

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 197 OF 2018

- IN THE MATTER OF: ARTICLES 22 (1) & (2) (c), 23, 48, 50(1), AND 258 (1) & (2) (c)
OF THE CONSTITUTION OF KENYA, 2010
- IN THE MATTER OF: ARTICLES 1(3)(c), 20(4), 47(3), 159(1), 162(4) AND 169(1)(d),
169(2), AND 261(5), (6) & (7) OF THE CONSTITUTION AND
THE FIFTH SCHEDULE TO THE CONSTITUTION
- IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF THE
NATIONAL VALUES AND PRINCIPALS OF GOVERNANCE IN
ARTICLES 1, 2, 3(1), 4(2), 10(1)&(2), 160(1), 172, AND 259(1)
OF THE CONSTITUTION OF KENYA, 2010.
- IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF THE
RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 48
AND 50(1) OF THE CONSTITUTION OF KENYA, 2010.
- IN THE MATTER OF: THE ALLEGED VIOLATION OF THE PRINCIPLE OF SEPARATION
OF POWERS BETWEEN THE EXECUTIVE AND JUDICIARY IN THE
OPERATION OF TRIBUNALS ESTABLISHED BY PARLIAMENT
PURSUANT TO ARTICLE 169(1)(d) OF THE CONSTITUTION,
INCLUDING BY HOW MEMBERS ARE APPOINTED AND REMOVED
FROM OFFICE.
- IN THE MATTER OF: THE ALLEGED FAILURE TO ESTABLISH INDEPENDENT AND
IMPARTIAL TRIBUNALS.

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

~ VERSUS ~

THE JUDICIAL SERVICE COMMISSION 1ST RESPONDENT
THE HON. ATTORNEY GENERAL 2ND RESPONDENT
THE PARLIAMENT OF KENYA 3RD RESPONDENT

AND

KATIBA INSTITUTE INTERESTED PARTY

AMENDED PETITION

THE HONOURABLE JUDGE
THE HIGH COURT OF KENYA
NAIROBI.

RECEIVED
KATIBA INSTITUTE

Date: 19/12/2018 Time: 2:05 PM

By: Douglas

Sign: [Signature]

THE HUMBLE PETITION OF OKIYA OMTATAH OKOITI
(HEREIN AFTER REFERRED TO AS "THE PETITIONER"),

BEING AN ADULT CITIZEN OF KENYA AND RESIDENT OF NAIROBI CITY COUNTY, WHOSE ADDRESS OF SERVICE FOR PURPOSES OF THIS PETITION IS CARE OF ROOM 4, FLOOR B1, BLOCK A, WESTERN WING, NSSF BUILDING, BISHOPS ROAD, P. O. BOX 60286 - 00200, NAIROBI, IS AS FOLLOWS:

A. PETITIONER'S NAME AND ADDRESS

1. The Petitioner - OKIYA OMTATAH OKOITI - a resident of Nairobi City County, is a law abiding citizen of Kenya, a public spirited individual, and a human rights defender. He is the Executive Director of Kenyans for Justice and Development (KEJUDE) Trust, which is a legal entity, incorporated in Kenya and founded on republican principles and was set up with the purpose of promoting democratic governance, economic development, and prosperity. His address of service for purposes of this Petition is care of ROOM 4, FLOOR B1, BLOCK A, WESTERN WING, NSSF BUILDING, BISHOPS ROAD, P. O. BOX 60286-00200, NAIROBI

B. RESPONDENTS' NAMES AND ADDRESSES

2. The 1st Respondent - THE JUDICIAL SERVICE COMMISSION - is an independent constitutional Commission established under Article 171 (1) of the Constitution of Kenya. The mandate of the Commission as provided for under Article 172 (1) of the Constitution is to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice. The Commission has been sued herein for failing/refusing to execute its constitutional mandate of appointing members of tribunals through a competitive and transparent process as provided for in Article 171(1)(c) and (2)(a) of the Constitution. The Commission's address of service for purposes of this Petition is care of P.O. BOX 40048 - 00100 Nairobi, Re-insurance Plaza, Podium Floor, Taifa Road, Nairobi.
3. The 2nd Respondent - THE HON. ATTORNEY GENERAL - has been sued in this Petition as the legal adviser and representative of the Government of Kenya; a promoter and protector of the rule of law; and a defender of the public interest within the meaning of Article 156 of the Constitution. His address of service for purposes of this Petition is

care of the Hon. Attorney General's Chambers, Sheria House, Harambee Avenue, P. O. Box 40112, NAIROBI.

