition, the Petitioner seeks, among others:

a. A declaration that the process and manner in which the Interested Party was appointed is unconstitutional;

b. A declaration that the Interested Party is not a fit and proper person with due regard to his honesty, dignity, personal integrity, dignity and suitability and hence his appointment shall be inconsistent with the Constitution and invalid.

c. An order of review and setting aside the approval and appointment of the Interested Party;

d. The Petitioner be paid costs

3. The Petition having been certified as raising a substantial question of law under Article 165(3) (b) or (d) of the Constitution, the Chief Justice assigned the hearing of this petition to three judges pursuant to Article 165(4) of the Constitution hence the composition of this bench. We accordingly gave directions inter alia allowing the *amici* to appear and make representations and for the filing and exchange of written submissions.

The Facts

4. The facts surrounding the case are fairly straightforward. The Constitution provides at Article 79 that Parliament shall enact legislation to give effect to the provisions of Chapter Six and to establish a commission to deal with ethics and integrity issues. Pursuant to this mandate, Parliament passed the Ethics and Anti-Corruption Commission Act ("the Act") which became law on 5th September, 2011 upon receiving Presidential assent. The Act repealed Part III of the Anti-Corruption and Economic Crimes Act (Act No. 3 of 2003) which

had established the (former) Kenya Anti-Corruption Commission, and established a new commission with a mandate as set out in section 11 of the Act. The Act laid down the procedure for the appointment of members of the new commission.

5. Section 6 of the Act lays down the procedure for the appointment of members of the Commission as follows:

6. *(1) The President shall, within fourteen days after the commencement of this Act, constitute a selection panel comprising one person from each of the following bodies:*

(a) the Office of the President;

(b) the Office of the Prime Minister;

(c) the Ministry responsible for ethics and integrity;

(d) the Judicial Service Commission;

(e) the Commission for the time being responsible for matters relating to human rights;

(f) the Commission for the time being responsible for matters relating to gender;

(g) the Media Council of Kenya;

(h) the joint forum of the religious organisations described in subsection (2), and

(i) the Association of Professional Societies of East Africa.

(2)The joint forum of religious organizations referred to in subsection (1)(h) shall consist of representatives of–

(a) the Supreme Council of Kenya Muslims;

(b) the Kenya Episcopal Conference;

(c) the National Council of Churches of Kenya;

(d) the Evangelical Fellowship of Kenya; and

(e) the Hindu Council of Kenya.

(3) The Public Service Commission shall"

(a) convene the first meeting of the selection panel, at which the members of the selection panel shall elect a chairperson from among their number; and

(b) provide the selection panel with such facilities and other support as it may require for the discharge of its functions.

(4) The selection panel shall, within seven days of convening, by advertisement in at least two daily newspapers of national circulation, invite applications from persons who qualify for nomination and appointment for the position of the chairperson and members referred to under section 4.

(5) The selection panel shall

(a) consider the applications received under subsection (4) to determine their compliance with the provisions of the Constitution and this Act;

(b) short list the applicants;

(c) publish the names of the short listed applicants and the qualified applicants in at least two daily newspapers of national circulation;

(d) conduct interviews of the short listed persons in public;

(e) shortlist three qualified applicants for the position of chairperson;

(f) shortlist four qualified applicants for the position of the members; and

(g) forward the names of the qualified persons to the President.

(6) The President shall, within fourteen days of receipt of the names of successful applicants forwarded under subsection (5) (g), ***select*** *the chairperson and members of the Commission and forward the names of the persons so selected to the National Assembly for approval.*

(7) The National Assembly shall, within twenty-one days of the day it next sits after receipt of the names of the applicants under subsection (6), ***vet*** *and consider all the applicants, and may approve or reject any or all of them.*

(8) Where the National Assembly approves of the applicants, the Speaker of the National Assembly shall forward the names of the approved applicants to the President for appointment.

(9) The President shall, within seven days of receipt of the approved applicants from the National Assembly, by notice in the Gazette, appoint the chairperson and members approved by the National Assembly;

(10) Where the National Assembly rejects any nomination, the Speaker shall within three days communicate its decision to the President and request the President to submit fresh nominations.

(11) Where a nominee is rejected by the National Assembly under subsection(10), the President shall within seven days, submit to the National Assembly a fresh nomination from amongst the persons short listed and forwarded by the selection panel under subsection (5).

(12) If the National Assembly rejects any or all of the subsequent nominees submitted by the President for approval under subsection (11), the provisions of subsections (1) to (6) shall apply.

(13) In short listing, nominating or appointing persons as chairperson and members of the Commission, the selection panel, the National Assembly and the President shall ensure that not more than two-thirds of the members are o the same gender.

(14) The selection panel may, subject to this section, determine its own procedure.

(15) After the first general elections under the Constitution, the member of the selection panel under subsection (1) (b) shall be replaced by a representative of the Public Service Commission.

(16) The selection panel shall stand dissolved upon the appointment of the chairperson and members under subsection (9).

(17) Where the provisions of subsection (11) apply, the selection panel shall continue to exist but shall stand dissolved upon the requisite appointments being made under subsection (12).

(18) Despite the foregoing provisions of this section, the President may, by notice in the Gazette, extend the period specified in respect of any matter under this section by a period not exceeding twenty-one days.

6. Pursuant to the foregoing provisions, the President constituted a selection panel which advertised the vacancies in the mainstream press. The Interested Party and other persons applied for the positions. The selection panel then shortlisted candidates, including the Interested Party, from among the applicants. It then placed an advertisement in the media inviting the public to submit any relevant information about those who had been shortlisted. The panel then interviewed the shortlisted candidates and recommended three for the position of Chairperson of the Commission. The persons whose names were recommended and forwarded to the President and the Prime Minister are: the Interested Party; Mr. Erick O. Omogeni; and Dr. Sarah M. Kilemi.

7. The President and the Prime Minister then selected the Interested Party out of the three who had been recommended for chairmanship, and submitted his name to Parliament for further vetting and approval. In accordance with Parliamentary procedure, the name of the Interested Party was submitted to the Departmental Committee on Justice and Legal Affairs (**"Parliamentary Committee"**). The Parliamentary Committee then interviewed the Interested Party, after which it prepared a report on his suitability to the full House. In the report, the Parliamentary Committee found the Interested Party as well as the candidates recommended for appointment as members of the Commission were "unfit" to hold office because they did not have the "passion" for the job.

8. The report of the Parliamentary Committee was duly tabled and debated by the House. In the course of the debate, some members of the House differed with the finding of the Parliamentary Committee on the ground that the Parliamentary Committee's basis for objecting to the candidates was neither a statutory nor constitutional requirement. The integrity of the Interested Party was briefly mentioned in the debate. In the end, Parliament rejected the recommendation from the Parliamentary Committee and recommended the appointment of the Interested Party as the Chairperson, and the two other persons as Commissioners and submitted the names to the President for appointment. The President then appointed the Interested Party to the position of Chairperson of the Commission through Gazette Notice Number 6602 (Volume CXIV – No. 40) dated 11th May, 2012.

9. It was this appointment that precipitated the filing of this Petition.

The Petitioner's Case

10. The gist of the Petitioner's case is that the Interested Party does not meet the constitutional threshold required for appointment to the office of the Chairperson of the Commission. It argued that Parliament and the Executive abdicated their constitutional duty to ensure they select a candidate who meets the constitutional threshold.

11. The Petitioner contended that every person who is interested in the Chairmanship of the Commission has to meet the threshold set out in Chapter Six of the Constitution. It is its case that although the formalities for the appointment of the Chairperson were followed, the person who was appointed does not meet the criteria laid down in the Act and the Constitution.

12. This, the Petitioner says, is because of some actions by the Interested Party at a time when he held several senior positions at the Agricultural Finance Corporation (*hereinafter* "AFC"). More specifically, it questions his integrity by stating that he swore an affidavit with false information on the amount of money that a company known as Rift Valley Agricultural Contractors Limited ("RVAC") owed AFC, and secondly, that as Legal Officer at AFC, he approved certain loans which had not been properly secured, and whose proceeds were paid out in fraudulent and unclear circumstances. The Petitioner claims that some of these allegations were the subject of criminal investigations by the police and the Criminal Investigations Department (CID) but the investigations have never been completed. The

Petitioner pointed out to the Court that the criminal investigations file is still open with a recommendation that the Interested Party be interviewed. The Petitioner adds that during the Interested Party's tenure as Legal Officer at AFC, the company's governance record was characterized by mismanagement, dubious writing off of debts and loss of billions of shillings of tax payers' money.

