REPUBLIC OF KENYA

IN HIGH COURT AT ELDORET

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. E011 OF 2025

DR. MAGARE GIKENYI.....1ST PETITIONER

ELIUD KARANJA MATINDI.....2ND PETITIONER

DISHON KEROTI MOGIRE.....3RD PETITIONER

PHILEMOMON ABUGA NYAKUNDI.....4TH PETITIONER

VERSUS

THE NATIONAL HEALTH INSURANCE FUND

PENDING MEDICAL CLAIMS VERIFICATION COMMITTEE.....1st RESPONDENT

HON. ADEN DUALE, CABINET SECRETARY HEALTH.....2ND RESPONDENT

PRINCIPAL SECRETARY MEDICAL SERVICES.....3RD RESPONDENT

HON. ATTORNEY GENERAL.....4TH RESPONDENT

AUDITOR GENERAL.....5TH RESPONDENT

JAMES MASIRO OJEE.....6TH RESPONDENT

DR. ANNE WAMAE.....7TH RESPONDENT

CATHERINE MUNGANIA.....8TH RESPONDENT

EDWARD KIPLIMO BITOK.....9TH RESPONDENT

MESHACK MATENGO.....10TH RESPONDENT

MEBOH ATIENO AWUOR.....11TH RESPONDENT

TOM NYAKABA.....12TH RESPONDENT

CATHERINE KARORI BOSIRE.....13TH RESPONDENT

PAUL WAFULA.....14TH RESPONDENT

JAMES OUNDO.....15TH RESPONDENT

JACKLINE MUKAMI NJIRU.....16TH RESPONDENT

DR. JUDITH AWINJA.....17TH RESPONDENT

DAVID DAWE.....18TH RESPONDENT

PETER KITHEKA.....19TH RESPONDENT

SHAWN MOGAKA.....20TH RESPONDENT

DR. CONSOLATA OGOT.....21ST RESPONDENT

DR. EMMANUEL AYODI LUSIGI.....22ND RESPONDENT

HALIMA YUSSUF.....23RD RESPONDENT

WILBERT KURGAT.....24TH RESPONDENT

Coram: Before Justice R. Nyakundi

Dr. Magare Gikenyi, 1st Petitioner

Mercyline Odeyo for the Attorney General

JUDGMENT

1. By way of Petition dated 5th April 2025, the Petitioner seeks the following orders;
   a) *That declaration be and is hereby issued that The Health Cabinet Secretary COULD NOT legally and constitutionally establish a National Health Insurance Fund (NHIF) Pending Medical Claims Verification Committee as gazetted in Gazette Notice No.4069 Vol. CXXVII—No. 64 Of 28th March, 2025 or any other document of any other date to look in Audit/Claim Verifications involving public funds in the manner, composition and terms as set out in Gazette Notice No.4069 Vol. 64 of 28th March. 2025*
   b) *That declaration be and is hereby issued that the National Health Insurance Fund Pending Medical Claims Verification Committee through Gazette Notice No.4069 Vol. CXXVII—No. 64 Of 28th March, 2025 or any other document of any other date is unconstitutional, null and void.*
   c) *That a declaration is hereby issued that the establishment of National Health Insurance Fund (NHIF) Pending Medical Claims Verification Committee through Gazette Notice No.4069 Vol. CXXVII No 64 of 28th March, 2025 and/or any other document of any other date to the extent that their actions and/or omissions inter alia usurps powers/functions of the independent office of the Auditor General and/or those of the Internal Audit office; and to the extent that their actions exposes patients' sensitive and confidential data about their illness/sickness to other people without patient's consent, and to extent its contravening the digital health records contrary to various provisions of digital health authority(DHA),the same has contravened inter alia article 1, 2 (1,2 & 4),3(1), 10, 31,73,74,75(1), 93, 94, 95, 96(1), 159, 168, 185(2),186,187,189,190,201,226(3),229,232,248,249,250,252,253*

,254(2&3) AND 260 of the constitution of Kenya(2010) as read with , Public Audit Act, the Public Finance Management Act and Public Finance Management Regulations 2015, digital health authority(DHA) and others relevant statutes, the Committee and its resultant report/recommendations if any) and any subsequent actions/omissions are illegal, unconstitutional, null and void.

d) *That judicial review orders of Certiorari be and is hereby issued quashing the Gazette Notice No.4069 Vol. CXXVII—No. 64 of 28th March 2025 purporting the establish the National Health Insurance Fund Pending Medical Claims Verification Committee through Gazette Notice and any other document purporting to establish National Health Insurance Fund (NHIF) through Gazette Notice No.4069 Vol. CXXVII—No. 64 of 28th March and/or any other document of any other date.*

e) *That a declaration be and is hereby issued that any report/recommendations and or any activities borne out of the above impugned gazette notice(s) is unconstitutional, null and void.*

f) *That this Honourable Court be pleased to issue a judicial review orders of PROHIBITION prohibiting the Respondents, either by themselves, anyone else acting at their behest, instructions or directions or any other person whosoever, from taking any action whatsoever pursuant to or in reliance on or in fulfilment of any duty or obligation or implementation of Gazette Notice No.4069 Vol. CXXVII—No. 64 of 28th March, 2025 and/or any other document and or any report/recommendations and/or any subsequent actions and/omissions based on the National Health Insurance Fund (NHIF) Pending Medical Claims Verification Committee through Gazette Notice No.4069 Vol. CXXVII—No. 64 of 28th March. 2025 and/or any other document date of any other date.*

g) *That an order is issued directing the respondents and any other person to allow spending of any money on the said committee and if spent refunding the same to the consolidated fund.*

h) That Judicial orders of mandamus be and is hereby issued compelling the respondents to comply with relevant constitutional provisions and/or any other law.

i) That any other appropriate relief the court may deem just to grant for the sake of justice for all Kenyans.

j) This being a public interest Petition filed in defence of the Constitution, the respondent be ordered to pay costs of the petition for her action and/or omissions

2. The brief background underlying the Petition is that on 28th March 2025, the Cabinet Secretary Health caused to be published Gazette Notice No. 4069 Vol. CXXVU-No. 64 of 28th March, 2025. The Petitioners contend that the legal/constitutional basis of the impugned appointment of the impugned NHIF Committee of "National Health Insurance Fund" (NHIF) - Medical Claims Verification Committee through Gazette Notice No.4069 Vol. CXXVII—No.64 Of 28th March, 2025" was never known to anyone and was a roadside declaration', without any legal and constitutional basis. That the 6th – 24th Respondents in these proceedings were constituted as members of the committee. Further, that the Committee's citation and Terms of Reference are as set on its face. While its duration is for three (3) months from 05.07.2024, this period may be extended by a Notice in the Gazette.
3. The Petitioners impugn the constitutional validity of the Gazette Notice No.4069 Vol. CXXVII—No. 64 of 28th March, 2025 in its entirety. It is their belief and conviction that Health cabinet secretary, violated numerous provisions of the Constitution and the law in establishing the National Health Insurance Fund Pending Medical Claims Verification Committee, constituting its membership, Terms of Reference, duration and secretariat.
4. The Petitioners' set down the Terms of Reference of the Technical Working-Group of the committee and stated that if one was to juxtapose the TOR's with section 7 of Public Audit Act Cap. 412B, one comes to a conclusion of duplication of roles. They urged that they

therefore crave for a declaration that, in accordance with Article 2(4) of the Constitution, Health Cabinet Secretary, acted in contravention of the Constitution when he issued Gazette Notice No.4069 Vol. CXXVII—No. 64 Of 28th March, 2025, in establishing a National Health Insurance Fund Pending Medical Claims Verification Committee.

