



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 388 OF 2016

TRANSPARENCY INTERNATIONAL (TI KENYA).....PETITIONER

VERSUS

ATTORNEY GENERAL.....RESPONDENT

AND

AUDITOR GENERAL.....1ST INTERESTED PARTY

AFRICA CENTRE FOR OPEN GOVERNANCE (AFRICOG)...2ND INTERESTED PARTY

JUDGMENT

Introduction

1. The Auditor General is holder of an independent office under the Constitution. The functions, qualifications and manner of appointment of the holder of the office are provided for in **Article 229** of the **Constitution**. The National Assembly is the state organ responsible for legislation. Article 2(1) declares the Constitution the supreme law while Article 2(4) decrees that any law that is inconsistent with the Constitution is void to the extent of the inconsistency, and that any act or omission done in contravention of the Constitution is invalid.

2. The National Assembly, in exercise of its legislative mandate under the Constitution, enacted the **Public Audit Act, 2015** which was assented to on 18th December 2015 and published in the Kenya Gazette on 24th December 2015 with a commencement date of 1st January 2016. The Act assigned the Auditor General a definition, created the position of **Senior Deputy Auditor General** and assigned duties and functions to the office holder. The Act further established and assigned functions to unincorporated body known as **Audit Advisory Board** in the office of the Auditor General among other things.

The Petition

3. **Transparency International** (TI- Kenya), the Petitioner, is a non-profit organization established with

the aim of developing a transparent and corrupt free society through good governance and social justice initiatives. It filed a petition against the **Attorney General**, who is the principal legal adviser to the government, mandated to represent the National Government in civil litigation, and a duty to defend public interest, promote, protect and uphold the rule of law.

4. Joined in this petition as 1st and 2nd interested party are the **Auditor General**, holder of an independent office established under Article 229 as read with Articles 248(3) and 249 of the Constitution, whose mandate is to audit and report on financial accounts and expenditure of state organs and public bodies, and **Africa Centre for Open Governance (AFRICOG)** also a non-profit organization. The National Assembly sought leave and was enjoined in this petition as the 3rd Interested party.

5. The petitioner stated that the Auditor General is the Supreme Institution for Audit, and within the frame work and structure of the Constitution, the Auditor General is an ally of the people. While Parliament is the peoples representative, the Auditor General provides Parliament with accurate and independently derived audit information on state organs and public bodies expenditure thus ensures that there is public sector accountability.

6. The petitioner averred that various provisions of the **Public Audit Act 2015** violated values and principles of the Constitution. The petitioner in particular challenged constitutional validity of sections **4(2), 7(1)(g), 9, 12, 14, 17, 18(3) the entire of Part III, that is section 25, 26, 27, sections 40, 42, 68, 70 and 72 of the Act.**

7. Regarding section 4(2), the petitioner averred that the section defined the Auditor General as head of the office of the Auditor General established under section 4(1). The petitioner contended that describing the **Auditor General** as the head, the section created statutory office that is different from that contemplated under the Constitution. The petitioner averred that section 4(2) is in effect unconstitutional as it attempts to define and create the office of the **Auditor General** as a directorate and relegated the Auditor General to a statutory head.

8. The petitioner further stated that section 4(2) is Constitutionally invalid for subjecting the Auditor General's staff to delegation in accordance with **Article 234** of the Constitution, a derogation from and contravention of **Article 252(1)(c)** of the Constitution which empowers each Commission and Independent Office to recruit their own staff. It was stated that the impugned section gives the executive some measure of control over an independent office holder by forcing the Auditor General to appoint staff as may be delegated in accordance with **Article 234(5)** of the Constitution.

9. The petition next questioned the constitutional validity of **section 7(1)(g)** of the Act which conferring on the Auditor General other functions as may be prescribed by any other written law. The petitioner contended that the Auditor General's duties and functions are provided for under the Constitution and any other functions are intended to overreach the Auditor General and are therefore unconstitutional.

10. The petitioner again challenged constitutionality of **section 8(a)(b)(c)(d)(e)** and **(f)** of the Act in so far as they subject the Auditor General to **Article 234** and **234(5)**. The provisions require the Auditor General to develop an organization, structure and staffing establishment subject to **Article 234(5)** of the Constitution; to recruit and promote qualified staff to perform office functions, exercise disciplinary control, develop human resource office, and subject to **Articles 230(4)(b)** and **234**, determine remuneration and benefit of members of staff; develop and maintain a code of ethics in consultation with the **Public Service Commission** and the **National Treasury**.

11. The petitioner stated that the above provisions undermine and compromise institutional

independence of the Auditor General by subjecting the control of its staff and personnel to Public Service Commission through invocation of **Article 234(5)** of the Constitution. The petitioner stated that section 8 would lead to usurpation of responsibility, authority and or power the Auditor General by the Public Service Commission which the Constitution has not donated.

12. Regarding section 9(1)(e), it was stated that although the Auditor General should have unrestricted access to all books, records, returns, reports electronic or otherwise and other documents and entities listed under **Article 229(4)** and any property or premises used or held by state organs or public entities by virtue of that Article, the proviso that such access should be **reasonably necessary** is a claw back on the **'un restricted'** access hence it is unconstitutional for a statutory provision to restrict the Auditor General in the performance of his duties.

13. The petitioner also questioned the constitutionality of section 12 for allowing the president to designate the **senior most person** in the Auditor General's office as the **Acting Auditor General** in the absence of the Auditor General. The petitioner averred that this is unconstitutional given that such a person would exercise full powers of the Auditor General yet the appointment was being done through an ordinary legislation which is not constitutionally permissible. The petitioner questioned the rationale of creating the position of **Senior Deputy Auditor General** as contemplated under section 15 the Act terming it unconstitutional.

14. The petitioner further averred that section 14 which requires the office of the Auditor General to develop an organizational structure for consideration and approval by the **Audit Advisory Board**. is also constitutionally invalid. He stated that the section confers functions and powers of the Auditor General to an entity that is unknown under the Constitution and therefore contravenes the object and spirit of the Constitution to create and establish independent offices under **Article 249** of the Constitution.

15. The petitioner also questioned constitutional validity of section 15 of the Act which creates position of **Senior Deputy Auditor General** to be competitively recruited by the **Audit Advisory Board** and appointed by the Auditor General. The petitioner stated that the officer is also to be recruited by an unconstitutional organ. The petitioner averred that the person will not be independently recruited by the Auditor General thus compromising the independence of the Auditor General. The petitioner further faulted the creation of the position of Senior Deputy Auditor General through through an ordinary legislation.

16. The petitioner went on to stated that section 17(1) of the Act is unconstitutional in so far as it requires the office of the Auditor General to recruit officers necessary for its proper functioning under the constitution, the Act and other written laws upon terms and conditions to be determined in consultation with the salaries and remuneration commission and subject to **Articles 230 and 234(5)** of the constitution. The petitioner contended that by subjecting recruitment to **Article 234 (5)** of the Constitution, section 17 (1) places the Auditor General under the control and supervision of the Public Service Commission which is unconstitutional.

17. The petitioner next averred next that section 18(3) of the Act which requires the Auditor General to second an officer to a state organ and the officer so seconded would during the period he is on secondment be under the **direction and control** of the state organ or public body is unconstitutional. The section further states that such officer would not audit the state organ or public entity for a period of 24 months after expiry of the secondment. The petitioner contended that such an arrangement is unconstitutional since the Auditor General has no constitutional mandate to provide technical support to state organs and or public bodies and that such an arrangement compromises independence of staff of the Auditor General, a violation of the constitution.

