REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 385 OF 2018

OKIYA OMTATAH OKOITI…...…….....…….....PETITIONER

– VERSUS –

THE HON. ATTORNEY GENERAL……..……...……1ST RESPONDENT

THE NATIONAL ASSEMBLY……..…….2ND RESPONDENT

JUDGMENT

1. The Petitioner herein, who describes himself as a law abiding citizen of Kenya, a public spirited individual and a human rights defender filed the instant petition against the Respondents on 7th November, 2018 seeking the following orders:

a) A declaration that Section 17(1)(a) and (b) of the National Cohesion and Integrations Act No. 12 of 2008 and the procedure for nominating commissioners of the National Cohesion and Integration Commission by the National Assembly under the First Schedule to the Act is unconstitutional and therefore, invalid, null and void.

b) A declaration that any appointments made pursuant to Section 17(1)(a) and (b) of the National Cohesion and Integration Act No. 12 of 2008 and the procedure for nominating commissioners of the National Cohesion and Integration Commission by the National Assembly under the First Schedule of the Act is unconstitutional, and therefore, invalid, null and void ab initio.

c) An order quashing Section 17(1)(a) and (b) of the National Cohesion and Integration Act No. 12 of 2008 and the procedure for nominating commissioners of the National Cohesion and Integration Commission by the National Assembly under the First Schedule to the Act ab initio.

d) An order quashing any appointments made pursuant to Section 17(1)(a) and (b) of the National Cohesion and Integration Act, No. 12 of 2008 and the procedure for nominating commissioners of the National Cohesion and Integration Commission by the National Assembly under the First Schedule to the Act.

e) An order that the costs of this suit be provide for

f) Any other relief that the court may deem just to grant.

2. A summary of the Petitioner's case is that on 2nd November, 2018, he read an advertisement that the 2nd Respondent had embarked on the process of recruiting persons for appointment as Commissioners of the National Cohesion and Integration Commission and the interviews were slated for 12th to 14th November, 2018.

3. According to the Petitioner, the said recruitment by the 2nd Respondent contravenes the constitutional principle of separation of powers. The Petitioner's case is that both Section 17(1) (a) and (b) of the National Cohesion and Integration Act No. 12 of 2008 (hereinafter **"the Act"**) and the First Schedule of the Act are unconstitutional since recruitment of persons to be appointed to public office is the preserve of the Public Service Commission (PSC) and the executive, and not Parliament.

4. The Petitioner contends that Section 17(1)(a) and (b) of the Act and the procedure for nominating commissioners by the National assembly under the First Schedule of the Act are both unconstitutional and therefore, invalid, null and void ab initio. He contends that the Act predates the Constitution and that pursuant to the provisions of Section 7(1) of the Sixth Schedule of the Constitution, it must ***"be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution."***

The 1st Respondent's Case

5. In response to Petition, the 1st Respondent filed grounds of opposition dated 8th November, 2018 and filed in court on the same date challenging the jurisdiction of the this court and the purported constitutional violation by the Respondents. However, the question of jurisdiction was sufficiently dealt with at the preliminary stage and therefore I will not delve into it.

The 2nd Respondent's Case

6. The 2nd Respondent opposed the petition through a Replying Affidavit sworn by Michael Sialai on 22nd November, 2018 and filed in court on the same date. He contends that in enacting the impugned section 17(1) (a) and (b) of the Act, Parliament was exercising its legislative role derived from the Constitution and the orders sought by the Petitioner seek to contravene the provisions of Article 109 of the Constitution. He further contends that there is a presumption of constitutionality of statutes until the contrary is proved as was stated by the Court of Appeal of Tanzania in ***Ndyanabo v Attorney General (2001) E.A 495*** which was a restatement of the law in the English case of ***Pearlberg v Varty (1972) 1WLR 534.***

7. The Respondent further contends that recruitment of state officers is not itself within the scope of the Public Service Commission by virtue of Article 234 (2) (a) as read with Article 260 of the Constitution. Further, it was their contention that the National Cohesion and Integration Commission is not a Chapter 15 commission under Article 248 of the Constitution for which the provisions of appointment and approval under Article 250 of the Constitution would be applicable. According to the 2nd respondent, the National Cohesion and Integration Commission is a *sui generis* state organ created by Parliament and therefore its operations, including appointment of Commissioners is determined exclusively by the legislature.