13. Mr. Gordon Ogola, Learned Counsel for the Petitioner, contended that parliamentary proceedings were not concerned with the integrity of the Interested Party. He referred to the *Hansard* report of Parliamentary proceedings particularly the contribution by the Vice-President from which he inferred that Parliament was not concerned with the integrity of the Interested Party. The question of integrity was also raised by Hon. Gitobu Imanyara – the Honourable Member of Parliament of Imenti Central - but the Petitioner contended that the issue was not adequately considered. Mr. Ogola argued further that since the investigations file is still open, it is not prudent to have a person facing fraud investigations of this nature heading the all-important Ethics and Anti-Corruption Commission.

14. Mr. Ogola further argued that the fact that the Parliamentary Committee rejected the appointment of the Interested Party, and that the motion was only narrowly passed in the full House by the casting vote of the Acting Speaker means the Interested Party did not get a clear majority.

15. Mr. Ogola admitted that the "right" process was followed, and that it was transparent, but he asserted that the fact that Parliament did not discuss the Interested Party's integrity after the issue was raised by Hon. Imanyara invalidates the appointment. It is the Petitioner's position that the mere fact that Parliament went through the formal motions, does not mean that the outcome was right.

16. To the argument that the Respondents were the wrong parties to the Petition, Mr. Ogola submitted that he sued the right parties because the Attorney General is the legal advisor to the government while the Commission falls under the Ministry of Justice, National Cohesion and Constitutional Affairs. The Director of Public Prosecutions, on the other hand, was also a proper party to the suit as he had within his knowledge matters relating to the suitability of the Interested Party for the position to which he was appointed.

***Submissions by* Amici**

17. Learned Counsel, Mr. Wilfred Nderitu appeared for the *amici*, Kenya Human Rights Commission and the Kenya Section of the International Commission of Jurists. He relied on the written submissions filed on 18th July 2012. According to him, this case calls upon the Court to make a clear pronunciation on the letter and spirit of the Constitution with regard to acts done in the name of the Constitution. He referred the Court to Article 94(2) of the Constitution which provides that legislative authority is derived from the people. He submitted that this Article must be read together with Articles 1, 2 and 3 of the Constitution. It is his position that the Constitution is supreme and as such, Parliament must act in accordance with the Constitution as there is no such thing as supremacy of Parliament outside the Constitution. He argued that this case must be determined in a manner that promotes constitutional values and good governance.

18. Mr. Nderitureferred the Court to Article 79 of the Constitution which requires Parliament to enact legislation establishing the Commission. To perform its functions, this Commission needs to be independent and its independence starts with the independence and integrity of the process which led to the appointment of the Commissioners. He argued that in order for this independence to be realized, there should be no failure to adhere to the provisions in the Constitution including Article 73 on integrity and suitability. There should be impartiality in decision making, which decision should not be influenced by improper motives.

19. Mr. Nderitu submitted that the Court will have to look at the documentary evidence submitted and come to a conclusion whether or not there was compliance with the Constitution. If the Court reaches the conclusion that the decision of Parliament was on a basis other than that contemplated by the Constitution, the Court must make appropriate orders to protect the Constitution. He argued further that there is sufficient material before the Court to doubt that there was adherence to constitutional provisions.

20. The Counsel for the *amici*, while stating that he was expressing no opinion whether or not Parliament acted in accordance with the Constitution, submitted that the court is under a duty to use its own objective measure to determine if Parliament acted in accordance with the Constitution. He added that due to the nature of the functions of the Commission, there should be no doubt in the mind of the public that the Commission will not be steadfast in enforcing

Chapter 6 of the Constitution. He, however, urged the court to grant an order that would nullify the appointment of the Interested Party.

1st and 2nd Respondents' Case

21. The 1st and 2nd Respondents were represented by the office of the Attorney General. They filed Grounds of Opposition and submissions in support of their case. In their written submissions, the Respondents argued that although the Petitioner alleges that it is acting on behalf of a third party, the Petition does not disclose the incapacity suffered by the third party which stopped it from coming to Court on its own behalf. They argue further that there is no formal resolution from the company allowing the Petitioner to file the Petition on its behalf. As such, the Respondents submit that the Petitioner lacks the *locus standi* to file this Petition. The Respondents argued further that the Petition does not disclose with reasonable certainty the provisions of the Constitution which are alleged to have been contravened, and the actions complained about. They have cited several authorities in which the High Court has held that constitutional petitions must succinctly state what provisions are alleged to have been contravened and the actions complained about.

22. The 1st and 2nd Respondents also argued that they have been wrongly joined to the suit since they were not involved in the appointment of the Interested Party. They contended that the Petitioner cannot question the appointment of the Interested Party through a constitutional petition when, throughout the appointment process, they had several opportunities to submit complaints on his character and integrity to various organs charged with his appointment. Related to this point, the Respondents argued that the matters which have been brought up in this Petition were the same as those canvassed in a previous court case and as such, it is improper to raise them in the form of a constitutional petition. It is also their case that the integrity of the Interested Party was adequately considered by Parliament and other appointing organs and as such, the Court has no business re-investigating such matters.

23. More importantly, the Respondents argue that the appointment of the Interested Party followed the procedure set by law, and any attempt by the Court to reopen the appointment would be in contravention of the doctrine of separation of powers. In support of this position, the Respondents relied on ***Constitutional Petition No. 101 of 2011 Kenya Youth Parliament***

& 2 Others v Attorney General and ***Constitution Petition No. 102 Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v Attorney General & Another.***

24. Without prejudice to the above arguments, the Respondents are also of the opinion that the material presented by the Petitioner is not sufficient to establish its claim that the Interested Party lacks integrity and is therefore unfit to hold office. Finally, the Respondents submitted that since the Interested Party had already been gazetted, his appointment could not be challenged. Rather, the Petitioner should have sought his removal through the right procedure for the removal of a commissioner.

25. In his submissions, Mr. Muiruri, Learned Counsel for the 1st and 2nd Respondents, also urged the Court to pay little regard to the submissions by the *amici* for being partial. He then reiterated the position that the High Court's jurisdiction in a case such as this is limited to a procedural review rather than a merit review of decisions made by the legislature. He added that the Petition did not succinctly disclose the provisions of the Constitution alleged to have been contravened, and that given the conduct of the Petitioner, they should not be awarded costs even if they were to succeed on the merits of the Petition.

The 3rd Respondent's Case

26. The 3rd Respondent filed a Replying Affidavit as well as written submissions in which he maintained that not only was he not involved in the recruitment of the Interested Party but also that there is no mention in the Petition of how the DPP contravened any constitutional provisions. He submitted that the Petition is an afterthought since the Petitioner did not attempt to make any complaints to the relevant organs during the appointment process. He contended that the name of the Interested Party did not feature in the reports filed with the Police by a Director of RVAC; that the Interested Party was not under investigation and as such, the Petitioner has failed to establish that he lacks integrity. Mr. Okello, who appeared for the DPP, concluded by asking the court to dismiss the Petition for it was an abuse of the court process.

The Interested Party's Case

27. The Interested Party filed a Replying Affidavit in opposition to the Petition. In this Affidavit, the Interested Party laid down the process that was followed in his appointment, stressing that the Petitioner and any other member of the public had ample opportunities to present memoranda on the suitability of any of the candidates who were being considered for the position. He argued that having failed to make use of such opportunities, the Petitioner is stopped from denying that it had the opportunity to complain. He argued further that the Petition merely quotes a broad spectrum of Articles in the Constitution without disclosing with reasonable precision the provisions of the Constitution which are alleged to have been breached. Moreover, the Interested Party argued that this Court cannot substitute its decision for that made by other State Organs in the selection process – that it should only ascertain whether the said organs acted in accordance with the Constitution, a fact which the Petition has failed to establish. He also stated in his Affidavit that his integrity was conclusively debated in Parliament and the Petitioner cannot thereafter ask a Court of law to reconsider the same.

28. The Interested Party also stated that the 1st and 3rd Respondents were not involved in his selection and as such they are improperly joined in the suit. Additionally, he stated that the allegations made by the Petitioner were already deliberated upon in Parliament so that in arriving at its decision to approve the appointment, Parliament took all relevant matters into consideration. He annexed to his affidavit copies of the *Hansard* report of Parliamentary proceedings from the relevant days. The Interested Party also denied the claim that he participated in the approval of any loans by AFC. Moreover, he stated that the dispute between RVAC and AFC was settled through HCCC No. 1535 of 1999 and as such, the issues raised by the Petitioner having been laid to rest should not be revived under the guise of a constitutional petition. The Affidavit he swore in that case, he stated, was sworn with the authority of his employer and not in his private capacity, and it should not be investigated by this Court since it served a specific purpose in a case which has since been concluded. The Interested Party also stated that the prayers in the Petition are not capable of being granted.

