REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 476 OF 2015

IN THE MATTER OF THE CONSTITUTION OF KENYA AND ENFORCEMENT AND INTERPRETATION OF THE CONSTITUTION

AND

IN THE MATTER OF THE ENACTMENT OF LEGISLATION AND PRESIDENTIAL POWERS ON AMENDMENT OF BILLS

AND

IN THE MATTER OF ARTICLES 1, 2, 3, 4, 10 (2), 93 (1) & (2), 94 (1) (2) (3) (4) & (5), 97 (1), 109 (1) (2), 115 (1) (2) (3) (40 (5) & (6), 129 (1) (2), 131 (2) (A), 159, 165 (3), 258, 259 AND 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF PART X1X, STANDING ORDER NO. 153, 154 AND 155 OF THE NATIONAL ASSEMBLY STANDING

ORDERS

AND

IN THE MATTER OF THE MEMORANDUM CONTAINING A REFUSAL BY THE PRESIDENT TO ASSENT TO THE PUBLIC AUDIT BILL, 2014

AND

IN THE MATTER OF THE MATTER OF THE MEMORANDUM CONTAINING A REFUSAL BY THE PRESIDENT TO ASSENT TO THE RETIREMENT BENEFITS (DEPUTY PRESIDENT AND DESIGNATED STATE OFFICERS) BILL, 2015

AND

IN THE MATTER OF SECTION 4 OF THE RETIREMENT BENEFITS (DEPUTY PRESIDENT AND DESIGNATED STATE OFFICERS) ACT, 2015

AND

IN THE MATTER OF THE MEMORANDUM CONTAINING A REFUSAL BY THE PRESIDENT TO ASSENT TO THE ETHICS AND ANTI-CORRUPTION COMMISSION (AMENDMENT) BILL, 2015

AND

IN THE MATTER OF THE MEMORANDUM CONTAINING A REFUSAL BY THE PRESIDENT TO ASSENT TO THE ETHICS CENTRAL BANK OF KENYA (AMENDMENT) BILL, 2015

AND

IN THE MATTER OF THE MEMORANDUM CONTAINING A REFUSAL BY THE PRESIDENT TO ASSENT TO THE KENYA INFORMATION AND COMMUNICATIONS (AMENDMENT BILL, 2013

AND

IN THE MATTER OF THE MEMORANDUM CONTAINING A REFUSAL BY THE PRESIDENT TO ASSENT TO THE PUBLIC PROCUREMENT AND DISPOSAL ACT (AMENDMENT) BILL, 2014

AND

IN THE MATTER OF THE MEMORANDUM CONTAINING A REFUSAL BY THE PRESIDENT TO ASSENT TO THE STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL, 2014: PROPOSING AMENDMENT TO THE INTERPRETATION AND GENERAL PROVISIONS ACT, THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, 2003, THE ETHICS AND ANTI-CORRUPTION COMMISSION ACT, 2011 AND THE LEGAL EDUCATION ACT, 2012.

AND

IN THE MATTER OF THE MEMORANDUM CONTAINING A REFUSAL BY THE PRESIDENT TO ASSENT TO THE FLAG, EMBLEM AND NAMES (AMENDMENT) BILL, 2014

AND

IN THE MATTER OF THE MEMORANDUM CONTAINING A REFUSAL BY THE PRESIDENT TO ASSENT TO THE NATIONAL POLICE SERVICE (AMENDMENT) BILL, 2014

BETWEEN

COALITION FOR REFORMS AND DEMOCRACY (CORD).....PETITIONER

VERSUS

ATTORNEY GENERAL.....RESPONDENT

AND

INTERNATIONAL INSTITUTE FOR LEGISLATIVE AFFAIRS.....1ST INTERESTED PARTY

KATIBA INSTITUTE.....2ND INTERESTED PARTY

JUDGMENT

THE PARTIES

1. The Petitioner is a coalition of Political Parties comprising of the Orange Democratic Movement, the Wiper Democratic Party and the Forum for the Restoration of Democracy-Kenya (FORD-Kenya). The coalition is registered under the Political Parties Act[1] and each constituent party forming the coalition is registered under the Political Parties Act.[2]

2. The Respondent is the Honorable Attorney General, the Principal government legal adviser and representative pursuant to Article **156** of the Constitution. He represents the national government in court or in any legal proceedings to which the national government is a party, other than criminal proceedings.

3. The first Interested Party **International Institute for Legislative Affairs**, is a not- for- profit organization that works closely with Policy making institutions, Government Departments, Members of Parliament and other stakeholders in the legislative process to draft and advocate for pro- people policies and legislation. Its mandate is to engage stakeholders in the policy and legislative process to facilitate the enactment and implementation of policies and legislation that have a positive impact on the lives of people.

4. The second interested Party, Katiba Institute, is a non-profit making company, registered under the Companies Act. It was established to promote the understanding and implementation of Kenya's Constitution and endeavours to enhance the implementation and the realization of the objects of the Constitution through research, constitutional education, constitutional litigation and encouraging public participation.

The Petitioner's case

5. The Petitioner's case is contained in the Amended Petition dated 20th January 2016, and the Petitioner's written submissions dated 3rd August 2016. The Amended Petition is premised on two main grounds. The first ground challenges the scope of the Presidential powers of assent and referral of legislative Bills under Article 115 of the Constitution of Kenya. It is the Petitioner's case that the Constitution of Kenya under Article 93 establishes the National Assembly, and its roles outlined under Article 95. Further, that Article 95 (3) empowers the National Assembly to enact legislation in accordance with Part 4 of Chapter 8 of the Constitution, while the rules of procedure on enactment of legislation are provided for under Articles 109-125 of the Constitution. The Petitioner contends that the President went beyond the scope of his powers conferred in this respect by Article 115 of the Constitution.

6. On various dates between 2013 to 2015, various Bills were published in the *Kenya Gazette*, subjected to the relevant legislative processes and approved by the National Assembly. The said Bills were subsequently forwarded to the President for assent as provided under Article 115 of the Constitution. The President however referred the Bills in question back to the National Assembly vide various memoranda containing his refusal to assent to the Bills and proposed amendments to the said Bills.

7. The succeeding paragraphs contain an enumeration of the Bills that are the subject of the Petitioner's case.

8. The first Bill under challenge is the Public Audit Bill, 2014, which was published in the Kenya Gazette Supplement No. 162 (National Assembly Bills No. 38) on the 8th December 2014. The Petitioner avers that on 27th May 2015, the Speaker of the National Assembly, pursuant to the provisions of the National Assembly Standing Order number 153, presented the above Bill for assent by the President in line with the provisions of Article 115 of the Constitution. That on 10th June 2015, the President returned the Bill to the National Assembly containing his reservations for reconsideration on the following clauses:-

a. The President recommended or substituted a new clause for clause 4 (2).

b. The President proposed that clauses 8 (a) (b) (c) (d) (h) and (j) be deleted and substituted them with new clauses.

c. That the President inserted a new clause, namely clause 11A.

d. The President recommended an amendment to clause 16 (1).

e. The President proposed an amendment at clause 19 (2).

f. The President inserted a new clause 40A.

g. The President proposed to delete provisions of the Bill that empowered the Auditor General to make regulations and proposed to replace the Auditor General with the Cabinet Secretary responsible for the matters relating to finance.

9. The second Bill under challenge is the Retirement Benefits (Deputy President and Designated State Officers) Bill, 2015. The Petitioner avers that the Bill was published in the special issue of the Kenya Gazette Supplement No. 154 (National Assembly Bills No. 38), and, that it was subjected to the relevant stages of reading as per the Standing Orders. That on 27th May 2015, the President returned the Bill to the National Assembly with a memorandum containing his reservations for reconsideration by the National Assembly as follows:-

a. Deleting and substituting the long title.

b.The President proposed specific amendments to clause 2, on the definition of the term retired "Speaker" by deleting the time held in office from the 15 January 2008 and substituting it with 1 January 1993, and also deleting the definition of "retired Deputy Prime Minister."

c.The President proposed an amendment to clause 3 by substituting the date of retirement of 15 January 2008 with 1 January 1993.

d. The President proposed an amendment to clause 4 by including a new paragraph (d).

e.The President proposed an amendment to clause 5 by deleting "one and a half years salary" and replaced it with "one year's salary."

f. The President proposed an amendment to clause 7 by deleting "one and a half years salary" and replaced it with "one year's salary."

10. The third Bill challenged by the Petitioner is the Central Bank of Kenya (Amendment) Bill, 2014. The Petitioner avers that the Bill was published in the special issue of the Kenya Gazette Supplement No. 110 (National Assembly Bills No. 28), and was subjected to the relevant stages of reading as per the Standing Orders. That on 27th May 2015, the President returned the Bill to the National Assembly with a memorandum containing his reservations for reconsideration by the National Assembly, and in particular, he recommended that clause 2(1) of the Bill be deleted.

11. The Information and Communication (Amendment) Bill 2013, was the fourth Bill under challenge. The Petitioner avers that the Bill was published in the special issue of the *Kenya Gazette Supplement* and was subjected to the relevant stages of reading as per the Standing Orders of the National Assembly. That on 27th November 2013, the President returned the Bill to the National Assembly with a memorandum containing the following recommendations:-

a. That clause 5 be amended by introducing a new clause 5C.

b. Clause 7 proposed the insertion of new sections to the principal Act, namely 6B, 6C and 6D, which set out the procedures for the appointment and removal of the members of the Board of the Communications Authority of Kenya.

c. Clause 17 proposed the deletion of sub-sections (3), (4) and (5) of section 461 of the principal Act and replaced them with new

provisions.

d. Clause 37 proposed amendments to section 102(3), 102 (16), 102A(1), 102E(1)(f) of the Bill by deleting them and replacing them with new provisions.

e. Clause 39 proposed amendments to section 102A of the Act and which was re-numbered as 102K by deleting subsections (6)-(15) and replacing them with new provisions.

f. Clause 41 recommended the amendment of the transitional provisions at paragraphs 9(b) (c) and replaced them with new provisions.