3A. The 3rd Respondent - THE PARLIAMENT OF KENYA - has been sued in this Petition for failing to discharge its mandate under the Article 169 (2) of the Constitution which requires Parliament to enact legislation to give effect to Article 169 (1). It states, (2) Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1). Further, the Fifth Schedule to the Constitution outlines legislation to be enacted by Parliament and concerning the Judiciary, it provides that the legislations for system of courts (Article 162) ought to have been enacted within 1 year. Parliament's address of service for purposes of this Petition is care of the 5th Floor, Protection House, Parliament Road, NAIROBI.

C. INTERESTED PARTY'S NAME AND ADDRESS

4. The Interested Party - **KATIBA INSTITUTE** - was established to promote the understanding and implementation of Kenya's new Constitution. It is joined here as an entity that has an identifiable stake or legal interest or duty in these proceedings. Its address of service is care of Katiba Institute, off Argwings Kodhek Road, Rose Avenue, Hurlingham, P. O. Box 26586-00100, NAIROBI.

D. FACTS RELIED UPON

5. Tribunals play a critical part in adjudication and resolution of disputes. They enjoy great advantages over regular courts of law which make them an important vehicle for delivering administrative justice. More importantly, due to their informality, simpler procedures and cheapness, tribunals are better placed than regular courts to ensure that the majority of citizens access justice.

6. However in Kenya today tribunals are incapable of delivering quality administrative justice to the people. The plethora of tribunals is confusing and compounding even to the lawyer, let alone the ordinary Kenyan. Ironically, the whole justification of the tribunal system is to enable citizens to access administrative justice easily, speedily, cheaply and fairly. The present system does not foster these core values of an

administrative justice system. The tribunals are constituted and operate as part of the administration whose decisions are normally called into question before them. They lack independence and impartiality. They enjoy wide discretion without adequate mechanisms for accountability, leading to great variations in decision making. So many fundamental differences defying rational justification exist between the tribunals that the principle of equal access to justice is undermined.

7. The Kenya Law Reform Commission estimates that, in Kenya today, there are more than 100 Tribunals all established under different pieces of legislations, all discharging judicial functions in one form or the other, and operating under various administrative structures.
8. Tribunals in Kenya are set up on a statute by statute basis without any common characteristics. The tribunals and their enacting statutes include the following:
 - 8.1. Advocates Complaints Commission (Advocates Act, Cap 16, S.53)
 - 8.2. Advocates Disciplinary Committee (Advocates Act, Cap 16, S. 55)
 - 8.3. Board of Review (Prisons Act, Cap 90, S. 48)
 - 8.4. Teachers Service Appeals Tribunal (Teachers Service Commission Act, Cap 212 S. 11)
 - 8.5. National Museums Board of Governors (National Museums Act, Cap 216, S.4)
 - 8.6. Radiation Protection Board (Radiation Protection Act, Cap 243, S.4)
 - 8.7. Pharmacy and Poisons Board (Pharmacy and Poisons Act, Cap 244, S.3)
 - 8.8. Kenya Board of Mental Health (Mental Health Act, Cap 248, S.4)
 - 8.9. Practitioners and Dentists Board (Medical Practitioners and Dentists Act, Cap 253, S.4)
 - 8.10. Rent Restriction Tribunals (Rent Restriction Act, Cap 296, S.4)
 - 8.11. Land Surveyors' Board (Survey Act, Cap 299, S. 7)
 - 8.12. Business Premises Tribunal (Landlord and Tenant (Shops, Hotels & Catering Establishments Act), Cap 301, S.11)
 - 8.13. Land Control Board (Land Control Act, Cap 302, S.5)
 - 8.14. Provincial Land Control Appeals Board (Land Control Act, Cap 302, S. 10)
 - 8.15. Central Land Control Appeals Board (Land Control Act, Cap 302, S.12)
 - 8.16. Gold Mines Development Loans Board (Gold Mines Development Loans Act, Cap 311, S.3)
 - 8.17. Agricultural Appeals Tribunal (Agriculture Act, Cap 318, S.193)