29. Mr. Gatonye, Learned Counsel for the Interested Party, argued that the process laid down by law for the appointment of the Chairperson of the Commission was followed to the letter, and that the process was transparent and open to public participation. He argued further that the Petitioner did not fault any of the steps in the appointment process.

30. The Interested Party also faulted the Petitioner for failing to state with sufficient clarity the provisions of the Constitution which were allegedly contravened in the appointment process. He relied on ***Constitutional Petition No. 65 of 2011 John Harun Mwau & 2 Others v Attorney General & 2 Others.***

31. On jurisdiction, the Interested Party submitted that this Court cannot substitute its decision for that of any other organs involved in the appointment of the Interested Party if the appointing authority acted within the four corners of the law; that this Court should not get involved in investigating the fitness of the Interested Party. According to Mr. Gatonye, this argument is supported by the position adopted by this Court in***Constitutional Petition No. 243 of 2011 Community Advocacy & Awareness Trust & 8 Others v Attorney General***. Closely related to this, the Interested Party argued that the power over the appointment of the Interested Party is vested by law on the Legislature and other organs in the appointment process all of which exercised their discretion properly within the law and as such, the Court cannot usurp the powers vested in those organs. The Interested Party also relied on ***Kenya Youth Parliament & 2 Others v Attorney General (supra)*** and ***Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v Attorney General & Another (supra)*** in this regard.

32. The Interested Party further submitted that the Petitioner, having failed to file complaints with the relevant authorities which sought memoranda from the public during the appointment process, is stopped from denying that it lacked sufficient opportunity to voice its concerns about the suitability of the Interested Party. Moreover, added the Interested Party, the Petitioner has not shown any disability on the part of the RVAC that stopped it from filing the Petition in its own name. Additionally, the Interested Party submitted that the report that was made about RVAC related to a dispute between two directors of the company and at no point in the investigations was the Interested Party mentioned in person. The Interested Party argued that he was not involved in loan approvals generally, and certainly not the loan approvals for RVAC. He argued further that the case resulted in a court case and as such, the Petitioner cannot open fresh litigation on the same matter under the guise of a constitutional petition.

33. Mr. Gatonye submitted that although the Petition complained of actions by the National Assembly, the Speaker of the National Assembly was not joined as a party and it would be difficult to issue orders against a person who is not a party to the proceedings.

34. He argued that the Court had no jurisdiction in matters over which other arms of government have been vested with jurisdiction and authority to act. However, Mr. Gatonye conceded that in the new constitutional dispensation, there are exceptional circumstances when the Court can properly and legitimately review the decisions of other State organs – including Parliament -- where those organs act in complete contravention of the Constitution. While Mr. Gatonye did not fashion a specific test for identifying those "exceptional" cases when the Court might "interfere" with the decision of another State Organ, he submitted that this present case was not one of those exceptional situations and as such, the Court should not issue the orders sought. He reminded the Court that the Petition is not grounded on the *Hansard* but on the Supporting Affidavit to make the argument that there was insufficient material before the Court for it to take the rare step of reviewing Parliamentary action. In other words, whatever the test for "exceptional circumstances" he had alluded to, it had not been reached here.

35. Regarding the comments made in Parliament by the Vice President as contained in the *Hansard* , Mr. Gatonye submitted, first, that it was not an indication that Parliament was not concerned with the integrity of the candidate but rather that it should set "human" or realistic standards for integrity, and secondly, that those were merely the comments of one member of the House which should not be taken as the official position of Parliament. If anything, Mr. Gatonye submitted, the material before this Court was also placed before Parliament and there were comments on integrity of the Interested Party from both sides of the debate, which is an indication that Parliament gave due consideration to the integrity of the candidates, thereby deciding on his appointment in the manner laid out in the Constitution and the Act. He also argued that Parliament was in a better position to judge the integrity of the Interested Party and with all the information presented to it, Parliament decided that the Interested Party was fit for office.

36. Mr. Gatonye urged this Court not to replace the decision of the appointing authorities with its own simply because it would have arrived at a different decision. The Court should

respect the decisions of other organs of government because, when there is too much readiness to interfere with such decisions, a constitutional problem will be precipitated.

37.Finally, Mr. Gatonye argued that the prayers sought in the Petition and the Amended Petition are not capable of being granted by this Court.

Issues for Determination

38.Having set out the respective submissions of the parties, this Court takes the view that the following are the issues for determination in this matter:

a. Does the court have jurisdiction to hear the petition?

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

c. Is the Petition moot for failure by the Petitioner to complain about the appointment during the appointment process?

d. If the Court has jurisdiction to entertain the Petition, the Petitioner has standing to sue and it has sued the right parties, and the Petition is not moot, does the appointment of the Interested Party pass constitutional muster?

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

A. Jurisdiction

39. Jurisdiction is the first issue the Court should deal with, for without it, the entire process and the resulting orders will be a nullity. As was stated by Nyarangi JA in ***The Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited (1989) KLR 1*:**

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

40. Ojwang J. (as he then was) also had this to say on jurisdiction in ***Misc. Application No.639 of 2005 Boniface Waweru Mbiyu v Mary Njeri & Another*:**

The entry point into any court proceeding is jurisdiction. If a court lacking jurisdiction to hear and determine a matter overlooks that fact and determines the matter, its decision will have no legal quality and will be a nullity. Jurisdiction is the first test in the legal authority of a Court or tribunal, and its absence disqualifies the Court or tribunal from determining the question.

41. It is not in doubt that the High Court is the right forum for cases challenging the constitutionality of actions done under the authority of the Constitution. Article 165 of the Constitution provides that:

165(3)(d) subject to clause (5), the High Court shall have—

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(ii) ***the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.*** (Emphasis ours)

42. Based on the above provision of the Constitution, we take the view that this case has been rightly filed before the High Court.

43. The Respondents and the Interested Party, however, make the further argument that the Petitioner has not properly invoked the jurisdiction of the Court because the Petitioner did not frame its case with "reasonable precision." This harkens to the rule of law enunciated in the famous case of ***Anarita Karimi Njeru v The Republic (1976-1980) 1 KLR 1272*** and its progeny to the effect that a constitutional petition must state, with reasonable precision, the provisions of the Constitution which are alleged to have been contravened and the manner in which they are infringed. In that case, Justices Trevelyan and Hancox stated that:

We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of

which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

44. Both the Respondents and the Interested Party argued that the Petition has merely quoted omnibus provisions of the Constitution which are alleged to have been contravened without stating which specific provisions have been contravened, and how they have been contravened.

45. We must point out that ***Anarita Karimi Njeru*** was decided under the Old Constitution. The decision in that case must now be reconciled and be brought into consonance with the New Constitution. In our view, the present position with regard to the admissibility of Petitions seeking to enforce the Constitution must begin with the provisions of **Article 159** on the exercise of judicial authority. Among other things, this Article stipulates that:

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

46. We do not purport to overrule ***Anarita Karimi Njeru*** as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.

47. While the present Petition might not be the epitome of precise, comprehensive, or elegant drafting, our view is that the complaints raised by the Petitioner are concrete enough to warrant substantive consideration by the Court: The Petitioner complains against the appointment of the Interested Party to the Commission; and thinks that the appointment, at a minimum, violates Article 73 of the Constitution as far as integrity and suitability of the Interested Party for the appointment to the position is concerned. That much seems not to be in doubt. Indeed, both the Respondents and the Interested Party have proceeded from this understanding. They have sought to explain at length the contours of Article 73 and Chapter Six of the Constitution in response to the Petitioner's allegations. If one needed evidence that these parties understood the claim facing them, it is to be found in their various papers filed in Court and the oral submissions made in Court. This being a constitutional issue of immense public importance and interest, we refuse to worship at the altar of formal fetishism on this issue and hold that the controversy at issue has been defined with reasonable precision to warrant a proper judicial determination on merits.

B. Does the Petitioner have *locus standi* to file the Petition, and should it be filed against the Respondents?

48. The Respondents argued that the Petitioner is not the right person to present the case to Court, and perhaps, that the right Petitioner would have been the RVAC which alleges that it lost money due to the actions of the Interested Party while he was a Legal Officer at the AFC.