18. The petitioner again stated that the entire **Part III** of the Act (**sections 25 , 26 and 27**) is constitutionally invalid. Section 25 creates the **Audit Advisory Board**. The principal function of the **Audit Advisory Board** is to advise the Auditor General on the performance of his/her functions under the Constitution. Some of the members of the Board are the Attorney General or his nominee and chair of the public Service Commission or his nominee. The petitioner averred that this provision is unconstitutional since state organs and public bodies to be audited are given a role to over sight the performance of the Auditor General's functions which compromises his constitutional independence.

19. The petitioner went on to aver that section 26 which makes provisions for meetings and section 27 which gives the **Audit Advisory Board** power to advise the Auditor General on the performance of his duties are constitutionally invalid. The petitioner contended that these sections in so far as they relate to creation of an **Advisory body** to advise the Auditor General on the performance of his duties, are unconstitutional.

20. The petitioner again attacked the constitutional validity of section 40 of the Act which requires the Auditor General or his representatives to hold inception meetings at the highest level with national security organs they intend to audit to agree on areas that may touch on national security and determine the appropriate audit approach to ensure confidentiality of the information, and makes the audit reports confidential and shields and subjects officers to carry out audit to vetting by authorized government vetting agency.

21. The petitioner averred that this requirement is aimed at crippling the Auditor General's powers and ability to discharge his mandate without fear or favour hence is unconstitutional. It was contended that the state organ to be audited will decide how to be audited and who to do it contrary to Article 229 (6) of the Constitution.

22. The petitioner also questioned the constitutional validity of section 42 of the Act which states that the Auditor General should not question the merit of a policy objective of either the national or country governments or any public entity. The petitioner averred that the section casts limitation on the ability of the Auditor General to discharge his constitutional mandate to question policy objectives at both levels of government.

23. The petitioner averred that **Article 229(6)** of the Constitution requires the Auditor General to confirm through audit reports whether public money had been lawfully and efficiently applied. He averred that the Auditor General can only come to such a conclusion if he applies his mind on the policy objectives being pursued and their lawfulness. The petitioner stated that the Auditor General is bound by Articles 2(1), 4(1), 73(1), 174, 201, 203 and 232 of the Constitution on the principles that underscore issues of governance including public finance and accountability which the Auditor General cannot ignore.

24. With regard to section 68 of the Act, the petitioner stated that it contravenes the Constitution in so far as it gives power to the Cabinet Secretary for finance to make regulations for the carrying out or giving effect to the Act. The petitioner averred that such a move is patently unconstitutional because the regulations are meant to regulate the functions of an independent constitutional office which is required to operate independent of other state organs and is not under the direction or control of any person.

25. The petitioner again stated that section 70 of the Act is unconstitutional in stating that the provisions of the Act will prevail in case of any conflict between it and any other legislation as one that seeks to elevate the supremacy of the Act to sanitize any unlawful and unconstitutional provisions within it. Regarding section 72 the petitioner averred that it limits the public's access to reports if such access may jeopardize state security. The petitioner averred that access to official reports of the Auditor General

can only be limited by the Constitution and that any limitation must pass the constitutional test under Article 24(1) of the Constitution. The petitioner averred that the impugned statutory provisions are unconstitutional and violate the constitutional mandate of the Auditor General.

26. Second the petitioner complained that there was violation of the law making process. The petitioner averred that the President exceeded his mandate under Article 115(1) of the Constitution during the law making process leading to the enactment of the impugned provisions. The petitioner stated that the President actively engaged in law making and drafted specific amendment to the Bill returned to Parliament.

27. The petitioner stated that in the Memorandum dated 10th June 2015 noting the President's refusal to assent to the Bill, the President recommended specific amendments, deletion and additional clauses. He averred that the President even suggested definitions in the Bill thus played an active role in legislating. The petitioner stated that by suggesting new amendments, the President exceeded his mandate of "**noting reservations**" by actually drafting replacement to the sections.

28. The affected sections included amendments to section 8(a)(b)(c)(d)(h) and (j) by substituting them with new section now section 8 which were adopted by the national assembly, that the president recommended insertion of a new clause including in section 16 section 16(1) by inserting "**and 234(5)**" that he recommended introduction of words to clauses **19 (a)** and **(b)** to introduce words "**review and**", and deletion of the words "with the Cabinet Secretary's comments".

29. The petitioner further contended that the President directed the national Assembly to insert a new clause "40A" and inclusion of another clause to the section, and that in clause 66 the president recommended amendment by deleting the words "**Auditor General**" and replacing them with "**Cabinet Secretary responsible for matters relating to finance**".

30. With these objections, the petitioner averred that the President instead of noting his reservations to the Bill, took an active role of drafting and legislating to suit the executive's agenda contrary to the Constitution given that the President has no legislative powers. The petitioner contended that this violated Article 115(1) of the Constitution terming the law making process relating to the impugned provisions flawed and unconstitutional.

31. The petitioner sought the following reliefs:-

(i) A declaration that sections 4(2), 7(1)(g) 8, 9(1)(e), 12, 14, 15, 17, 14(3) Part III, sections 25, 26, 27; sections 40, 42, 68, 70 and 72 of the Public Audit Act are inconsistent with and contravene of the constitution and invalid.

(ii) A declaration that the President of the Republic of Kenya exceeded his powers and mandate under Article 115(1) of the Constitution thereby vitiating the process of making the Public Audit Act and rendering the Act invalid.

(iii) A declaration that the Public Audit Act (no 34) of 2015 is invalid because the process of making it was flawed.

(iv) Any relief or such other orders as the Honourable Court shall deem fit and just to grant.

(v) Costs of the petition.

1st Interested Party's Response

32. The 1st interested Party filed a replying affidavit by **Milcah Ondiek**, the head of legal services in the Auditor General's office sworn on 19th October 2016 and filed in court on 1st November 2016. **Miss Ondiek** deposed that section 4(2)) of the Act defines Auditor General as the statutory head of the office contrary to the Constitution since he a holder of an independent constitutional office thus relegating a constitutional office to a statutory one.

33 **Miss Ondiek** also deposed that as holder of an independent office, the Auditor General is entitled to recruit her own staff as required by Article 252(1)(c) of the Constitution hence the impugned sections 15 and 17 imply that the Auditor General cannot employ staff directly except through the Public Service Commission an equal state organ. **Miss Ondieki** further deposed that the Act not only compromises but also undermines institutional independence of Auditor General by attempting to subject control of its staff to the Public Service Commission.

34. Further deposition was to the effect that creation of the position of **Senior Deputy Auditor General** to exercise powers of the Auditor General as **Acting Auditor General** violates values and principles in the Constitution. According to **Miss Ondiek**, such a position cannot be created through legislation. It was deposed that section 17 places the Auditor General under supervisory control of the Public Service Commission a power the Commission cannot exercise under the Constitution.

35. Regarding section 25, **Miss Ondieki** deposed that the work of the Audit Advisory Board portends a conflict between the role of the Auditor General office and the Board which erodes independence of the Auditor General. She further deposed that the composition of the Advisory Board creates conflict of interest since some of the offices that constitute the Board are to be audited by the Auditor General, yet they will have to oversight the Auditor General's mandate. In that regard, it was deposed, the functions of the Board are unconstitutional as they seek to impair the independence of the Auditor General granted by the Constitution.

36. **Miss Ondieki** went on to depose that section 42 is unconstitutional in so far as it dis allows the Auditor General from questioning policy objectives at both levels of government or public entities. **"Being a restrictive provision to the work of the Auditor General, it contradicts Article 229(6) of the Constitution"**. It was deposed. **Misss Ondiek** further deposed that section 68 of the Act is unconstitutional in so far as it gives the Minister power to make regulations to regulate the work of the Auditor General a contravention of the constitutional mandate of the holder of the office..

