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

PETITIONER'S SUBMISSIONS SUPPORTING THE PETITION

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May it please the Honourable Court:

A. INTRODUCTION

1. On 22nd May 2018, the petitioner lodged the instant constitutional petition, which is dated 21st of May 2018, before the High Court. On 19 December 2019, with leave of the Court, the petitioner filed an amended petition dated 8th December 2018.

2. The petitioner reiterates the contents of his amended petition filed pursuant to articles **3(1), 22(1) & (2)(c), 23, 48, 50(1), and 258(1) & (2)(c)** of the Constitution of Kenya, 2010.

3. The petitioner contends that there are various Acts of Parliament establishing more than 60 **'local tribunals'** in Kenya, independent of each other. And that the varying provisions of these Acts, especially those which allow the tribunals to be controlled by the Executive, and not by the Judiciary, through the appointment of their members by the Judicial Service Commission, have hindered delivery of justice by the tribunals.

4. The absence of impartiality in violation of **Articles 48 and 50(1)** of the Constitution is best marked where private litigants against the Executive appear before the tribunals which are constituted by the Executive.

5. Hence, it is the petitioner's contention that the said provisions of the Acts listed at paragraph 8 of the amended petition, regarding the constitution and control of tribunals by the Executive and not by the Judiciary, are unconstitutional.

6. Specifically, the petitioner is aggrieved by the prevailing state of affairs, and he alleges:

    a. The 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.

b. The contravention and violation of the rights and fundamental freedoms under articles 48 and 50(1) of the Constitution of Kenya, 2010.

c. The 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.

d. The violation of the Constitution in the failure to establish independent and impartial tribunals.

B. THE DEFINITION OF TRIBUNALS

7. The petitioner submits that a tribunal, generally, is any person or institution with authority to judge, adjudicate on, or determine claims or disputes—whether or not it is called a tribunal in its title.

8. In many (but not all) cases, the word *tribunal* implies a judicial (or quasi-judicial) body with a lesser degree of formality than a court, to which the normal rules of evidence and procedure may not apply, and whose presiding officers are frequently neither judges nor magistrates.

9. The following is published online on the official website of the Kenyan Judiciary at https://www.judiciary.go.ke/courts/tribunals/

TRIBUNALS

> Tribunals are bodies established by Acts of Parliament to exercise judicial or quasi-judicial functions. They supplement ordinary courts in the administration of justice. Tribunals, however, do not have penal jurisdiction. Tribunals, like the courts, have to respect the Bill of Rights in their decisions and not be repugnant to justice and morality or be inconsistent with the Constitution or other laws of the land. Most tribunals are subject to the supervision of the High Court.

C. TRIBUNALS IN THE CONSTITUTION

10. Article 1(3)(c) of the Constitution recognizes the Judiciary and independent tribunals as State organs to which sovereign power is delegated by the people of Kenya. According to Article 159 (1) of the Constitution, judicial authority vests in and is to be excised by courts and tribunals established by or under the Constitution. Article 169 (1)(d) further defines subordinate courts under the Judiciary to include **'local tribunals'** as may be established by an Act of Parliament.

11. In the scheme of things, given we are dealing with the Constitution of Kenya and not international law, the expression **'local tribunals'** should be understood as having been used to specify that the entities in issue are those established under local law specific to Kenya and to distinguish them from international tribunals, such as those established by the Security Council under Article 41 of the United Nations Charter.

12. Clearly, the framers of the Constitution of Kenya, 2020 wanted to distinguish these **'local tribunal'** from international tribunals which have jurisdiction in Kenya by dint of Article 2(5) & (6) of the Constitution.

13. These **'local tribunals'** are subordinate courts which Parliament has established or is empowered to establish vide Article 169(1)(d) of the Constitution, and which, under the doctrine of exhaustion, the superior courts recognize as legitimate alternative avenues or forums for adjudicating disputes, having subject matter jurisdiction as courts of first instance, and before which parties must appear in the first instance before moving the Courts.

14. These **'local tribunals'** which are standing **subordinate courts** are also to be distinguished from the *ad hoc* **'independent tribunals'** under Article 1(3)(c), 20(4) & (5), 24(3), 47(3)(a), 50(1), 144(3), 158(4), 159(1) & (2), 163(3)(b)(ii), 164(3)(b), 165(3)(c), 168(5)(a) & (b), and 251(4)(b) of the Constitution, which are separate and distinct from the judiciary (the courts), and are set up as provided under the law to address a specific need when it arises, and they stand dissolved upon discharging that function.