49. Moreover, both the Respondents and the Interested Party have questioned whether the Attorney General and the Minister for Justice are the proper Respondents to this Petition since neither of them was involved in the appointment of the Interested Party.

50. The test for *locus standi* in constitutional petitions has been laid down in Article 258 of the Constitution.

258. *(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.*

(2) *In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—*

(a) a person acting on behalf of another person who cannot act in their own name;

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

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

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

51. The Respondents and the Interested Party have claimed that the Petitioner should not have filed the Petition on behalf of RVAC because the latter is not in any way unable to act on its own. It is true that the Petitioner\'s concern with the integrity of the Interested Party appears to have arisen out of the Interested Party's dealings with the RVAC, a private company. However, the Petitioner is a Human Rights Society registered under section 10 of the Non-Governmental Organizations Coordination Act. Its mandate is to promote human rights and constitutionalism. It is therefore evident that the Petitioner is acting in the public interest and is entitled to bring this Petition.

52. The Petition has been filed against, among others, the Attorney General who claims he is the wrong Respondent because he was not in any way involved in the appointment of the Interested Party. The office of the Attorney General is established by Article 156 of the Constitution which provides that

156 (4) The Attorney-General—

(a) is the principal legal adviser to the Government;

(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings.(Emphasis ours)

53. The appointment of the Interested Party was done by the President through a Gazette Notice. The selection and vetting on the other hand was done first by the selection panel (constituted by the President, and comprising representatives from the Office of the President, the Office of the Prime Minister, the Ministry responsible for justice, independent commissions, media, religious organizations and professional associations) then by Parliament as required under the Ethics and Anti-Corruption Act, 2011. It is clear therefore

that the selection panel was performing an executive function on behalf of the President. As such, if there is anything allegedly wrong with the appointment process or the person appointed, then the right person to sue is the appointing authority which is the President. When an action is intended against the President in his official capacity the suit is filed against the Attorney-General and he is, therefore, a proper party to these proceedings.

54. The Petitioner argues that the Minister for Justice, National Cohesion and Constitutional Affairs handles the docket responsible for matters justice. It is true that the affairs of the Commission squarely fall under this ministry. However, under the provisions of Article 156(4)(b), as part of national government, the Minister is required to be represented by the Attorney General. In our view, therefore, the Minister's inclusion as a Respondent in this case was superfluous and unnecessary.

55. The Director of Public Prosecutions was named as the 3rd Respondent. The office of Director of Public Prosecutions is established by Article 157 of the Constitution. The functions are to initiate prosecutions, take over prosecutions initiated by other persons/authorities and, in some cases, discontinue prosecutions. In performing these functions, the DPP has the responsibility to ensure the Constitution and the values therein are observed. In fact, under Article 157(11), the DPP is required to take into account public interest in the discharge of his functions. The Petitioner alleges that the DPP had, in his knowledge, information about the suitability of the Interested Party to hold public office. In the Petitioner's mind, in fact, the information that the DPP had was sufficient to sustain a criminal charge. If true, it would be, to our mind, a dereliction of constitutional duty for the DPP to have failed to present such information during the process of vetting of the Interested Party. The position is that since the DPP bears the responsibility for criminal prosecutions, it is expected that he will be an instrumental office in the vetting of public officials. Hence, while the DPP might not have been directly involved in the process of appointment of the Interested Party, he bore responsibility to properly inform the appointing authorities about the investigations facing the Interested Party. The DPP has, therefore, been properly joined in this petition.

C. IS THE PETITION MOOT?

56. The Respondents and the Interested Party argued that the Petitioner had the opportunity to present its complaints against the suitability of the Interested Party to the Selection Panel and the Parliamentary Committee both of which invited public memoranda on the nominees. They argued that the Petitioner should not have filed this case at this stage because he failed to utilize these opportunities.

57. The Respondents argued further that since the Interested Party has actually been gazetted, he has in effect been appointed as the Chairperson of the Commission and his removal can only be in accordance with the procedure set out in the Constitution and the Act for the removal of a commissioner, and not by a constitutional petition challenging his appointment.

58. A similar question on the timing of a petition against an appointment to a public office was raised in Petition No. 102 of 2011 ***FIDA-K & Others v- The Attorney General & Another (Supra),*** **where Justices Mwera, Warsame, and Mwilu held that:**

If the process of the appointment is unconstitutional, wrong, unprocedural or illegal, it cannot lie for the Respondents to say that the process is complete and this Court has no jurisdiction to address the grievances raised by the Petitioners. In our own view even if the five appointees were sworn in, this court has jurisdiction to entertain and deal with the matter.

59. We have already noted that anybody has a right to bring a Petition challenging the constitutionality of an action, and it should not matter that the Petitioner did not present any complaints during the selection or vetting process. The fact that the person who was appointed does not meet the constitutional threshold will not change merely because the person who brings the matter to Court did not raise it during the selection process, and the Court cannot shy away from making such a determination if sufficient evidence is presented before it. Needless to say, the Petitioner must exercise vigilance to file such a case within a reasonable time following the appointment. In addition, the Court must be satisfied that the constitutional challenge is not brought in bad faith or merely for purposes of harassing or delaying legitimate governmental processes. In this case, it has not been alleged that the Petitioner willfully sat on information and delayed bringing it to light in order to obstruct the appointment process through Court action. On the contrary, the evidence that has emerged shows that the Petitioner knew that the

information it had was raised in Parliament. It, therefore, had a right to expect that the matter would be thoroughly investigated and debated before the appointment was made. The Petitioner's specific argument is that this was neither done by Parliament nor by the Executive as it had expected. It therefore follows that this was the earliest point in the process when the Petitioner could bring the challenge. Consequently, we hold that the Petition is not moot.

D. DOES THE COURT HAVE JURISDICTION TO GIVE THE ORDERS SOUGHT?

60. The Respondents and the Interested Party hold the unanimous view that any attempt by the Court to review the process of appointment of the Interested Party will be an unlawful interference with the powers vested by the Constitution on the Executive and the Legislature. The Respondents have argued that the Court has no jurisdiction to grant the orders sought by the Petitioner because the Court would be intruding into the realm of Executive and Legislative powers. They concede, however, that the Court has power to review the procedure followed by the appointing authority, but not the merit of the decision. They urge this Court to hold that respect for the doctrine of separation of powers between the different arms of government necessitates that the Court embraces constitutional humility and accepts the decisions of the other constitutional organs.

61. The Interested Party raised similar arguments with regard to the doctrine of separation of powers. However, the Interested Party would go a little further. He conceded that the Court would be entitled to review process both in terms of the procedure of the appointment as well as the "substance" of the appointment itself in "exceptional" circumstances where such an appointment is in "complete contravention" of the Constitution.

62. From the above arguments, two questions arise for consideration. First, does the doctrine of separation of powers disentitle the Court from reviewing the appointment of the Interested Party? Second, if the answer to the first question is in the negative, what test should the Court apply to determine if the appointment passed constitutional muster?

63. In answering these constitutional questions, it is imperative that we begin by re-stating that the doctrine of separation of powers is alive and well in Kenya. Among other pragmatic manifestations of the doctrine, it means that when a matter is textually committed to one of

the coordinate arms of government, the Courts must defer to the decisions made by those other coordinate branches of government. Like many modern democratic Constitutions, the New Kenyan Constitution consciously distributes power among the three co-equal branches of government to ensure that power is not concentrated in a single branch. This design is fundamental to our system of government. It ensures that none of the three branches of government usurps the authority and functions of the others. This constitutional design is a direct influence from Montesquieu, the noted French Philosopher who is often called the father of modern constitutionalism. Noting that separation of powers was essential to the liberty of the individual, Montesquieu famously said:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.... There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals. 1 Charles Secondat, Baron de Montesquieu, The Spirit of the Laws 151-52 (Thomas Nugent trans., Hafner Publishing Co. 1949) (1748).

64. Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuan influence is palpable throughout the foundational document, the Constitution, regarding the necessity of separating the governmental functions. The Constitution consciously delegates the sovereign power under it to the three branches of government and expects that each will carry out those functions assigned to it without interference from the other two. We readily agree with the Respondents that this must mean that the Courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent. Yet, as the Respondents also concede, the Courts have an interpretive role – including the last word in determining the constitutionality of all governmental actions. That, too, is an incidence of the doctrine of separation of powers.