Respondent's response

37. The respondent filed Grounds of Opposition dated and filed in court on 30th November 2016. The respondent contended that the petition discloses no violation or threat to violate the constitution or rights and fundamental freedoms under the Constitution, that independence of Commissions and Independent offices does not entail complete isolation from other state organs, that all state organs are expected to collaborate and consult among themselves in the spirit of upholding national values and principles of governance under Article 10, and that the impugned Presidential actions consist of legitimate obligations under Article 115 of the Constitution hence there is no basis for the claim of interference in the law making process by the President.

38. The respondent further contended that the petition discloses selective and piece meal interpretation and application of the Constitution, that all Acts of Parliament are presumed constitutional until the contrary us proved, and that the petitioner has failed to demonstrate how the impugned provisions

violate the Constitution and rebut the presumption of constitutionality.

39. The respondent finally contended that the legislation was enacted within the confines of a proper legislative process, that the legality and object of the Act is connected to a just and legitimate purpose, and that the petition is founded on wrong principles of law hence there is no basis for granting the reliefs sought. The respondent contended that the petition is inept, incompetent and a gross abuse of the Court process.

3rd Interested Party's response

40. The 2nd interested party, the National Assembly, filed a replying affidavit by **Michael Sialai**. Clerk to the Assembly sworn on 28th September 2017 and filed in Court on 29th September 2017. **Mr Sialai** deposed that the **Public Audit Act** was enacted to give effect to **Article 226** of the Constitution pursuant to Article 261 and the 5th Schedule to the Constitution. He deposed that after the Act had been passed by both houses of Parliament, it was forwarded to the President for assent pursuant to Article 115 of the Constitution.

41. **Mr Sialai** further deposed that the National Assembly received a memorandum from the President returning the Bill to Parliament with recommendations on various sections/clauses, that the President's reservations were referred to the national Assembly's Departmental Committee for Finance Planning and Trade for consideration and a report by the Committee was tabled and the National Assembly passed the Bill without amendments on 23rd June 2015.

42. **Mr Sialai** went on to depose that the Bill having been passed by the assembly, it was forwarded to the Senate where it was also passed with the President's recommendations on 16th December 2015. Thereafter, **Mr. Sialai** deposed, the Bill was again forwarded to the President for assent. It was **Mr Sialai's** deposition that according to **Article 115** of the Constitution, it is within the President's mandate to return a Bill with reservations and that he can make reservations in any manner. He deposed that in noting his reservations, the President may choose to include specific recommendations on how to deal with those reservations

43. According to **Mr Sialai** the issue of whether the President can make specific proposals to a Bill was raised in Parliament but was over ruled by the Speaker. He deposed therefore, that it was incorrect for the petitioner to assert that the President went beyond his mandate and engaged in legislation in the manner his reservations were made.

Petitioner's Submissions

44. **Mr Mboya**, learned counsel for the petitioner, submitted highlighting their written submissions and reiterated the averments in the pleadings. Learned counsel submitted that the impugned provisions violate various Articles of the Constitution and are therefore unconstitutional null and void. The sections are 4 (2) ,7, 8, 9, 12, 14, 15, 17 and 18 and the whole of part III of the Act, that is sections 25, 26 and 27. Other provisions are sections 40, 42, 68, 70 and 72.

45. Learned Counsel argued that the impugned provisions deal with the office of the Auditor General, an independent constitutional office holder. He contended that the Auditor General acts only in accordance with and is only subject to the Constitution and is not under the control of any person or authority. **Mr Mboya** took issue with section 4(2) of the Act on the definition of the Auditor General contending that the definition in the Act contradicts that in the constitution. Learned counsel contended that the provisions right from the definition, creation of other positions including that of **Senior Deputy Auditor General**,

appointment of staff of the Auditor General and the creation of a body called **Audit Advisory Board**, its composition and functions do not only violate the Constitution but also curtail the independence of the Auditor General, hence violate the constitution and are invalid.

46. Learned counsel argued that staff of Auditor General should not be subject to the Public Service Commission, that they cannot be seconded to other state organs or public bodies, that the Auditor General should not hold pre audit consultative meetings over pending audits and that his staff intending to perform audit duties in certain cases should not be vetted. Learned counsel contended that if allowed, this will compromise the independence conferred on the Auditor General by the Constitution.

47. Learned counsel took issue with several other sections including section 15 of the Act which creates position of **Acting Auditor General** to exercise full powers of the Auditor General, a position not contemplated by the Constitution, that for the Audit Advisory Board to advise the Auditor General violates clear provisions of the Constitution. Regarding section 68, learned counsel contended that it violates the Constitution in so far as it empowers the Cabinet Secretary for finance to formulate regulations on the enforcement of the Act. Counsel argued that the whole purpose was to regulate the activities of the Auditor General thus render the office subject to other state organs or public bodies in violation of the Constitution.

48. **Mr Mboya** also attacked the procedural aspect of coming up with the Act. He contended that it violated Articles 115 of the Constitution. According to learned counsel, when returning the Bill to Parliament, the President was required to note his reservation in the memorandum but instead went on to make amendments and introduced completely new clauses which amounted to legislation, a preserve of Parliament. Learned counsel argued that the President was not required to designate specific amendments and even new clauses in the Bill to replace those enacted by the national assembly.

49. In counsel's view, the President should have only pointed out his areas of concern and leave the national assembly to debate and come up with the manner the provisions should read instead of inserting specific clauses and even words in the Bill, thus went beyond his mandate and usurped the mandate of parliament which was against the principle of separation of powers. Counsel relied on a member of judicial decisions in support of his position including; **Re The Matter of Interim Independent Electoral and Boundaries Commission** [2011] eKLR , **J. Harrison Kinyanjui v Attorney General & another** [2016] eKLR, and **Law Society of Kenya v Attorney General & another** [2016] eKLR

1st Interested Party's Submissions

50. **Miss Ondieki**, learned counsel for the 1st interested party, associated herself with **Mr. Mboya's** submissions. Learned counsel added that the necessity of creating independent offices under the Constitution was to do away with the mischief of government and public bodies exercised under the retired constitution. Counsel argued that Parliament is obliged to make laws that are consistent with the Constitution and pointed at section 8 of the Act as one way of trying to subject the control of personnel of the Auditor General to the Public Service Commission which is unconstitutional.

51. Learned counsel also pointed out section 42 of the Act contending that it limits the Auditor General's powers to question policies while carrying out his mandate a violation of Article 229(6) of the Constitution. She took issue with part 111 of the Act and the establishment of Audit Advisory Board in violation of Article 249 (2) (b).

2nd Interested Party's Submissions

52. **Miss. July Soweto**, learned Counsel for the 2nd Interested Party also agreed with the petitioner's submissions. Learned Counsel submitted that in constitutional interpretation the Court should not just read the provisions of the statute, but also consider the interests that were sought to be protected. Counsel relied on the case of ***R V Big M Drug Mart Ltd. [1985] SCR 295*** for the proposition that both purpose and effect are relevant in determining constitutionality of a statute.

53. Learned counsel submitted that the impugned provisions must be read against **Article 229** of the Constitution which establishes the office of the Auditor General as well as **Article 249** on Commissions and Independent offices, their objectives and mandate, and the fact that these offices are independent and not subject to anybody's control or direction. Counsel contended that the impugned provisions contradict the principles in **Article 249** of the Constitution, that the **Public Audit Advisory Board** undermines and erodes the principles under Article 249(2)(b), and that the sections read on their own or together are designed to whittle down the independence of the office of the Auditor General.

54. **Miss Soweto** went on to submit that section 4(2) contravenes **Article 229(1)** in the manner it defines the Auditor General, and drew parallels with the office of the Attorney General and Director of Public Prosecutions (DPP) under **Articles 156** and **157** respectively. Counsel contended that in the case of the Auditor General, the emphasis is on the "**person**" and not **office**. In Counsel's view **Articles 156** and **157** create '**offices**' while **Article 229(1)** is about '**the person**'. Counsel emphasized that unlike Commissions, the Constitution creates the position of **the Auditor General** and **controller of Budget** as independent offices.