12. The fifth Bill under challenge is the Public Procurement and Asset Disposal (Amendment) Bill 2013. The Petitioner avers that the Bill was published in the special issue of the Kenya Gazette Supplement No. 139 (National Assembly Bills No. 31), and, that it was subjected to the relevant stages of reading as per the Standing Orders. That on 27th May 2015, the President returned the Bill to the National Assembly with a memorandum containing his refusal to assent to the Bill. The reasons for the refusal as set out in the said memorandum were that Parliament had just passed the Public Procurement and Asset Disposal Act of 2015, which adequately covered the matters, addressed in the amendment Bill and therefor rendered the Bill nugatory.

13. The sixth Bill under challenge is the Statute Law (Miscellaneous Amendment) Bill 2014. The Petitioner avers that the Bill was published in the special issue of the Kenya Gazette Supplement No. 75 (National Assembly Bills No. 24), and, that it was subjected to the relevant stages of reading as per the Standing Orders. That on 19th September 2014, the President returned the Bill to the National Assembly with a memorandum containing his reservations for reconsideration by the National Assembly as follows:-

a. The deletion of the definition of "Cabinet Secretary" in the Interpretation and General Provisions Act and proposed a new definition.

b.Amendments to section 62(1) of the Anti-Corruption and Economic Crimes Act, 2003 by deleting some words from the sub-section and the deletion of sub-section 62(1A).

c. An amendment to section 17 of the Ethics and Anti-Corruption Commission Act by deleting section 17(3) and 17 (4).

d. An amendment to the definition of "legal education provider" in the Legal Education Act, 2012.

14. The seventh Bill under challenge is the National Flag, Emblems and Names (Amendment) Bill, 2013. The Petitioner avers that the Bill was published in a special issue of the Kenya Gazette Supplement (National Assembly Bills No. 23 of 2013), and, that it was subjected to the relevant stages of reading as per the Standing Orders. That on 12th May 2014, the President returned the Bill to the National Assembly with a memorandum containing his reservations for reconsideration by the National Assembly. The President proposed that the Bill be amended in the proposed section 4A (2) by inserting the word "Cabinet Secretaries."

15. The eighth Bill is the National Police Service Commission (Amendment) Bill, 2013.The Petitioner avers that the Bill was published in the special issue of the Kenya Gazette Supplement No. 103 (National Assembly Bills No. 17), and, that it was subjected to the relevant stages of reading as per the Standing Orders. That on 3rd June 2014, the President returned the Bill to the National Assembly with a memorandum containing his refusal to assent to the Bill. The President proposed that clauses 15 and 49 of the Bill be deleted.

16. The last Bill that was challenged is the Excise Duty (Amendment) Bill, 2015. The Petitioner stated that after the said Bill went through all the legislative processes, it was forwarded to the President for assent, and, the President returned the Bill in a Memorandum dated 24 September 2015 in which he recommended several amendments to part 1 of paragraph 1 of the first schedule by deleting and substituting items and rate of excise duty in relation to fruit juices, cigarettes, motor vehicles and motor cycles.

17. The Petitioner's contention with respect to all the above Bills is that the President exceeded the powers conferred and contemplated under Article 115 (1) (b) of the Constitution. In particular, the Petitioner contends that to the extent that the President's actions of deleting and amending clauses arrogated to the President legislative powers, the said actions were *ultra vires*,

illegal and therefore a nullity. In addition, that the said actions were an invasion of the powers of the National Assembly, and a breach of the doctrine of separation of powers.

18. The Petitioner also referred to a ruling on a point of order raised by a Member of Parliament on 25th June 2015 on the scope of consideration of Presidential reservations to Bills. The Speaker of the National Assembly delivered the ruling in a communication to the Members dated 28th July 2015. The Speaker, *inter alia*, stated that in submitting his reservations on a Bill, the President is not prohibited from including his preferred text of the particular clause or section of the Bill and is free to propose further amendments. According to the Petitioner, the Honourable Speaker misdirected himself and misconstrued the provisions of Article 115 of the Constitution in his ruling.

19. The second ground of the Amended Petition challenges the constitutional validity of section 4 (1) of the Retirement Benefits (Deputy President and Designated State Officers) Act, 2015.[3] The Petitioner contends that the said section limits political rights under Article 38 of the Constitution and violates Article 27 of the Constitution. The Petitioner further contends that the right to retirement benefits is an entitlement, which is earned, and cannot be taken away at the whims or discretion of the National Assembly. The Petitioner also states that the above limitation of rights offends Article 24 of the Constitution. In addition, that the Bill, which gave rise to the Act, did not specify in its memorandum of objects and reasons that it would have the effect of limiting rights. Lastly, that the said section offends Article 47 of the Constitution and the Fair Administrative Action Act.

20. The Petitioner therefore seeks the following orders:-

*a. **A DECLARATION** that the powers of the President under Article 115 of the Constitution are limited to making the reservations and do not extend to making or sharing of legislative powers with the National Assembly or the Senate and any proposed amendments to delete or insert fresh or new clauses is unconstitutional, amounts to a usurpation of the power of Parliament, is in breach of the principles of separation of powers, null and void and therefore unconstitutional.*

*b.**A DECLARATION** that the reservations and proposed amendments contained in the memorandum by the President are in breach of the Constitution and therefore null and void:*

i. The memorandum dated 10th of June 2015 containing reservations on The Public Audit Bill, 2014 by President returned to the National Assembly.

ii. The memorandum dated 27th of May 2015 containing reservations on the Retirement Benefits (Deputy President and designated State Officers) Bill, 2013 by President returned to the National Assembly.

iii. The memorandum dated 31st of July 2015 containing reservations on The Ethics and Anti-Corruption Commission (Amendment) Bill, 2015 by President returned to the National Assembly.

iv. The memorandum dated 27th of May 2015 containing reservations on The Central Bank of Kenya (Amendment) Bill, 2014 by President returned to the National Assembly.

v. The memorandum dated 27th November 2013 containing reservations on the Kenya Information and Communication (Amendment) Bill, 2013 by President returned to the National Assembly.

vi.The memorandum dated 27th November 2013 containing reservations on the Kenya Information and Communication (Amendment) Bill, 2013 by President returned to the National Assembly.

vii. The memorandum dated 19th September 2014 containing reservations on The Statute Law Miscellaneous (Amendment) Bill, 2014 by President returned to the National Assembly.

viii. The memorandum dated 12th May 2014 containing reservations on The National Flag, Emblems and Names (Amendment) Bill, 2013 by President returned to the National Assembly.

ix.The memorandum dated 3rd June 2014 containing reservations on The Police Service Commission (Amendment) Bill, 2014 by

President returned to the National Assembly.

*c. **A DECLARATION** that the President's unilateral proposals to strike out, amend or delete provisions of the following Bills is unconstitutional, in breach of the doctrine of separation of powers and therefore null and void.*

i. The Public Audit Bill, 2014;

ii. The Retirement Benefits Bill (Deputy President and designated State Officers) Bill, 2013;

iii. The Ethics and Ant-Corruption Commission (Amendment) Bill, 2015.

iv. Central Bank of Kenya (Amendment) Bill, 2015;

v. Kenya Information and Communication (Amendment) Bill,2013

vi. The Public Procurement and Disposal (Amendment) Bill, 2013;

vii. The Statute Law Miscellaneous (Amendment) Bill, 2014;

viii. The National Flag, Emblems and Names (Amendment) Bill, 2013;

ix. The Police Service Commission (Amendment) Bill, 2013.

*d. **A DECLARATION** that section 4 of the Retirement Benefits (Deputy President and designated State Officers) Act, 2015 to the extent that it purports to take away rights accrued by a retired public officer on account inter alia of their participation in activities of a political party or other consideration therein is selective, punitive, discriminatory, in breach of human rights and fundamental freedoms in the Bill of rights, in particular Articles 24, 27 and 38 of the Constitution and therefore unconstitutional.*

*e. **AN ORDER OF MANDAMUS** compelling the Respondents and in particular the 2nd Respondents to pay the terminal and retirement benefits of the Rt. Hon. RAILA AMOLO ODINGA (the former Prime Minister) and HIS EXCELLENCY STEPHEN KALONZO MUSYOKA (the former Vice President) in accordance with the Retirement Benefits (Deputy President and designated State Officers) Act, 2015.*

*f. **AN ORDER OF PERMANENT INJUNCTION DOES ISSUE** permanently restraining or staying and or to stay the operation of and implementation of the Legal Notice No. 245 published vide Special Gazette Supplements No. 188 of 27th November, 2015 appointing the 1st of December, 2015 to be the date of coming into operation of the Excise Duty Act, 2015 and in particular to STAY and or SUSPEND the operation or coming into force of the 1st Schedule paragraph 1 part One as far as it relates to ITEMS:*

i. Fruit juices (including grapes must), and vegetable juices unfermented and not containing added sugar or other sweetening matter.

ii. Food supplements.

iii. Water and non-alcoholic beverage not including food or vegetable juices.

iv. Beer, cider, perry, mead, opaque beer and mixtures of fermented beverages with alcoholic strength not exceeding 10%.

v. Powdered beer.

vi. Wines, including fortified wines and other alcoholic beverages obtained by fermentation of fruits.

vii. Spirits of udenatured ethyl alcohol; spirit liquors and other spirituous beverages of alcoholic strength exceeding 10%.

viii. Cigars, cheroots, cigarillos, containing tobacco substitutes.

ix. Electronic cigarettes.

x. Cartridges for use in electronic cigarettes.

xi. Cigarettes containing tobacco substitutes.

xii. Other manufacturers tobacco substitutes; "homogenous" and "reconstituted tobacco," tobacco extracts and essences.

xiii. Motor vehicle of tariff heading 87.02, 87.03 and 87.04 (Less than 3 years old from the date of 1st registration Kshs 150,000 per unit; over three years old from the date of 1st registration Kshs. 300,000 per unit.

xiv. Motor cycles of tariff 87.11 other motorcycles ambulances.

g. ***AN ORDER*** *awarding costs of the petition of petitioners.*

Responses to the Petition

21. The Respondent and the first Interested Party did not file responses to the Petition and stated that they would instead rely of their legal submissions on the points of law raised by the Petition.