8. Lastly, the 2nd Respondent contends that the process of recruitment of Commissioners to the National Cohesion and Integration Commission has previously, in 2009 and 2014, been undertaken by the National Assembly's Select Committee on National Cohesion and Equal Opportunity.

Parties' Submissions

9. The Petitioner, who appeared in person, submitted that the Petition is primarily concerned with the role of Parliament as regards employment in public office and whether Parliament can perform the function of recruitment and identify the persons to be appointed to public office. He further submitted that Section 17 of the Act is offensive to the constitutional doctrine of separation of powers. He argued that Parliament's role is oversight and either the Executive or the Public Service Commission should perform the recruitment through an independent selection committee. It was his further submission that Parliament plays the role of appointment which is to approve or reject nominees and should therefore not be engaged in the recruitment process.

10. It was the petitioner's position that the impugned section 17 of the Act is unconstitutional and should be declared as such as the First Schedule of the Act specifically refers to the earlier nominations before the new Constitution was promulgated and does not refer to subsequent nominations. He further submitted that out of the 54 shortlisted candidates for the positions of Commissioners, 12 were former MPs who were unsuccessful in the past election and that the general public would not know he merits of the shortlisting. It was the petitioner's case that Parliament had no role in recruitment process because not even a single standing order of the National Assembly provides for recruitment as only the approval of nominees is provided for.

11. The 1st Respondent on the other hand aligned itself with the submissions of the 2nd Respondent and submitted that the National Cohesion and Integration Act gives that the National Assembly the power to nominate Commissioners of the National Cohesion and Integration Commission for approval by the President. It was submitted that the impugned Act was enacted in 2008 and later revised in 2012 after the promulgation of the 2010 Constitution and that in enacting the impugned Section 17(1) (a) and (b) of the Act, Parliament was exercising its legislative role derived from the Constitution. It was the 1st respondent's argument that the impugned section 17 (1) (a) and (b) and the first Schedule of the Act gives the National assembly power to nominate commissioners.

12. It was submitted that recruitment and/or nomination of State Officers is not within the scope of the Public Service Commission and that the National Cohesion and Integration Commission is a State Office and not a public office. It was the 1st respondent's position that since the NCIC is established under Section 15 of the Act and the Office of the Commissioners established under Section 17 of the Act, the office should be construed as a *sui generis* State Office and the occupants of the said office as State Officers and not Public Officers. It was further argued that the NCIC is not a Chapter 15 Commission under Article 248 of the Constitution for which the provisions of appointment and approval under Article 250 of the Constitution can apply. It was the respondent's contention that recruitment of state officers is not an exclusive function of the Executive and that Parliament can undertake any duty imposed or prescribed by the law since anything provided for under the law cannot be termed as unconstitutional unless the contrary is proven. For this argument, the 1st respondent relied on the decisions in the following cases; ***Kenya Small Scale Framers Forum & 6 Others –vs- Republic of Kenya & 2 Others (2013) eKLR***, ***Justus Kariuki Mate & Anor –vs- Martin Nyaga Wambora & Anor (2017) eKLR*** and ***Civil Appeal No. 11 of 2018 Pevans East Africa Limited & Anor –vs- Chairman, Betting Control and Licensing Board and 7 Others.***

13. On whether the Petition is meritorious, the respondent argued that the Petitioner did not outline the particular provision of the Constitution that has been contravened by the impugned legislation and further stated that the petitioner was guilty of laches as he was challenging a law that has been in operation for over a decade.

Analysis and Determination

14. I have considered the instant petition, the respondents' responses, the parties' submissions and the authorities that they cited. I find that two main issues that arise for determination are as follows: Firstly, the role of the National Assembly in appointment of commissioners and whether the impugned legislation is unconstitutional.