- 8.18. The Seeds and Plants Tribunal (Seeds and Plant Varieties Act Cap 326, S.28)
- 8.19. Canning Crops Board (Canning Crops Act, Cap 328, S.4)
- 8.20. Cotton Board of Kenya (Cotton Act, Cap 335, S.3)
- 8.21. Kenya Dairy Board (Dairy Industry Act Cap 336, S.4)
- 8.22. National Cereals and Produce Board (National Cereals and Produce Board Act, Cap 338, S.3)
- 8.23. Pyrethrum Board of Kenya (Pyrethrum Act, Cap 340, S.4)
- 8.24. Sisal Board (Sisal Industry Act Cap 341, S.3)
- 8.25. Coffee Board of Kenya (Coffee Act, No 9 of 2001, S.3)
- 8.26. Kenya Sugar Board (Sugar Act, No 10 of 2001, S.3)
- 8.27. Sugar Arbitration Tribunal (Sugar Act, No 10 of 2001, S.31)
- 8.28. Tea Board of Kenya (Tea Act, Cap 343, S. 3)
- 8.29. Pest Control Products Board (Pest Control Products Act, Cap 346, S.5)
- 8.30. National Irrigation Board (Irrigation Act, Cap 347, S.3)
- 8.31. The Pig Industry Board (The Pig Industry Act, Cap 361, S.3)
- 8.32. Water Resources Management Authority (Water Act, No 8 of 2002, S.7(1))
- 8.33. Water Services Regulatory Board (Water Act, No 8 of 2002, S.46(1))
- 8.34. Water Service Boards (Water Act, No 8 of 2002, S.51)
- 8.35. Water Appeal Board (Water Act, No 8 of 2002, S.84)
- 8.36. Wildlife Conservation and Management Service Appeals Tribunal (Wildlife (Conservation and Management) Act, Cap 376, S.65)
- 8.37. Tourist Appeal Board (Tourist Industry Licensing Act, Cap 381, S.9)
- 8.38. Road Boards (Public Roads and Roads of Access Act, Cap 399, S.3)
- 8.39. Kenya Roads Board (Kenya Roads Board Act, No. 7 of 2000, S.4)
- 8.40. Transport Licensing Appeal Tribunal (Transport Licensing Act, Cap 404, S.19)
- 8.41. State Corporations Appeals Tribunal (State Corporations Act, Cap 446, S.22)
- 8.42. Value Added Tax Appeals Tribunal (Value Added Tax Act, Cap 476, S. 32)
- 8.43. Capital Markets Tribunal (Capital Markets Authority Act, Cap 485, S. 35)
- 8.44. Insurance Appeals Tribunal (Insurance Act, Cap 487, S. 169)
- 8.45. Co-operatives Tribunal (Co-operative Societies Act, Cap 490 as amended by Act No 2 of 2004)
- 8.46. Hotels and Restaurants Appeals Tribunal (Hotels and Restaurants Act, Cap 494, S.10)
- 8.47. Kenya Bureau of Standards (Standards Act, Cap 496, S.11)