15. The expression **'the Judiciary and independent tribunals'** which is used in Article 1(3)(c) of the Constitution shows clearly that the two entities are separate and distinct. The one is not the other and the other is not the one. This is underscored elsewhere in the Constitution where the words 'tribunal' and 'court' are used in the same sentence, meaning they refer to two distinct and separate entities.

16. The petitioner reiterates that under the architecture and design of the Constitution of Keny, 2010, the **'independent tribunals'** are quasi-judicial bodies which are set up on a needs basis. They are not courts. And as such, this petition does not concern them. The petition is strictly about **'local tribunals'** which are standing bodies which are part and parcel of the Judiciary and are established under **Article 169(1)(d)** of the Constitution.

17. Hence, the petition does not concern just any tribunal. The petition is strictly about **'local tribunals'** which are subordinate courts established pursuant to Article 169(1)(d) of the Constitution. The petition lays emphasis on the importance of ensuring access to justice for users of local tribunals by ensure that **'local tribunals'** in Kenya are regulated as part of the Judiciary by the Judicial Service Commission.

D. THE FACTS

18. The facts relied upon are stated at Paragraphs 5 to 34 of the petition. Further facts are provided in the 1st Respondent's Replying Affidavit dated 30th August 2018.

E. PLEADINGS RELIED ON BY THE PETITIONER

19. Besides these submissions and authorities in their support, the petitioner relies on the following pleadings he has filed herein:

    a. The amended petition and supporting affidavit dated the 18th day of December, 2018.

b. The Supporting Affidavit to the original petition dated 21st May 2018.

c. The 1st Respondent's Replying Affidavit dated 30th August 2018.

d. The 1st Respondent's Written Submissions dated 18th May 2020.

e. The 2nd Respondent's Written Submissions dated 4th February 2019.

f. 3rd Respondent's Grounds of Opposition dated 12th February 2020.

g. The Interested Party's Written Submissions dated 24th October 2018.

F. ISSUES FOR DETERMINATION

20. From the pleadings filed by the various parties herein, the petitioner submits that the following issues arise for the Court to determine:

(i) Whether local tribunals are subordinate courts and an integral part of the Judiciary?

(ii) Whether the Judicial Service Commission should be exclusively responsible for local tribunals?

(iii) Whether the Parliament has failed to transition local tribunals from the Executive to the Judiciary?

(iv) Whether laws vesting powers to constitute local tribunals in the executive and other third parties are unconstitutional?

(v) Whether Parliament should be dissolved if it fails to enact legislation as ordered by this Court?

(vi) Whether upon Parliament enacting legislation to transit local tribunals to the Judiciary, the Judicial Service Commission should immediately re-constitute the tribunals?

(vii) Whether costs are payable?

(i) <u>Whether local tribunals are subordinate courts and an integral part of the Judiciary</u>?

21. Local 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).*

22. **Article 169 (2)** of the Constitution expressly 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).***

23. Local tribunals are also covered under **Article 162 (4)** which provides, ***"subordinate courts are the courts established under Article 169 or by Parliament…"***

24. The petitioner submits that it is undisputed that under the Constitution of Kenya, 2020 **'<u>local tribunals</u>'** are established as subordinate courts and an integral part of the Judiciary.

(ii) <u>Whether the Judicial Service Commission should be exclusively responsible for local tribunals</u>?

25. The Judicial Service Commission is an independent constitutional organ established under Article 171 (1) of the Constitution of Kenya. Its mandate 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.

26. Given that the local tribunals are subordinate courts and an integral part of the judiciary, it goes without saying that, under the law, the Commission should be wholly responsible for their constitution, operations and regulation.

27. It is submitted that in the circumstances, the Judicial Service Commission should be exclusively responsible for appointing and removing members of the local 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.

(iii) Whether the Parliament has failed to transition local tribunals from the Executive to the Judiciary?

28. The Judicial Service Commission was 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 172(1)(c) and (2)(a) of the Constitution.

29. Whereas it is undisputed that the place of local tribunals under the Constitution is in the Judiciary, 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).***

30. From the pleadings of the 1st Respondent, it has been clarified that *"the process of transiting tribunals to the Judiciary is not self-executing and needed legislative intervention as provided for under Article 169(1)(d) and (2) of the Constitution."* (Paragraphs 10 of the 2nd Respondent's Replying Affidavit dated 30th August, 2018. See also paragraphs 43, 44, 45 and 46 thereof.)