15. The issues raised in the petition will require the interpretation of the provisions of Articles 234, 248, 250 and 260 of the Constitution. This court has also been called upon to determine the constitutionality of the impugned section of Act. I appreciate that determining the issues raised by the petitioner will involve the interpretation of the section of the said Act that is alleged to be unconstitutional and the relevant provisions of the Constitution. In order to effectively address the said issues, this court will be guided by the well settled principles governing the interpretation of the Constitution and statutes.

16. In interpreting the constitution, the starting point is *Article **259** of the constitution which enjoins the court to interpret the Constitution **in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance.** Further, in exercising its judicial authority, this court is obliged under Article **159 (2) (e)** of the Constitution **to protect and promote the purposes and principles of the Constitution.***

17. Through case law, various courts in different jurisdictions have expressed themselves on the manner in which the provisions of the Constitution and Acts should be interpreted. In fact, one can say that case law is awash with decisions on the subject of the interpretation of the constitution and I therefore find that it will be necessary to highlight a few of those decisions in this judgment. In the case of **Paul Ssemogerere and Others vs. The Attorney General, Constitutional Appeal no. 1 of 2002) [2004] UGSC10)** the Supreme Court of Uganda held that it is a cardinal rule in constitutional interpretation that provisions of a constitution concerned with the same subject should, as much as possible, be construed as complementing, and not contradicting one another. The court further held that constitution must be read as an integrated and cohesive whole.

18. In the case of **Ndyanabo vs. Attorney General [2001] 2 EA 485** the Tanzania Court of Appeal held:-

"We propose to allude to general provisions governing constitutional interpretation. These principles may, in the interest of

brevity, be stated as follows; first, the Constitution of the Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must, therefore, endevour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. As Mr. Justice E.O Ayoola, former Chief Justice of Gambia stated….. "A timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the Constitution a stale and sterile document." Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our democracy not only functions but grows, and the will and dominant aspirations of the people prevail. Restrictions of fundamental rights must strictly be construed."

19. In **Kigula and Others vs. Attorney-General [2005] 1 EA 132** the Uganda Court of Appeal sitting as a Constitutional Court held that the principles of constitutional interpretation are as follows (1) that it is now widely accepted that the principles which govern the construction of statutes also apply to the interpretation of constitutional provisions and that the widest construction possible, in its context, should be given according to the ordinary meaning of the words used; (2) that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other; (3) that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument; (3) that a Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms are to be given a generous and purposive interpretation to realise the full benefit of the rights guaranteed; (4) that in determining constitutionality both purpose and the effect are relevant; and (5) that Article 126(1) of the Constitution of the Republic of Uganda enjoins Courts to exercise judicial power in conformity with law and with the values, norms and aspirations of the people. See also **Besigye and Others vs. The Attorney-General [2008] 1 EA 37** and **Foundation for Human Rights Initiatives vs. Attorney General HCCP NO. 20 of 2006 (CCU) [2008] 1 EA 120.**

20. The sanctity of the Constitution, its special character and special rules of interpretation were captured in the decision of the High Court of Kenya in the case of ***Anthony Ritho Mwangi and another vs. The Attorney General*** **Nairobi Criminal Application no. 701 0f 2001** where the court stated:-

"Our Constitution is the citadel where good governance under the rule of law by all three organs of the state machinery is secured. The very structure of separation of powers and independence of the three organs calls for judicial review by checking and supervising the functions, obligations and powers of the two organs, namely the executive, and the legislature. The judiciary though seems to be omnipotent, is not so, as it is obligated to observe and uphold the spirit and the majesty of the Constitution and the rule of law."

21. Further, the Supreme Court in ***Re The Matter of the Interim Independent Electoral Commission [2011] eKLR***, adopted the words of ***Mahomed J*** in the Namibian case of ***State v Acheson*** 1991(20 SA 805, 813) where he stated that;

"The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship 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".