- 8.48. Restrictive Trade Practices Tribunal (Restrictive Trade Practices, Monopolies and Price Controls Act, Cap 504, S.20)
 - 8.49. Board of Registration of Architects and Quantity Surveyors (Architects and Quantity Surveyors Act, Cap 525, S.4)
 - 8.50. Auctioneers Licensing Board (Auctioneers Act, 1996, S.3)
 - 8.51. Engineers Registration Board (Engineers Registration Act, Cap 530, S.3)
 - 8.52. Registration of Accountants Board (Accountants Act, Cap 531, S.11)
 - 8.53. Valuers Registration Board (Valuers Act, Cap 532, S 3)
 - 8.54. Estate Agents Registration Board (Estate Agents Act, Cap 533, S.3)
 - 8.55. Registration of Certified Public Secretaries Board (Certified Public Secretaries of Kenya Act, Cap 534, S.11)
 - 8.56. Electricity Regulatory Board (Electric Power Act, No. 11 of 1997)
 - 8.57. Land Disputes Tribunals (Land Disputes Tribunals Act, No 18 of 1990)
 - 8.58. Land Disputes Appeals Committee (Land Disputes Tribunals Act, S.9)
 - 8.59. NonGovernmental Organizations Co-ordination Board (NonGovernmental Organizations Co-ordination Act, No 19 of 1990)
 - 8.60. National Environment Tribunal (Environmental management and Coordination Act, No 8 of 1999, S.125)
9. The petitioner is aggrieved that contrary to Articles 24, 48, 165(3)(c) and 164(3) of the Constitution, some of these tribunals deny or limit the right of litigants to appeal, including to the Superior Courts.
10. The petitioner is aggrieved that contrary to Article 172(1)(c) of the Constitution, appointments to these tribunals are predominantly made by the Executive, or by third parties, and not by the Judicial Service Commission as it ought to be, creating a major breach of the doctrine of separation of powers, and that undermines the basic structure of the Constitution.
11. The petitioner is aggrieved that since the tribunals are all set up by different statutes, their members are appointed and constituted differently. Some members of the same tribunal are appointed by the President and the rest by the Cabinet Secretary. In other tribunals, all the members are appointed by the Cabinet Secretary. The Cabinet Secretary appoints some members at their own discretion, others on “advice”, “consultation”, or “nomination” by specified institutions. In yet other Tribunals, the

appointment is by different authorities such as the Chief Justice. Some members of tribunals are elected by specified organizations or sectors. Members of different tribunals enjoy different remuneration and terms of office. Members of some enjoy a measure of independence and security of tenure whilst others serve at the pleasure and discretion of the Cabinet Secretary.

12. The petitioner is aggrieved that all these tribunals exercise different powers. They operate on different procedural rules. Parties before some are allowed representation by advocates whilst others are not. The decisions of some are final whilst those of others are appealable either to the Cabinet Secretary, to other tribunals, to subordinate courts or to the High Court. Even in those tribunals where appeals are allowed to the High Court, some are allowed only on questions of law, others on both questions of law and fact. In some tribunals, the decision of the High Court on appeal is final whilst in others further appeals to the Court of Appeal are allowed. The right of appeal is exercisable within different periods: some within 14 days, others within 28 days, others within 30 days, others within 60 days and others within 90 days.
13. The petitioner is aggrieved that:
 - 13.1. There are no standard criteria for the appointment of members of the tribunals.
 - 13.2. There are no standard terms of service for members of tribunals and how are they removed from office.
 - 13.3. There are no mechanisms in place to ensure the independence and impartiality of the tribunals.
 - 13.4. There are no mechanisms in place to ensure that the tribunals are accountable, transparent, and competent.
 - 13.5. The decisions of some tribunals are final whilst others are appealable to other tribunals or the High Court.
 - 13.6. Different Tribunals have different rules of procedure, some adopting procedures akin to those of regular courts whilst others are quite informal.
 - 13.7. Some tribunals expressly allow representation by counsel whilst others don't or are silent on the issue.
14. The petitioner posits that the present undesirable state of affairs impacts negatively on the ability of Kenyans to access justice and does not ensure or guarantee equal justice for all Kenyans.

15. The petitioner is aggrieved that the respondents have failed in their obligation under the Constitution to adopt common standards and procedures for all tribunals established under Article 169(1)(d) of the Constitution.
16. The petitioner is aggrieved that in breach of Articles 73(2)(a) & (b), 172(2)(a), and 232(1)(g), as read together with Articles 10(2) and 27 of the Constitution, appointments to the tribunals (by the Executive) are not made through a competitive, objective, merit based and inclusive process.
17. When the Executive handpicks and appoints members of the tribunals, they become agents of the Executive and cannot be considered to be the independent and impartial tribunals anticipated in Article 50(1) of the Constitution, or to be part of the independent Judiciary anticipated by Article 160(1).
18. When the Executive litigates before a tribunal it has constituted, there is a major violation of the principle of natural justice, that one cannot be a judge in its own cause.
19. The petitioner is aggrieved that the conflict of interest which arises when the Executive litigates in tribunals it has constituted violates/threatens the express provisions of Articles 48, 50(1), and 160(1) of the Constitution.
20. Amidst all this confused jungle of variations, there is no equal justice before tribunals: when some tribunals operate as part of Government ministries, departments and agencies, whilst others operate as independent quasi-judicial bodies; when some tribunals allow litigants the advantage of counsel, whilst other do not; and when litigants before some tribunals have the advantage of audience in an appellate court, whilst others do not.
21. Tribunals normally address issues of administrative justice, which would otherwise end up for adjudication and resolution by ordinary courts. To the extent that tribunals are an important alternative forum to the regular courts for remedying citizens' grievances and addressing administrative justice issues, there is need for consistency and certainty in their legal framework and operations.