5. The Petitioners have a legitimate expectation that all state officers and state organs had to follow the law and the constitution including statutory requirements of ensuring that they should never perform functions of independent commissions and offices and if there was contrary to this expectation the respondent's actions and/or omissions thwarted the legitimate expectations of Kenyans.
6. The Petitioners laid out the manifestation of violations or infringement of or threats to the constitution including the bill of rights statutes regulations and other applicable laws and rules. They urged that the impugned Gazette notice violates the Constitution, thereby making it unconstitutional, null and void to wit:
   a) *In establishing the Committee as notified, Health cabinet secretary violated the sovereignty of the people of Kenya under Article 1 of the Constitution.*
   b) *The people of Kenya delegated their sovereign power to carry out forensic audit/Verification of Any Exercise Involving Public Funds under Article 229(4) (g) to the Auditor-General, not the persons named by Health cabinet secretary in the impugned Gazette Notice. There is currently, in office, an Auditor-General, empowered and competent to carry out an audit/Verification Of any Exercise Involving Public Funds of the Republic. This includes either on own motion or on receipt of a complaint/request in exercise of powers donated under Article 252(l) (a) and (2) of the Constitution.*
   c) *Under Article 254(2) of the Constitution, as read together with Section 37 of the Public Audit Act, the people of Kenya empowered the Health Cabinet Secretary or any public organ/person at any time, to require the Auditor-General to submit a forensic report on*

audit/Verification exercise Involving Public Funds like NHIF covering any period of time.

d) *Appointing a Committee to carry out the audit/Verification exercise Involving Public Funds like NHIF outside the provisions of Articles 229(4)(g), 254(2) and Section37 of the Public Audit Act is an affront to the Constitution and a violation of those provisions.*

e) *Further, requiring persons other than the Auditor-General to undertake such an audit/Claim Verification Exercise Involving Public Funds like NH1F is a violation of Articles 226(3), 229(1), (2) and (4)(g) of the Constitution. The nineteen (19) persons hand-picked by Health cabinet secretary to be members of the Committee, (the 6th – 24th respondents), have not demonstrated, through fair competition and merit as required by Article 232(l)(g), that they meet the qualifications for appointment as Auditor-Generals under Article 229(2). Neither have those nineteen (19) persons been approved for appointment as auditor-generals under Articles 132(2) (f) and 229(1) of the Constitution. Those appointments are therefore in violation of the Constitution.*

7. It goes without saying that the Constitution only provides for one person to hold the office of the Auditor-General at any one time. The appointment, by the Health Cabinet Secretary, of nineteen (19); persons, to act as the auditors'/claim verifiers of audit/claim verification exercise Involving Public Funds like NHIF is without any constitutional authority and a violation of Article 2(2) of the Constitution.
8. The Health Cabinet Secretary of the Republic does not have constitutional authority to recruit staff for the office of the Auditor-General, let alone hand-pick persons to serve in or act as staff of the Auditor-General. The appointment of the 19 persons to carry out a function exclusively reserved to the office of the Auditor-General and its staff, is a violation of Article 252(l) (c) of the Constitution.
9. The Health Cabinet Secretary's actions, as set out in the impugned, gazette notice, further violated Article 249(2) of the Constitution. Rather than follow the lawful process set out in Article 254(2) of the

Constitution, as read together with Section 37 of the Public Audit cabinet secretary arrogated to himself powers outside the institution. As well as violating Article 2(2) of the Constitution, the Health Cabinet Secretary's action were further an affront to the national values and principles of governance under Article 10(2). They were not based on any law, thereby violating the requirement to uphold the rule of law. The selection of persons to serve on the committee was not subjected to any known recruitment process, thereby violating the requirement for good governance, integrity, transparency and accountability.

10. The manner in which Health cabinet secretary acted in establishing the impugned Committee, including its composition and terms of reference, violated the responsibilities of leadership under Article 73 of the Constitution. The Health Cabinet Secretary's actions were outside the authority assigned to a State officer. They were inconsistent with the purposes and objects of the Constitution, failed to demonstrate respect for the people of Kenya and failed to bring honour to the nation and dignity to the office of the Health Cabinet Secretary. The actions further failed to promote public confidence in the integrity of the office and were a naked demonstration of abuse of the Constitution, ruling rather than serving the people of Kenya.

11. Having been appointed at the whim of the Health Cabinet Secretary, it cannot be demonstrated that the persons constituted to serve on the Committee possess the personal integrity, competence and suitability to serve as ad-hoc Auditors-General. This violates Article 73(2) (a) of the Constitution. Health cabinet secretary cannot further demonstrate that his decision to appoint the persons to constitute the Committee was not influenced by nepotism, favouritism, and other improper or corrupt practices, contrary to Article 73(2) (b) of the Constitution.

12. It is notable that the impugned Gazette notice makes no provisions for any remuneration or benefits of the persons appointed out of public funds. This omission provides reasonable grounds to believe the persons serving on the Committee are there to fulfil the private interests of unknown persons and not serve the people of Kenya in

accordance with the Constitution and the law. This lack of transparency as to how members of the Committee will be remunerated is an affront to the requirements of transparency and accountability, including under Articles 10(2) and 201 of the Constitution.

13. Despite the claimed need for the Committee as set out in the gazette notice s citation, i.e., to establish whether the claims as claimed were legitimate by auditing record acquired in the name of serving people's health of Kenya, and whether the same were lawfully and effectively as required by Article 229(6), there was no public participation, either in setting the terms of reference of the Committee or appointment of its members, despite this being a required principle under Articles 10(2) (a) and 201 (a) of the Constitution. This, it is the Petitioners 'case, was a violation of those constitutional provisions.

14. Contrary to Articles 1 (1), 2(1) and (2), 10(2)(c), 94(4), 95(1),(2) and 5(b), 96(1),201,229(7 and 8) and 254(2 and 3), the Committee established by the impugned Gazette notice report to and is accountable to Health cabinet secretary in the performance of its mandate. The Health Cabinet Secretary, a creature of the Constitution, has unconstitutionally elevated himself above and outside the limits set by the Constitution. It is not known what fate will befall any reports submitted to Health cabinet secretary once the Committee completes it task, whenever that may be.

15. Unlike audit reports, including forensic audit reports carried out by the Auditor-General under Articles 254(2) of the Constitution which must be published and publicised, no person, other than the Health Cabinet Secretary, knows what will happen to any reports that result from the work of the Committee established under the impugned gazette notice. The Petitioners vehemently contest the constitutional validity of such a state of affairs.

16. Rather than respect, uphold, safeguard and defend the Constitution, the sovereignty of the people of Kenya and the rule of law as required by Articles 3(1), 10(2) and 131 (2) (a and e), the Health Cabinet Secretary, in establishing the Committee, choosing its composition and

setting its terms of reference, chosen to wander out to constitutional wilderness. This, the Petitioners believe, turn Health cabinet secretary into a constitutional outlaw.

17. That handpicking people who are not employees of NHIF and/or SHA (Its predecessor) nor public servants nor staff of the auditor general to look into sensitive and confidential medical records of patients in the name of claim verification and exposing private data and patients' disease conditions is against Article 31 of the constitution.

18. That the patients whose records will be verified have not yet given any consent to the outsider (verification committee) for their private data to be exposed pursuant article 31 as read with to Data Protection Act. That respondents' actions of interfering with patients' digital records contrary to digital health authority (DHA) and article 31 of the constitution.

19. That the TOR (terms of reference of the committee) is the same one as that on oversight committee of the National Assembly and the Senate, but it's not the work of the CS Health. His actions and/or omissions is contrary to articles 93-96 of the Constitution. That the terms of reference appointed by the cabinet secretary in the ministry of health of the national government who is only concerned with policy formation and nit any form of implementation. His actions and/or omissions encroached of devolution since health is a devolved function contrary to Articles 6,185,186,187, 189 and 190 of the Constitution.

20. That further the CS is neither a board nor a supervisor of a state corporation. His actions are contrary to State Corporations Act-cap 446 of the laws of Kenya as read with article 1,3,10,73,75 and 232 (l) (d) of the Constitution (2010). That SHA being a successor of NHIF, then it's the former parastatal which is supposed to audit/verification its debt if there is need and not the CS Health. His actions are contrary to article 1, 3,10,73,75 and 232(l) (e) and 232 of the constitution (2010).

21. The Petitioners then set out the issues that they prayed the court to determine as follows;

a) *Whether the Health cabinet secretary could legally and constitutionally establish a National Health Insurance Fund Pending Medical Claims Verification Committee to audit/ perform a Verification Exercise Involving Public Funds like NHIF Through Gazette Notice No.4069 Vol. CXXVII—No. 64 Of 28th March, 2025 in the manner, composition and terms as set out in the impugned gazette notice without usurping powers and functions on independent commissions?*

b) *Whether the actions of the respondents of hand handpicking people who are not employees of NHIF and/or SHA) its predecessor) nor public servants nor staff of the auditor general to look into sensitive and confidential medical records of patients in the name of claim verification and exposing private data and patients' disease conditions with patient consents is against article 31 of the constitution as read with data protection act:*

c) *Whether the "National Health Insurance Fund/NHIF) Pending Medical Claims Verification Committee as gazetted in Gazette Notice No.4069 Vol. CXXVII—No. 64 Of 28th March, 2025 is constitutional.*

Response to the Petition

22. Dr. Magare Gikenyi J Benjamin, the 1st Petitioner, filed an affidavit in support of the Petition. He requested the court to grant the prayers and that having put across the statutory and constitutional violations of undertaken by the respondents against defenceless Kenyans he urged the court to allow the Petition.

23. In response to the Petition, Dr. Ouma Oluga filed a replying affidavit dated 9th May 2025. He deponed that Article 152 of the Constitution establishes the Cabinet as part of the Executive Arm of Government, comprising of the President, Deputy President, Attorney General and not fewer than fourteen and not more than twenty-two Cabinet Secretaries. That they head the different Ministries established under Executive Order No. 2 of 2023 (Organization of the Republic of Kenya)

issued by the Executive Office of the President. He urged that among other roles, a Cabinet Secretary is charged with: a) developing reviewing and implementing Government policies within his or her respective Ministry; b) providing strategic leadership and direction to his or her Ministry; c) oversight of the operations of his or her Ministry; and d) advising the President.