22. While in the case of ***Njoya & 6 Others v Attorney General & Another [2004] eKLR*** the Court observed that ***"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."***

23. A Constitution is a living instrument with several provisions that should be read as an integrated whole, reading one provision alongside others so that they are seen as supporting one another and not contradicting or destroying each other.(see ***Tinyefuze v Attorney General of Uganda*** Constitutional Petition No 1 of 1996 [1997]3 UGCC). In ***Re The Matter of Kenya National Human Rights Commission,*** (Supreme Court Advisory Opinion Ref. No.1 of 2012), the Supreme Court advocated a holistic interpretation of the Constitution stating:

"But what is meant by a holistic interpretation of the Constitution" It must mean interpreting the Constitution in context. It is

contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions in each other, so as to arrive at a desired result."

24. And in ***Minister of Home Affairs v Fisher*** [1980] AC 319 the Privy Council stated at 329;

"A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the requirement that rules of interpretation may apply, to take as a point of departure for the process of interpretation, a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences."

25. The principles applicable in the construction of statutes, on the other hand, were outlined in the case **Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others [2017] eKLR** wherein at paragraph 63-64 Mativo, J. stated:-

"There are important principles which apply to the construction of statues such as:- (a) presumption against "absurdity" – meaning that a court should avoid a construction that produces an absurd result;(b) the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces "unworkable or impracticable" result; (c) presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an "anomaly" or otherwise produces an "irrational" or "illogical" result and (d) the presumption against artificial result – meaning that a court should find against a construction that produces "artificial" result and, lastly,(e) the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to "public interest," " economic", "social" and "political" or "otherwise."

26. This court could go on and on over the various court decisions on the principles of interpretation of the Constitution. Having regard to the foregoing jurisprudence on the interpretation of the Constitution, I hasten to add that courts are under an obligation, when interpreting the Constitution, to be conscious of the legal environment under which they operate and to take into account the contemporary situation of each age so as to attach such meaning and interpretation that meets the purpose of guaranteeing Constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms. In doing this, the court is under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.

27. In considering the constitutionality of the Act, one must bear in mind the rebuttable principle of 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. This was the main contention by the respondents in this petition.

28. The Supreme Court of India aptly highlighted the principle of constitutionality of statutes 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."

29. It is therefore 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)**.

30. 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…"***

31. Bearing in mind the principle of constitutionality of statutes and the requirement that that legislation must be read in conformity with the Constitution, I now turn to consider the issue of Constitutionality of the impugned sections of the Act. The instant petition is pegged on the provisions of Articles 234, 248, 250 and 260 of the Constitution. The petitioner contended that under Article 234 of the Constitution, the recruitment of persons to be appointed to public office is the preserve of the Public Service Commission (PSC) and the executive, and not of Parliament. The Respondents, on the other hand, relied on the provisions of Article 248, 250 and 260 of the Constitution to argue that the NCIC is not a Chapter 15 commission so as to be subject to the provisions of the appointment and approval under Article 250 of the Constitution. It was the respondents' contention that the NCIC is a *sui generis* state organ created by Parliament and that its operations including appointment of Commissioners are therefore determined exclusively by the legislature.

32. Article 234(2) of the Constitution sets out some to the functions of the Public Service Commission as follows:

(2) The Commission shall-

(a) Subject to this Constitution and legislation-

(i) establish and abolish offices in the public service and;

(ii) appoint persons to hold or act in those offices, and to confirm appointments.