65. The question, then, is what the outer limits of the doctrine of separation of powers are in the context of appointments by the coordinate branches of government to State or public

offices especially on the determination of whether the proposed appointees meet the constitutional criterion for appointment. The High Court of Kenya has faced this issue in at least two occasions. In ***FIDA-K & Others –Vs- The Attorney General & Another (Supra),*** **Justices Mwera, Warsame and Mwilu stated that:**

The jurisdiction of this court is dependent on the process and constitutionality of appointment. In this sense, if the Judicial Service Commission, a State Organ does anything or omits to do something under the authority of the Constitution and which contravenes that Constitution, that act or omission when so proved before the High Court shall be invalid. Accordingly we find and hold that we are properly seized of this Petition as we have the requisite jurisdiction. We think the objection raised by the Respondents against the Petition as concerns our powers to determine the dispute is without merit.

66. The same judges reiterated this position in ***Kenya Youth Parliament & 2 Others v Attorney General & Another (Supra)*** where they stated that:

The process of the nomination, confirmation and appointment of the 2nd Respondent is the central attack in the present Petition and we find that we are clothed with the requisite jurisdiction being as we are, the High Court which is the supreme upholder and protector of the Constitution and we have only one option, to obey each command of the Constitution. We appreciate and respect the doctrine of separation of powers but find that in this case it is not applicable. We would not be wandering into the no go zones of the Executive by venturing into the matter of the appointment of the Director of Public Prosecutions to interrogate the constitutionally prescribed process under Article 157 of the Constitution. In actual fact it is this Court's sole mandate to provide checks and balances for the Executive and the Court will not hesitate to interfere when called upon to enter and interpret the Constitution and supervise the exercise of constitutional mandates. We find that to do otherwise would be a dereliction of our constitutional mandate.

67. The Learned Judges went further to state that:

We state here, with certain affirmation, that in an appropriate case, each case depending on its own peculiar circumstances, facts, and evidence, this Court clothed with jurisdiction as earlier stated, would not hesitate to nullify and revoke an appointment that violates the spirit

and the letter of the Constitution but the Court would hesitate to enter into the arena of merit review of a constitutionally mandated function by another organ of State that has proceeded with due regard to procedure.

68. Both the Respondents and the Interested Party have relied on this paragraph from ***Kenya Youth Parliament (Supra)*** to buttress their position that the Court has no jurisdiction to question the appointment if the correct process was followed. However, the Court's holding in this case is clear that it does not rule out the possibility of the Court reviewing the constitutionality of a decision by a coordinate arm of government beyond procedural matters: the Court merely advises that it must exercise an abundance of caution in doing so where procedural infirmity is not alleged or proved in the decision-making process. Indeed, the Court cited with approval the Supreme Court of Appeal of South Africa case of ***Democratic Alliance v The President of the Republic of South Africa & 3 Others, (case no. 263/11) (2011) ZA SCA 241*** and stated that:

That case [i.e. the Democratic Alliance Case] was not similar to this one but the decision, though not binding on this Court is of great persuasive value and reinforces the view we have expressed elsewhere in this judgment that in an appropriate case and depending on the particular circumstances and evidence in that particular case, this Court has jurisdiction to declare an appointment violative of the Constitution and therefore a nullity and to set aside such an appointment as was the case in the South African case.

69. Of these cases, the Court in ***FIDA-K v The Attorney General (Supra)***, most notably found that "because the courts have the ultimate and sole responsibility of the interpretation of the law" the Court is entitled to determine whether the political body's "interpretation of the provisions of the Constitution is unconstitutional." In other words, the Court has jurisdiction over a State organ's interpretation of their constitutional mandate. The ***FIDA-K*** Court firmly, and, in our view, correctly stated:

In actual fact it is this Court's sole mandate to provide checks and balances for the Executive and the Court will not hesitate to interfere when called upon to interpret the Constitution and supervise the exercise of Constitutional mandates. We find that to do otherwise would be a dereliction of our Constitutional mandate.

70. Indeed, this has been the position in most constitutional democracies since the famous American landmark case of ***Marbury v Madison 5 U.S. (1 Cranch) 137, 177 (1803)*** enunciated the modern day principle of judicial review of Executive and Legislative action with the now well-known declaration that *"it is emphatically the province and duty of the Judicial Department to say what the law is."*

71. As was rightly argued by Counsel for the *amici*, there is nothing like supremacy of Parliament outside the Constitution. There is only supremacy of the Constitution. Given that the Constitution is supreme, every organ of State performing a constitutional function must perform it in conformity with the Constitution. Where any State organ fails to do so, the High Court, as the ultimate guardian of the Constitution, will point out the transgression. As the cases cited above demonstrate, however, there is a legitimate question of how far the authority of the Court to review the decisions of other State Organs which exercise independent constitutional authority go. There are some areas where the Court can simply not go; some outer limits on its power to review the decisions and actions of the other branches and State Organs.

72. Is the issue under consideration in the instant case a proper one for the Court to adjudicate upon? One line of argument is that the Court does not have jurisdiction to determine the issue at hand because the Constitution divests it of such jurisdiction simply by providing that the discretion to appoint Commission officials lies with the coordinate branches of the government. In essence, the view is that the issue at hand is not "justiciable" in the sense that it is not an appropriate one for the Court to pronounce on due to a number of prudential reasons. One of these is that the issue to be resolved is textually committed by the Constitution to the co-equal Executive and Legislative branches of the government hence necessitating the Court to defer to the decision of the coordinate branches reaching the determination. Under this argument, the question is whether the issue presented to the Court is a justiciable controversy (which is amenable to judicial review) or a policy decision by the political branches of government (which is a "political question" inappropriate for judicial review). The justiciability doctrine expresses fundamental limits on judicial power in order to ensure that Courts do not intrude into areas committed to the other branches of government. The arguments on this issue are based on the foundational doctrine of separation of powers and its application to the case at hand. Sharply put, the question presented in the

case is whether it is constitutionally permissible for the Court to review the decisions by Parliament and the Executive on appointment to a State or public office either due to procedural infirmities of the appointment process or on legality on its merits when the procedural formalities for appointment have been followed. Paraphrased, once Parliament and the Executive allege that they have followed the formal procedures for appointment to an office under the Constitution, does that divest the Court of any jurisdiction to conduct a review of the appointment to determine its conformity with the Constitution?

73. The Constitution has bequeathed to Parliament the task of vetting appointees to the Commission – including the position of Chairperson -- and to the Executive the prerogative of appointment to the office. That much is clear and uncontested. However, both State Organs must do so in accordance with the law. That law, in our view, has two aspects: the procedural aspects are that the laid down procedures must be followed for the appointment to be constitutionally valid. But there is a second aspect: the substantive one. The appointees must also meet the constitutional threshold; the qualifications for appointment. If the correct procedures are followed, and the test of legality is substantively met, then the two coordinate political branches can appoint whomsoever they wish to the constitutional office. It is, for example, within their constitutional discretion to pick from among competing candidates as long as they are all qualified; and as long as the correct procedures are followed. As other jurisdictions put it (see, for example, ***The State ex rel. The Attorney General v Porter*** **1ALA. 688; 1840 WL 243 (ALA.)),** the Court is "powerless" to determine whom the Legislature or Executive should appoint once the two tests are satisfied because such a determination would present a political question; an inappropriate one for the Courts. However, the Court has both the power and the duty to determine whether a particular appointee is constitutionally unqualified to fill the vacant office.

74. Other jurisdictions have come up with a similar test for determining the outer limits of the doctrine of separation of powers in the context of appointments to State or Public Offices. The South African Supreme Court of Appeal in the ***Democratic Alliance*** caseearlier cited has taken the approach that where there is evidence that an appointee does not meet the prescribed test of "fit and proper person" the Court will interrogate whether the appointing authority undertook a "proper inquiry" before pronouncing whether the appointee has reached the constitutional threshold for appointment. In other words, the Court will not merely be

satisfied by the fact that the appointment process seemed to have gone through the procedural hoops. The Court enunciated the rule of law that when the Executive or other State Organ is given power to act by the Constitution, their action must be rational and in compliance with the Constitution and the doctrine of legality.

75. The ***Democratic Alliance*** case involved a challenge to the decision of the President of South Africa to appoint the National Director of Public Prosecutions (NDPP). The Petitioner in the case contended, inter alia, that the Presidential appointee did not qualify under section 9(1)(b) of the South African National Prosecuting Authority Act. That section specifies that an appointee to the position of NDPP must be a "fit and proper person" to hold that position. The Court came to the conclusion that the President did not undertake a proper inquiry into the objective requirements for appointment as required by the law. In any event, the Court held that on the available evidence, the President could not have legally reached a rational conclusion that the appointee was "proper and fit" to hold that office since there were too many unresolved questions concerning his integrity and experience.