22. The first Interested Party opposed the Petition by way of a Replying Affidavit sworn 15thJuly 2016 by **Philip Nyakundi Gichana,** it's Legal Officer. A significant portion of the 1st Interested Party's affidavit was dedicated to a detailed explanation of the process followed in the enactment of the Excise Duty Bill, 2015 and in particular the considerations in the taxing of tobacco products. He also averred that the 1st Interested Party made its presentations in this regard to both Parliament and the President.

23. According to the 1st Interested Party, the President is empowered under Article 115 of the Constitution to within 14 days of receiving the Bill to either assent to the Bill or refer the same back to Parliament for reconsideration noting any reservations he has concerning the Bill. The 1st Interested Party further averred that Parliament has the powers to accept or reject the reservations made by the President through a vote before re-submitting the same to the President for assent.

Determination

24. The Parties were directed by the court to file written submissions. M/s A.T. Oluoch & Co Advocates filed written submissions dated 28th July 2016 for the Petitioner. Mwangi Njoroge, then a Chief State Counsel at the Attorney General's Chambers filed submissions on 11th October 2016 on behalf of the Respondent. The first Interested Party's advocates on record M/s Makhanu Odhiambo & Co Advocates filed submissions dated 2nd August 2016, while Christine Nkonge the Advocate for the 2 Interested Party filed submissions dated 28th March 2017. The counsel for the parties highlighted the submissions during the hearing.

25. We have considered the pleadings filed herein, the submissions together with the authorities cited. We find that the following issues fall for determination:-

a. Whether the President in making the reservations in the Memoranda on the impugned Bills exceeded his powers under Article 115(1) (b) of the Constitution.

b.Whether the reservations made by the President on Bills should be subjected to public participation.

c. Whether section 4 (1) of the Retirement Benefits (Deputy President and Designated State Officers) Act, 2015 violates Articles 27 and 38 of the Constitution.

d. Whether the Petitioner is entitled to the reliefs sought.

a. Whether the President in making the reservations in the Memoranda on the impugned Bills exceeded his powers under Article 115(1) (b) of the Constitution.

26. Mr. Onyango, learned counsel for the Petitioner argued that Kenya practices the Pure Presidential system under the 2010 Constitution. He submitted that under this system, although the President is still both the Head of State and Government, the executive arm is distinct and separate from the legislative arm of government. He contended that under the Constitution, the President and his/her Cabinet are not members of the legislature and are not vested with legislative powers.

27. Mr. Onyango gave a background of the systems of government that have obtained in Kenya since independence. He identified the previous systems as the pure Parliamentary system and the hybrid/semi-presidential system, and noted that the current system of government is the pure presidential system adopted under the 2010 Constitution. He also cited provisions from the previous Constitution, which bestowed the President with direct legislative powers in his capacity as a legislator, given that Parliament then comprised of the Executive and the National Assembly under the hybrid system of government. He contrasted these provisions with the provisions of the 2010 Constitution under which legislative authority is vested in Parliament while executive authority rests in the office of the President. According to counsel, the system of government under the 2010 Constitution is informed by Montesquieu's concept of separation of powers, that advances the theory and philosophy that the same persons should not form more than one of the three arms of government; and that organs of government should not interfere with each other's work or exercise the functions of the other. He however noted that the doctrine of separation of powers is not to be construed in a manner that denies the organs of government opportunity to perform checks and balances on one another.

28. Mr. Onyango further argued that the power given to the President under Article **115** of the Constitution to assent to Bills, (including the power to express his or her reservations), are, "check and balance" **powers given to the Head of State,** in a pure presidential system, as opposed to the legislative, and, executive powers the President had under the old Constitution, that were contextualized within a hybrid/semi-presidential system.

29. On the Role of Parliament in making legislation and the limits of Presidential powers in enactment of laws passed by parliament, the Petitioner's counsel contended that the Constitution contemplates a complete separation of powers where Parliament legislates. He submitted that the powers of the President to participate in the process of legislation under Article 115 is a shared platform in which his powers are seriously circumscribed and limited. He cited Articles 129 (1), (2) and 131(2) regarding principles of executive authority.

30. To fortify his argument, counsel cited The Parliamentary Standing Orders and procedure of making legislation, and the Ugandan cases *Oloka Onyango & Others v Attorney General*,[4] *Makula International v Cardinal Emmanuel Nsubuga & Another*.[5] He also relied on relied on various judicial authorities namely; *Independent Policing Oversight Authority & Another v Attorney General & 660 others*,[6] *Doctors for Life International v The Speaker National Assembly*,[7] *Speaker of the National Assembly v De Like*[8], *Martin Nyaga Wambora & 4 Others v The Speaker of National Assembly 6 Others*,[9] *Speaker of National Assembly v Attorney General & 3 Others*,[10] *Martin Nyaga Wambora & 4 Others v The Speaker of the Senate & Others*[11] in support of the proposition that where the Constitution vests powers on state organs, they must act in accordance with and within the limits of the Constitution. He argued that in making his reservations on the impugned Bills, the President acted outside his powers under Article 115(1)(b) of the Constitution.

31. Mr. Onyango, in his oral submissions made during the hearing, referred to the decisions in *Transparency International v Attorney General & 2 Others* and *Nation Media Group and 6 Others v The Attorney General & 9 Others* where various provisions of the Public Audit Act and the Kenya Information and Communication Act which the Petitioner was also challenging were declared unconstitutional. He submitted that as a result some of the prayers in the Amended Petition had been overtaken by events. Accordingly, counsel abandoned prayers C (i) and C (v) of the Amended Petition which sought a declaration that the President's proposals to strike out, amend or delete provisions of the Public Audit Bill, 2014 and Kenya Information and Communication (Amendment) Bill, 2013 were unconstitutional, in breach of the doctrine of separation of powers and therefore null and void.

32. Mr. Ochiel, learned counsel for the second Interested Party supported the Petition. His submissions touched on three aspects of the exercise of the President's powers under Article 115 (1) (b) of the Constitution. The first aspect was on the nature and context of the President's powers to make reservations where he reiterated the Petitioners argument that the Constitution of Kenya 2010 created a political system that is rooted on a strong separation of powers principle. He cited the decisions in *Trusted Society of Human Alliance v Attorney General & 2 Others*[12] and I*nstitute of Social Accountability & Another v National Assembly & 4 Others*[13] that affirmed the principle of separation of powers, and contended that under the said principle, only Parliament has power

to make law.

33. The second aspect of Mr. Ochiel's submissions were on the extent on of the President's power to make reservations. On this aspect, counsel addressed two concerns. Firstly, that Article 115 (1) (b) does not demarcate the issues for which the President can make reservations, neither do the Standing Orders. In his view, a reading of Article 115(1) (b) is that it gives the President a significant leeway to express any reservations he may have on a Bill. Counsel made a comparison with the provisions of the South African Constitution, which expressly state that the reservation must relate to the constitutionality of the Bill, but opined that the distinction from the South African position may have been informed by the fact that Kenya's President is not a Member of Parliament unlike in South Africa.

34. Mr. Ochiel contended that notwithstanding the wide powers granted to the President to make reservations, the same must be exercised in conformity with the Constitution, particularly Article 131 and 132, which define the powers and obligations and limit the authority of the president. Furthermore, Article 132(a) obligates the President to uphold and safeguard the Constitution and the power to make reservation has to be exercised in a manner that respects other provisions and principles of the Constitution including separation of powers and the mandate of Parliament to make laws. He further argued that in a constitutional democracy, the president carries heightened obligation to follow the rule of law, a position he argued was aptly captured by the Constitutional Court of South Africa in *Economic Freedom Fighter v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*.[14]

35. Secondly, Mr. Ochiel was concerned that Article 115 does not prescribe the form the reservation should take. He however submitted that Standing Order Number 155(5) is instructive, and, that its wording indicates that Parliament contemplated that the President's reservations would be in a form that would require Parliament to develop proposals on amendments to address the reservation. In his view, the President's reservations were expected to be in the form of Statements. He contended that when the President makes his reservation through redrafting of the law or expressly drafting new additional provisions, he usurps Parliament's mandate of law making, which results in unconstitutionality even though the purpose may have been different. In support of this position, counsel cited *Institute of Social Accountability & Another v National Assembly & 4 Others* [15] and *International Centre for Policy and Conflict v Attorney General and 2 Others.*[16]

36. However, in a seemingly contradictory submission, Mr. Ochiel contended that Standing Order 155 (5) aids the unconstitutionality through its effect, by providing that where there is disagreement in the National Assembly on the President's reservations, the reservation shall be taken to have been approved upon the laying of the report on the Table of the House. In counsel's view, this provision enables the President to provide his reservation not in the form of a statement but as an alternative draft provision. In addition, counsel took the view that Standing Order 155 (5) is unconstitutional to the extent that it sanctions a deemed amendment to a Bill solely based on the President's reservations and without Parliamentary approval, with the result that the President, not Parliament makes the law in violation of Article 94(5).

37. Mr. Ochiel also submitted on the ruling by the Speaker of the National Assembly in his communication on the reservations from the President, that two thirds majority vote of the total membership of the National Assembly is required to reject a recommendation by the President. He contended that the Speaker's directions were unconstitutional because deeming a Bill as passed on the basis that a two third support of members of Parliament was not achieved to defeat the President's reservation has the outcome that the President is the one effectively legislating and not Parliament.

38. The last aspect of Mr. Ochiel's submissions was that the manner in which the provisions on the reservations are enforced undermine public participation. He contended that some reservations introduce new provisions that where hitherto not part of consideration by Parliament or the people in the law making process. He relied on Article 118 of the Constitution that obligates Parliament to facilitate public participation during law making, and on various judicial decisions that have addressed the extent of the legislature's obligations in this regard including *Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others*,[17] *In the matter of the National Land Commission, Advisory Opinion No. 2 of 2014*,[18] *Robert N. Gakuru & Others v The Governor Kiambu County & 3 Others*.[19]

39. In conclusion, Mr. Ochiel, invited the court to find that the manner in which the President exercised his power on reservation, and in which Parliament processed the reservation are unconstitutional. He urged the court to hold that Parliament acts unconstitutionally by deeming a bill containing reservations to have been passed if not objected to or where any amendment introduced in Parliament is not voted by two-thirds of the Members of Parliament.