55. In learned counsel's view, **Article 229(1)** provides for there being "**an Auditor General**" and not **Office of the Auditor General** as the impugned section 4(2) purports. Counsel supported this view with reference to **Article 228(1)** submitting that it also provides for "**a Controller of Budget**" and not Office of Controller of Budget. Counsel contended therefore, that the provisions intend to take away the independence and autonomy of the Auditor General in contravention of the constitution.

56. **Miss Soweto** also agreed with **Mr. Mboya** that Part III (sections 25,26 and 27) of the Act in so far as it establishes the **Audit Advisory Board**, is an attempt to undermine the Auditor General. Learned counsel pointed to a possibility that under section 26, the Board can hold meetings in the absence of the Auditor General since he is not chair of the Board, and make decisions on the functions of the Auditor General without his knowledge contrary to the constitution.

57. Counsel also took issue with section 40 of the Act submitting that it is vague as to who the "**highest authority**" a clear violation of **Article 249** of the Constitution. According to counsel, the section requires the Auditor General to consult unknown people in the performance of his duties yet he is supposed to conform to the constitutional dictates. Learned counsel relied on numerous authorities including; ***Re The Matter of Interim Independent Electoral and Boundaries Commission*** [2011] eKLR ***Bato Star Fishing Pty Ltd v Minister of Environmental Affairs & others*** and ***Department of Lands & others v Goedgelegen Tropical Fruits Pty Ltd*** CCT 69/06; [2007] ZACC 12(10) BCLR 1027 CC among others.

Respondent's Submissions

58. **Mr. Kuria**, Learned Counsel for the respondent, submitted that there was no basis on the submission that the President actively participated in the law making process or that the legislative process was flawed. In counsel's view, the President was right in suggesting amendments to the Bill which is allowed under **Article 115** of the Constitution, and that there was nothing to show that the amendments were intended to subvert the Auditor General's mandate. In learned Counsel's view, the President can

veto a Bill and that is what he did in suggesting those amendments.

59. Citing the case of **Nation Media Group v Attorney General, Petition No 30 of 2014**, learned counsel submitted that Article 115 is founded on the separation of powers hence should not be given a narrow interpretation to the effect that the President should merely state reservations on a Bill. In counsel's view, the President made his recommendations under Article 115 and it was up to the Parliament to accept or reject them.

60. With regard to the impugned sections, counsel contended that they are not unconstitutional and that section 4 (2) does not curtail the independence of the Auditor General. He urged the Court to give the constitutional provisions a holistic interpretations including **Article 253** on incorporation of Commissions and Independent offices as corporate entities.

61. On section 14, learned counsel submitted that it does not whittle down powers and independence of the Auditor General and referred to the case of **Re The Matter of Interim Independent Electoral and Boundaries Commission [2011]eKLR** (SC opinion No 2)(para37)on the holistic interpretations is of the Constitution. Learned counsel submitted that the body established under section 25 does not conflict with the duties and powers of the Auditor General since it is merely **an advisory body** with not role on the substantive mandate of the Auditor General.

62. Regarding section 40, counsel submitted that confidentiality is required while auditing security organs and according to counsel, the highest organ contemplated in that section is that under Article 239(1) (a)(b)(c)(d) of the Constitution.

3rd Interested Party's Submissions

63. **Mr Kunyi**, learned counsel for the 3rd interested party associated himself with **Mr Kuria's submissions**. He also relied on their written submissions arguing that the national assembly followed the law and procedure in enacting the impugned Act and provisions. Learned counsel disputed the petitioner's, 1st and 2nd interested parties' submissions that the President participated in the laws making process.

64. According to learned counsel, what the President did in the Memorandum accompanying the Bill was to make recommendations or suggestions to the national assembly. Counsel contended that the issue was raised in the national assembly and a ruling made by the Speaker allowing the assembly to proceed and consider the suggestions or recommendations.

Analysis and Determination

65. I have considered this petition, the responses, submissions by counsel for the parties and the authorities relied on. Two issues arise for determination, namely; whether the impugned provisions of the Public Audit Act are constitutionally invalid; and whether the President's procedure of noting reservations over the Bill contravened Article 115 of the Constitution.. However before dealing with these issues, it is important to briefly consider the underlying principles in constitutional interpretation.

66. Article 259(1) of the Constitution provides how the Constitution should be interpreted. The Supreme Court referring to this Article in **Re The Matter of Interim Independent Electoral and Boundaries Commission** (supra) stated;

“[87] In Article 259(1) the Constitution lays down the rule of interpretation as follows: “This

Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.” Article 20 requires the Courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.”

67. The Constitution should not be given a light, narrow simplistic interpretation. The Court must strive to interpret the Constitution in a manner that gives effect to the values and principles that underlie the desires of the people it intends to help govern.

68. There are also various judicial decisions on interpretation of the constitution, In the case of **State v Acheson 1991 20 SA SOS” Mahomed J** stated:

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

69. Another principle states that the Constitution should not be given a rigged or artificial interpretation to avoid distorting the spirit ideals and aspirations of the people. In the case of **The Government of Republic of Namibia v Cultura 2000, 1994 (1) SA 407 at 418, Mahomed CJ** again stated;

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

70. In the case of **Njoya & 6 Others v Attorney General & another [2004]eKLR** the Court put the position thus-

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

71. It is also important to bear in mind that although the Constitution has various provisions, it is one document that should be given a holistic interpretation, each provision supporting the other and not one provision destroying another. In the case of **Tinyefuze v Attorney General of Uganda Constitutional Petition No 1 of 1997 [1997]3 UGCC** the Court stated observed that**“The entire Constitution has to be read together as an integrated whole, not one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness. And exhaustiveness.”** The **Court of Appeal of Tanzania** agreed with this view in the case of **Attorney General of Tanzania v Rev. Christopher Msikila [2010] EA 13** on the rule of harmonization. It stated that the principle requires that the entire Constitution be read as one entity.

72. There is a rebuttable presumption of constitutionality of statutes. The principle states that statutes should be presumed to be constitutional until the contrary is proved. The philosophy behind this principle

is that Parliament as a peoples' representative legislates laws to serve the people they represent and therefore, as legislators, they understand the problems people face and enact laws to solve these problems.

73. The Supreme Court of India put it better in the case of **Hambardda Dawakhana v Union of India** Air (1960) AIR 554, thus;

“In examining the constitutionality of a statute, it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and, the elected representatives in a legislature and it enacts laws which they consider to be reasonable for purposes for which they were enacted. Presumption is therefore in favour of the constitutionality. In order to sustain the presumption of constitutionality, the court may take into account matters of common knowledge, the history of the times and may assume every state or facts as existing at the time of legislation.”

74. It is the duty of the person alleging constitutional invalidity of a statute or statutory provision to prove that indeed the statute or any of its provision(s) are unconstitutional. (**Ndyanabo v Attorney General of Tanzania** [2001] EA 495).

75. The Court must also consider whether the purpose and effect of implementing the statute or statutory provision would result into unconstitutionality. In **Olum and another v Attorney General** [2002] 2 EA 508, the Constitutional Court of Uganda stated;

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

76. We now turn to answer the issues raised in the petition.

Whether the impugned Provisions of the Act are constitutionally invalid

77. The petitioner, 1st and 2nd interested parties submitted that a number of sections of the Public Audit Act are unconstitutional both in purpose and effect as they tend to interfere with the independence and mandate of the Auditor General, an independent constitutional office.