24. He urged that the allocation of functions is established under Section 9(3) of the National Government Co-ordination Act (Cap. 127) which mandates a Cabinet Secretary with the responsibility of policy formulation and guidance and, where required, implementation of the policy in respect of his or her Ministry, State departments or agencies under them. Further, that the Cabinet Secretary for Health (hereinafter referred to as "CS Health") is particularly mandated to, among other functions: a) formulate and implement national health policies, laws, and strategies to ensure equitable access to quality healthcare services; b) oversight of the different state departments, agencies and institutions under the Ministry of Health; and c) overall leadership of the Ministry of Health.

25. The deponent averred that the functions of the CS Health are further underpinned by the Fourth Schedule of the Constitution which mandates the National Government, through the Ministry of Health, with the functions of health policy, setting of standards and capacity building and technical assistance to the counties. Further, that notably, Article 43 (1) (a) of the Constitution recognizes every person's right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care. He stated that Article 21(2) subsequently mandates the State to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the right to the highest attainable standard of health.

26. The deponent stated that the CS Health is consequently mandated to, on behalf of the State, take legislative, policy and other measures to achieve the progressive realization of the right to the highest attainable

standard of health. That such measures include administrative actions/measures implemented by the CS Health to manage operations, ensure compliance, and reduce risks particularly in areas like security, safety, and regulatory adherence.

27. He stated that Section 2 of the Fair Administrative Action Act (Cap. 7L) defines administrative actions to include the powers, functions and duties exercised by authorities or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. That the CS Health can therefore implement such administrative measures, in accordance with his powers, duties and functions, to ensure the progressive realization of the right to the highest attainable standard of health and to ultimately ensure regulatory adherence to the national health policies and laws under his purview. Further, under the head of Universal Health Coverage (UHC), he stated that the Government of Kenya has identified healthcare delivery as one of the core pillars of its Bottom-Up Economic Transformation Agenda (BETA). In the Plan, a number of commitments have been identified towards the delivery of Universal Health Coverage (UHC) which he laid out.

28. The deponent stated that the Social Health Insurance Act seeks to provide a framework for improved health outcomes and financial protection in line with the right to health and universal health coverage. That Section 54 of the Act repeals the National Health Insurance Fund Act, 1998 which previously established the now-defunct National Health Insurance Fund (NHIF). He cited Paragraph 3 of the First Schedule urging that by virtue of the provisions therein, all liabilities that were previously enforceable against the Government on behalf of NHIF are now enforceable against the Government on behalf of the Social Health Authority (SHA). The liabilities currently enforceable against SHA include the existing pending medical claims previously enforceable against the defunct NHIF. He stated that it is the duty of the CS Health, on behalf of the Ministry of Health and the

National Government, to ensure the successful implementation of the Social Health Insurance Act.

29. The deponent averred that it is therefore the duty of the CS Health to ensure the accurate determination of the liabilities that are enforceable against SHA (an agency under the Ministry of Health as established by Executive Order No. 2 of 2023); and to subsequently forward such liabilities to the National Treasury and Economic Planning for settlement of the same. In response to Paragraph 54 of the Petition, he deponed that it is the constitutionally-guaranteed role of the CS Health to: Oversee and ensure the implementation of health laws, policies and strategies under his purview; oversight of the different state departments, agencies and institutions under the Ministry of Health; and overall leadership of the Ministry of Health.

30. Further, that the CS Health is mandated, on behalf of the State, to take legislative, policy and other measures (including administrative measures) to achieve the progressive realization of the right to the highest attainable standard of health and to ensure regulatory adherence to the national health policies and laws under his purview. It is therefore the Cabinet Secretary's role to, pursuant to Paragraph 3 of the First Schedule to the Social Health Insurance Act, establish all liabilities that were previously enforceable against the defunct NHIF in order to ensure the realization of the UHC agenda and the successful implementation of the Social Health Insurance Act. He further deponed that as the public officer charged with the overall leadership of the Ministry and all the institutions falling under the Ministry (including the Social Health Authority), the CS Health can take all measures (including administrative measures such as establishing the Committee) to ensure the effective implementation of the Social Health Insurance Act and all other laws, policies and strategies falling under his authority. The Petitioners' assertions that the appointment of the Committee lacks a legal and constitutional basis are therefore incorrect and misleading.

31. He urged that the empanelling of a committee to scrutinize claims arising from the operations of the former National Hospital Insurance

Fund (NHIF) was done within the confines of the law, in good faith, and in exercise of the lawful powers vested the Cabinet Secretary under Article of the Constitution and relevant enabling statutes. That Article 153 of the Constitution provides that a Cabinet Secretary is responsible for exercising any power or performing any function conferred on them by the Constitution or by national legislation, including implementing decisions of the Cabinet. Further that it was undertaken pursuant to the transitional provisions under the Social Health Insurance Act, 2023 (SHA Act), which expressly empower the Cabinet Secretary to facilitate an orderly and lawful transition from the former NHIF framework to the new social health insurance scheme.

32. The deponent urged that the petitioners' averments under Paragraph 56 of the Petition are misleading by: a) Incorrectly referring to the Committee's date of appointment as 05.07.2024 instead of 28th March, 2025 - being the date of issue of the Gazette Notice establishing the Committee (Gazette Notice No. 4069 of 2025); and b) Falsely alluding that the Committee's duration may be extended by a Notice in the Gazette. On the contrary, Paragraph 7 of the Gazette Notice only provides that the members of the Committee shall serve for a period of three months with effect from the date of the Gazette Notice, without any reference to an extension of such duration. He annexed and marked as PA-1 a copy of Gazette Notice No. 4069 of 2025 establishing the Committee.

33. The deponent pointed out that Paragraph 58 of the Petition seeks to mislead this Court by incorrectly referring to the Committee's Terms of Reference (TORs) as provided under the Gazette Notice. They allege that, amongst other TORs, the Committee is mandated to;

    "a) Scrutinize/Audit and analyse the existing NHIF pending medical claims that have accumulated between the 1st July, 2022 and the 30th September, 2024 and make recommendations to the Ministry of Health on settlement of the same".

34. On the contrary, the Committee's TORs as provided under the Gazette Notice do not make any reference to the Committee's role to

audit the pending medical claims. He reproduced the contents of the TOR as follows;

"a) scrutinize and analyse the existing NHIF pending medical claims that have accumulated between the 1st July, 2022 and the 30th September, 2024 and make recommendations to the Ministry of Health on settlement of the same."

35. He urged that while an "audit" is a systematic examination and evaluation of records, processes, systems, or financial statements to determine whether they are accurate, complete, and in compliance with established standards or regulations, "scrutinizing" simply refers to examining or inspecting something very carefully and thoroughly, often with close attention to detail. That by distinction, an audit is a broader, formal and systematic process of examining records, processes, or systems, often done according to established standards, and for the purpose of assessing accuracy, compliance, and reliability. On the other hand, scrutiny is a more informal but close, narrow and detailed inspection or examination for the purpose of detecting flaws, inconsistencies, or gathering detailed information. He further stated that the scrutinization exercise is administrative and preparatory in nature, aimed at compiling, clarifying, and documenting claims and liabilities to ensure a structured and transparent handover, pending any formal audit or further action by constitutionally mandated oversight bodies including the Auditor General.

36. He pointed out that as noted under the Committee's TORs, the Committee is solely mandated to scrutinize but not to audit the existing NHIF pending medical claims accumulated between 1st July, 2022 and 30th September, 2024. This scrutiny is intended to be done in order establish the liabilities enforceable against the Social Health Authority, pursuant to Paragraph 3 of the First Schedule to the Social Health Insurance Act. The committee's Terms of Reference, as outlined in the Gazette Notice, were limited to the scrutinizing and analysing of medical claims made under the former National Hospital Insurance Fund (NHIF) scheme, these are administrative functions intended to

identify, compile, and clarify the status of pending claims and liabilities, consistent with the Cabinet Secretary's transitional responsibilities under the Social Health Insurance Act, 2023.

37. The deponent averred that the Petitioners' erroneous but intentional introduction of the term "audit" under the Committee's TORs is only a desperate attempt to bedevil the Committee's noble roles; and ultimately speaks to the fact that the entire Petition is founded on frivolous and malicious claims. That the mischaracterization by the Petitioner that the committee is carrying out an "audit" is factually inaccurate, legally misguided, and intended to mislead this Honourable Court into believing that the Cabinet Secretary has encroached on the constitutional functions of the Auditor-General. He stated that the language used in the Gazette Notice is clear, deliberate, and carefully limited to ensure that the committee does not exercise any powers or mandates reserved for constitutional oversight bodies.