31. Further and in particular, the 1st Respondent has pleaded that:

(i) The Constitution and the Judicial Service Act do not expressly confer appointing authority of members of local tribunals in the Judicial Service Commission;

(ii) The Constitution and the Judicial Service Act do not repeal any of the legislations listed at paragraph 8 of the amended petition, and which vest appointing authority in the Executive or other entities.

(iii) It is Parliament's duty to enact legislation to transit local tribunals to the judiciary, and that would enable the Judicial Service Commission to constitute the tribunals as required under the Constitution.

(iv) Thus, in the absence of a legislation divesting appointing authority from the Executive and other entities and vesting it in the Judicial Service Commission, and in light of numerous valid statutes vesting appointing authority expressly on the Executive and other entities, the Judicial Service Commission has its hands tied.

32. The said pleadings of the 1st Respondent have also demonstrated that the Judicial Service Commission has proactively participated in efforts to transition local tribunals to the Judiciary to the extents possible within the prevailing legislative framework.

33. To this end, the Judicial Service Commission's achievements include the formation of the Judiciary Working Committee Transition of Tribunals into the Judiciary **(JWCT-T),** the establishment of the Tribunals Secretariat, contribution to the Tribunals Bill, bench marking trips to Canada, Scotland and England and public awareness campaigns on Tribunals such as the Tribunals Service Weeks and exhibitions at Agricultural Society of Kenya shows across the regions.

34. In the circumstances, the Judicial Service Commission cannot be compelled to perform that which there is no legal framework to perform and, therefore, that which it has not failed to perform.

35. That exoneration of the JSC lays the blame squarely at the feet of Parliament. The Fifth Schedule to the Constitution outlines legislation to be enacted by Parliament and concerning the Judiciary. It provides that the legislations for the system of courts (Article 162) ought to have been enacted within 1 year from 27th August 2010, when the Constitution was promulgated.

36. **Article 162(4)** of the Constitution provides that:

> ***(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.***

37. This means that:

(i) Under Article 169(2), Parliament was obligated to enact legislation conferring jurisdiction, functions and powers on the courts established under Article 169(1) which includes local tribunals in Article 169(1) (d).

(ii) As pointed out above, 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.

38. Since the promulgation of the Constitution on 27th August 2010, the Legislature had up to 27th August 2011 to enact legislations for the courts. However, all legislations enacted for the system of courts since after the promulgation of the Constitution do not cover local tribunals.

39. Hence, it is Parliament and not the Judicial Service Commission which has failed in their mandate to enact the necessary legislation to transit Tribunals from the Executive to the Judiciary.

(iv) Whether laws vesting powers to constitute local tribunals in the executive and other third parties are unconstitutional?

40. Judicial authority is vested in Courts and Tribunals under Articles 1(3)(c), 159 (1), 162, 169 (1) of the Constitution.

41. Articles 171 and 172 of the Constitution establish the Judicial Service Commission with the mandate to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice. Under Section 3 of the **Judicial Service Act Chapter 185B [Rev. 2015]** the object and purposes of the Judicial Service Act is to give effect to Articles 171 and 172 of the Constitution. Some of those objects conform to the objects and purposes of establishment of local tribunals.

42. It goes without saying that, given the mandate of the Judicial Service Commission, and the doctrine of the separation of powers, it is conceptually impossible to imagine a situation where the Executive or any other party can be mandated by Parliament to constitute (i.e. to appoint or remove members of) local tribunals.

43. However, as matters stand today, the impugned sections of the Acts of Parliament listed at paragraph 8 of the amended petition still vest the power to constitute local tribunals in the Executive, its agencies, or other third parties. Though these laws predate the Constitution, they remain in the law books courtesy of **Section 7(1) of the Sixth Schedule to the Constitution**, which provides that:

> ***(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.***

44. Unfortunately, though they remain in force, these laws cannot ***be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with this Constitution.*** Their unconstitutionality cannot be cured by merely construing of them; they just have to be repealed by Parliament or to be voided by this Court.

45. The Constitution of Kenya does not annul legislations relating to local tribunals which were not in conformity with it at the time it was promulgated. Instead,

under the Fifth Schedule, the Constitution provided the timelines within which to bring those legislations into conformity. Therefore, unconstitutional as they are, these legislations are still the valid and applicable laws.

46. Further, the Constitution does not expressly state that failure to adhere to the timelines provided for in the Fifth Schedule in regards to enacting legislation to transit local tribunals to the Judiciary would render void the impugned provisions in existing Statutes.