22. The Constitution of Kenya 2010 incorporates tribunals into the judiciary as subordinate courts pursuant to Articles 1(3)(c), 20(4) & (5), 24(3), 47(3), 50(1), 159(1) & (2), 164(3)(b), and 169(1)(d) of the Constitution.
23. Tribunals are Subordinate Courts established by Acts of Parliament pursuant to Article 169(1)(d) of the Constitution to exercise judicial or quasi-judicial functions under the supervision of the Judicial Service Commission as provided in Article 172(1)(c).
24. Tribunals supplement the Superior Courts in the administration of justice and, under the exhaustion principle, it is mandatory to exhaust any adjudicatory provisions created in statute before approaching the Courts.
25. It is trite case law that where there is a laid down procedure in statute for adjudicating disputes, the same should and must be followed, making tribunals the courts of first instance for many litigations. Hence, to safeguard the rights and fundamental rights of access to justice enshrined in Article 48 of the Constitution, it is a constitutional imperative that the tribunals accord to the threshold in Article 50(1) of the Constitution.
26. Given the peripheral role the Judicial Service Commission plays in the composition of these tribunals, as opposed to the dominant role played by the Executive, none of the current tribunals in Kenya is set up to accord with Article 50(1) of the Constitution, which requires that they be independent and impartial, and that shortfall impedes the enjoyment of the rights and fundamental freedoms of access to justice enshrined in Article 48 of the Constitution.
27. Kenya's current tribunal system is mired in confusion and uncertainty. The many tribunals exist independent of each other; are appointed and constituted differently, operate on different procedural rules and with different degrees of accountability, yet litigants under the exhaustion principle are required to move the tribunals as courts of first instance where statutes provide for them.
28. To add to the confusion, these judicial bodies are called by different names, including 'tribunal', 'board', 'commission', 'committee', 'authority', 'bureau', or 'council'.

29. The inconsistency in names is not a mere aberration; it mirrors greater inconsistencies in more fundamental issues touching on the mandate of tribunals and their ability to deliver justice to litigants.
30. Prior to the promulgation of the Constitution of Kenya 2010, tribunals were part of the Executive established to deal with specific problems in an area requiring regulation.
31. The respondents have failed to transition Kenya's tribunal system from the Executive into the ambit of the Judiciary to accord with the express provisions of the Constitution of Kenya 2010.
32. In essence, it is unconstitutional for the Executive and other third parties to appoint and remove members of the tribunals, and the flawed practice should be discontinued to protect the public interest.
33. This Court is enjoined to intervene and ensure that the respondents align Kenya's tribunal system with the Constitution, including by ensuring that the tribunals are set up to operate in a transparent manner; that all appointments to the tribunals are made by the Judicial Service Commission as required by Article 172(1) and (2); that the tribunals are placed under accountable governance systems including uniform appointment and removal structures; and that they have an appropriate financing framework to ensure their efficient operations.
34. This Petition is filed in the public interest to ensure access to justice for users of the tribunal system in Kenya.

D2. THE LAW RELIED UPON

34A. The place of Tribunals under the Constitution is in the Judiciary as per Articles 1(3)(c), 20(4) & (5), 24(3), 47(3), 50(1), 159(1) & (2), 164(3)(b), 165, 169(1)(d), 171 and 172 among others. Article 169 (2) requires Parliament to enact legislation to give effect to Article 169 (1). It states:

(2) Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1).