38. The deponent stated that it is also important to note that the establishment of the Committee does not bar, in any way, the Auditor-General's functions provided under Article 229 of the Constitution or the Office's functions to undertake audit activities in state organs and public entities to confirm whether or not public money has been applied lawfully and in an effective way, as mandated under Section 7 of the Public Audit Act (Cap. 412B). Further, that the Cabinet Secretary has not interfered with nor limited the Auditor-General's independence, jurisdiction, or authority in any manner, and any relevant findings of the verification committee will be availed to the Auditor-General and other oversight bodies for further scrutiny as appropriate in any event the Gazette notice in question was not to the exclusion of the Auditor General at any point.

39. In response to the allegations under Paragraph 64 (a) of the Petition, the deponent stated that the CS Health was acting in accordance with Article l(3)(b) of the Constitution which delegates the sovereign power of the people of Kenya to the national executive (which includes the Cabinet). That in exercising these powers, the CS Health acted strictly

within the statutory mandate and in accordance with the principles of constitutional governance under Articles 10, 73 and 232 of the Constitution, which demand responsible public administration, accountability, and proper stewardship of public resources. The committee in question was constituted to conduct administrative scrutinization of pending claims and liabilities, and not to exercise functions of the Auditor General. The said exercise is purely investigative and advisory in nature, aimed at promoting transparency, accountability, and prudent use of public resources, in accordance with Article 201 of the Constitution.

40. He deponed that Petitioners further made an incorrect reference to Article 229(4)(g) of the Constitution under Paragraph 64(b) of the Petition. The Petitioners allege that the People of Kenya delegated their sovereign power to carry out forensic audit verification of any exercise involving public funds to the Auditor General and not the Committee's members. Further, that Article 229(4)(g) of the Constitution mandates the Auditor General to, within six months after the end of each financial year, audit and report, in respect of that financial year, on public debt. Public debt, by simple definition, refers to the total amount of money that a government owes to external and internal lenders. Further, that medical claims, on the other hand, refer to bills/formal requests submitted by a healthcare provider or health facility to health insurance companies (such as the defunct NHIF and the existing SHA) for payment of services provided to patients by healthcare professionals. The Committee's role is therefore only restricted to the scrutiny and analysis of such pending medical claims and in no way relates to the audit of the country's public debt as alluded by the Petitioners. He stated that the Petitioner's contention that the act of empanelling the committee is unconstitutional is misconceived, premature, and founded on a misapprehension of the law.

41. The deponent averred that the Constitution recognizes the principle of public administration and governance under Articles 10 and 232, which emphasize accountability, transparency, and efficient use of

resources - all of which the committee is intended to advance. On the lack of competitive recruitment of the Committee's members, he stated that it is therefore important to note that the appointment of the members of the Committee was made as an executive decision pursuant to the powers granted to a Cabinet Secretary. He cited the decision of the High Court, in Thirdwav Alliance Kenya & another v Head of the Public Sendee-Joseph Kinyua A 2 others: Martin Kimani & 15 others (Interested Parties) (2020) eKLR. He further deponed that Article 232(1) of the Constitution provides for the Values and Principles of Public Service. Additionally, that it is important to note that Article 232(l)(g) specifically speaks to the upholding of fair competition and merit with regards to the appointment and promotions within the public service. He stated that considering that the members of the Committee were appointed on an ad hoc basis i.e., for three (3) months only, they are not public officers and their appointment is thus not subject to Article 232(1) of the Constitution. Further, that the Committee members are only entitled to allowances for the dispensation of their ad-hoc responsibilities and are not intended to be sustained in terms of remuneration and benefits, from the public exchequer. Notably, Section 2 of the Employment Act (Cap. 226) defines remuneration as the total value of all payments in money or in kind, made or owing to an employee arising from the employment of that employee. The Committee members, however, are only entitled to allowances as they are appointed on an ad-hoc basis.

42. The deponent reiterated that the members of the Committee are also in no way seeking to act as auditor generals as alluded by the Petitioners. On the contrary, the Committee members are only mandated to, on an ad hoc basis, establish the liabilities enforceable against the Social Health Authority as required under Paragraph 3 of the First Schedule to the Social Health Insurance Act. In response to the allegations under Paragraphs 64 (m) and (n) of the Petition, that no one other than the CS Health knows what will happen to the reports resulting from the work of the Committee, he urged that such an

allegation is only based on assumption and fear and has no legal basis. On the contrary, the reports from the Committee shall, as implied from the Committee's TORs, guide the Ministry on the necessary actions to be taken for satisfactory disposal or settlement of the identified pending medical claims. He stated that the Committee members were not simply handpicked as alleged by the Petitioners under Paragraph 64(p) of the Petition but were rather carefully selected based on their expertise in various fields including Tax Policy, Audits, Finance and Custom Matters, accounting, law, health financing and health.

43. He stated that contrary to the Petitioners' assertions under Paragraphs 64 (p), (q) and (r) of the Petition, the Committee is bound by the Digital Health Act (No. 15 of 2023) and the Data Protection Act (Cap. 411C) which require the Committee members to uphold the principles of confidentiality and privacy as they handle the necessary data in the performance of their functions. Further, that the Committee will be scrutinizing medical claims and not patients' record; as alluded by the Petitioners, and will be accessing such data in an anonymized form i.e., following the removal of personal identifiers from the personal data so that the data subject (patient) is no longer identifiable.

44. The deponent stated that the public interest heavily tilts in favour of allowing the committee to proceed with its work to ensure that any irregularities or questionable claims from the former NHIF are duly verified before any payments or obligations are honoured. That the Committee members are further bound by the Oath/Affirmation that they took following their appointment, declaring that they would strictly maintain the confidentiality of all information, data, documents, deliberations, or discussions that they would access, receive, or become privy to in the course of their duties on the said Committee, he annexed and marked as PA-2 a copy of the Oath/Affirmation taken by the members of the Committee].

45. He urged that the petition lacks merit and prayed that it be dismissed with costs.

Petitioners' response to the Respondents' Replying Affidavit

46. In response to the Replying Affidavit, the Petitioners filed a Supplementary affidavit dated 22nd May 2025, sworn by Eliud Karanja Matindi. He deponed that nothing in the 1st - 3rd and 6th - 24th Respondents' Replying Affidavit displaces their case. That the Replying Affidavit is, in fact, in support of and a complete vindication of the Petition. He restated the averments at paragraph 70 of the Replying Affidavit and urged that the admission that the members of the committee are not public officers destroys the 1st - 3rd and 6th - 24th Respondents' defence against the charges levelled against them in the Petition.

47. He urged that they are certainly not State officers, as defined by Article 260 of the Constitution, and neither is the impugned Committee established and designated as a State office by national legislation. The 3rd respondent readily admitted that members of the Committee were appointed in exercise of some claimed administrative powers. He further stated that Articles 74 and 80(c) of the Constitution, as read together with Section 52, Leadership and Integrity Act, require a person to take and subscribe the oath or affirmation of office before assuming a public office, acting in a public office or performing any functions of a public office. That it is notable, and not a mere oversight or a coincidence, that both the impugned Gazette Notice and the Replying Affidavit have omitted the claimed Declaration the members of the impugned Committee subscribed to, prior to embarking on their duties. The admission by the 3rd respondent that the members of the impugned Committee are mere private citizens, out to serve undisclosed private interests while hoodwinking the public that they are public officers performing a public function, is the reason for this deliberate omission.

48. The deponent averred that no oath or affirmation was taken and subscribed to by the 6th - 24th respondents before they assumed the public office of THE NATIONAL HEALTH INSURANCE FUND PENDING MEDICAL CLAIMS VERIFICATION COMMITTEE. This is because, as the

3rd RESPONDENT admits, no such public office exists. It is for this reason why the 6th - 24th RESPONDENTS are not public officers. What, was, instead, established under the smokescreen of a “scrutiny and analysis office for medical claims against the defunct NHIF”, is a scheme, made up of meddlesome busybodies and interlopers, out to muddy the waters on what debts may or may not be owed to health care services’ providers under the now-repealed National Health Insurance Fund Act.

49. It is the Petitioners’ case that this deliberate subversion of the Constitution and the law is solely intended to facilitate fraud, corruption and false claims against public funds. The abuse of authority by the 2nd respondent, aided and abetted by the 1st, 3rd, and 6th - 24th Respondents, in appointing private citizens, at public expense for purposes unknown to the Constitution and the law, is as breath-taking as it is, regrettably, unsurprising. Further, that the appointment of private persons by the 2nd respondent, in his capacity of the Cabinet Secretary, Ministry of Health, to be involved in any of the functions of the Ministry, was not based on any known provision of the Constitution or statute.