40. Mr. Kuria, learned counsel for the Hon. Attorney General submitted that the issues raised in this Petition had already been determined by a three-judge bench in *Nation Media Group & Others vs Hon Attorney General & Others*[20] where the court addressed a similar challenge on the Presidents refusal to assent to a Bill and made recommendations to Parliament. The court held inter alia that the reservations by the President under Article 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.

41. He submitted that the Article does not prescribe the manner or format for such reconsideration, and, that, the constitutional basis for the veto power is to respect, uphold and protect the Constitution, the President's oath and checks and balances/separation of powers. He referred to a recent Court of Appeal decision *Pevans East Africa Limited & Another vs Chairman, Betting Control & Licensing & Others*[21] where the court declined to uphold a similar argument on the interpretation of Article 115 as advanced by the Petitioner in this case.

42. Mr. Kuria argued that the President acted within the law and that there is a constitutional basis for exercise of his veto power. He stated Article 131(2) (a) (b) of the Constitution obligates the President to respect, uphold and protect the Constitution, Human Rights and the rule of law and he cannot assent to Bills that are unconstitutional. Further, the President is conferred with unlimited legislative function under Article115 of the Constitution and that the Petitioner is challenging the validity and supremacy of the Constitution, which is expressly prohibited under Article 2 (3) of the Constitution. He maintained that the presidential veto is one of the checks and balances for ensuring that Bills emanating from the legislature are constitutionally sound. He cited the US Supreme Court decision in *INS v Chadha.*[22]

43. Referring to the South African cases cited by the Petitioner's counsel, Mr. Kuria argued that they are not relevant to our circumstances because Article 115 is clear on the scope of the President's powers.

44. Mr. Odhiambo, learned counsel for the first Interested Party opposed the Petition. He submitted that there was no contravention of the constitution or improper motive and that the reservations made by the President were in strict conformity with the law. He cited *Nation Media Group & Others vs Hon Attorney General & Others*[23] in support of his position. He argued that the President's reservations are not binding since they must be debated by Parliament within the set down procedures in law before they can be adopted or rejected.

45. From the above summary of the parties' submissions, we note that the crux of Petitioner's and the second Interested Party's case is that the President by making specific legislative proposals in his reservations on the impugned Bills exceeded his mandate under Article 115 (1) (b) of the Constitution. Article 115 provides that:-

(1) Within fourteen days after receipt of a Bill, the President shall--

(a) assent to the Bill; or

(b) refer the Bill back to Parliament for reconsideration by Parliament, noting any reservations that the President has concerning the Bill.

(2) If the President refers a Bill back for reconsideration, Parliament may, following the appropriate procedures under this Part -

(a) amend the Bill in light of the President's reservations; or

(b) pass the Bill a second time without amendment.

(3) If Parliament amends the Bill fully accommodating the President's reservations, the appropriate Speaker shall re-submit it to the President for assent.

(4) Parliament, after considering the President's reservations, may pass the Bill a second time, without amendment, or with amendments that do not fully accommodate the President's reservations, by a vote supported--

(a) by two-thirds of members of the National Assembly;

and

(b) two-thirds of the delegations in the Senate, if it is a Bill that requires the approval of the Senate.

(5) If Parliament has passed a Bill under clause (4)--

(a) the appropriate Speaker shall within seven days re-submit it to the President; and
(b) the President shall within seven days assent to the Bill.

(6) If the President does not assent to a Bill or refer it back within the period prescribed in clause (1), or assent to it under (5)(b), the Bill shall be taken to have been assented to on the expiry of that period.

46. In the Petitioner's and second Interested Party's view, the President's act of making the said proposals amounted to undertaking a legislative function, which is constitutionally conferred upon Parliament and is contrary to the principle of separation of powers. The Petitioner and the second Interested Party posed the pertinent questions as being:- (a) the theoretical and philosophical underpinning of Article 115 (1) (a) (b) of the Constitution; (b) the scope of powers conferred upon the President under Article 115 (1) (a) (b) of the Constitution and the limitations if any; and, (c) the manner and form of referral of a Bill to Parliament and reservations thereon by the President.

47. The Respondent and the first Interested Party in rebuttal maintained that the manner in which the President exercised the powers under Article 115(1)(a)(b) of the Constitution is constitutional having been expressly provided for by the Constitution, and constitutes one of the checks and balances under the doctrine of separation of powers.

48. At this juncture, we consider it necessary to address the fundamental legal theories and tenets underlying the provisions on presidential veto powers in Article 115 (1) (b) of the Constitution. According to the classical doctrine of the separation of powers, the power of enacting laws (legislative power) should be separated from the power of administering the state (executive power) and the power of interpreting and applying the laws to particular cases (judicial power).[24] However, Constitutions adhering to this doctrine do not typically keep the branches of government entirely separate. As James Madison argued, the doctrine allows for each of the three branches of government to have some involvement in, or control over, the acts of the other two. This partial mixture of mutually controlling powers is known as a system of checks and balances.[25]

49. The extent to which there is separation of powers between different arms of government is largely determined by the system of government that is provided for in a country's constitutional structure. There are varieties of constitutional structures of national governments; however, the common and frequent structures are the Parliamentary or Presidential systems of government, or a hybrid of the two systems. In a Presidential system, the head of the government is the President who is elected either directly by the people or indirectly by an electoral college. In contrast, in a Parliamentary system, the head of government, normally the Prime Minister, is selected by the legislature. The selection can be way of election by the members of Parliament or by selection by the majority Political Party or a coalition of Parties. The other distinction between the two systems is that in a Presidential system the President serves for a fixed term, and can only be removed by a constitutionally prescribed process during that term. In a Parliamentary system, the head of government's term is dependent on the legislature, and he/she can be removed by a no-confidence vote by the legislature.

50. These different methods of selecting and removing the head of government in a Parliamentary and Presidential system has far reaching implications on the powers that are allocated to the different arms of government. In particular, the parliamentary system involves a certain fusion between the legislative and executive branches of government, and Parliament is often viewed as supreme. It is therefore often the case that it is only in a Presidential system that there can be a true separation of powers. However, in practice, the constitutional structures are influenced by the socio-political realities and culture in any given state.[26]

51. It is common ground that a Presidential system of government at national level is prescribed under the current Kenyan constitutional dispensation. The Constitution further provides for the election of the Executive and legislatures at the national and county levels of government. The law making functions are granted to the Parliament and national government level and the county assemblies at the county government level. For the purposes of this determination, Articles 94, 96 and 96 provide for the legislative authority and roles of Parliament, and its constituent bodies, namely, the National Assembly and the Senate.

52. The executive powers, authority and functions of the President are also specifically provided for in the Constitution under Articles 129 to 133. It is significant to note that the Presidential powers of assent and referral of Bills under Article 115 of the Constitution are granted in the context of the legislative framework provided by the Constitution. Under the Constitution, the President plays a key role in the legislative process because all Parliamentary Bills require his/her approval before they can take effect. Thus, it is correct to state that under the Kenyan Constitution, the Parliament and the President share the legislative powers and functions, with the former making laws to which the latter must assent if they are to come into force. In our view, this discourse settles the legal theory and philosophy underlying Article 115 of the Constitution.

53. The next question for our determination is the extent and scope of the President's Powers under Article 115. The primary duty of the court in this regard is to uphold the Constitution and the law, which we must apply impartially and without fear, favour or prejudice.[27] It is also useful at this stage to restate the general principles relating to constitutional interpretation. The *first* principle is that the Constitution of a nation is not to be interpreted like an ordinary statute. The late Mahomed A.J. in the Namibian case of *S v Acheson*[28] described the Constitution as 'a mirror reflecting the national soul, the identification of the ideals 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.[29] In keeping with the requirement to allow the constitutional spirit and tenor to permeate, the Constitution must not be interpreted in 'a narrow, mechanistic, rigid and artificial' manner.[30] Instead, constitutional provisions are to be 'broadly, liberally and purposively' interpreted so as to avoid what has been described as the 'austerity of tabulated legalism.'[31] It is also true to say that situations may arise where the generous and purposive interpretations do not coincide.[32] In such instances, it was held that it may be necessary for the generous to yield to the purposive.[33] *Secondly*, in interpreting constitutional rights, close scrutiny should be given to the language of the Constitution itself in ascertaining the underlying meaning and purpose of the provision in question.[34]

54. Turning to the powers and processes provided for under Article 115 of the Constitution, once a Bill is passed by the appropriate house of Parliament, it is sent to the President for assent. The President has fourteen days to either sign it into law or refer it back to Parliament for reconsideration. If the President returns the Bill to Parliament for reconsideration, Parliament can either:- (a) incorporate any changes suggested by the President and amend the Bill and send it back to the President for his signature or, (b) override the President's reservations by passing the Bill a second time with the support of at least two-thirds of the members of the relevant house.[35] If the President does not sign or return the bill to Parliament within fourteen days of receiving it, the Bill is automatically enacted.

55. The contestation here is that by inserting his proposals in the reservations while rejecting the Bills in question, the President engaged in a legislative function and usurped the law-making role of Parliament in violation of the Constitution and the doctrine of separation of powers. It is noteworthy that Article **115 (1) (b)** provides in mandatory terms that in the event the President has any reservations concerning a Bill, he/she shall refer the Bill back to Parliament for reconsideration, noting the said reservations. Therefore, the powers given to the President under this Article are two-fold; firstly, the power to make reservations on a Bill, and, secondly, the power to refer that Bill back to Parliament for reconsideration with the reservations.

56. It is uncontested that the President has power to make reservations. The contestation as we understand it is on the scope and extent of the President's powers in making the reservations. The Petitioner and the second Interested Party acknowledge that no limitation exists under the Constitution on the content of the reservations that may be made by the President. Their arguments are that the President's powers are limited in the sense that the President is obliged in making the reservation to respect the principle of separation of powers and in particular, the mandate of Parliament to make laws. The Petitioner and the second Interested Party therefore essentially fault the format and effect of the reservations, which according to them amounts to the President drafting legislation and directing Parliament in the exercise of its functions.