76. In similar vein, the Indian Supreme Court in ***Centre for PIL and another v Union of India and Another, Petition Writ no. 348 of 2010*** has adopted an approach that judicial review of appointments must scrutinize not only the appointment processes but also adherence to the eligibility criteria. Thus while judicial review is not a merit review, where the appointing authorities do not adhere to the eligibility criteria, then such an appointment is to be struck down.

77. The constitutional standard emerging from these cases, which we now adopt, is that the Court is entitled to review the process of appointments to State or Public Offices for procedural infirmities as well as for legality. A proper review to ensure the procedural soundness of the appointment process includes an examination of the process to determine if the appointing authority conducted a proper inquiry to ensure that the person appointed meets the constitutional requirement. The absence of any evidence that such an inquiry was conducted, or, the availability of evidence that such an inquiry was, in fact, not conducted, would lead to the conclusion that the procedural aspects of this constitutional test have not been satisfied. Additionally, the Court must review the appointment decision itself to determine if it meets the constitutional threshold for appointment. The test here is one for

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

78. This approach maintains the constitutional design of separation of powers by acknowledging and respecting the Legislature's and Executive's absolute discretion to choose from among all constitutionally qualified persons the one person they wish to fill the office, but also acknowledges the Judiciary\'s role in preventing the Legislature and Executive from overstepping the limits of their authority by appointing a constitutionally unqualified person.

79. Therefore, we have come to the conclusion that the doctrine of separation of powers does not disentitle the Court from entertaining the controversy surrounding the appointment of the Interested Party. A constructive reading of our Constitution; our previous case law on the question; and comparative jurisprudence from other jurisdictions on the question have led us to the conclusion that the High Court of Kenya can properly review both the procedures of appointment of the Interested Party as well as the legality of the appointment itself – including determining whether the Interested Party meets the constitutional threshold for appointment to the position.

80. We will now apply this constitutional standard to the case at hand.

E. Was the appointment of the Interested Party Constitutional?

81. A proper analysis and application of the constitutional standard we have set out above to the facts of this case must begin with the provisions of Article 132(2) of the Constitution. That Article provides as follows:

The President shall nominate and, with the approval of the National Assembly, appoint, and may dismiss –

.....

(f) in accordance with this Constitution, any other State or public officer whom this Constitution requires or empowers the President to appoint or dismiss.

82. In turn, section 6 of the Act stipulates as follows:

(6) The President shall, within fourteen days of receipt of the names of successful applicants forwarded under subsection (5)(g), ***select*** *the chairperson and members of the Commission and forward the names of the persons so selected to the National Assembly for approval.*

83. These two legal provisions provide the procedure which must be followed in the appointment of the Chairperson of the Commission. Importantly, the law gives a role to both the Executive and the Legislature in the appointment process. While the President nominates the Chairperson from among names in a list provided to him by a duly appointed Selections Panel, the Executive must have its own independent procedure for approving the nomination. As we observed above, each of the two organs is obligated to follow its own established procedures in the appointment or approval process as well as ensure that the proposed appointee has satisfied the constitutional criterion.

84. The Petitioner argues that both the Executive and the Legislature failed in their constitutional duties in appointing the Interested Party to the post of Chairperson of the Commission. As we understand it, the Petitioner has raised two specific arguments to challenge the appointment. In the first place, the Petitioner argues that while it is true that both the Executive and the Legislature technically followed each of the steps laid down in the law for appointment, the appointment process still fails the procedural test because both organs failed to consider vital information that was available to them about the Interested Party, information which, the Petitioner argues, would have rationally led the two organs to the conclusion that the Interested Party was not proper and fit to be appointed to that office.

85. Secondly, the Petitioner argues that the Interested Party is unsuitable simply because it is not possible to say, with any sense of reasonableness or rationality, that the Interested Party

can meet the substantive requirements of Chapter 6 of the Constitution and particularly Article 73(2). That Article provides that:

73 (2) The guiding principles of leadership and integrity include—

(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections…

86. In particular, the Petitioner doubts that the Interested Party would pass constitutional muster for the test of integrity and suitability to the office of Chairperson to the Commission. The Petitioner's basis for impugning the integrity and suitability of the Interested Party is what the Petitioner says are unresolved allegations linking him to financial impropriety committed while the Interested Party was the Legal Officer at the AFC, a parastatal funded by public money.

87. Hence, the theory of the case for the Petitioner is that the appointment process of the Interested Party must be nullified because it fails the procedural propriety test. The Petitioner argued that given the very serious and plausible allegations raised against the Interested Party, it behooved both the Executive and Parliament to investigate and resolve the allegations one way or the other first before either nominating or approving the appointment of the Interested Party.

88. We agree with the Petitioner that the constitutional standard is not whether a proposed appointee has technically appeared before all the right committees in the chronological sequence stipulated by law. The procedure laid down by law is surely meant to serve a constitutional objective. In our view, it would be constitutional mockery to sanitize an appointment process merely on the ground that it went through the procedural hoops if, in fact, it turns out that the organs charged with the task of appointment were merely going through the procedural motions. That would be to empty the Constitution of its meaning and intent when it bequeaths the appointment task to a government organ and lays down an appointment procedure which is aimed at fulfilling the constitutional objectives. In our view, a procedure cannot be deemed to have been legitimately and substantively satisfied if it appears from available evidence that the appointment process was designed and executed in such a way that no proper inquiry into pertinent issues related to the appointment which were

known to the appointing authorities was conducted. To reiterate, we appraise the constitutional standard to be that a mere showing that the appointment process went through the technical procedures would not be sufficient to immunize it from constitutional challenge if it can be shown that the technical procedures could not rationally lead to a proper inquiry into the suitability of the proposed appointee to the State or Public Office in question.

89. In this case, the Petitioner complains that no proper inquiry was conducted by either the Executive or the Legislature about the allegations of lack of integrity and unsuitability of the Interested Party to the position of Chairperson of the Commission. It is uncontested by all parties that these allegations were brought to the attention of the appointing authorities. What the Petitioner claims, however, is that the allegations were treated in a very cavalier manner by the Legislature – and not *at all* by the Executive.

90. The Interested Party argued that the issue of his integrity and suitability was, in fact, extensively debated upon by the National Assembly on 15th December, 2011 and again on 20th December, 2011 and that in giving its approval, Parliament conclusively considered the allegations which form the basis of the instant case. The Interested Party, therefore, argues that the allegations against him were considered by the appointing authorities.

91. The specific allegations which the Petitioner makes against the Interested Party and which the Petitioner says needed to be resolved before the appointment of the Interested Party to any State or Public office are serious ones. All the allegations centre on the Interested Party's tenure at the AFC. At various times, the Interested Party was a Legal Officer, Acting Company Secretary, Deputy Chief Legal Officer, or the Chief Legal Officer of AFC. The Petitioner makes the claim that the Interested Party was, at worst, involved in several shady deals that resulted in the AFC losing millions of tax payers' money. At best, the Petitioner says the Interested Party was, at least, criminally negligent in failing to exercise due diligence to prevent several incidences of fraud at AFC that resulted in the losses. There are two specific instances involving a company known as the RVAC which the Petitioner highlighted to demonstrate that the allegations are serious enough and plausible enough to warrant a proper inquiry. In the more straightforward claim, the Petitioner alleges that the Interested Party was involved in approving a loan of Kshs. 24 Million to RVAC using land known as L.R. No. Nakuru/Municipality Block 6/23 as collateral. However, a copy of the official search

for that title reveals that no charge was ever registered against the title, raising suspicions about the integrity of the transaction. The Petitioner says that these suspicions are further heightened by the fact that the loan advanced was never paid to the account of RVAC but was instead deposited in a National Bank of Kenya account in what the Petitioner insists were "dubious" circumstances.