50. Being in violation of the Constitution, including Articles 2(1, 2 and 4), 3(1), 10, and 74, paragraphs 5 - 37 of the 3rd respondents Replying Affidavit are of no probative value as appointment of private persons to purportedly carry out a public function is unconstitutional, null and void ab initio. He further urged that while the impugned Committee was constituted for three months, there is nothing to stop the 2nd respondent from extending its time in office. Such extensions of time are routine, including as provided by Section 59, Interpretation and General Provisions Act. That the power claimed by the 2nd respondent to determine the initial period of time for the impugned Committee is unfettered and could be used to extended such time, deemed necessary.

51. The impugned Committee’s Terms of Reference read and interpreted holistically clearly indicate that the purpose of the

Committee was to determine whether the claims against the defunct NHIF for the specified period, had been incurred prudently, responsibly, lawfully and effectively. Members of the impugned Committee were empowered to determine the genuineness, or otherwise, of each impending claim and identify any cases where there may have been corrupt, fraudulent and false medical claims, and make appropriate recommendations to the relevant Government agencies. In carrying out its mandate, the impugned Committee was empowered to carry out or cause to be carried out such studies or research as was necessary in furtherance of its mandate. It was further empowered, in consultation with the 2nd respondent to co-opt any person as may be necessary to assist it carry out its mandate. Despite the 3rd respondents' averments to the contrary, the deponent maintained that the impugned Committee was tasked with carrying out a forensic audit on the pending bills claimed to have been incurred by and against the defunct NHIF which is the clear import of Clauses 2(a, b and d) and 3(a, c and d) of the published Terms of Reference.

52. The power to carry out forensic audits to establish fraud, corruption or other financial improprieties in any public entity in Kenya, is exclusively reserved to the Auditor-General under Section 37, Public Audit Act. As provided by Articles 252(l)(d) and 254(2) of the Constitution and Section 37, Public Audit Act, no State or public officer (let alone private citizens), other than the Auditor-General, can undertake any function to identify any cases where there may have been corrupt, fraudulent and false medical claims with respect to the now-defunct NHIF. Further that the 3rd respondent knows that empowering persons, other than the Auditor-General, to undertake a forensic audit on outstanding debts said to be owed by the now defunct NHIF, is a waste of public money, in violation of Articles 10(2), 201(d) and 232(l)(b) of the Constitution.

53. He urged that as the 3rd respondent acknowledges, there is nothing barring the President, through the 2nd respondent, from requesting the Auditor-General, the rightful State organ, from carrying out the tasks

unconstitutionally delegated to private individuals who have no standing whatsoever to undertake to impugned functions. Once moved to carry out such a forensic audit, the Auditor-General determines how to undertake the task.

54. He reiterated that the claim that private citizens can make actionable recommendations to Government agencies upon their findings of corrupt, fraudulent and false medical claims against the defunct NHIF, is without any constitutional or statutory basis. By contrast, Articles 229(6 - 8) and 254(2 and 3) of the Constitution require Parliament to debate and consider a report from the Auditor-General, and take appropriate action. Further, unlike the report from the impugned Committee, reports from the Auditor-General, including forensic audit reports under Section 37, Public Audit Act, must, as provided by Article 254(3) of the Constitution, be published and publicised.

55. He stated that it is unknown what criteria the 2nd respondent used to determine that the private individuals he selected as members of the impugned Committee were qualified for such appointment. This was in violation of constitutional requirements, including Articles 10(2), 73(2)(a) and 232(l)(g) of the Constitution. The 2nd respondent enjoys no executive powers to appoint private persons to undertake a public function. Further, that the 2nd Respondent, as the appointing authority, has no constitutional or statutory powers to determine whether or not a person has expertise in the identified fields. That function has been delegated, by the people of Kenya, to the Public Service Commission under Articles 10, 27, 232,233, 234,248 and 249 of the Constitution.

56. In the absence of appointment after recruitment through fair competition and on merit carried in accordance with the Constitution and the law, the 2nd respondent further cannot demonstrate the 6th – 24th Respondents were the most suitably-qualified persons for the role. He further cannot justify discriminating in favour of the 6th – 24th Respondents in appointing them as members to the impugned

Committee, to the exclusion of other equally or better qualified candidates for the positions.

57. He deponed that the admission by the 3rd respondent that despite not being public officers, the 6th – 24th Respondents are entitled to allowances from public funds for the dispensation of their responsibilities, confirms the Petitioners' charge of wasteful and unlawful use of public funds, in violation of Articles 10(2)(d), 201(d) and 232(l)(b) of the Constitution. As they are not public officers, it is not known who or how their allowances were determined, since Article 230(4)(b) of the Constitution would not be applicable. It is further not known how much those allowances are. As the accountable officer for the responsible State Department, the 3rd respondent is reminded he bears personal responsibility under Article 226(5) of the Constitution for unconstitutional and unlawful expenditure of public funds to pay allowances to private persons purporting to carry out a public function.

58. The deponent averred that as private citizens who, contrary to Article 74 of the Constitution, have not taken and subscribed to an oath or affirmation of office before assuming office, the 6th – 24th respondents, aided by the 1st - 3rd respondents, present grave threat to the confidentiality and privacy of information and data of persons whose pending financial bills they will be auditing. Their lack of standing as public officers mean they are not bound and cannot be held accountable for abuse and misuse of confidential and private information, including sensitive, medical private and personal information, that falls into their possession. The Petition was canvassed by way of written submissions.

Petitioners' submissions

59. The Petitioners filed submissions dated 23rd May 2025. Counsel submitted that it is evident the Respondents' action of unilaterally forming an NHIF Claims Verification Committee, which is essentially performing functions that the Auditor-General, DCI, EACC, and other independent commissions or offices established pursuant to Articles

246 and 249 of the Constitution are mandated to perform, is contrary to the law. Further, the Respondents have acted in contravention of the common law principle established in *Entick Vs Carrington* (1765) 2 Wils, to the effect that the State or State agencies can only do that which is permitted by law. He additionally cited the cases of **Hardware & Ironmongery Vs Attorney General (E.A)1972 and Salaries and Remuneration Commission & another v Parliamentary Service Commission &15 others; Parliament & 4 other (Interested Parties) [2020] eKLR** in this regard.

60. Counsel urged that the appropriate relief would be nullifying the committee and any recommendations born out of an illegal task force. He referred to the definition of an appropriate relief as set out in the case of *Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 other (Interested Parties) [supra]* and further, submitted that the respondent's actions were outside the law and the constitution and hence the said actions liable to be rectified by the high court through appropriate reliefs as espoused in article 23 of the constitution.

61. On whether the constitution envisages usurpation of powers of the executive in the context of the Cabinet Secretary's action of establishing the impugned committee, counsel urged that as per paragraph 70 of the Replying Affidavit, the 3rd respondent deponed "That it is also important to note that the Committee is ad hoc in nature and its members are thus not public officers". He urged that they are not State officers, as defined by Article 260 of the Constitution, as THE NATIONAL HEALTH INSURANCE FUND PENDING MEDICAL CLAIMS VERIFICATION COMMITTEE is not one of the State offices listed thereunder. Neither is the impugned Committee established and designated as a State office by national legislation. He stated that this admission that they are not public officers or state officers destroys the 1st - 3rd and 6th – 24th respondents'' defence. Further, that if the members of the Committee are not public officers, they cannot, under circumstances, perform a public function. Counsel submitted that the

admission by the 3rd Respondent that the members of the impugned Committee are mere private citizens, out to serve undisclosed private interests while hoodwinking the public that they are public officers performing a public function, is unconstitutional.

62. Counsel submitted that the members are essentially performing the same functions as those of the 5th respondent (Auditor General), DCI, EACC. The objects of the Committee are as follows

a) Scrutinize/Audit and analyse the existing NHIF pending medical Claims that have accumulated between the 1st July, 2022 and the 30th September, 2024 and make recommendations to the Ministry of Health on settlement of the same;

b) establish a clearly defined criteria for detailed examination and analysis of such pending medical claims with a view to determining the genuineness of each or otherwise;

c) make recommendations to the Ministry of Health on the necessary actions to be taken for satisfactory disposal or settlement of the identified pending medical claims;

d) identify any cases where they may have been corrupt, fraudulent and false medical claims and make appropriate recommendations to the relevant Government agencies;

e) propose reforms or measures that will ensure future accumulation of pending medical claims is avoided; and

f) perform any other function incidental to the foregoing

63. Counsel posited that the appointment of private persons by the 2nd Respondent in his capacity of the Cabinet Secretary Ministry of Health, to be involved in any of the functions of the Ministry was not based on any known provision of the Constitution or statute. He urged that it was in violation of Articles 2(1, 2 and 4), 3(1), 10, and 74 of the Constitution. Further, that the impugned Committee's Terms of Reference read and interpreted holistically clearly indicate that the purpose of the Committee was to determine whether the claims against the defunct NHIF for the specified period, had been incurred prudently, responsibly, lawfully and effectively. Counsel urged that the impugned

Committee was tasked with carrying out a forensic audit on the pending bills claimed to have been incurred by and against the defunct NHIF. That this is the clear import of Clauses 2(a, b and d) and 3(a, c and d) of the published Terms of Reference.