- 34B. Further, the Fifth Schedule to the Constitution outlines legislation to be enacted by Parliament and concerning the Judiciary, it provides that the legislations for system of courts (Article 162) ought to have been enacted within 1 year.
- 34C. Tribunals are covered under Article 162 (4) which provides, “subordinate courts are the courts established under Article 169 or by Parliament...”
- 34D. Tribunals are anchored under Article 169(1) (d) which states,
(1) The subordinate courts are–
(d) any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162 (2).
- 34E. The place of Tribunals under the Constitution is in the Judiciary as per Articles 1(3)(c), 20(4) & (5), 24(3), 47(3), 50(1), 159(1) & (2), 164(3)(b), 165, 169(1)(d) , 171 and 172 among others. Article 169 (2) requires Parliament to enact legislation to give effect to Article 169 (1). It states,
- 34F. Under Article 169(2), Parliament was under obligation to enact legislation conferring jurisdiction, functions and powers on the courts established under Article 169(1) which includes Tribunals in Article 169(1) (d)
- 35G. Under the Fifth Schedule, the Constitution anticipated a period of one year within which Parliament would enact legislation to give effect to the Constitutional provisions on Tribunals and to transit them from the Executive to the Judiciary.
- 35H. Since the promulgation of the Constitution on 27th August 2010, the Legislature had up to 27th August 2011 to enact legislations for the system of courts under Article 162 of the Constitution.
- 35I. More than eight years after the promulgation of the Constitution, legislations enacted for system of courts do not cover tribunals.
- 35J. On the other hand, the Judicial Service Commission has not transitioned Tribunals to the Judiciary to the extent required under the Constitution.

35K. Article 261(5), (6) & (7) state categorically that:

(5) If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter.

(6) The High Court in determining a petition under clause (5) may—

(a) make a declaratory order on the matter; and

(b) transmit an order directing Parliament and the Attorney-General to take steps to ensure that the required legislation is enacted, within the period specified in the order, and to report the progress to the Chief Justice.

(7) If Parliament fails to enact legislation in accordance with an order under clause

(6) (b), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament.

Obligation on the Honourable Court to Intervene

35. The petitioner has a right to access justice pursuant to articles 48 and 50 (1) of the Constitution and an obligation under Article 3 (1) to respect, uphold and defend the Constitution.
36. The petitioner is also vested with *locus standi* to institute these proceedings by Articles 22 and 258 of the Constitution which are tailored for the community and they enact into the Constitution of Kenya the doctrine of public interest litigation. They vest every person, including the petitioner, with *locus standi* to institute such proceedings in the public interest for the protection of rights and fundamental freedoms and of the Constitution. The petitioner is also vested with standing pursuant to Article 261(5) of the Constitution.
37. The High Court has original jurisdiction pursuant to Articles 23 and 165 of the Constitution to hear this petition relating to the mismanagement of Kenya's tribunal system. The petitioner is also vested with jurisdiction pursuant to Article 261(5) of the Constitution.
38. The circumstances prevailing at Kenya's tribunal system, which is a key and integral component of the judiciary, whose mandate includes ensuring access to justice and the independence of the Judiciary, are untenable under the law and this Court is enjoined to intervene and uphold the law by granting appropriate reliefs.

E. CONSTITUTIONAL PROVISIONS VIOLATED

39. From the foregoing, it is very clear that the actions and omissions of the respondents have violated the following provisions of the Constitution:

- 39.1. Article 1 of the Constitution of Kenya, 2010.
- 39.2. Article 2 of the Constitution of Kenya, 2010.
- 39.3. Article 3(1) of the Constitution of Kenya, 2010.
- 39.4. Article 4(2) of the Constitution of Kenya, 2010.
- 39.5. Article 10(2) of the Constitution of Kenya, 2010.
- 39.6. Article 27 of the Constitution of Kenya, 2010.
- 39.7. Article 47 of the Constitution of Kenya, 2010.
- 39.8. Article 48 of the Constitution of Kenya, 2010.
- 39.9. Article 50(1) of the Constitution of Kenya, 2010.
- 39.10. Article 73 of the Constitution of Kenya, 2010.
- 39.11. Article 75(1) of the Constitution of Kenya, 2010.
- 39.12. Article 232(1) (a), (b), (c), (d), (e),(f) and (2) (b) of the Constitution of Kenya, 2010.
- 39.13. Article 259(1) & (3) of the Constitution of Kenya, 2010.