57. In determining the scope and extent of the President's power under Article **115**, it is necessary to consider the system of checks and balances within the doctrine of separation of powers. This system is applied in constitutional governments as a means of sharing power amongst the separate branches of government and *inter alia* allows a branch of government to veto acts of another branch as a means of limiting abuse of power. The Presidential powers of assent and referral of Bills provided for under Article 115 are part of an overall system of checks and balances in the Constitution. The traditional functions of these powers is to protect the public against legislation that is blatantly unconstitutional or that has not been enacted in accordance with the proper constitutional procedure and the President therefore undertakes these powers in his capacity as the constitutional guardian and custodian of public interest. This power is also used to prevent legislation that is objectionable on policy and substantive grounds where the legislation may be harmful to the public. This position was emphasised in *Apollo Mboya v Attorney General & 2 others*[36] as follows:-

"95. The protection of the constitution is the original purpose of the powers under Article 115 as envisaged by the authors of the Constitution. This power is conceived as a reactive, and quite exceptional, instrument that would be used only occasionally and that could only 'be applied legitimately to legislation that is clearly unconstitutional, or was badly drafted.[45] *This Presidential power is also a protection against harmful policies and corruption. It can be used by Presidents to prevent the passage of legislation that the President finds objectionable on policy or substantive grounds, without having to make any complaint against the constitutional or procedural propriety of the bill in question.*

96. In addition to being deployed against legislation to which the President is ideologically opposed, the power is often relied upon as a means of preventing the enactment of so-called pork-barrel bills (where legislators vote for public funds to be spent on projects in their own areas) or special-interest legislation (where lobbyists attempt to influence legislators to enact laws that privilege a certain section of society against the common good).

97. This understanding of the veto power, in contrast to the veto exercised solely on constitutional or procedural grounds, widens the scope of presidential discretion. It calls on the president, as a figure representing a national constituency, to consider the merits, wisdom and necessity of a bill, and to act as the guardian of general interests.[46] *It envisages the president as an autonomous policy actor, but not necessarily as the sole or primary policy initiator.*

98. To prevent the arbitrary or capricious use of the power, while keeping responsibility in the hands of the President, the drafters of the Constitution carefully in Article ***115*** *included a provision requiring the President in the memorandum to note any reservations that the President has concerning the Bill.*

99. My understanding is that this reservation is a clear statement of the president's objections, giving a reasoned justification for the exercise or the refusing to assent to the Bill. The statement also gives the president an opportunity to lay out precisely what is wrong with the bill and to specify how the bill could be improved. In this way, the veto power also becomes—albeit indirectly—an agenda setting power through which the president is able to exercise political leadership, to define policy stances to the electorate and to put political pressure on legislators."

58. Our finding therefore is that the Presidential powers to make reservations under Article 115 are designed in line with the requirements of the doctrine of separation of powers, as part and parcel of the checks and balances architecture envisaged by the Constitution. The said Presidential powers are akin to and play the same role as the powers given to the courts to review legislation passed by Parliament on grounds of illegality and unconstitutionality.

59. On the arguments made in respect to the format of the reservations, the Constitution in Article 115 does not provide any specific mode or format on the exercise of the power. In essence, it is at the discretion of the President to determine the mode or format, however, the President is in this regard bound by the Constitution and in particular, the values and principles espoused in Article 10 of the Constitution. The overriding factor is that there should be no arbitrary or capricious use of this power. In the case of the impugned Bills, the President provided memoranda with statements of reasons for his reservations and refusal to assent to the Bills and to this extent, there was a reasoned justification for the exercise of his powers of reservation.

60. In making his reservations on the impugned Bills, the President also proposed specific amendments to the Bills, which is the Petitioners and second Interested Party's main grievance with the format of the reservations. They claim that the President cannot propose specific legislative amendments in a reservation, as this is a function of Parliament. This argument was raised and extensively addressed in *Nation Media Group Limited & 6 Others v Attorney General & Another,*[37] 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 therein 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."

61. We are in agreement with this decision and adopt the findings therein. Article 115 (1) (b) provides that the President can note any reservations on a Bill. The Constitution does not define the word *'reservations.'* However, the *Concise Oxford English Dictionary*[38] defines "reservation" as "***a qualification or expression of doubt attached to a statement or claim***." In our view, since the Constitution does not restrict the President as to the format that a reservation will take, what is relevant is that such a format adequately and clearly communicates the President's qualifications or doubts on a Bill. In addition, Article 115(3) of the Constitution gives Parliament the option of wholly accommodating the President's reservations when amending a Bill. A purposive interpretation of this provision is that the President is therefore allowed to make specific proposals as to amendments of the Bill and that Parliament may fully adopt, amend or reject the proposals.

62. On the powers of the President to refer a Bill with reservation back to Parliament, it is our view that the exercise of this power is expressly provided for in the Constitution and is not unconstitutional. It is also not inconsistent with the doctrine of separation of powers, because when the President makes alternative suggestions to a Bill; they do not automatically become law until and unless Parliament complies with the provisions of Article 115(4) and its Standing Orders regarding accommodating, or overriding the President's reservations. Parliament therefore ultimately is the organ that passes the law and not the President.

63. The Court of Appeal had occasion to deal with the same issue in *Pevans East Africa Limited & Another v Chairman, Betting Control & Licensing Board & 7 others*[39] where it stated as follows:-

"We do not find any evidence either, that the President usurped the role of the National Assembly or that the Assembly abdicated its responsibility, in the enactment of the Finance Act, as contended by the appellants. Article 115 of the Constitution (1) requires the President, where he has not assented to a Bill, to return it to Parliament for reconsideration together with his comments or reservations. Article 153(2) (sic) empowers the Parliament to amend the Bill to accommodate the President's concern or to pass the Bill a second time without accommodating the President's concern. The Standing Orders of the National Assembly are to the same effect and in particular, Standing Order No. 154(3) provides thus:

"The Assembly may, in considering the Bill a second time, propose amendments in light of the President's reservation either fully accommodating the President's reservations, or not fully accommodating the President reservations."

All the evidence on record shows is that, after considering the President's reservations, the National Assembly agreed with his view, which is one of the options open to it under the Constitution and the Standing Orders. The mere fact that it settled for one of the two options open to it in law is not ipso facto evidence of usurpation or abdication of the National Assembly's power. To arrive to such a conclusion, in our view, would require more cogent and convincing evidence than the mere fact that the Assembly opted for one of the options rather than the other, available in law. The High Court easily appreciated this fact in Nation Media Group Limited & 6 Others v. Attorney General & 9 others [2016] eKLR."

64. We now turn to the second Interested Party's argument that Standing Order 155(5) aids unconstitutionality through its effect by providing that where there is a disagreement on approving the President's reservation, the reservation shall be taken to have been approved by Parliament upon the laying of the joint committee's report on the table of the house. Counsel for the second Interested Party invited the court to find that Standing Order No. 155(5) is unconstitutional, because it deems a law to have been passed by Parliament when an objection to the President's reservation does not garner a two third support of Members of Parliament. He argued that the Standing Order dislodges Parliament's constitutional obligation to pass the law as required by Article 94(5) and 109(1).

65. We note that the alleged unconstitutionality of Standing Order number 155(5) was not pleaded in the amended Petition, therefore we are unable to make a finding on the said argument. We also note that the Petitioner and the second Interested Party made submissions on the procedure provided for under Standing Order number 155(5) *vis a vis* the provisions of Articles 94(5) and

109(1). However, Standing Order number 155 has since been repealed, and a new procedure for Parliamentary debate on Bills referred by the President is now provided under Standing Order 154. Therefore, a finding on the procedure that obtained in Standing Order number 155 would largely be an academic exercise.

b. Whether the reservations made by the President on Bills should be subjected to public participation.

66. The Petitioner and second Interested Party assault on the constitutionality of the various Bills is premised on their contestation that after the President made the reservations, the Bills were enacted without subjecting them to public participation. It was their argument that some of the reservations introduced provisions that were hitherto not part of the consideration by parliament or the people in the process of law making. Reference was made to Article 118 of the Constitution on the obligation to facilitate public participation during law making. The petitioner and second Interested Party also cited various judicial decisions on the rationale and requirements on public participation including *Robert N. Gakuru & Others v the Governor Kiambu County and 3 Others.*[40] They therefore urged that by Parliament processing the reservations without public participation, the resultant legislation would be unconstitutional.

67. Addressing a similar challenge, the Court of Appeal in *Pevans East Africa Limited & Another v Chairman, Betting Control & Licensing Board & 7 others*[41] stated:-

"The next question relates to public participation. There is no contestation that prior to the passing of the Finance Bill by the National Assembly on 30th May 2017, it was preceded by adequate public participation. The record teems with evidence to that effect, including newspaper advisements by the Clerk of the National Assembly notifying members of the public of the publication of the Finance Bill and inviting memoranda thereon, copies of numerous memoranda submitted in response, by various stakeholders, civil society organizations and Government entities, and even evidence of a workshop held in Mombasa to discuss the Bill. The dispute is whether when the President referred the Bill back to the National Assembly with his observation, further public participation was required.

We have already referred to the terms of Article 115 of the Constitution which leaves no doubt that what the National Assembly was required to do was either effect amendments to the Bill to accommodate the President's reservations, or decline to effect the amendments. The real question therefore is whether the Finance Act was vitiated by lack of public participation on the President's reservations.

It is common ground that up to the point when the National Assembly passed the Bill on 30th May 2017, it was preceded by adequate public participation. As published, the Bill proposed a tax rate of 50%. Proposals were made, ranging from adopting a tax of 50%, 35% and retaining the tax as it was under the 2016 Finance Act. With respect, we agree with the learned judge that there was no need for further public participation on the narrow issue of the percentage of the tax. It must be appreciated that after the National Assembly has heard the views of members of the public and industry stakeholders on a Bill, it is not precluded from effecting amendments to the Bill, before finally passing it. Those amendments do not necessarily have to agree with the views expressed by the people who have been heard, so long as the views have been taken into account. (See Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others [2013] eKLR). In our view, it would bring the legislative process to a complete halt and undermine Parliament's ability to discharge its constitutional mandate if, after having facilitated public participation on a Bill, Parliament is required to adjourn its proceedings every time a member proposes an amendment to the Bill, so that further public participation can take place on the particular proposed amendment.