64. Counsel submitted that what is being established under the smokescreen of a "scrutiny and analysis office for medical claims against the defunct NHIF" is a scheme made up of meddlesome busybodies and interlopers, out to muddy the waters on what debts may or may not be owed to health care services' providers under the now-repealed National Health Insurance Fund Act. It is the Petitioners' case that this deliberate subversion of the Constitution and the law is solely intended to facilitate fraud, corruption and false claims against public funds.

65. Counsel urged that the impugned Gazette notice violates the Constitution thereby making it unconstitutional, null and void and reiterated the contents paragraph 64 of the Petition in this regard. Further, that as the 6th – 24th Respondents are not public officers, it is not known who or how their allowances were determined, since Article 230 (4) (b) of the Constitution would not be inapplicable. It is further not known what those allowances are. Further, that the action of the respondents is contrary to article 249 (2) of the constitution and amounts to interference of independent institutions.

66. Counsel submitted that this action is superfluous, waste of public resources and is contrary to article 10,131,201,248 and 249 of the constitution. Further, citing the case of **Azimio La Umoja One Kenya Coalition Party v President of Kenya & 9 others; Kenya National Commission on Human Rights (Interested Party) (Petition El 53 of 2023) [2024] KEHC 8251 IKLR] (Constitutional and Human Rights) (11 July 2024) (Judgment)** counsel urged that the cabinet secretary's powers is not open cheque which can be exercised capriciously and/or whimsically but it's only exercised through the constitution and relevant statutes.

67. Counsel cited the case of **Dr. Magare-Gikenyi Benjamin v Attorney General & 6 others: Maraga & 23 others (Interested Parties) (Petition E048 of 2023) [20251 KEHC 4645 (KLR) (Constitutional and Human Rights) (10 April 2025) (Judgment)**, pointing out that the court declared as unconstitutional for the impugned taskforce purporting to perform the function of independent commissions and offices contrary to the law and constitution. He urged that the Supreme Court has confirmed that part of the work of independent commissions is to work in harmony with other organs in order to achieve commonality, citing the case **Interim Independent Electoral Commission [2011] eKLR.**

68. Counsel reiterated that the action of the respondents is contrary to Article 249 (2) of the Constitution and amounts to interference of independent institutions.

69. On whether executive policy formulation powers extend to formation of taskforces for and on behalf of independent commissions, counsel urged that Article 132 of the Constitution sets out the functions of the president. The cabinet secretary is part of the executive. There is nowhere the president and its appendage the cabinet secretary supposed to form a committee for and on behalf independent commissions and/or institutions. He cited the provisions of article 132(4)(a) of the Constitution and urged that Articles 79,229,248 (2)[j) and 249 which establishes independent offices especially the EACC, DCI, 5th respondent (Auditor General), does not give powers to the president or the cabinet secretary to establish a task force on its behalf. Juxtaposing this provision with above Article of 132 (4) (a) which states that, the president can perform any function provided in the constitution except as otherwise provided for in this Constitution shows that the president is not allowed to set up committees which performs roles/functions meant for independent commissions. Counsel maintained that that the executive powers do not extend to formation of committees for independent commissions and/or state institution.

70. Counsel cited the case of **Republic v Vice Chancellor Moi University & 2 others Ex parte Benjamin J. Gikenyi Magare [2019] eKLR, Eldoret High court JR 1 OF 2018** and submitted that while performing their duties, state and state agencies are supposed to act within the law. Further, that if need be, independent offices like the 5th respondent, DCI (NPSC), EACC ought to initiate taskforces and/or committees independently and ought not to be influenced by external forces contrary to Article 249 of the Constitution 2010.Anything outside the constitution and enabling laws is illegal and void ab initio.

71. Counsel cited the case of **Republic v Public Procurement Administrative Re Board & 2 others Exparte Rongo University [2018] eKLR**, urging that the respondent made errors in purporting to form a committee, get that was a function of the 5th respondent (Auditor General) for purposes of scrutinizing NHIF claims before payment. He reiterated the averments as to illegality as set out in the petition. Additionally, he stated that the petitioner and Kenyans had a legitimate expectation of having a normal functioning society which follows respects independent offices like the 5th respondent, DCI and EACC and did not expect the same to be influenced by the executive. He cited the case of **Oindi Zaippeline & 39 others v Karatina University & another (2015) eKLR** on legitimate expectation and the principles on legitimate expectation as set out by the **Supreme Court in Communications Commission of Kenya & 5 Others -vs- Royal Media Services Limited & 5 Others, Petition No. 14 of 2014** to wit; (a) there must be an express, clear and unambiguous promise given by a public authority; (b) the expectation itself must be reasonable; (c) the representation must be one which was competent and lawful for the decision-maker to make; and (d) there cannot be a legitimate expectation against clear provisions of the law or the Constitution.

72. Counsel reiterated that there had been no legal or justifiable reasons given by respondents and/or the executive in utilizing

scarce public financial resources in forming a committee which is supposed to fall squarely on the feet of 4th respondent (Auditor General). He cited the case of **Republic vs Chief Licensing Officer & another Ex Parte Tom Mboya Onyango (2017) eKLR.** He further cited the case of Republic Vs Vice Chancellor Moi University & 2 others ex parte Benjamin J. Gikenyi Magare (2019) eKLR and urged that the 2nd Respondent used her discretion capriciously in pursuit of narrow political correctness as opposed to constitutional correctness. Further, that the Respondents have been shown to be a person(s)/body who Act arbitrarily and capriciously without allowing independent offices space to perform its own constitutionality mandated roles. He invited the court to find so.

73. Counsel reiterated that this matter is of public interest since it involves use/misuse of public funds in forming a committee yet the same is supposed to be done by independent body. He cited the case of *Pius Wanjala v Cleopa Mailu & 4 Others [2016] eKLR* in this regard and urged that the 2nd Respondent is haphazardly forming committees which he is not supposed to form contrary to inter alia Articles 10, 201, 230 and 249 of the constitution of Kenya 2010 and a blatant violation of the rights of the Kenyans people and non-prudent use of financial resources.

74. Counsel prayed the court allow the Petition with costs.

Respondents' Submissions

75. Counsel for the Respondents urged that the Cabinet Secretary for Health lawfully established the NHIF Pending Medical Claims Verification Committee. That the Committee was constituted as a transitional mechanism under Paragraph 3 of the First Schedule to the Social Health Insurance Act, 2023. Further that the position that the CS Health acted ultra vires by issuing Gazette Notice No. 4069 on 28th March 2025 to establish the Committee, as the Gazette Notice reflects a proper exercise of executive authority under Articles 152 and 153 of

the Constitution. It is also grounded in the National Government Coordination Act and the Social Health Insurance Act 2023.

76. Counsel set out the legal framework of executive authority by citing Articles 152(1), 153(4), 43(l)(a), 21 (2), 129, 132(3)(b), 132(4)(a),132(3)(b) and 152 of the Constitution urging that these provisions support the delegation of executive tasks including the formation of ad hoc committees to improve operational efficiency and oversight. He additionally urged that the CS Health bears responsibilities under the Public Finance Management Act 2012 and as a Cabinet Secretary overseeing public funds, he is obligated to ensure transparency and lawful expenditure. He stated that Section 5 of the PFMA requires financial management to reflect principles in Articles 201 and 202, including accountability and transparency; Section 12 of the PFMA tasks the National Treasury with overseeing financial affairs; and Section 13 (2) (d) authorizes the CS to address discrepancies in budget execution. Further that establishing the Committee is consistent with this mandate and it ensures that only verified claims are settled, thereby protecting public funds. Counsel submitted that Section 68(2)(c) requires accounting officers to ensure lawful use of public resources.

77. Counsel urged that the Social Health Insurance Act 2023 repealed the NH1F Act and created the Social Health Authority (SHA) and Paragraph 3 of the First Schedule provides that NHIF liabilities become enforceable against the SHA. The CS Health must identify and verify these liabilities. The Committee was created to fulfil this transitional responsibility. It scrutinizes claims not as an audit, but as an internal review.