F. NATURE OF INJURY CAUSED TO THE GENERAL PUBLIC

40. By failing to transition tribunals from their line ministries and to the Judiciary in accordance with Article 169(1)(d) so as to establish independent and impartial tribunals that accord with the threshold in Article 50(1) as read with Articles 159(1) and 160(1) of the Constitution, the respondents have gravely undermined the administration of justice in Kenya.
41. The respondents have failed in their mandate under the law to the extent that they have not transitioned Kenya's tribunal system from the Executive into the ambit of the Judiciary to accord with the express provisions of the Constitution of Kenya 2010.
42. The enjoyment of rights and fundamental freedoms enshrined in Article 48 and 50(1) of the Constitution is impeded because tribunals not delinked from their parent ministries are compromised and, therefore, incapacitated to the extent that the tribunals are

unable to deliver outcomes that are fair, credible, accessible and proportionate. As currently established the tribunals are part of the executive and simply do the bidding of the executive.

43. From the foregoing, the respondents have failed to respect, uphold and defend the Constitution of Kenya 2010.

G. CASES RELATED TO ISSUES IN THE PETITION

44. There is no case pending in any court of competent jurisdiction between the parties over the subject matter herein.

H. RELIEFS SOUGHT BY THE PETITIONER

REASONS WHEREFORE Your Petitioner therefore humbly prays for:

(i) A DECLARATION THAT:

- a. Tribunals established pursuant to Article 169(1)(d) of the Constitution of Kenya 2010, are not part of the Executive machinery, nor are they independent adjudicatory bodies, but are subordinate courts which are an integral part of the Judiciary.
- b. The Judicial Service Commission is exclusively responsible for appointing and removing members of the tribunals established pursuant to Article 169(1)(d) of the Constitution of Kenya 2010, for establishing their rules of procedure, and for doing anything incidental thereto to ensure their smooth operations as courts of law.
- c. The doctrine of separation of powers under the Constitution of Kenya is an absolute bar to the Executive and its agencies, or any other entities who are not the Judicial Service Commission, being mandated by Parliament to appoint or remove any members of tribunals created under Article 169(1)(d) of the Constitution of Kenya 2010.

- d. Any law which vests in the Executive and its agencies, or in any other entities who are not the Judicial Service Commission, the mandate to appoint or remove any members of tribunals created under Article 169(1)(d) of the Constitution of Kenya 2010 is unconstitutional and, therefore, invalid, null and void *ab initio*.
- e. All sections of statutes which allow the Executive and/or other parties who are not the Judicial Service Commission to make appointments to tribunals created under Article 169(1)(d) of the Constitution through a competitive process are unconstitutional and, therefore, invalid, null and void *ab initio*.
- f. The budget for tribunals should be a line budget in the Judiciary.
- g. Parliament has failed to enact necessary legislation pursuant to Article 169(2) to give effect to Article 169(1)(d) within the time specified in the Fifth Schedule to the Constitution.

(ii) **AN ORDER:**

- a. **ANNULLING** all appointments to tribunals created under Article 169(1)(d) of the Constitution which were not made by the Judicial Service Commission through a competitive process.
 - a1. **COMPELLING** Parliament and the Attorney-General to enact legislation pursuant to Article 169(2) to give effect to Article 169(1)(d) of the Constitution within three months, and to report the progress to the Chief Justice.
 - a2. **THAT** if Parliament fails to enact legislation pursuant to Article 169(2) to give effect to Article 169(1)(d) of the Constitution within three months, the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament.
- b. **COMPELLING** the Judicial Service Commission to immediately but not later than three months re-constitute all tribunals created under Article 169(1)(d) of the

Constitution ~~within six months of~~ upon Parliament enacting legislation pursuant to Article 169(2) to give effect to Article 169(1)(d).

c. **SUSPENDING** order (a) above for a period of six months to allow for a smooth transition.

d. **COMPELLING** the respondent to bear the costs of this suit.

(iii) Any other relief the court may deem just to grant.

~~DATED at NAIROBI this 21st day of May 2018.~~

DATED at NAIROBI this 18th day of December 2018.