Article 260 of the Constitution defines a "**public officer**", **"public office", "public service", "state office", "state officer" and "state organ"** as follows:

"Public officer" ***means-***

(a) any state officer; or

(b) any other person, other than a State Officer, who holds a public office

"Public office" means ***an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament.***

"Public service" ***means the collectivity of all individuals, other than State officers, performing a function within a State organ.***

"State office" ***means any of the following offices—***

(a) President;

(b) Deputy President;

(c) Cabinet Secretary;

(d) Member of Parliament;

(e) Judges and Magistrates;

(f) member of a commission to which Chapter Fifteen applies;

(g) holder of an independent office to which Chapter Fifteen applies;

(h) member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government;

(i) Attorney-General;

(j) Director of Public Prosecutions;

(k) Secretary to the Cabinet;

(l) Principal Secretary;

(m) Chief of the Kenya Defence Forces;

(n) Commander of a service of the Kenya Defence Forces;

(o) Director-General of the National Intelligence Service;

(p) Inspector-General, and the Deputy Inspectors-General, of the

National Police Service; or

(q) an office established and designated as a State office by national legislation;

"State officer" ***means a person holding a State office;***

"State organ" ***means a commission, office, agency or other body established under this Constitution.***

33. The question which then arises is whether the NCIC is a public office or a state office. While the Respondents argued that NCIC is a *sui generis* state organ and not a public office for which the provisions of Article 234 of the Constitution is applicable, the Petitioner maintained a contrary opinion.

34. My finding, which finding is guided by the provisions of Article 260 on interpretation of the Constitution is that even though the NCIC is not an independent commission expressly established and provided for under Chapter 15 of the constitution, it is nonetheless a state office established by national legislation. The critical question that then arises is what then is the role of the National Assembly in appointment of state officers" The answer to this question sends me back to the Constitution which under Article 95 stipulates as follows on the role an functions of the National Assembly as follows:

"(1) The National Assembly represents the people of the constituencies and special interests in the National Assembly.

(2) The National Assembly deliberates on and resolves issues of concern to the people.

(3) The National Assembly enacts legislation in accordance with Part 4 of this Chapter.

(4) The National Assembly—

(a) determines the allocation of national revenue between the levels of government, as provided in Part 4 of Chapter Twelve;

(b) appropriates funds for expenditure by the national government and other national State organs; and

(c) exercises oversight over national revenue and its expenditure.

(5) The National Assembly—

(a) reviews the conduct in office of the President, the Deputy President and other State officers and initiates the process of removing them from office; and

(b) exercises oversight of State organs.

(6) The National Assembly approves declarations of war and extensions of states of emergency."

35. The impugned Section 17 (1) (a) and (b) of the Act on the other hand stipulates as follows:

(1) ***The commission shall consists of***

(a) A chairperson appointed by the President from amongst the commissioners appointed under paragraph (b);

(b) Eight commissioners nominated by the National Assembly in accordance with the First Schedule and appointed by the President;

(c) The chairperson of the Kenya National Commission on Human Rights;

(d) The chairperson of the National Commission on Gender and Development; and

(e) The chairperson of the Public Complaints Standing Committee

(Ombudsman)

(3) The Commissioners shall, at their first meeting, elect a vice –chairperson from amongst the commissioners appointed under Subsection (2) (b).

(4) In appointing members to the Commission, the principle of gender equity shall apply.

75. On its part, the First Schedule to the Act provides for the procedure for nominating commissioners by the National Assembly, thus:

1. The Clerk of the National Assembly shall, within fourteen days of the commencement of this Act, by advertisement in the Gazette and in at least three daily newspapers of national circulation, invite applications from persons qualified under this Act for nomination as commissioners.

2. An application under paragraph 1 shall be forwarded to the Clerk within twenty-one days f the advertisement and may be

made by any-

a) Qualified person; or

b) Any person, organization, or group of persons proposing the nomination of any qualified person.

3. The relevant Parliamentary Committee in consultation with the Minister shall, within seven days of the expiry of the period prescribed under paragraph 2-

a) Consider all the applications received under paragraph 2; and

b) Recommend to the National Assembly suitably qualified persons for nomination as commissioners.

4. The Committee shall rank and provide comments regarding each of the finalists to the National Assembly.

5. The National Assembly shall, upon receipt of the recommendations of the committee under paragraph 3, nominate fifteen persons for appointment as commissioners and shall submit the list of nominees to the Minister for onward transmission to the President.