78. Counsel stated that Section 9(3) of the National Government Coordination Act requires Cabinet Secretaries to provide policy direction and implement national policy. That under Section 2 of the Fair Administrative Action Act, "administrative action" includes any act or decision that affects rights. He urged that establishing the Committee fits within the CS’s authority to manage transitional functions following the repeal of the NHIF Act. Further, that this

framework supports the delegation of executive functions to Cabinet Secretaries, including the authority to create internal or ad hoc committees to assist in operational efficiency, policy formulation, and administrative oversight. That the formation of a Committee to verify pending NHIF medical claims is a preventive measure consistent with this mandate intended to ensure that only verified and lawful claims are honoured, thereby safeguarding public funds. Moreover, Section 68(2) (c) of PFFMA imposes a duty on accounting officers to ensure that public resources are used in a lawful and authorized manner. The CS Health is duty-bound to put in place internal controls and oversight mechanisms to fulfil this obligation.

79. Counsel cited the case of **Law Society of Kenya v Cabinet Secretary, Ministry of Lands & 3 Others [2017] eKLR** and **Kenya Human Rights Commission v NGO Coordination Board (2016) eKLR** urging that the decision to form a verification committee is not only lawful but necessary to protect the integrity of public health financing and uphold Article 201 of the Constitution which demands prudent and responsible use of public resources. That the Constitution confers the President and Cabinet Secretaries with powers to coordinate national policy. Article 132 (3) (b) allows the President to direct and coordinate functions of ministries and government departments. Cabinet Secretaries, as heads of their ministries, exercise similar powers to organize their internal administrative processes. The Committee falls squarely within this framework. He stated that Courts have recognized that ad hoc committees can be validly formed to gather information or provide, citing the case of **Musyoka & Another v Attorney General & 2 Others [2017] eKLR** in this regard.

80. Counsel submitted that it is imperative that the CS Health facilitate the identification of pending liabilities and reiterate that the committee serves this purpose vide scrutiny and analysis not auditing. He submitted that in **Republic Vs County Government of Mombasa Ex- Parte Outdoor Advertising Association of Kenya (2014) eKLR** the Court held that a public authority must have power to

organize and manage its administrative functions for effective service delivery.

81. Counsel submitted that Article 129(1) of the Constitution provides that executive authority is derived from the people and exercised in accordance with the Constitution. Article 132(3) (b) mandates the President to direct and coordinate functions of ministries and government departments, a duty executed through Cabinet Secretaries under Article 152. Further, that Section 5 of the Public Finance Management Act, 2012 (PFMA) affirms that public finance shall be managed at both levels of government in accordance with the principles set out in Articles 201 and 202 of the Constitution, including transparency, accountability, and prudent use of public resources. He stated that Section 12 of the PFMA empowers the Cabinet Secretary to: "monitor the financial and economic affairs of the national government and to manage the budget process at the national level. Furthermore, that Section 13(2) (d) requires the Cabinet Secretary to: “take appropriate measures to address any discrepancies identified in budget execution reports.” That Paragraph 3 of the First Schedule to the Social Health Insurance Act, 2023, provides for transitional arrangements from NHIF to SHA. This grounds the Committee in law, not just policy discretion. The Committee is part of lawful transitional oversight under Paragraph 3 of the First Schedule to the Social Health Insurance Act, 2023. Counsel urged that the Committee was constituted in furtherance of these duties to identify anomalies in pending NHIF claims before disbursement, thereby protecting public funds from loss or fraud.

82. Counsel submitted that the State Corporations Act and the SHA transitional framework allow Cabinet Secretaries supervisory oversight. He cited the case of **Judicial Service Commission Vs Speaker of the National Assembly & Another [2013] eKLR** and urged that the Petitioners have failed to show that the CS exceeded his lawful powers or acted contrary to the Constitution.

83. Counsel urged that the establishment of the NHIF Pending Medical Claims Verification Committee through Gazette Notice No. 4069 of 28th March 2025 does not violate Articles 229 and 232 of the Constitution and other provisions as Article 229(4) of the Constitution mandates the Auditor-General to audit and report to Parliament on the accounts of public entities after expenditure has been incurred and the Committee's role is not an audit, but a pre-payment verification mechanism to assist the Ministry of Health in validating pending claims before disbursing funds. He added that It does not replace or duplicate the Auditor-General's post-expenditure audit function. He cited the case of **Law Society of Kenya v Cabinet Secretary, Ministry of Lands & 3 Others [2017] eKLR** in this regard. Further, he submitted that Section 13(2) (d) of the Public Finance Management Act (PFMA) authorizes the Cabinet Secretary to: "take appropriate measures to address any discrepancies identified in budget execution reports." In this context, the Committee supports compliance with fiscal discipline and prudent expenditure before public funds are committed, and not in lieu of constitutional audit mechanisms.

84. Counsel submitted that there was no violation of Article 232 as the Committee is an ad hoc non-statutory, non-remunerated taskforce established for a time-limited technical function. Its members were not appointed as public officers nor employed into the public service within the meaning of Article 260 of the Constitution or the Public Service Commission Act, 2017. He cited the case of **Republic v Principal Secretary. Ministry of Education & 2 Others Ex parte Okiya Omtatah [2018] eKLR** the Court held that: *"on competitive recruitment and submitted that the members were selected for their technical knowledge and administrative experience not as a pathway to permanent employment or regulatory power"*. Additionally, that this does not offend Article 232.

85. On the argument that health is devolved and therefore the Committee encroaches on county functions, counsel urged that this is erroneous and stated that NHIF (now SHA) is a national fund and

payment of national health insurance claims where the national government is the funder, falls within the national function. He urged that Article 187 permits cooperative implementation between levels of government and that the Committee does not interfere with county service delivery. It merely reviews payment claims that originate from, or are directed to, the national health insurer. He cited the case of **Council of Governors v Attorney General & Another (2017) eKLR** in this regard.

86. On the issue of legitimate expectation that only constitutional bodies would verify claims, counsel cited the case of **Republic v Kenya Revenue Authority Ex parte Shake Distributors Ltd [2012] eKLR** where the Court stated that legitimate expectation must be clear, unambiguous and founded on past conduct or a promise and within legal capacity of the public authority. He urged that no such expectation has been established here. No promise was made, nor is there a longstanding practice barring the formation of internal committees. He pointed out that the Petitioners placed reliance on the case of **Republic v Public Procurement Administrative Review Board & 2 Others Ex Parte Rongo University [2018] eKLR and Pastoli v Kabale District Local Government Council [2008] 2 EA 300**, which are inapplicable. That those cases involved decisions made ultra vires by statutory bodies.

87. Counsel submitted that the Committee enhances the values under Article 10 (2) (c) and Article 201(d) by promoting: Transparency in payment of claims; Accountability in financial management; Efficient use of public resources; and Integrity in processing historical liabilities.

88. On whether the Committee's functions usurp the constitutional and statutory mandates of independent offices, counsel submitted that it was established as an ad hoc administrative and policy advisory body, with the limited and specific mandate of assisting the Ministry of Health in verifying long-standing pending NHIF medical claims. That the aim is to: Prevent further financial loss, Recommend reforms, Aid policy clarity on systemic inefficiencies and fraud within public health procurement.

Counsel added that it is not a statutory commission, tribunal, or public audit institution and further that it does not purport to act in the capacity of the Auditor-General, the DCI, or the EACC. Counsel further added that it is rather, a task-oriented advisory mechanism consistent with the executive's administrative and oversight powers under Articles 129 and 132 of the Constitution. The Committee is an ad hoc, non-executive, and non-binding administrative mechanism to assist in claims verification. Its existence does not violate Article 229 or 254 of the Constitution.

89. Counsel submitted that an audit, as defined under Article 229(4), is a formal exercise undertaken by the Auditor-General in accordance with prescribed standards, culminating in a statutory report to Parliament. In contrast, the Committee merely compiles and organizes financial data for advisory purposes. Its role is preparatory, enabling the Ministry to engage constitutionally designated offices (such as the Auditor-General) where necessary. He submitted that the Petitioners' argument rests on an overly broad and rigid interpretation of exclusivity. The Constitution does not prohibit administrative agencies from conducting preliminary reviews, verifications, or assessments in support of their policy and oversight functions particularly where no coercive power, finality, or enforcement is involved.

90. Counsel submitted that the Committee's mandate is akin to internal risk assessment and preliminary validation of liabilities which is standard administrative practice. Further, that in the case of **Judicial Service Commission v Speaker of the National Assembly & Another (2013) eKLR** the Court held that overlapping functions do not automatically translate to unconstitutional usurpation, especially where each actor remains within the bounds of its authority. Additionally, there is no legal bar preventing a Ministry from seeking to understand the scope of financial exposure inherited from a defunct institution. The Social Health Insurance Act, 2023, imposes a duty of structured transition, which includes reconciling historical liabilities a

task which must necessarily involve internal committees or working groups.