*In **Institute for Social Accountability & 6 Another v. National Assembly & 4 Others** **[2015] eKLR**, the High Court considered the power of the National Assembly to amend Bills vis-à-vis the duty to ensure public participation and stated:*

"We are aware that during the legislative process, amendments to the Bill may be moved during the Committee Stage and to hold that every amendment moved must undergo the process of public participation would negate and undermine the legislative process. In this case, we are satisfied that the amendment moved was in substance, within the parameters of what had been subjected to public participation during the review process. We find that the public was involved in the process of enactment of the CDF Act through the Task Force and review panel earlier set up by CDF Board. The amendment was within the parameters of what was in the public domain and in the circumstances we find and hold that the amendment bill did not violate the principle of public participation."

68. We are guided by the Court of Appeal decision that once a Bill has been subjected to public participation, Parliament is not

bound by the public views and can still amend the legislation. Likewise, in the context of public participation, the President's reservations are also views, which Parliament may take into consideration or override in exercise of its law making powers. What is critical is that the Bill at the time of the initial enactment by Parliament met the threshold of public participation.

c. Whether section 4 (1) and 2 of the Retirement Benefits (Deputy President and Designated State Officers) Act, 2015 violates Articles 27 and 38 of the Constitution.

69. This issue was urged by the Petitioner in light of the provisions of section 4 of the Retirements Benefits (Deputy President and Designated State Officers) Act[42] (herein after referred to as the Act), which provides for circumstances under which retirement benefits may not be paid to persons who hold office or have served as Deputy President, Vice-President, Prime Minister, Speaker, Chief Justice or Deputy Chief Justice after 1st January 1993. The said provisions state as follows;

(1) Despite the provisions of section 3, the National Assembly may, on a motion supported by the votes of not less than half of the members thereof, resolve that an entitled person, surviving spouse or children, as the case may be, shall not receive any benefits conferred by this Act, on the grounds that such person—

(a) ceased to hold office on account of having acted in wilful violation of the Constitution;

(b) was guilty of gross misconduct;

(c) has, since ceasing to hold office been convicted of an offence and sentenced to imprisonment for a term of three years or more, without the option of a fine; or

(d) has, since ceasing to hold office, held office in, or actively engaged in the activities of, any political party: Provided that this provision shall come into operation on the date of commencement of this Act.

(2) Where an entitled person holds any appointive or elective post in or under the Government to which there is attached a rate of pay, other than a nominal rate, the benefits to which he is entitled shall be reduced by the amount of such pay.

70. The Petitioner urged that the above provisions introduced limitations to the political rights of an entitled person contrary to Article 27 of the Constitution, which enshrines the right to equality and freedom from discrimination, and Article 38, which guarantees the right to make political choices. In particular, the Petitioner contended that the provisions are selective, punitive and discriminatory; the right to retirement benefits is an entitlement, which is earned and cannot be taken away at the discretion on the National Assembly; and that the provisions do not conform to the permissible limitations that are provided for under Article 24 of the Constitution.

71. The Petitioner's counsel cited *Peter K. Waweru v Republic*,[43] *Andrews v Law Society of British Columbia*[44] and *Willis v The United Kingdom*[45] for the definition of discrimination. Counsel also referred the court to the provisions of the Universal Declaration of Human Rights and African Charter on Human and People's Rights that provide for the principle of equality and non-discrimination.

72. The Respondent's counsel did not address this particular issue.

73. The impugned section sets out two circumstances where the National Assembly may, on a motion supported by the votes of not less than half of the members thereof, resolve that an entitled person, surviving spouse or children, as the case may be, shall not receive any benefits conferred under the Act. The first set of circumstances falls under the grounds listed in paragraphs 4 (1) (a) to (c) of the section, which address instances of alleged misconduct or illegal conduct on the part of an entitled person. The second set of circumstances is described in section 4 (1) (d) and section 4 (2) which cover alleged subsequent engagement of an entitled person in either political party activities or appointment to a remunerated political or public office.

74. In interpreting the above provisions, this court must infuse them with values of the Constitution as obliged by Article 259 (1) of the Constitution. As **Moseneke DCJ** stated, courts must never shirk from this constitutional responsibility:-

"The Constitution has reconfigured the way judges should do their work. It invites us into a new plane of jurisprudential creativity and self-reflection about legal method, analysis and reasoning consistent with transformative roles. The new legal order liberates the judicial function from the confines of the common law, customary law, statutory law or any other law to the extent of its inconsistency with the Constitution. This is an epoch making opportunity, which only a few, in my view, of the High Court judges have cared to embrace or grasp. A substantive, deliberate and speedy plan to achieve an appropriate shift of legal culture at the High Courts and Magistrates' Courts is necessary. After all, the Constitution confers substantial review powers on the judiciary. However, without an appropriate legal culture change the judiciary may become an instrument of social retrogression. In time the judiciary will lose its constitutionally derived legitimacy."[46]

75. Article **2 (4)** of the Constitution in this respect provides that any law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and that any act or omission in contravention of the Constitution is invalid. Article **165 (3) (d) (i)** provides that the High court has jurisdiction to determine the question whether any law is inconsistent with or in contravention of the Constitution.

76. Article **259** in addition provides that the Constitution shall be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights and permits the development of the law; and contributes to good governance. Consistent with this, when the constitutionality of legislation or any act or omission is in issue, the court is under a duty to examine the objects and purport of the legislation, the act or omission and to read the provisions of the legislation, the conduct or omission so far as is possible, in conformity with the Constitution.[47]

77. All law must conform to these constitutional edifice. It follows that the impugned provision must meet the threshold prescribed by the Constitution. Differently stated, when the constitutionality of legislation is challenged, a court ought first to determine whether, through "the application of all legitimate interpretive aids,"[48] the impugned legislation is capable of being read in a manner that is constitutionally compliant.

78. The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.[49] When confronted with legislation, which includes wording not capable of sustaining an interpretation that would render it constitutionally compliant, courts are required, to declare the legislation unconstitutional and invalid. Mindful of the imperative to read legislation in conformity with the Constitution, but only to do so when that reading would not unduly strain the legislation we now turn to an analysis of the constitutionality of the impugned section.

79. The Act defines benefits as follows:- ***"benefits"*** *means pension and other retirement benefits conferred by this Act.* The *Concise Oxford English Dictionary*[50] defines a benefit as an advantage or profit gained from something, payment made by the state or an insurance scheme to someone entitled to receive it. From the above definition, it is clear that a retirement benefit or pension is an entitlement. The *Black's Law Dictionary*[51] defines entitlement as an absolute right to a benefit, such as social security, granted immediately upon meeting a legal requirement. Thus, a retirement benefit scheme is in the nature of an entitlement program. The *Black's Law Dictionary*[52] defines an entitlement program as a government program guaranteeing certain benefits, such as financial aid or government provided services, to people or entities that meet the criteria set by law. It proceeds to give the following examples, unemployment benefits and Social Security. The same dictionary defines "Social security" as the doctrine or belief that the government should provide a minimum level of economic security and social welfare for citizens and their families or government money that is paid to people who are out of work, ill, or old or money that is paid out as part of a social security program.

80. The fact that a retirement benefit is an entitlement has also received a constitutional underpinning. Article 43 (1) (e) of the Constitution provides that every person has the right to social security. Article 151 of the Constitution also provides that the retirement benefits payable to a former President and a former Deputy President, the facilities available to and the privileges enjoyed by them, cannot be varied to their disadvantage during their lifetime. Article 160 (4) of the Constitution also provides that subject to Article 168(6), the remuneration and benefits payable to, or in respect of, a judge shall not be varied to the disadvantage of that judge, and the retirement benefits of a retired judge shall not be varied to the disadvantage of the retired judge during the lifetime of that retired judge. Article 168 (6) applies to judges on suspension who are entitled to half pay during the period of the suspension.

81. The question presented to this court is whether a retirement benefit which is an entitlement that has been lawfully earned can be taken away in the circumstances provided in section 4 (1) and (2) of the act. *First,* the impugned sections give the National Assembly the mandate of determining by a motion supported by not less than half of the members whether an entitled person shall

be paid the benefits. To the extent that this section gives the National Assembly, which enacts the law the responsibility of determining the circumstances under which an entitled person would or would not be paid a retirement benefit, it offends the doctrine of separation of powers. This is because it confers to the National Assembly the role of legislating, interpreting and implementing the law. This provision creates a situation whereby when a question arises as to whether an entitled person should be paid, the same is referred back to the National Assembly to determine the question. Implementation of laws is a function of the executive while interpreting the law is a function of the judiciary.

82. In our considered view, to extent that the impugned section confers to the National Assembly, a legislative body, the mandate of debating and determining whether the persons eligible for the retirement benefits qualify to be paid in accordance with the said provisions, it out rightly offends the doctrine of separation of powers which renders it constitutionally invalid.

83. *Second,* section 3 of the Act provides that subject to sections 5(3) and 15, the persons entitled to the benefits conferred by the Act shall be persons who— (a) at any time after the 1st January, 1993, retire as Deputy President, Prime Minister, Vice-President or Speaker; or (b) at any time after the 27th August, 2010, retire as Chief Justice or Deputy Chief Justice. However, the impugned section purports to interfere with the retirement benefit entitlements, which are expressly protected by Article 151 (3) and 160(4) of the Constitution with respect to a Deputy President, the Chief Justice and Deputy Chief Justice, which cannot be varied to their disadvantage during their lifetime. To this extent the impugned provision therefore fail the constitutionality test.