6. The Minister shall forthwith forward the names of the persons nominated in accordance with paragraph 5 to the President who shall, by notice in the Gazette, appoint there from eight commissioners.

7. In nominating or appointing persons as commissioners, the National Assembly and the President shall have regard to gender equity and regional balance.

36. A holistic reading of Articles 260 of the constitution on the interpretation of the meaning of the words public office, public officer and public service shows that the NCIC is a public office whose appointment of commissioners fall within the purview of the PSC under Article 234(2)(ii) of the Constitution. In my humble and considered view, the NCIC is a commission like any other commission established under Article 250 of the Constitution and I therefore find that the respondents' argument that NCIC is a *sui generis* body that is subject to a different set of rules from other commissions is misguided and bereft of any constitutional backing.

37. Furthermore, Article 95 of the Constitution is clear and specific on the role of the National Assembly and nowhere in that Article is the National assembly given the mandate to make appointment of the commissioners of the NCIC. I therefore find that the impugned section of the Act is not consistent with the provisions of Article 95 of the Constitution. Articles 2(4) and 165(3) (d)(i) give this court the power to invalidate any law, act or omission that is inconsistent with the Constitution. The said Articles stipulate as follows:

Article 2(4)- ***Any law, including customary law that is inconsistent with the constitution is void to the extent of the inconsistency, and any act or omission in contravention of this constitution is invalid.***

Article 165(3)(d)(i) – ***There is established the High Court, which –subject to clause (5) shall have jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of – the question whether any law is inconsistent with or in contravention of this constitution.***

38. In line with the above Articles of the Constitution, courts have on numerous occasions struck down provisions of law or even entire Acts of Parliament, where the said laws have been found to be unconstitutional. For example in **Coalition for Reform and Democracy (CORD) & 2 others vs Republic of Kenya & 10 others [2015] eKLR**, the Court struck down several provisions of the Security Laws (Miscellaneous Amendment) Act 2015, an omnibus bill providing for amendments to various security and related laws, for violating the Bill of Rights. In **Institute of Social Accountability & Another v National Assembly & 4 others [2015] eKLR** and Council of Governors & 3 Others vs Senate & 53 others [2015] e KLR; the court voided the CDF Act 2013 and the County Governments (Amendments) Act 2014 respectively in their entirety upon finding that both laws violated the principles of rule of law and separation of powers among other grounds. Similarly, this court, in the case of **Okiya Omtatah Okoiti vs the**

Cabinet Secretary National Treasury & 3 Others [2018] eKLR declared the Provisional Collection of Taxes and Duties Act No 44 of 1959, which had been in operation for several decades, unconstitutional.

39. The common thread that runs through the above court decisions is that of the supremacy of the Constitution and the mandate given to the courts to strike down any law that contravenes or is inconsistent with the Constitution. The respondents contended that the impugned Act has been in operation unchallenged for the past decade and that the petitioner was therefore guilty of laches in filing the instant petition in 2018.

40. I find that it is worthy to note that the Constitution does not set out the timelines within which any law can be challenged or declared unconstitutional and in fact, section 7(1) of the Sixth Schedule of the Constitution is categorical that- ***All law in force before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution.***

41. For the above reason, I find that it is necessary that the impugned Act, having been enacted in 2008 prior to the promulgation of the Constitution, ought to be construed in conformity with the Constitution and the mere fact that the law has been in operation for a long period of time does not preclude the court from declaring the said law unconstitutional if it is found to be inconsistent with the constitution. My take is that this petition should serve as a wake-up call to the legislature to take urgent measures to amend the impugned sections of the Act so as to make them compliant with the Constitution bearing in mind the critical role that the NCIC is supposed to play in our young and fragile democracy.

42. My above findings on the constitutionality of the impugned sections of the Act would have been sufficient to determine this petition but I am however still minded, having found that the function of appointment of commissioners is a function of the PSC and by extension, a function of the executive, to address the issue of the principle of separation of powers that the petitioner referred to in this case. The Supreme Court has ably captured this principle in **Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011** where it expressed itself as follows:

"The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation."