78. The impugned provisions are sections 4(2), 7(1) (g), 8, proviso to section 9(1)(e) (ii), sections 12, 14, 15, 17, 18(2) the entire of Part III (sections 25, 26 and 27), sections 40, 42, 68, 70 and 72. In contending that these provisions are unconstitutional, the petitioner argued that they contravene the Constitution or have an unconstitutional effect.

79. First the petitioner contended that section 4(2) of the Act is unconstitutional in effect. Section 4(1) establishes the office of the Auditor General in accordance with Article 253 of the Constitution while sub section 2 states that ***the office shall comprise the Auditor General as its statutory head and all other staff appointed by the auditor General as may be delegated in accordance with Article 234 of the Constitution.***

80. The petitioner, 1st and 2nd interested parties submitted that this section, in so far as it refers to the Auditor General as a **“statutory head”** and that he will appoint staff **“subject to Article 234”** is unconstitutional. The respondent and 3rd interested party saw nothing unconstitutional in this subsection submitting that the agitation was unfounded.

81. My understanding of the petitioner’s submission is that their attack was only directed on the constitutionality of section 4(2) for calling the Auditor General a **“statutory head.”** The Auditor General is established under the Constitution as an independent office. To understand the petitioner’s concern, it is important to look at **Article 229 (1)**. It provides that:-

“There shall be an Auditor-General who shall be nominated by the President and, with the approval of the National Assembly, appointed by the President.”

82. Article 229(1) is clear that there is to be an Auditor General nominated by the president and on being approved by Parliament, is appointed by the President. The position of Auditor General is created by the Constitution and not statute. He cannot therefore, be **“a statutory head”**. The impression created by section 4(2) is that the Auditor General exists by virtue of the Public Audit Act and for that reason he is holding a statutory office. This is erroneous and results into an unconstitutional effect. Such a situation would make a statute unconstitutional in effect. In ***R v Big M Drug Mart Ltd*** (supra) the Court stated that ***either an unconstitutional purpose or an unconstitutional effect can invalidate legislation***. This was also emphasized in ***Olum and another v Attorney General*** (supra) that the Court must examine the effect of a statute to determine its constitutionality.

83. Section 4 (2) as drafted has resulted into an unconstitutional effect and therefore offends Article 229(1) of the Constitution. Although section 4(1) recognizes that the Auditor General exists by virtue of **Article 229(1)**, subsection 2 defines him as a **“statutory head”** which in ordinary circumstances reduces a constitutional office to a statutory one. It contradicts Article 229 (1) of the constitution which establishes that office and provides for his functions and manner of appointment. The section creates a problem when it subjected the appointment of his staff to the Public Service Commission and Article 234(5) not withstanding Article 252 (1) (c) that he should recruit his own staff. This attack was, in my view, well founded.

84. The petitioner also impugned section 7(1) (g) of the Act which states that 7(1) ***in addition to the functions and responsibilities of the Auditor General as set out in Article 229 of the constitution, the Auditor General shall (g) perform any other functions as may be prescribed by any other written legislation***. The petitioner’s contention was that **paragraph (g)** purports to confer on the Auditor General other functions not intended under the Constitution.

85. Section 7 is generally on the functions and powers of the Auditor General. Functions and powers of the Auditor General are provided for in **Article 229(4) and (5)** that is; ***to audit and report in respect of financial expenditure of the enumerated public entities***. Article 229 does not state that the Auditor General may perform any other duties or is subject to any other legislation. The Article does not even state that the functions and powers of the Auditor General **“include”** those contained in Article 229(4) and (5). The petitioner, 1st and 2nd interested parties appear to have limited their reading to Article 229 of the Constitution only.

86. Had the petitioner read beyond Article 229, they would have noticed Article 252(1) which states each Commissions and each holder of an independent office ***(d) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution***. Article 248 (3) recognizes the **Auditor General** and **Controller of Budget** as the

independent offices. It is therefore incorrect and unacceptable to contend that the impugned section 7(1) (g) violates the Constitution. In enacting that provision the legislature did not expand functions and powers of the Auditor General beyond what the Constitution has assigned him. The drafters of our Constitution intended that the Auditor General perform functions and exercise powers in addition to those conferred by the Constitution. I see no constitutional invalidity in section 7 (1) (g) of the Act.

87. Next, the petitioner doubted the constitutionality of section 8 of the Act for providing that in developing staff organizational structure, the Auditor General should recruit and promotes qualified staff and human resource **subject to Article 234(5)** of the Constitution. It was submitted that by subjecting staff of the Auditor General to **Article 234(5)** would compromise his independence and mandate.

88. Article 234 is on the functions and powers of the **public service**. Article 234(5) is to the effect that the Public Service Commission may **delegate with or without conditions, any of its functions and powers to any or more of its members or to any officer body or authority in the public service.** The Auditor General is an independent constitutional office. He does not operate subject to the **Public Service Commission**, does not recruit staff subject to the Public Service Commission and cannot discipline them as such. In that regard, the workings of the Auditor General including recruitment and discipline cannot be subject to the Public Service Commission or any other authority.

89. To require the Auditor General to take certain actions and make some decisions subject to Article 234 with regard to his staff does not only erode but also to undermine the independence bestowed on him by the Constitution. **Article 252 (1)** of the Constitution is clear that each commission, and each holder of independent office **(c) shall recruit its own staff.** To that extent therefore, and giving a holistic reading to Articles 229, 234, 249, and 252 of the Constitution, reveals that the Auditor General cannot be subject to the Public Service Commission when either recruiting or disciplining his staff. Public Service Commission is an independent commission and so is the Auditor General.

90. The petitioner further challenged the constitutionality of the proviso to section 9(1) (e). It was contended that the proviso limits the Auditor General's access to documents, reports, records and even properties for the purpose of carrying out his work. Section 9(1) (e) provides;

(1) Without prejudice to the powers given under the Constitution and this Act and for the purposes of carrying out his or her duties effectively, the Auditor General, or an officer authorized for the purpose of this Act, shall have powers—

(e) of unrestricted access to—

(i) all books, records, returns, reports, electronic or otherwise and other documents of entities listed under Article 229 (4) of the Constitution;

(ii) any property or premises used or held by State Organs or public entities covered by Article 229 (4) of the Constitution and subject to audit under this Act, Provided that such access is reasonably necessary, in the opinion of the Auditor-General, in carrying out his or her functions

91. The petitioner's submission was that the proviso introduces a limitation to the Auditor General's access to documents, reports properties or premises against the constitutional requirement that the Auditor General access any documents or premises for purposes of carrying out his work. Principles of interpretation of statutes require that a statute or provision should be read as a whole to get the legislative intention. In the case of **The Engineers Board of Kenya v Jesse Waweru Wahome & others** Civil Appeal No 240 of 2013 the Court of Appeal stated that ***“One of the canons of statutory***

interpretation is a holistic approach... no provision of any legislation should be treated as 'stand-alone' An Act of parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act."

92. A holistic reading of the entire section 9 shows that the Auditor General's powers have been well stated therein. He can conduct investigations, can obtain professional assistance, can issue summons where necessary, and has unrestricted access to what he requires for purposes of his work including access to property or premises used or held by state organs or public entities covered under Article 229(4) of the Constitution. The proviso to section 9 (1) (e) states that he should have unrestricted access if in his opinion, access is ***reasonably*** necessary for the audit.

93. In my respectful view, I do not see any limitation since the proviso leaves the matter of access at the discretion of the Auditor General. The Auditor General's mandate to audit state organs, public bodies and any institutions funded by the public is given by the Constitution. In that regard, Section 9 (1) (e) makes it clear that he has unrestricted access where, in his own opinion, it is ***reasonably*** necessary for the audit. It would have been different had the proviso left the question of necessity of access in the opinion of the state organ or public body to be audited. I also do not see any ambiguity or vagueness in the proviso to make it constitutionally invalid.