92. A second set of allegations the Petitioner highlighted relate to an affidavit the Interested Party swore and had filed in a civil case involving RVAC. That suit was initially filed by RVAC and one of its directors (supposedly in a derivative capacity) against another director of RVAC. That suit is Nairobi High Court Civil Suit No. 1535 of 1999 – *Rift Valley Agricultural Contractors Limited & Benson Thiru Karanja versus Mahesh Kumar Manibhai Patel*. We do not have the full set of pleadings in the suit but we can glean from the pleadings annexed to the Supporting Affidavit of Elijah Sikona that at some point AFC became involved in the suit. It did so by way of a Chamber Summons application which was supported by an affidavit of the Interested Party in his capacity as Chief Legal Officer of AFC. Among other things, the Interested Party depones in that affidavit that AFC was owed upwards of Kshs. 131 Million by RVAC and that all or most properties belonging to RVAC, including chattels, are charged to AFC which, then, enjoyed priority over any Receiver who might otherwise be appointed over the property belonging to RVAC. The Petitioner, however, claims that these statements by the Interested Party, averred in a sworn affidavit, amount to perjury since he knew or must have had reason to know at the time that most of the loans advanced to RVAC had already been paid off. The Petitioner attached loan statements in support of its argument that the Interested Party committed perjury in swearing that affidavit; and that the perjury was in furtherance of a nefarious scheme aimed at facilitating the continued looting of funds from AFC.

93. There is no doubt that, if true, these are serious allegations and they would, ineluctably, affect any reasonable person's assessment of the integrity of the Interested Party or his suitability to head the Commission. We are not in a position to make any findings whether these allegations are proved or not. That will have to await appropriate legal proceedings tailored for that purpose. However, what we are prepared to hold at this point is that the allegations are serious enough and sufficiently plausible to warrant any reasonable person who is charged with the constitutional responsibility of assessing the integrity or suitability of

the Interested Party for an appointment to a State or public office, especially one which is as sensitive as the Chairperson of the Ethics and Anti-Corruption Commission, to conduct a proper inquiry before such an appointment. We say so on a cursory assessment of the evidence made available to us – which includes a letter by a Criminal Investigations Department (CID) Officer who wrote to the CID Director stating his opinion that there was substance in some of the allegations and urging the CID Headquarters to dedicate more resources – including experts in forensic science and auditing and computer analysis – to the case. That letter was written on 7th June, 2011.

94. This information was presented to the Director of Public Prosecutions. It is not clear whether this issue was considered by the Selection Panel which placed the Interested Party's name among the three who were recommended for appointment as Chairman of the Commission. It is also not clear whether the President and the Prime Minister, in picking the Interested Party out of the three names submitted to them, gave any consideration to this information. Hence, by the time the name of the Interested Party was sent to Parliament officially as a nomination by the President, no evidence availed to us shows that any investigations regarding these allegations had been done and had informed the assessment of the suitability of the Interested Party for the position of Chairperson of the Commission.

95. In Parliament, the matter was first sent to the Parliamentary Committee for consideration prior to approval by the whole House. The Parliamentary Committee interviewed the Interested Party as well as the other two appointees to the Commission and considered their Curriculum Vita. The Parliamentary Committee returned a recommendation that the House should reject the appointment of all the three proposed appointees – including the Interested Party. In reaching that recommendation, the Parliamentary Committee noted that "all the [three] nominees had excellent careers with excellent academic qualifications but lacked the passion to lead the Anti-Corruption Commission which qualifications could be relevant at other levels." There is no evidence that the Parliamentary Committee considered or investigated the allegations of lack of integrity made in this Petition. Indeed, the first time the issue of integrity surfaced was on the floor of the House during the debate on the Parliamentary Committee's report recommending rejection of the nominees. There were specific allegations made against the Interested Party by some members of Parliament relating to his tenure at the Kenya Revenue Authority; that he suspiciously failed or refused to collect

Income Tax amounting to Kshs. 2.4 billion from Kingsway Tyres and Auto Mart Limited even after the High Court ruled that the amounts were owed. A few members debated that point and documents substantiating it were tabled by Hon. Boniface Khalwale. Exactly one Member of Parliament spoke about the allegations relating to the Interested Party's tenure at AFC and his alleged involvement in the loss of millions of tax payers' money through RVAC. When Hon. Gitobu Imanyara tabled the documents which are now presented to this Court as affidavit evidence, no substantive debate on the issue followed. The Members of Parliament focused most of their discussion on the issue of "passion" raised in the Parliamentary Committee's Report. Few ventured to the territory of integrity and suitability of the nominees. No evidence whatsoever was tabled to indicate what investigations, if any, had been done to clear the Interested Party of the serious allegations made against him. Neither was there any adequate explanation why the allegations against the Interested Party were brushed aside. Finally, there was no attempt to craft a test which would enable the Members of Parliament determine if the Interested Party had passed the constitutional test under Chapter Six of the Constitution.

96. As we have noted above, all the organs involved in the appointment of the Interested Party had an obligation to ensure that due process was followed and also apply the constitutional test in measuring the qualifications of the nominees. In our view, procedural propriety of appointment to a State or Public Office includes weighing the qualifications and attributes of nominees or candidates against the constitutional test – in this case, as laid out in Chapter Six and, specifically, Article 73 of the Constitution. Consequently, it is not possible to return a verdict that due procedure in an appointment or nomination to a State or public office has been followed when there is absolutely no evidence that the appointing authority considered the constitutional test. Additionally, as we held above, a procedure cannot be deemed to have been duly followed if it appears from available evidence that the appointment process was designed and executed in such a way that no proper inquiry into pertinent issues related to the qualifications of the appointee was conducted.

97. All the organs involved in the appointment of the Chairperson of the Commission had the obligation to consider whether the applicants met the qualifications in the Constitution and in the Act. They were required to investigate the background of the applicants and to conclusively consider any information which went to their qualifications. From the record

presented to the Court, it is evident that the appointing authorities gave lip service or no consideration at all to the question of integrity or suitability to hold the office. They failed to ascertain for themselves whether the Interested Party met the integrity or suitability threshold. They did not give due attention to all information that was available, and which touched on his integrity or suitability. Because of this failure, none of them makes any conclusive determination on whether the Interested Party met the integrity or suitability test set out in the Constitution. We consider this failure – the failure to honour the duty to diligently inquire – coupled with the failure to adequately apply the constitutional test to have rendered the procedure used to appoint the Interested Party to chair the Commission to be fatally defective and to be violative of the spirit and letter of the Constitution. It is, therefore, constitutionally untenable, null and void.

98. Aside from the procedural infirmity of the appointment process which we have found to have violated the Constitution, we also hold, on the strength of available evidence, that the appointment of the Interested Party to head the Commission would not pass constitutional muster under the substantive "rationality" test we set out earlier. As we previously stated, the Court must, where appropriate, review appointment decisions by State Organs to State or public offices to determine if the appointees meet the constitutional threshold for appointment. We review using a standard of rationality: whether the decision made by the appointing authority is within the realm of rationality, that is, whether a reasonable person or organ would plausibly make the same decision after applying the constitutional criterion. If the answer is in the negative, then the Court will nullify the determination of the appointing authority. However, the Court cannot replace the name of the appointee it has rejected with a name of its choice; it must remand the decision to the appointing authority to appoint another person.

99. Chapter Six of the Constitution sets forth principles on the leadership and integrity requirements of public officials. Included in these provisions is Article 73 which requires that State officials be selected "on the basis of personal integrity, competence, and suitability." This is an independent and substantive criterion for appointment. To illustrate this point, the Court may look at a similar Article within Chapter Six, which states that a State officer must be a citizen of Kenyan (except for Commissioners and judges, and persons who cannot opt out of dual citizenship). The Executive may breach this mandate in two ways:

either it fails to investigate the nominee to determine whether this Article is fulfilled, or it knowingly appoints a State officer who does not meet these standards.

100. To use Article 78 as a parallel example, the Executive has a responsibility to inquire whether or not a nominee is a citizen. If the Executive appoints an individual who is not a citizen (either knowingly or not), that appointment would fail to meet the constitutional requirement. This will happen whether or not the appointment process as laid down in the law is meticulously followed.

101. Similarly, the Executive and Parliament must investigate the nominee's integrity, competence and suitability for the position to which the nominee is being appointed. The appointee must, on his or her part, meet the constitutional requirement of having the requisite integrity, competence, and suitability. As we have already established, the Court has a duty to satisfy itself, using a standard of rationality, that determinations on each of these constitutional requirements by other State Organs or officials are made in good faith and in accordance with the Constitution.