43. The doctrine of separation of powers was dealt with by **Ngcobo, J** in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)** in the following manner:

"The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court. It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation."

44. The learned Judge then continued:

"It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary

obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation. By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1) (a) does."

45. I am also guided by the words of **Kasanga Mulwa, J** in **R vs Kenya Roads Board exparte John Harun Mwau HC Misc Civil Application No.1372 of 2000** wherein he held that:

"Once a Constitution is written, it is supreme. I am concerned beyond peradventure that when the makers of our Constitution decided to put it in writing and by its provision thereof created the three arms of Government namely the Executive, the Legislature and the Judiciary, they intended that the Constitution shall be supreme and all those organs created under the Constitution are subordinate and subject to the Constitution.

46. The dictum from the above cited decisions on the doctrine of separation of powers is that when any of the state organs steps outside its mandate, the Court will not hesitate to intervene when called upon to do so. Having found that this court is vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, I also find that this court has an obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard therefore, since this petition alleges a violation of the Constitution by the Respondents, it is my finding that the doctrine of separation of power does not preclude this Court from intervening and arresting a violation of the Constitution by any arm of the government in this case, the legislative arm. I find and hold that this Court has the power to enquire into the constitutionality of the actions of the National Assembly notwithstanding the privilege of debate accorded to its members and its proceedings. My finding is fortified under the principle that the Constitution is the Supreme Law of this country and Parliament must function within the limits prescribed by the Constitution. In cases where it has stepped beyond what the law and the Constitution permits it to do, I find that it cannot seek refuge in or hide behind the twin doctrines of parliamentary privilege and separation of powers to escape judicial scrutiny.

47. In my view the doctrine of separation of powers must be read in the context of our constitutional framework and where the adoption of the doctrine would clearly militate against the constitutional principles the doctrine must bow to the dictates of the spirit and the letter of the Constitution. This is my understanding of the work of **Professor Laurence Tribe** in ***American Constitutional Law*** Vol 1, 3 ed. (Foundation Press, New York 2000) at 127) where he opines that:

"What counts is not any abstract theory of separation of powers, but the actual separation of powers operationally defined by the Constitution. Therefore, where constitutional text is informative with respect to a separation of powers issue, it is important not to leap over that text in favour of abstract principles that one might wish to see embodied in our regime of separated powers, but that might not in fact have found their way into our Constitution's structure."

Conclusion

48. Having regard to my observations and findings in this judgment and having considered the petition, the constitution and the law, as well as the parties submissions and the authorities that they cited, I am satisfied that the *petition* raises a genuine constitutional grievance in so far as the role of the National Assembly in nominating commissioners to be appointed to the NCIC is concerned. The petition therefore succeeds and consequently, I make the following orders:-

a) A declaration is hereby issued that Section 17(1) (a) and (b) of the National Cohesion and Integrations Act No. 12 of 2008 and the procedure for nominating commissioners of the National Cohesion and Integration Commission by the National Assembly under the First Schedule to the Act is unconstitutional and therefore, invalid, null and void.

b) A declaration is hereby issued that any appointments made pursuant to Section 17(1) (a) and (b) of the National Cohesion and

Integration Act No. 12 of 2008 and the procedure for nominating commissioners of the National Cohesion and Integration Commission by the National Assembly under the First Schedule of the Act is unconstitutional, and therefore, invalid, null and void ab initio.

c) An order is hereby issued quashing Section 17(1)(a) and (b) of the National Cohesion and Integration Act No. 12 of 2008 and the procedure for nominating commissioners of the National Cohesion and Integration Commission by the National Assembly under the First Schedule to the Act.

d) I make no orders as to costs.

Dated, Signed and Delivered in open court at Nairobi this 14th day of January 2019

W. A. OKWANY

JUDGE

In the presence of:

The petitioner

Mr Angaya for Mwendwa for the 2nd respondent

Mr Mutinda for the 1st respondent

Court Assistant – Melisa