OKIYA OMTATAH OKOITI
THE PETITIONER

DRAWN & FILED BY:

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TO BE SERVED UPON:

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2. **HON. ATTORNEY GENERAL,**
HON. ATTORNEY GENERAL'S CHAMBERS,
SHERIA HOUSE,
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3. **KATIBA INSTITUTE,**
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4. **PARLIAMENT OF KENYA,**
5TH FLOOR, PROTECTION
HOUSE,
PARLIAMENT ROAD,
NAIROBI.



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 197 OF 2018

IN THE MATTER OF: ARTICLES 22 (1) & (2) (c), 23, 48, 50(1), AND 258 (1) & (2) (c) OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: ARTICLES 1(3)(c), 20(4), 47(3), 159(1), 162(4), 169(1)(d), 169(2), AND 261(5), (6) & (7) OF THE CONSTITUTION AND THE FIFTH SCHEDULE TO THE CONSTITUTION

IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF THE NATIONAL VALUES AND PRINCIPALS OF GOVERNANCE IN ARTICLES 1, 2, 3(1), 4(2), 10(1)&(2), 160(1), 172, AND 259(1) OF THE CONSTITUTION OF KENYA, 2010.

IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF THE RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 48 AND 50(1) OF THE CONSTITUTION OF KENYA, 2010.

IN THE MATTER OF: THE ALLEGED VIOLATION OF THE PRINCIPLE OF SEPARATION OF POWERS BETWEEN THE EXECUTIVE AND JUDICIARY IN THE OPERATION OF TRIBUNALS ESTABLISHED BY PARLIAMENT PURSUANT TO ARTICLE 169(1)(d) OF THE CONSTITUTION, INCLUDING BY HOW MEMBERS ARE APPOINTED AND REMOVED FROM OFFICE.

IN THE MATTER OF: THE ALLEGED FAILURE TO ESTABLISH INDEPENDENT AND IMPARTIAL TRIBUNALS.

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

~ VERSUS ~

THE JUDICIAL SERVICE COMMISSION 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

THE PARLIAMENT OF KENYA 3RD RESPONDENT

AND

KATIBA INSTITUTE INTERESTED PARTY

SUPPORTING AFFIDAVIT

I, OKIYA OMTATAH OKOITI, a resident of Nairobi County in the Republic of Kenya and of P.O Box 60286 - 00200, Nairobi within the Republic aforesaid make oath and state as follows.

1. THAT I am the petitioner herein hence competent to swear this Affidavit.

2. THAT I swear this affidavit in good faith in support of the petition filed herewith.
3. THAT I have perused the petition herein and confirm that the facts stated therein are true and correct.
4. THAT I hereby reaffirm and solemnly repeat the facts and averments stated and included in the Petition, including each of the paragraphs (each individually as well as cumulatively), and solemnly state that the facts therein are true and to my own knowledge, information and belief.
5. THAT I am aware that Parliament is a necessary party to these proceedings.
6. THAT what is deponed to herein is true to the best of my knowledge, information and belief.

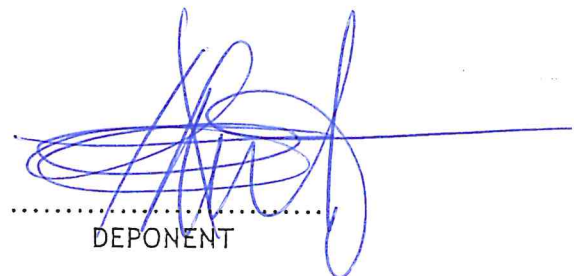
SWORN by the said OKIYA OMTATAH OKOITI
 at NAIROBI this 18th day of December 2018
 BEFORE ME

J.K. BOSEK, ADVOCATE
 COMMISSIONER FOR OATHS
 & NOTARY PUBLIC
 P.O. BOX 60286-00200
 NAIROBI

COMMISSIONER OF OATHS / MAGISTRATE

DRAWN & FILED BY:

OKIYA OMTATAH OKOITI,
 ROOM 4, FLOOR B1, BLOCK A,
 WESTERN WING, NSSF BUILDING,
 BISHOPS ROAD,
 P. O. BOX 60286-00200,
NAIROBI.


 DEPONENT

STATE OF TEXAS
COUNTY OF [illegible]

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