84. *Third,* is question is whether the impugned sections can take away the retirement benefits of the remaining entitled persons. The constitutional validity of withdrawing retirement benefits has been the subject of decisions of the Supreme Court of India in the case of *State Of Jharkhand & Ors vs Jitendra Kumar Srivastava & Anr***[53]** where it was held that gratuity, pension and retirement benefits are hard-earned benefits of an employee and the right to receive pension or a retirement benefit is in the nature of "property." The Supreme Court held as follows:-

"The antiquated notion of pension being a bounty a gratituous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in Deoki Nandan Prasad v. State of Bihar and Ors.[1971] Su. S.C.R. 634 wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a Government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon any one's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied maters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in State of Punjab and Anr. V. Iqbal Singh (1976) IILLJ 377SC".

It is thus hard earned benefit which accrues to an employee and is in the nature of "property". This right to property cannot be taken away without the due process of law as per the provisions of Article 300 A of the Constitution of India."

85. The above passage resonates well with Article 40 (1) of the Constitution, which protects the right to private property. The Article guarantees the right of every person individually or in association with others to acquire and own property subject to Article 65 of the Constitution. Article 40(2) instructs Parliament not to enact law that permits the State or any person to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description. The right to private property can only be interfered with in the circumstances created under Article 40 (3) of the Constitution, which are not relevant to this case.

86. Our finding is that to the extent that the impugned provision gives the National Assembly power to deprive an entitled person the right to property without due process, the same is arbitrary and therefore unconstitutional. It violates the right to a fair administrative action guaranteed under Article 47 of the Constitution and the Fair Administrative Action Act[54] and the right to a fair hearing under Article 50 and the principles of natural justice. The impugned section simply provides for the National Assembly to pass a motion supported by not less than a half of the members thereof. It does not provide for the affected person to be afforded an opportunity to be heard.

87. Our further finding is that even where there is no explicit constitutional protection for retirement benefits, American courts have recognized that the states' statutory retirement and pension schemes, establish a property interest that qualifies for protection from arbitrary legislative action under the due process provisions in their Constitution.[55] Rights or retirement benefits accrued to any person under the law cannot therefore be diminished or eliminated because once an individual has attained eligibility for a

retirement benefit; the benefit is afforded constitutional protection.

88. In Nevada, the courts have held that when all retirement conditions are satisfied retirement benefits are deemed to ripen into a full contractual obligation.[56] The court recognizes that pension rights become absolutely vested upon retirement at which time pension benefits are constitutionally protected against impairment. Similarly, in Missouri, there is no explicit constitutional protection for public pension benefits, but courts have provided protection based on impairment of contract principles to the extent that the vested rights are set forth in the controlling statute in effect at the time of vesting which became a part of the contract of employment.[57]

89. In Minnesota, there is no explicit constitutional protection for public pension benefits, but courts have applied promissory estoppel and contract theories to protect reasonable pension expectations.[58] In addition, in North Dakota there is no explicit constitutional protection for public pension benefits, but courts provide protection based on impairment of contract principles recognizing that the state's statutory retirement system was contractual in nature, and, that accrued benefits are protected from impairment.[59]

90. Constitutional provisions have been construed to protect retirement benefits[60] holding that where a statute establishes a retirement plan for government employees who contribute toward the benefits and performs services while the statute is in effect, the statute becomes part of the contract of employment so that an attempt to amend the statute violates the Constitution. Courts have recognized that a retirement plan for government employees becomes a part of an employee's contract of employment if the employee contributes at any time any amount toward the benefits. If the employee performs services during the effective dates of the legislation, the benefits are constitutionally vested, precluding their legislative repeal as to the employee, regardless of whether or not the employee would be able to retire on any basis under the plan.[61]

91. From the above jurisprudence, it is clear that a retirement benefit is in the nature of “property” and that it enjoys constitutional protection and even where the Constitution does not expressly provide so, courts are willing to find that it is constitutionally, protected, and cannot be arbitrarily taken away. Consistent with the above jurisprudence, it is our finding that even though Article 151(3) and 160(4) of the Constitution only mentions the President, Deputy President, and judges, retirement benefits of all employees are in the nature of property within the meaning and context of Article 40(1) of the Constitution, and therefore it enjoys constitutional protection and cannot be taken away arbitrarily. On this ground alone, the impugned provision suffers constitutional invalidity.

92. *Fourth*, The Petitioner’s counsel argued that section 4 (1) (d) offends Articles 27 and 38 of the Constitution. Article **38** of the Constitution guarantees political rights. Undoubtedly, the right created under Article **38** in favour of citizens of Kenya to participate in political rights is a basic feature of democracy. There are two important points to note. The first is the freedom to make political choices. Second, is the right to be a candidate for a public office or political office is part of the basic structure of a democratic state and also of public service. This would mean that restrictions on political rights can only be justified under the tests provided in Article 24 of the Constitution. Our discussion and findings on the constitutional basis on retirement benefits clearly demonstrates that a restriction of the political rights of an entitled person would not be justified and would not be reasonable in a democratic state and would be inimical human dignity and fundaments rights.

93. Article **27** of the constitution guarantees on the other hand the right to equality and freedom from discrimination. Equality of rights under the law for all persons, male or female, is so basic to democracy and commitment to Human Rights. The right to equal treatment, and the right not to be discriminated against, is a right vested in individuals. The Constitutional freedom to vote (and run for office or participate is political processes) as an aspect of Article **38** is an individual freedom. Any action that specifically bars a citizen, from participating in the democratic process, is unconstitutional unless it can be justified under the limitation clause. The right/freedom to vote, join a political party and the right/freedom to stand for office are conceptually inseparable, as they form equally integral parts of the democratic process.

94. The guiding principles in a case of this nature are clear. The first step is to establish whether the impugned provision differentiates between different persons. In the present case, the impugned provisions clearly deny the entitled persons their retirement benefits in the stated circumstances, which does not apply to other retirement benefits beneficiaries. It also restricts their political activity unlike the case for other Kenyan citizens. The second step entails establishing whether that differentiation amounts to discrimination. To the extent that the entitled persons will in the stated circumstances lose their retirement benefits and right to political participation, they will be positively discriminated against. The third step involves determining whether the discrimination is unfair. In this regard, it is our view that if the discrimination is based on any of the listed grounds in Article **27** of the Constitution,

it is presumed to be unfair. In this regard, Article 27 (2) specifically provides that every person has the right to equality in the enjoyment of all rights and fundamental freedoms which has been denied to the entitled persons by the impugned provisions. It must also be noted, that once an allegation of unfair discrimination based on any of the listed grounds in Article **27** of the Constitution is made and established, the burden lies on the Respondent to prove that such discrimination did not take place or that it is justified. In the instant case, the Respondent did not attempt to discharge this burden.

95. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups or status. To this extent, the goal of the Constitution should not be forgotten or overlooked. The Canadian Supreme Court analysing the subject of discrimination stated:-[62]

"This court has recognized that inherent human dignity is at the heart of individual rights in a free and democratic society..[63] *More than any other right in the Charter,… Equality, as that concept is enshrined as a fundamental human right… means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate….distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity."*[64]

96. Applying the above principles to the facts and the circumstances of this case, we find and hold that the impugned section offends the provisions of Articles 27 and 38 of the Constitution to the extent that the provisions not only deny a certain category of employees their retirement benefits, but it also seeks to limit their rights to political participation.

97. *Fifth*, and lastly, a reading of the impugned section leaves no doubt that it is not only vague and ambiguous for want of certainty, but it is also retrospective in its application. For instance, section 4 (1) (b) simply provides that an employee shall not be entitled to a benefit if he "was guilty of gross misconduct." This provision does not specify what constitutes gross misconduct, not does it specify whether the alleged gross misconduct is relevant if it occurred before, during or after retirement.

98. Similarly, section 4 (1) (a) does not specify whether the alleged violation of the Constitution occurred before, during or after the retirement. Further, section 4 (1) (c) which provides that a person shall not be entitled to a retirement benefit if since ceasing to hold office has been convicted of an offence and sentenced to imprisonment for a term of three years or more, without the option of a fine is retrospective in application. It seeks to take away a lawful entitlement, which will have accrued long before the alleged conviction and has no connection with the alleged offence or misconduct. This provision also offends the rule against double jeopardy since it seeks to deny an entitled person his or her lawful benefits in addition to the punishment that will be imposed.

99. Section 4 (2) which provides that where an entitled person holds any appointive or elective post in or under the Government to which there is attached a rate of pay, other than a nominal rate, the benefits to which he is entitled shall be reduced by the amount of such pay, is in our view absurd, unreasonable and unconstitutional. This provision seeks to alter retirement benefits that have already accrued. As stated above, Article 151(3) and 160 (4) provides that retirement benefits payable to a former President, former Deputy President and retired judges shall not be varied to their disadvantage during their lifetime. Further, as held above, even where retirement benefits are not expressly offered constitutional protection, courts have consistently held that they enjoy constitutional protection and cannot be altered to the disadvantage of the beneficiary.

100. Certainty is generally considered to be a virtue in a legal system while legal uncertainty is regarded as a vice. Uncertainty undermines both the rule of law in general and the law's ability to achieve its objective.

101. David Mellinkoff had the following on the importance of certainty of words:-

"… the law is a profession of words.[65] *By means of words contracts are created, statutes are enacted, and constitutions come into existence. Yet, in spite of all good intentions, the meanings of the words found in documents are not always clear and unequivocal. They may be capable of being understood in more ways than one, they may be doubtful or uncertain, and they may lend themselves to various interpretations by different individuals. When differences in understanding are irresolvable, the parties having an interest in what is meant may end up in litigation and ask the court to come up with its interpretation. In the eyes of the law, when this kind of situation arises, the contract or the legislative act contains "ambiguity."*[66]

102. Judicial pronouncements have construed the term ambiguity as having more than one interpretation: a highly general sense

that pertains to language use, and a more restricted meaning that deals with some fundamental properties about language itself. The words "ambiguous" and "ambiguity" are often used to denote simple lack of clarity in language.[67] The word "ambiguous" means doubtful and uncertain.[68]

103. In *Eric Gitari & Others v The Honourable Attorney General*[69] the court stated that the doctrine of void for vagueness establishes specific criteria that all laws or any legislation must meet, to qualify as constitutional. Such criteria include: **(a)** the Law must state explicitly what it mandates; **(b)** what is enforceable and provide definitions of potentially vague terms. Vagueness is the imprecise or unclear use of language, which contrasts with clarity and specificity.[70]

104. In addition, as was held in *Law Society of Kenya v Kenya Revenue Authority & another*,[71] 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*." The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it.