102. We are persuaded that this is the only approach to the interpretation of Article 73 of the Constitution which maintains fealty to the Constitution and its spirit, values and objects. Kenyans were very clear in their intentions when they entrenched Chapter Six and Article 73 in the Constitution. They were singularly aware that the Constitution has other values such as the presumption of innocence until one is proved guilty. Yet, Kenyans were singularly desirous of cleaning up our politics and governance structures by insisting on high standards of personal integrity among those seeking to govern us or hold public office. They intended that Chapter Six and Article 73 will be enforced in the spirit in which they included them in the Constitution. The people of Kenya did not intend that these provisions on integrity and suitability for public offices be merely suggestions, superfluous or ornamental; they did not intend to include these provisions as lofty aspirations. Kenyans intended that the provisions on integrity and suitability for office for public and State offices should have substantive bite. In short, the people of Kenya intended that the provisions on integrity of our leaders and public officers will be enforced and implemented. They desired these collective commitments to ensure good governance in the Republic will be put into practice.

103. It follows, therefore, that those organs and officials to whom the authority to select officials to certain State Organs and institutions are delegated have an obligation to ensure that the persons selected for the various positions meet the criteria set out in the Constitution and other legislation for those positions. Where there are allegations that these organs have failed to discharge this obligation, the Court is obligated to step in, when called upon to do so, to investigate whether the process of recruitment and the individuals recruited meet the constitutional requirements. The High Court is the ultimate guardian of the Constitution on behalf of the people of Kenya. Where the people feel that an individual who was appointed to some office does not meet the requirements of that office, the High Court cannot turn them away simply because the responsibility for that appointment is reserved by the Constitution to the Executive or Legislature. Whereas the appointment is a preserve of the Executive and the right of concurrence is given to Parliament, the enforcement of the Constitution is left to the High Court.

104. When, then, can the Court declare that an appointee or nominee to a State or Public Office lacks integrity or is unsuitable for the position and that, therefore, it would be irrational and unconstitutional for an appointing authority to appoint them to the position? We concede that the Court can come up with no more than a guide; a standard rather than a rule, for each case will be unique and dependent on the facts and circumstances. A determination of lack of integrity or unsuitability for a position will, therefore, tend to be an intensely fact-based inquiry. Even then, we can offer the general standard to be utilized in making this assessment. We can draw this from the English meaning and common understandings of the words “integrity” and “suitability” as well as draw wisdom from two analogous cases from other jurisdictions whose jurisprudence we look upon with admiration as forming an evolving universal standard of good governance and human rights.

105. According to **Black\'s Law Dictionary (2nd Edition)**, “integrity, as occasionally used in statutes prescribing the qualifications of public officers, trustees, etc., means soundness of moral principle and character, as shown by one person dealing with others in the making and performance of contracts, and fidelity and honesty in the discharge of trusts; it is synonymous with “probity,” “honesty,” and “uprightness.”

106. In the ***Democratic Alliance Case*** cited earlier, the Supreme Court of Appeal of South Africa said this of integrity of public officers:

An objective assessment of one's personal and professional life ought to reveal whether one has integrity. In The Shorter Oxford English Dictionary on Historical Principles (1988), inter alia, the following are the meanings attributed to the word 'integrity': 'Unimpaired or uncorrupted state; original perfect condition; soundness; innocence, sinlessness; soundness of moral principle; the character of uncorrupted virtue; uprightness; honesty, sincerity.' Collins' Thesaurus (2003) provides the following as words related to the word 'integrity': 'honesty, principle, honour, virtue, goodness, morality, purity, righteousness, probity, rectitude, truthfulness, trustworthiness, incorruptibility, uprightness, scrupulousness, reputability.' Under 'opposites' the following is noted: 'corruption, dishonesty, immorality, disrepute, deceit, duplicity.'

.....

On the available evidence the President could in any event not have reached a conclusion favourable to Mr Simelane, as there were too many unresolved questions concerning his integrity and experience.

107. To our mind, therefore, a person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or his commitment to the national values enumerated in the Constitution. In our view, for purposes of the integrity test in our Constitution, there is no requirement that the behavior, attribute or conduct in question has to rise to the threshold of criminality. It therefore follows that the fact that a person has not been convicted of a criminal offence is not dispositive of the inquiry whether they lack integrity or not. As the ***Democratic Alliance*** case held, it is enough if there are sufficient serious, plausible allegations which raise substantial unresolved questions about one's integrity.

108. In this particular case, as outlined above, the Petitioner alleges that the Interested Party must have been involved in shady transactions which led to the approval of unsecured loans and the loss of public funds at the AFC. Though the evidence the Petition relies on is yet to be tested in judicial proceedings and cannot be taken as the truth of the matter, the allegations are

substantial enough that it is not possible for any appointing authority to rationally make a determination without the aid of proper inquiry to resolve the issue one way or the other, that the Interested Party has passed the integrity test demanded by our Constitution.

109. We think that the Interested Party would equally fail the suitability test. In our view, the suitability test asks the question whether the person appointed has the attributes needed to hold that particular position and function effectively in accordance with the demands and expectations of that position or whether there is anything in the person's experience, association, or character that prevents the person from effectively carrying on the duties required by that office. Suitability can only be determined by looking at the functions of the office to which the person is being appointed.

110. A recent case decided by the Supreme Court of India puts this suitability test in context. The case – ***The Centre for PIL and Another v Union Of India (Supra)*** – is remarkably similar in context and facts to the present one. In that case, P.J. Thomas, was recommended to the Central Vigilance Commission (CVC), an institution charged with advocating for the integrity of political officials in India. P.J. Thomas, however, faced allegations of corruption arising from a criminal case he was involved in years earlier. The issues presented in that case were still unresolved even though he had never been convicted of any criminal offence. When P.J. Thomas was appointed to the CVC, an integrity institution charged with, among other things, investigating corruption, the Supreme Court of India rejected the appointment as illegal. The Court pointed out that part of its reasoning was based on the fact that if appointed, P.J. Thomas might end up working in the same commission which might be seized of his investigations. Like in the instant case, the Supreme Court of India noted that the mandate of the appointing committee required that they appoint someone whose background or experience would not threaten the "institutional integrity" of the post to which they were assigned. In a passage that is relevant to the present case, the Court ruled:

The touchstone for the appointment of the CVC is the institutional integrity as well as the personal integrity of the candidate.... If the selection adversely affects institutional competency and functioning then it shall be the duty of the [appointing authority] not to recommend such a candidate….We do not wish to discount personal integrity of the candidate. What we are emphasizing is that institutional integrity of an institution like CVC

has got to be kept in mind while recommending the name of the candidate. Whether the incumbent would or would not be able to function? Whether the working of the institution would suffer? If so, would it not be the duty of the HPC not to recommend the person?

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

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

F. COSTS

113. The question of costs in constitutional petitions is well settled – the court has discretion in awarding costs, which discretion must be exercised judiciously, noting that an order for costs may bar citizens who would wish to litigate constitutional matters that concern fundamental rights or the public interest.

114. In ***John Harun Mwau & 3 Others v Attorney General & 2 Others [2012]*** Justices Lenaola, Majanja and Mumbi Ngugi laid down the rule as follows:

*The intent of **Articles 22** and **23** of the Constitution is that persons should have free and unhindered access to this court for the enforcement of their fundamental rights and*

*freedoms. Similarly, **Article 258** allows any person to institute proceedings claiming the Constitution has been violated or is threatened. The imposition of costs would constitute a deterrent and would have a chilling effect on the enforcement of the Bill of Rights.*

In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the state but lost. Equally, there is no reason why the state should not be ordered to pay costs to a successful litigant. The court also retains its jurisdiction to impose costs as a sanction where the matter is frivolous, vexatious or an abuse of the court process.

*Our Constitution places a premium on the values of social justice and rule of law, patriotism and participation of the public. Without unhindered access by the public to the courts, these values would be undermined. An award of costs is also one of the remedies the court may consider in granting appropriate relief under **Article 23(3)** and **Article 258**.*

*Our approach to the issue of costs in cases concerning the enforcement of fundamental rights and freedoms and for the enforcement of the Constitution is that the court has discretion in awarding costs. Like all forms of discretion, it must be exercised judicially, in light of the particular facts of the case and giving due regard to the values set out in the preamble of the Constitution and **Article 10** in order to achieve the objects of **Article 259(1)**.*

115. We agree with this reasoning and analysis. In our opinion, this is a matter which was brought to Court in good faith and in the interest of the public. It was litigated in similar fashion. We therefore make no order as to costs. That is also our cue to convey our gratitude to all the Counsel who appeared before us. They were supremely professional and sublimely talented in representing their clients.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2012.

JOEL NGUGI, J

MUMBI NGUGI, J

G.V. ODUNGA, J