94. Counsel again contended that section 12 of the Act is unconstitutional for creating the position of ***Acting Auditor General***. a position not contemplated by the Constitution. Section 12 provides that where the office of the Auditor General becomes vacant for whatever reason, or where his appointment is pending, the Public Service Commission will recommend the most senior officer in the office of the Auditor General to the President to designate such a person as ***Acting Auditor General*** for 90 days subject to meeting the qualifications for appointment as Auditor General. The person designate would exercise full powers of the Auditor General.

95. This section presents several problems. First the Auditor General is an independent office holder and is not subject to the Public Service Commission when it comes to his appointment or that of his staff. There is no constitutional requirement that the Public Service Commission should recommend a person for appointment as Auditor General. Under section 11 of the Act, it is the selection panel that recommends names to the President for appointment. The Constitution and the law are clear on how the Auditor General is appointed and there cannot possibly be any other way.

96. The petitioner argued that the position of ***Acting Auditor General*** is unconstitutional because only one person is recognized by the Constitution as Auditor General and I agree. The Constitution uses the word ***"an"*** Auditor General, meaning an individual and not individuals. The Constitution does not mention other substantive positions. Although the Constitution allows the Auditor General to recruit his own staff and in doing so, must develop staff organizational structure for the performance of his functions and exercise of powers. This is for purposes of functioning and the office must be ready for continuity as an independent office. However, the problem is whether there can be an ***Acting Auditor General*** and appointed in the manner suggested by section 12.

97. In my respectful view, there cannot be an ***Acting Auditor General*** because the Constitution only recognizes ***Auditor General*** appointed in accordance with Article 229(1). Any attempt to create a substantive position of ***Acting Auditor General*** by statute, appoint a person otherwise than as contemplated by the Constitution and allow him/her to exercise constitutional functions and powers of the ***Auditor General***, amounts an unconstitutional office and un constitutional exercise of functions and powers of the constitutional independent office. Appointing an ***Acting Auditor General*** as proposed by section 12 violates Article 229 (1). For that reason I find and hold that section 12 of the Act is

inconsistent with Articles 229 of the Constitution and is in valid.

98. Section 15 creates the position for **Senior Deputy Auditor General** to deputize the Auditor General and be head of the administration and management in the Auditor General's office. The petitioner has argued that this is unconstitutional because the position does not exist in the Constitution. The Constitution only recognizes **an Auditor General**. However, as I have said earlier, the Auditor General cannot act alone. He must have senior people in his office to assist in the performance of his work. He cannot be all over doing everything including supervising staff. That is why Article 252 (1) (c) allows him to recruit his staff. As long as the person works under the direction of the Auditor General and discharges duties assigned to him/her by the Auditor general, I see nothing unconstitutional about this position. Holding otherwise would reduce the Auditor General's office to a one man's office which may not attract qualified professionals thus limit its capability to function in the discharge of its constitutional mandate as the watch dog over public finance and administration.

99. Sections 16, 17, 18 and 19 are also is issue as far as their constitutional validity is concerned. Section 16 assigns functions and duties to **Senior Deputy Auditor General**. The petitioner has argued that this position is unknown under the Constitution. I have carefully looked at the impugned section 16 and the duties assigned to that holder of that office. It is clear to me that the holder works under the direction of the Auditor General. Given that he works to assist in the performance of the duties of the Auditor General, I do not see any friction between this section and the Constitution or the work of the Auditor General. I also do not find any unconstitutional effect in the implementation of this provision.

100. Section 17 provides;

(1) "The office of the Auditor-General may recruit such other staff as may be necessary for proper discharge of his or her functions under the Constitution, this Act and any other written law, upon such terms and conditions as he/ she may in consultation with the Salaries and Remuneration Commission and subject to Articles 230 and 234(5) of the Constitution.

(2) The remuneration of such staff should reflect prevailing remuneration of staff performing similar duties in the audit profession in other public and private institutions.

(3) The staff of the Office of the Auditor-General shall be competitively recruited in accordance to the organisation structure developed by the office of the Auditor-General.

(4) The recruitment and appointment of staff shall take cognisance of regional, ethnic and gender balance including equal opportunities to persons with disabilities" and marginalized groups and shall comply with the value and principles of public service as contemplated in Article 232 of the Constitution.

101. The problem in so far as I can see is in 17(1) when it states that recruitment of staff of the Auditor General is subject to **Article 234(5)** of the Constitution. Sub Article (5) states that **The Commission** (public service commission) **may delegate, in writing, with or without conditions, any of its functions and powers under this Article to any one or more of its members, or to any officer, body or authority in the public service.** The Auditor General is independent and has been given authority by the Constitution to recruit his own staff. He does not have to refer to the Public Service Commission nor can the Commission delegate functions or officers to his office. Doing so would interfere with his independence to recruit people who can discharge duties independently to meet the mandate bestowed on him. It is likely to raise a possibility of conflict of interests when auditing public bodies such as the Public Service Commission. Section 7(1) is inconsistent with Articles 249 (2) (b) and 252 (1) (c) of

the Constitution.

102. Regarding section 18, the petitioner's complaint was secondment of officers from other state organs to his office or from his office to state organs and public bodies.. It must be appreciated that the Auditor General employs staff for the purpose of carrying out his duties and performing his functions. It would be improper for him to second his staff to other public bodies yet his core mandate is to audit the same state organs and public bodies. This will not only lead to familiarity but also compromise the independence of individual staff. This will interfere with institutional independence and therefore may have an unintended consequence in so far as the independent office of the Auditor General is concerned.

103. Section 19 deals with delegation of duty by the Auditor General to his staff. The section provides that;

“(1)The Auditor General may, subject to such conditions as he or she may impose in writing, delegate any power and assign any duty conferred on him or her in terms of this Act or any other written law to a subordinate officer.

(2) A delegation or instruction in terms of subsection (1) shall not absolve the Auditor-General of the responsibility concerning the exercise of his or her power

or the performance of the duty.

(2) The Auditor-General may confirm, vary or revoke any decision taken by a member of staff in consequence of a delegation or instruction under this section”

104. The petitioner argued that this provision offends the Constitution because there cannot be such delegation. I do not agree with this submission. The Auditor General may not perform all his duties and functions alone. He may have some of his staff perform certain duties but under his watch. That is an internal matter and it is up to the Auditor General to decide who to do what and how. Independence does not mean the Auditor General will work alone. If that were the case, there would be no reason to recruit staff if he cannot delegate and or assign duties to them. The attack on this section is in my view, misplaced. The petitioner has taken a narrow interpretation of the functions and duties of the Auditor General, how he is to perform them as well as his independence. I am not persuaded that this section violates the Constitution.

105. The petitioners also attacked constitutional validity of the entire **Part III** of the Act that is; **sections 25, 26 and 27** in so far as they relate to the establishment, functions and meetings of the **Audit Advisory Board**. Section 25 establishes the **Audit Advisory Board** as an unincorporated body. Membership of the Board include the Auditor General or his nominee, the Attorney General or his nominee, a nominee by ICPAK, a nominee of Association of Professional Societies of East Africa, that of the Law Society of Kenya and chairperson, Public Service Commission or his/her nominee.

106. The section gives qualifications for membership to the Board, nomination and appointment of members to the Board, allows the Auditor General to co-opt two members with necessary expertise to the Board. Members of the Board elect a chairperson who should not be the Auditor General.

107. Section 26 is on the meetings of the Board whose quorum is five members but there may be a greater number determined by the Board on a need basis depending on the importance of the matter. The **Deputy Auditor General** is the secretary to the board. Meetings are to be convened by the

chairperson, and proceedings of the board would not be invalidated by reason of vacancy among members. The board will have four and not more than twelve meetings in a financial year.