105. Guided by the above judicial pronouncements, we find that the above sections void for ambiguity and uncertainty.

d. Whether the Petitioner is entitled to the reliefs sought.

106. Having found that the exercise of the President's power of making reservations under Article 115 were constitutional and did not offend the doctrine of separation of powers, we find that the declaration sought by the Petitioner on the said reservations and amendments contained in the memorandum are not merited.

107. Likewise, the Petitioner has therefore not established a *prima facie* case for an injunction to stay or suspend the Exercise Duty Act of 2015 based on arguments that the said amendments to the act made by the President are unconstitutional.

108. These findings notwithstanding, we find that the Petitioners are entitled to the declaration sought that section 4 of the Retirement Benefit (Deputy President and Designated Officers Act) 2015 is unconstitutional for the reasons we have given in the forgoing.

109. We however note in this respect that the Petitioner also sought an order of *Mandamus* to compel the Respondent to pay the terminal retirement benefits of the right honourable Raila Amolo Odinga, the former Prime Minister and His Excellency Stephen Kalonzo Musyoka, former Vice President in accordance with the said act.

110. It is common ground that an order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.[72] *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed. Originally, a common law writ, *Mandamus* has been used by courts to review administrative action.[73]

111. *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of action already taken in the exercise of either.[74]

112. *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for *mandamus* is set out in *Apotex Inc. vs. Canada* (*Attorney General*),[75] and, was also discussed in *Dragan vs. Canada* (*Minister of Citizenship and Immigration*).[76] The eight factors that must be present for the writ to issue are:-

(i) There must be a public legal duty to act;

(ii) The duty must be owed to the Applicants;

(iii) There must be a clear right to the performance of that duty, meaning that:

a. *The Applicants have satisfied all conditions precedent; and*

b. There must have been:

I. *A prior demand for performance;*

II. A reasonable time to comply with the demand, unless there was outright refusal; and

III. An express refusal, or an implied refusal through unreasonable delay;

(iv*) No other adequate remedy is available to the Applicants;*

(v) The Order sought must be of some practical value or effect;

(vi) There is no equitable bar to the relief sought;

(vii) On a balance of convenience, mandamus should lie.

113. In the instant case, we find that no material placed before us to demonstrate that the above tests have been satisfied. There is nothing before us to show that a demand was ever made requesting the alleged payment. In addition, there is nothing to demonstrate that there has been express “an express refusal, or an implied refusal through unreasonable delay" to pay the alleged amounts. *Mandamus* can only issue where it is clear that there is *wilful* refusal or *implied* and or *unreasonable* delay.

114. Consequently, we find and hold that the applicant has not satisfied the conditions for grant of order of *Mandamus*.

Disposition

115. In conclusion, we find that this Petition succeeds partly. Accordingly, we that the appropriate reliefs in the circumstances of this case are as follows:-

a. A DECLARATION *be and is hereby issued that section 4 of the Retirement Benefits (Deputy President and designated State Officers) Act, 2015 is unconstitutional on grounds that it offends Articles 27, 38, 40, 47, 50 and 151(3) and 160 (4) of the Constitution.*

b. A DECLARATION *be and is hereby issued that section 4 of the Retirement Benefits (Deputy President and designated State Officers) Act, 2015 is unconstitutional on grounds that it offends the doctrine of separation of powers and the common law principles of ambiguity, uncertainty, vagueness, unreasonableness, double jeopardy and retrospective application.*

c. *As this was a public interest matter we make no orders as to costs.*

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2019

P. NYAMWEYA **W. OKWANY** **JOHN M. MATIVO**

JUDGE **JUDGE** **JUDGE**

[1] Act No. 11 of 2011.

[2] Ibid.

,[3] The section provides as follows:- **4.** Circumstances under which benefits may not be paid

(1) Despite the provisions of section 3, the National Assembly may, on a motion supported by the votes of not less than half of the members thereof, resolve that an entitled person, surviving spouse or children, as the case may be, shall not receive any benefits conferred by this Act, on the grounds that such person—a. ceased to hold office on account of having acted in willful violation of the Constitution; (b) was guilty of gross misconduct; (c) has, since ceasing to hold office been convicted of an offence and sentenced to imprisonment for a term of three years or more, without the option of a fine; or (d)has, since ceasing to hold office, held office in, or actively engaged in the activities of, any political party: Provided that this provision shall come into operation on the date of commencement of this Act. **(2)** Where an entitled person holds any appointive or elective post in or under the Government to which there is attached a rate of pay, other than a nominal rate, the benefits to which he is entitled shall be reduced by the amount of such pay.

[4] Petition No. 8 of 2014.

[5] Civil Appeal No. 4 of 1981 [1982] UGSC 2 (8 April 1982).

[6] {2014} e KLR

[7] (CCT 12/05) [2006] ZACC 11

[8] 1999 (4) S.A 863(SCA)

[9] {2004} e KLR.

[10] {2013} e KLR.

[11] {2004} e KLR.

[12] {2012} e KLR.

[13] {2015} e KLR.

[14] {2016} ZACC 11.

[15] {2015} e KLR.

[16] {2014} eKLR

[17] {2015} e KLR.

[18] {2015} e KLR.

[19] Pet. No. 532 of 2013.

[20] No 30 of 2014 (as consolidated with Petition No. 31 and JR Misc App No. 30 OF 2014

[21] Civil Appeal No. 11 of 2018 delivered on 4 May 2018.

[22] 462 US 919 (1983)

[23] Pet No 30 of 2014 (as consolidated with Petition No. 31 and JR Misc App No. 30 OF 2014.

[24] Ibid

[25] Ibid

[26] See Sargentich Thomas O., "*The Presidential and Parliamentary Models of National Government,"* American University Law Review, Vol 8 Issue No.2/3, (1993): 579-592

[27] Section 165(2) of the Constitution.

[28] 1991 NR 1(HC) at 10A-B.

[29] Ibid.

[30] Government of the Republic of Namibia v Cultura 2000 1993 NR328 (SC) at 340A.

[31] Id at 340B-C.

[32] See the South African Constitutional Court cases of *S v Makwanyane* 1995 (3) SA 391 (CC) at Para [9] footnote 8; *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) at para 17.

[33] *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC) at 183J-184B; *S v Zemburuka* (2) 2003 NR 200 (HC) at 20E-H; *Tlhoro v Minister of Home Affairs* 2008 (1) NR 97 (HC) at116H-I; *Schroeder and Another v Solomon and 48 Others* 2009 (1) NR 1 (SC) at 6J-7A; *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2009 (2) NR 596 (SC) at 269B-C.

[34]*Minister of Defence v Mwandinghi* 1993 NR 63 (SC); *S v Heidenreich* 1998 NR 229 (HC) at 234.

[35] Article 115(2).

[36] {2018} eKLR.

[37] **{2016} eKLR.**

[38] 12th Edition at page 1223.

[39] {2018} eKLR.

[40] Petition No. 532 of 2013.

[41] {2018} eKLR.

[42] Act No. 8 of 2015.

[43] {2006} e KLR.

[44] {1989} 1 SCR 143.

[45] 36042/97 ECHR 2002.

[46]In **"***Transformative Adjudication, the Fourth Bram Fischer Memorial Lecture"* (2002) 18 SAJHR 309 at 318.

[47]Investigating Directorate: Serious Economic Offences and Others vs Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others vs Smit NO and Others [2000] ZACC 12; 2001(1) SA 545; 2000 (10) BCLR 1079 (CC) at para 22.

[48] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24.

[49] Thornton Legislative Drafting 4ed (1996) at 155 cited in JR de Ville above n 18 at 244.

[50]Twelfth Edition.

[51] Tenth Edition

[52] Tenth Edition

[53] 1990 AIR 1923, 1990 SCR (3) 697.

[54] Act No. 4 of 2015.

[55] See *Pineman v. Oechslin*, 488 A.2d 803 (1985).

[56] See *Nicholas v. State*, 992 P.2d 262 (Nev. 2000)

[57] See *Firemen's Retirement System v. City of St. Louis*, 2006 WL 2403955 (Mo.App. E.D. Aug 22, 2006).

[58] See *Housing and Redevelopment Authority of Chisholm v. Norman*, 696 N.W.2d 329 (Minn. 2005).

[59] See *Tait v. Freeman*, 57 N.W.2d 520 (S.D. 1953).

[60] See *Swann v. Bd. of Trustees*, 360 S.E.2d 395 (1987).

[61] See *Withers v. Register*, 269 S.E.2d 431.

[62] In *Egan v Canada* (1995) 29 CRR (2d) 79 at 104-5. L'Heureux-Dubé J

[63] Big M Drug Mart Ltd [(1985) 13 CRR 64] at p.97 . . . (per Dickson J. (as he then was)).

[64] (See also the judgment of *McLachlin J in Miron v Trudel* (1995) 29 CRR (2d) 189 at 205.)

[65] This is the opening sentence in David Mellinkoff's monumental work, The Language of the Law, Little, Brown & Co., Boston: 1963.

[66] Sanford Schane, Ambiguity and Misunderstanding in the Law, available at https://www.google.com.

[67] Universal C.I.T. Credit Corp. v. Daniel, 243 S.W. 2d 154, 157, 150 Tex.513. (Words and Phrases (p. 440).

[68] Osterholm v. Boston and Montana Consol. Copper and Silver Mining Co., 107 P.499, 502, 40 Mont.508 (Words and Phrases, p. 440).

[69] Petition No. 150 of 2016 consolidated with Petition 234 of 2016.

[70] Ibid.

[71] {2017} eKLR

[72] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[73]W. G. & C. Byse, Administrative & Review Law, Cases and comments 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[74] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review, 53 GEO. IJ. 19, 25-26 (1964).

[75] 1993 Can LII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100.

[76] 2003 FCT 211 (CanLII), [2003] 4 F.C. 189 (T.D.), aff'd 2003 FCA 233 (CanLII), 2003 FCA 233).