47. Under Sections 23, 42, 43 and 49 of the **Interpretation and General Provisions Act Chapter 2 of 2012 [Rev. 2014]**, the impugned provisions in existing legislations vesting appointing power in the Executive and other entities are still valid until they are repealed by Parliament ***(which has still not happened)*** or they are voided by this Court ***(which should happen in these proceedings)***.

48. **Nonetheless, the continued appointment of members of local tribunals by the Executive and others who are not the JSC, after the expiry of the transition period of one year, which is provided for in the Fifth Schedule, is unconstitutional.**

49. The spirit and letter of the Constitution is that local tribunals should be constituted by the Judicial Service Commission. And the Constitution mandated Parliament to enact legislation within one year of the promulgation of the Constitution to give effect to constitutional provisions for transiting local tribunals to the Judiciary. Parliament has failed in enacting the necessary legislation leading to the current stalemate.

50. The only remedy available is for this Court to declare the impugned sections of the Acts of Parliament listed at paragraph 8 of the amended petition to be unconstitutional, null and void, and to compel 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.

(v) <u>Whether Parliament should be dissolved if it fails to enact legislation as ordered by this Court</u>?

51. Under **Article 261**, on consequential legislation, the Constitution gave Parliament the power to extend the period prescribed in the Fifth Schedule by one more year under exceptional circumstances.

52. Under **Article 261 (5)**, the Constitution grants any person the right to approach the High Court if Parliament fails to enact any legislation. And these proceedings are such an approach to this Court.

53. Further, if Parliament fails to enact legislation even after a Court Order, the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament as per **Article 261 (7)** of the Constitution.

54. Consequently, if Parliament is dissolved under clause (7), the new Parliament shall enact the required legislation within the periods specified in the Fifth Schedule beginning with the date of commencement of the term of the new Parliament and if the new Parliament fails to enact the legislation, the provisions of **Article 261** apply afresh.

55. That is, Parliament can extend time by a year, anyone can approach Court for an order, if Parliament fails, Chief Justice can request the President to have it dissolved and if dissolved new one to enact legislation within a year.

56. Hence, it is submitted that should order Parliament to enact the legislation required within three months of the order. And 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 as ordered by this Court herein, the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament.

(vi) Whether upon Parliament enacting legislation to transit local tribunals to the Judiciary, the Judicial Service Commission should immediately re-constitute the tribunals?

57. It is submitted that upon Parliament enacting legislation pursuant to Article 169(2) to give effect to Article 169(1)(d) the Judicial Service Commission should immediately, but not later than three months, re-constitute all tribunals created under Article 169(1)(d) of the Constitution.

58. The urgency to do so is anchored in the fact that as matters stand right now, with Tribunals being part of the Executive and not the Judiciary, Articles 48 and 50(1) of the Constitution, respectively, on the right to access justice and the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before an independent and impartial tribunal.

(vii) Whether costs are payable?

59. As to appropriate costs order, the petitioner relies on the principle of award of costs in constitutional litigation between a private party and the State being that a private party who is successful should have costs paid by the State, and if unsuccessful, each party should bear their own costs. Such a position was held by the Court in In *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR* (supra).

60. This is a suit between a private citizen and the State, the petitioner persuades the court not to award costs to the respondents in the event the petition is not successful. The petitioner relies on the *ratio decidendi* in the South African case of ***Biowatch Case cited as CCT 80/2008 or 2009 ZA CC 14*** **at paragraph 21 thereof (Justice Saccs) held:**

> ***[21] In Affordable Medicines this Court held that as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs. In that matter a body representing medical practitioners challenged certain aspects of a licensing scheme introduced by the government to control the dispensing of medicines. Ngcobo J said the following:***

"The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and the circumstances of the case. In Motsepe v Commissioner for Inland Revenue this Court articulated the rule as follows:

> *'[O]ne should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the State, particularly, where the constitutionality of the statutory provision is attacked, lest such orders have an unduly inhibiting or "chilling" effect on other potential litigants in this category. This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this Court, no matter how spurious the grounds for doing so may be or how remote the possibility that this Court will grant them access. This can neither be in the interest of the administration of justice nor fair to those who are forced to oppose such attacks.'"*

G. CONCLUSION

61. The amended petition tilts in favour of public interest in as far as it seeks to entrench constitutionalism, the rule of law, and good governance in the constitution, operations, and regulation of local tribunals established under **Article 169(1)(d)** of the Constitution.

62. The petitioner submits that the amended petition is merited and properly before this court, and asks the Court to allow it as prayed, or with appropriate orders made by the Court pursuant to Article 23(3) of the Constitution.

DATED at **NAIROBI** this **6th** day of **June, 2020.**

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