108. Section 27 is critical for it provides for the functions of the board. The principle function being **to advice the Auditor General on the exercise of his or her powers and the performance of his or her functions under the Constitution and the Act.** Other functions include: advice on recruitment of senior managers in to the office of the Auditor General, advice on the development and review of organizational development issues, budgetary plans and estimates, remuneration and terms of employment of staff in consultation with salaries and remuneration commission and any other matter that may be referred to it by the Auditor General.

109. In so far as sections 25 and 26 are concerned I really do not see their constitutional invalidity. They are on establishment, composition, and meetings of the Board. The Auditor General has to hire staff. In the process he has to conduct interviews and hire the best people for the job. He therefore needs a team to help him do that. And even develop structures and budget plans. I do not even think the composition of the Board would be a problem in so far as these two sections are concerned. The problem is in section 27.

110. The office of Auditor General is a creature of the Constitution under Article 229 which also details his functions. Article 249 (2) of the Constitution provides for the objects of commissions and independent offices thus;

“(2) The commissions and the holders of independent offices—

(a) are subject only to this Constitution and the law; and

(b) are independent and not subject to direction or control by any person or authority.”

111. The independence of Commissions and independent offices including that of employing their own staff is guaranteed by the Constitution. They are required to act independent of control or direction of any person or authority. This independence is critical to the Auditor General in the discharge of duties and performance of his constitutional functions. He is insulated from interference from other state organs. That is why the Auditor General has his duties and functions well spelt out in the constitution. He is delinked from day to day interference from the executive and other arms of government. Both institutional and personal independence including the ability to work and hire his own key members of his staff is necessary as a way of minimizing interference from other state organs thus enhance the performance of his functions.

112. That the independence of the commissions and independent offices is critical, was appreciated by the **Supreme Court** in ***ReThe Matter of the Independent Electoral and Boundaries commission of Kenya [2011]eKLR*** where it stated :-

“ [59] ... the real purpose of the “independence clause”, with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates

of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the "independence clause". (emphasis)

113. The independence includes excluding the independent office's staff from the government. In case of ***Thomas v Attorney General of Trinidad and Tobago*** [1982] AC 113, 124 Lord Diplock observed with regard to independence of commissions that the whole purpose was to insulate members from political influence exercised directly upon them by the government of the day. He stated that the means adopted for doing this was to vest in autonomous commissions, to the exclusion of any other person or authority, and that although these autonomous commissions are public authorities, they are excluded from forming part of the service of the Crown.

114. The above principle applies to the Auditor General's position. When the Constitution uses the word "***independent office***" it means that office works independent of all other state organs in the discharge of its duties and performance of its functions. The Constitution is articulate in Article 249(2) that the Auditor General, as holder of an independent office, is not under ***direction or control of any person or authority***. The Auditor general was designed to work without external interference or pressure in order to fulfill the constitutional demands of financial probity in state organs and public bodies as demanded by Articles 10 and 201 of the Constitution on integrity, transparency and accountability in public financial expenditure.

115. An independent Auditor General was therefore deemed critical in establishing an office that would deal with public finance administration matters given that management of public funds represents a trust bestowed on state organs and public bodies by the people of Kenya to use those funds and resources in promoting an equitable society. In that regard, the Auditor General in carrying out audit is required to reveal any failures on the part of state organs and public bodies to comply with the public finance regulations which he cannot do if his independence is curtailed. Independence guarantees the holder of the office at any one time, sufficient safeguards and protection in the performance of his duties without fear of repercussions.

116. Looking at the principle function of the ***Audit Advisory Board***, it leaves no doubt that it is required to ***advise the Auditor General on how to discharge his mandate under the Constitution***. This is an interference with his institutional and individual independence. This, without a doubt, alters the constitutional architecture of the independent office of the Auditor General and the principles of independence contemplated by the Constitution. It also violates Article 249(2) (b) which states that he is independent and not subject to direction or control of any person or authority. There can be no doubt the function of the ***Audit Advisory Board to advise the Auditor General in the performance of his functions under the constitution*** violates Constitutional values and principles of independence of the Auditor General in Articles 229 and 249(2).

117. Even considering the composition of members of the ***Audit Advisory Boards*** such as the ***Attorney General*** and ***Chairperson of the Public Service Commission***, these are two head of public bodies that are to be audited by the ***Auditor general***. That notwithstanding, they are required to advise him on how to perform his work. This leaves section 27 plainly unconstitutional. it goes not only against Articles 229, 249(1) but also 249(2) (b). Parliament enacted a legislation that to a large extent altered the constitutional requirement that as holders of an independent office, he is subject only to the Constitution and the law and is not subject to direction or control of any person or authority.

118. Flowing from the exposition above, it leaves no doubt on the unconstitutionality of sections 40 and 42 of the Act. Section 40 requires the Auditor General to hold a pre audit meeting at the highest level to agree on areas to audit and appropriate audit approach when auditing national security organs and even allows vetting of officers to conduct the audit. Section 42 bars the Auditor General from questioning government policy objectives during audits. The section provides that “**Notwithstanding the provisions of this Act, in an examination under this Act, the Auditor-General shall not question the merits of a policy objective of the national government or county government or any other public entity.**”

119. The Auditor General has a constitutional obligation under Article 229(4) (h) to audit and report on the accounts of state organs public bodies and any entity funded by public money. This cannot be done if the Auditor General has to seek permission by holding meetings with higher authorities as proposed by section 40 before carrying out the audit. Subjecting officers to vetting before audit would leave room for state organs and public bodies to decide who to audit them. The Auditor General cannot also confirm the viability of the policy objectives funded by the people of Kenya when section 42 suggests that he should not question policy objectives funded by the people. This has the effect of stifling his independence. A statute cannot seek to impose conditions on the Auditor General's audit approaches when the Constitution gives him mandate to do his work without direction or control from any person or authority. This violates national values and principles of governance including integrity, transparency and accountability in Article 10 and financial openness in Article 201 of the Constitution.

120. Lastly the petitioner questioned constitutionality of sections 68, 70 and 72 of the Act. Section 68 gives power to the Cabinet Secretary for finance to make regulations necessary for the carrying out or giving effect to the Act. Although the petitioner says that this is unconstitutional, I note that they are not challenging the entire Act. In that regard, the cabinet secretary may make regulations in so far as they are for enforcing the provisions of the Act that are not found unconstitutional, and they do not interfere with the independence of the Auditor General in the discharge of his mandate. If and where the regulations would appear to interfere with his independence, they would be open to be challenged. Before that happens, the less I say about this provision, the better.

121. Regarding section 70, my view is that it is superfluous. The section provides that “**This Act shall prevail in case of any inconsistency between this Act and any other legislation relating to the functions and powers of the Auditor-General.** Powers and functions of the Auditor General are provided for in the Constitution and not by the Act. They are constitutional functions and not statutory. The Act merely restates them. If there is any legislation that would be in conflict with this Act, it would by implication be in conflict with the Constitution. Such an Act would be invalid in terms of Article 2(4) of the constitution.. Section 70 does not add anything new except repeating the words in the Constitution. It is therefore unnecessary

122. On limitation of access to reports by the Auditor General by section 72 on grounds of security, it is my considered view, that audit reports are public documents once submitted to Parliament. Section 72 recognizes the public's right of access under Article 35 of the Constitution. Any limitation on grounds of national security would have to be justified and it is not for this Court to make a declaration at this stage given that the right of access to information is a constitutional right that has been acknowledged in section 72.

123. I have looked at the impugned provisions and laid them against the Constitution and considered their purpose and effect. I have in particular examined the likely effect the provisions will have on the performance of the Auditor General's functions and exercise of his powers. As was stated in the case of **US v Buttler, 297 US 1 [1936]**, where an act of Congress is appropriately challenged as being

unconstitutional, the judicial branch has only one duty; to lay the Article of the constitution involved beside the statute challenged and decide whether the latter squares with the former.

124. Having juxtaposed the impugned provisions against the Articles of the Constitution concerned and applied my mind on the values and principles of our constitution in respect to those provisions and the applicable principles of constitutional interpretation, the conclusion I come to is that the failed provisions represent a legislative intrusion on the independence of the Auditor General, rendering the sections constitutionally invalid.

125. The cumulative effect would, in my view, be to curtail rather than enhance his independence in the discharge of his mandate as contemplated by the Constitution. Except sections 7(1) (g), 9 (1) (e) (proviso), 14, 15, 16, 19, 25 and 26, the rest of the impugned provisions have clearly failed the constitutional test of validity in terms of Article 2(4) of the Constitution.

Whether the President actively participating in the legislative process in the manner he noted his reservations

126. The petitioner, 1st and 2nd interested parties also argued that the process leading to enactment of the **Public Audit Act** was faulty. It was contended that the President engaged in a legislative process when he suggested amendments in the Bill complete with new words, phrases and clauses. This, they contended, violated the law making process by Parliament making the Act unconstitutional.

127. The respondent and 3rd interested party on their part argued that the president exercised his powers under Article 115 of the Constitution. They contended that the President was free to veto a Bill and even make suggestions in any manner he wished. They argued that it was up to Parliament to approve or reject the reservations in the memorandum.

128. Our constitutional architecture recognizes separation of powers among the three arms of government; the Executive, Legislature and the Judiciary. It is the mandate of the Legislature to make laws. Article 94 (1) of the Constitution reposes legislative power on parliament. It provides that **(1) The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.** Article 109(1) provides how the legislative power is to be exercised. It states that **(1) Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.**

129. Article 115 of the constitution provides for Presidential assent and referral of Bills to Parliament. When a Bill is presented to the President, he has 14 days to either assent to it or refer it back to Parliament for reconsideration noting any reservations he may have concerning the Bill. Once Parliament receives the Bill, it may amend the Bill in light of the President's reservations or pass the Bill a second time without amendment. Where parliament amends the Bill accommodating the President's reservations, the Bill is resubmitted to the President for assent. Parliament has also an option to consider the president's reservations, pass the Bill without amendments or with amendments that may not fully accommodate the President's reservations but with a vote of two-thirds of members of the National Assembly and the Senate where applicable,

130. The constitution states that a Bill passed in this manner, is forwarded to the President within seven days and the President must assent to it seven days after he has received it.. If the Bill resubmitted to the president is not assented to within seven days, it is taken to have been assented.

131. The question raised by the petitioner revolves around what exactly the President was supposed to

do while referring the Bill back to Parliament. The constitution states that the president shall (b) refer the Bill back to Parliament noting any reservations he has concerning the Bill. The key words are “**noting any reservations**”. The constitution does not define the words “**noting reservations**”. The question is, does the President merely “note” the reservations and how does he do that”

132. The *Concise Oxford English Dictionary, 12th Edition* defines the word “**reservation**” as “**a qualification or expression of doubt attached to a statement or claim.**” *Macmillan English Dictionary for Advanced Learners, New Edition (2007)*, defines “**reservation**” as “**a feeling of doubt about whether something is good or right.**” When the president notes reservations it means he has doubts or qualifications about the Bill as passed by Parliament thus returns it for reconsideration.

133. The President’s reservations were expressed in his memorandum to Parliament in the form of several recommendations and suggestions that Parliament eventually approved and passed without amendments. The drafters of our Constitution must have intended that the President’s reservations should almost prevail when they imposed a higher threshold of two thirds of members in order to reject or amend the reservations.

134. In the present petition, the Bill was placed before the relevant committee of the National Assembly which considered the reservations and made a report to the whole house which passed the Bill as suggested by the President. The Bill was then placed before the Senate which again passed it without amendments. The President assented to the Bill completing the law making process which the petitioner has faulted. The President has been given power by the Constitution to veto Bills and return them to parliament when he has reservations which he is required to note so that parliament can deal with them..

135. The Constitution states that where the President refers a Bill back for reconsideration, Parliament may, following the appropriate procedures amend the Bill as per the president’s recommendations or pass it without taking into account those recommendations, but after mastering two thirds of the members. In my view, reservations do not have to take any particular format as long as the President makes his views clear to Parliament. The same Constitution gives Parliament discretion to accept or reject the recommendations using parliamentary procedures.

136. Parliament, while considering the reservations should however bear in mind that the initial Bill went through public participation and should the President make substantial recommendations that significantly alter the character of the Bill as earlier passed, has to consider whether public participation will be necessary before passing those recommendations.

137. This issue was dealt with in the case of *Nation Media Group Limited & 6 Others V Attorney General & Another [2016] eKLR* where the President had refused to assent to a Bill and referred it to Parliament with explicit reservations and suggested alternative clauses which Parliament accepted. The petitioners argued that this was usurpation of Legislative authority of Parliament and a violation of the Constitution. In answering that question, the Court stated;

“[130]The question that we must grapple with in light of these contentions is: how, exactly, is the President required to express his reservations in respect of a Bill placed before him for assent” Does pointing out what he sees as problematic with specific provisions in the Bill, and making suggestions and recommendations in respect thereto, amount to usurpation of the legislative role of Parliament and therefore a violation of the Constitution”...

[132]It seems to us that the petitioners have ascribed a very narrow meaning to the term, which, with respect, we do not believe is in accord with the Constitution. It will be noted that Article 115

uses phrases such “noting any reservations that the President has concerning the Bill” (Article 115(1)(b); “in light of the President’s reservations” (115(2)(a); fully accommodating the President’s reservations” (115(3)) and “after considering the President’s reservations”.

[133] With all due respect to the petitioners, we must bear in mind the constitutional interpretation principles that require that we interpret constitutional provisions broadly so as to give effect to its provisions, and to promote the purposes, values and principles of the Constitution. To give the provisions of Article 115 the very narrow meaning that the petitioners contend it has would render its provisions meaningless. In our view, the reservations by the President under section 115 must entail such recommendations and observations pertaining to specific provisions of the Bills presented to him for assent as he deems merit consideration by the National Assembly.”

138. I agree with the above exposition of the law. The President in referring the Bill to Parliament, was exercising his constitutional mandate and Parliament as an independent state organ also exercised its constitutional mandate under Article 115 (2) (a). Furthermore, the petitioner, 1st and 2nd interested parties have not alleged that Parliament did not consider the President’s reservations over the Bill as required by the Constitution. In that regard, I find no fault on the part of the President and Parliament in the manner the reservations were made dealt with by Parliament.

139. In conclusion therefore, having considered the impugned provisions of the Act that were said to violate the Constitution as well as the process adopted by the President in noting his reservations while referring the Bill back to Parliament, and having also viewed the impugned provisions *visa viz* the Articles of the Constitution concerned, the verdict I return is that sections 4(2), 8, 12, 17(1), 18, 27, 40, 42 and 70 of the Act, have failed the constitutional test of validity. I am however unable to find fault with the procedure adopted by the President in making his reservations over the Bill when returning it to Parliament.

140. The upshot is that the petition dated 20th September 2016 partially succeeds and allowed as follows;

1. A declaration is hereby issued that sections 4(2), 8, 12, 17(1), 18, 27, 40, 42, and 70 of the Public Audit Act 2015 are inconsistent with and in contravene of the constitution and are in valid.

2. Each party to bear own costs.

Dated Signed and Delivered at Nairobi this 16th Day of February 2018

E C MWITA

JUDGE



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