91. Counsel urged that Article 132(3) (b) and (4) (a) of the Constitution vests the President and by delegation. Cabinet Secretaries with power to direct and coordinate functions of ministries. This includes establishing internal taskforces to advise on technical matters such as fraud risk, inefficiencies, and fiscal control. The Petitioners erroneously characterize the Committee's mandate as an 'audit.' As clarified in paragraphs 58 to 65 of the PS Health Replying Affidavit the Gazette Notice does not use the term 'audit' but instead authorizes 'scrutiny and analysis' a distinction clearly acknowledged in jurisprudence and administrative practice. The Committee does not perform statutory audits under Article 229, but merely compiles data and makes non-binding recommendations for further administrative or legal processing.

92. Counsel urged that the Committee's mandate is limited to "scrutinizing and analysing" pending medical claims which does not amount to a forensic audit, which is a structured financial examination conducted in accordance with auditing standards. He stated that Section 7 of the Public Audit Act preserves the Auditor-General's independence and mandates. However, it does not preclude other actors from undertaking administrative Regarding DCI and EACC, no investigative or prosecutorial function has been assumed by the Committee. Any findings on suspected fraud are to be referred to the relevant agencies, consistent with routine administrative conduct.

93. Counsel submitted that in **Republic v Kenya National Examinations Council ex parte Gathenji & Others (1997) eKLR** the Court clarified that administrative review is distinct from statutory power. Similarly, the Committee does not purport to act as an independent commission. He cited the case of **Law Society of Kenya v Cabinet Secretary, Ministry of Lands & 3 Others (2017) eKLR** and submitted that the Petitioners repeatedly confuse

recommendations with decisions. He reiterated that the Committee's findings do not result in direct payments or enforcement.

94. Counsel submitted that the argument that the appointment of the Committee members was unconstitutional because it lacked public participation and was not conducted through a competitive recruitment process as required under Articles 10, 73, and 232 of the Constitution misapplies those provisions and fails to distinguish between public officers and ad hoc technical appointees engaged in non-permanent advisory roles. He reiterated the contents of paragraphs 70 to 80 of the Respondents Replying Affidavit, and urged that Kenyan jurisprudence has consistently held that not every appointment by a public officer requires public participation or competitive recruitment. He cited the case of **Thirdway Alliance Vs Head of Public Service [2021] eKLR and KELIN & Another v CS for Health [2021] eKLR** in this regard. He urged that neither the Constitution nor statute mandates public participation or competitive hiring for internal ministerial committees of this nature. The Petitioners have not demonstrated how the appointments violated any legal requirement or prejudiced any right under Article 47 or Article 232.

95. On Competitive Recruitment, counsel submitted that Article 232(1)(g) of the Constitution mandates that appointments to public service must be based on fair competition and merit. However, this provision applies to appointments into the public service as defined in Article 260 of the Constitution and the Public Service Commission Act, 2017. It does not apply to temporary, unpaid appointments to advisory committees, especially those not vested with executive authority. He cited the case of **Republic v Principal Secretary, Ministry of Education & 2 Others ex parte Okiya Omtatah [2018] eKLR** in this regard. He reiterated that the Committee in question is ad hoc, serves for a fixed term of three months, and its members are paid allowances, not salaries. As such, they are not public officers within the meaning of Article 260 or as interpreted in **Fredrick Otieno Outa v Jared Odoyo Okello & Others [2014] eKLR**. He urged the Court to

find that the Committee's formation did not require public participation or competitive recruitment, and that no constitutional or statutory provisions were violated.

96. On whether the Committee's work violates the Data Protection Act and the Digital Health Act counsel submitted that the Committee's mandate is strictly confined to administrative verification of claims already submitted to NHIF. It does not access individual medical files or personal health records. All claim reviews are conducted using anonymized data provided by health facilities. At no point does the Committee request or handle patient-identifiable information. Its operations adhere fully to the standards set out under the Data Protection Act and the Digital Health Act. Further, that no evidence has been produced to demonstrate a breach of data privacy or any infringement of Article 31 of the Constitution. Accordingly, the Petitioners' claims are speculative and unsupported by fact or law. He urged that mere apprehension of a possible privacy violation does not amount to a constitutional violation, citing the case of **Kituo Cha Sheria v Independent Electoral and Boundaries Commission & Another [2013] eKLR** in this regard.

97. Counsel submitted that the Data Protection Act, 2019 governs the processing of personal data and sets out obligations for data controllers and processors. It recognizes public entities' right to process data where necessary for the performance of a legal duty. He cited Section 25 of the act and urged that the Ministry of Health is a data controller under the Act. The Committee operates under its authority and within its framework. Any processing of data (to the extent necessary) is conducted in accordance with: The Ministry's existing privacy policies; its designation as a data controller; Section 51 of the Act, which permits processing for a "legitimate interest pursued by the data controller." Additionally, that Section 35(c) allows processing of sensitive health data without consent where "the processing is necessary for the establishment, exercise or defence of a legal claim."

98. On the Digital Health Act, 2023, Counsel cited Sections 7, and 15(3 and urged that the Committee's access if any is limited to institutional claims submitted by hospitals or clinics. Such access is mediated by SHA systems and does not entail arbitrary or unlawful access to digital health records. He urged that there is no breach of privacy, no violation of the Digital Health Act, and no constitutional infringement demonstrated. The Petitioners' case rests on unsubstantiated fears, not proven facts, and must therefore fail on this ground as well. He urged the Court to find that the Committee's work does not violate the Constitution, the Data Protection Act, 2019, or the Digital Health Act, 2023, and that the Petitioners' claims on this ground are without merit.

99. Counsel submitted that granting the sweeping reliefs sought would amount to endorsing a legal vacuum at a critical juncture in Kenya's healthcare transition, thereby undermining public confidence in the Government's ability to manage health sector reforms. The Petitioners' approach prefers form over substance and would paralyze legitimate administrative functions. He reiterated that the Petitioners have not demonstrated any violation of constitutional rights or any illegality in the establishment or operation of the Committee. In conclusion, Counsel urged the court to dismiss the Petition with costs.

Analysis & Determination

100. The Constitution of Kenya 2010 is a product of negotiations at the height of our agitation for multiparty democracy. The final draft adopted at Naivasha between 18th and 28th January 2010 was later presented to the Committee of Experts on 2nd February 2010 paving the way for the referendum held on 4th August 2010. The Petitioner invoked the provisions of the Constitution referenced as Articles 1, 2, 3, 4, 10, 31, 73, 74, 75, 93, 95, 96, 185, 187, 190, 226, 232, 248, 254, 259, and 260. First and foremost, one must delve into the ambit of the rights and fundamental freedoms which provide the touchstone for the interpretation of the Constitution in its widest sense. Article 24 of the Constitution of Kenya 2010 provides inter alia;

"(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

a) the nature of the right or fundamental freedom;

b) the importance of the purpose of the limitation;

c) the nature and extent of the limitation;

d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."

101. Generally speaking, in context, Article 10 on National Values and Principles of Governance when read together with Article 259 of the Constitution, provides a framework of interpretation to be applied by a Constitutional Court competently constituted in accordance with the law. It is significant to reiterate these exacting provisions;

"10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them-

a) applies or interprets this Constitution;

b) enacts, applies or interprets any law; or

c) makes or implements public policy decisions.

(2) The national values and principles of governance include-

a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

c) good governance, integrity, transparency and accountability, and

d) sustainable development."

259. (1) This Constitution shall be interpreted in a manner that-

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

102. The Constitution of Kenya 2010 is not simply a collection of Articles or a form of legislation enacted merely because countries traditionally must have a legal instrument in the name of a charter or constitution. It embodies our history since independence as grafted in the old order and in 2010 it completely overhauled that order into what many refer to as a transformative constitution; one that is defensible and represents a radical and decisive break from a past that was unacceptable, a past against which Kenyans fought for decades, losing their lives to give themselves and future generations, a new order of constitutional democracy that entrenches the rule of law. This Constitution establishes a culture of openness, democracy, and universal human rights, marking a paradigm shift away from the concentration of power in one arm of government - the Executive. The aspirations of the Kenyan people since 2010 have been to build a future for generations founded on principles that are justifiable in an open and democratic society based on freedom and equality, and a legal culture of accountability and transparency. These are the ethos and echoes felt from Witu to Mandera, from Busia to Isebania, and from Lungalunga and beyond.

103. The Court in **Unity Dow -vs- Attorney General of Botswana (1992) LRC (Const) 623** at Page 668 remarked as follows;

"The Constitution is the Supreme Law of the land and is meant to serve not only this generation but yet unborn. It cannot allow to be a lifeless museum piece. On the other hand, Courts must breathe life into it as occasion may arise to assure the healthy growth of the state through it. We must not shy away from the basic fact that while particular

construction of a Constitutional provision may be able to meet the designs of the society of a certain age ... it is the primary duty of Judges to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever-developing society which is part of the wider society governed by acceptable concepts of human dignity."

The Constitution should be able to serve for a long time while accommodating the new changes the world has to offer without derogating from the original framers' intent. This was further witnessed in Hunter v. Southern Inc [27] "A Constitution must be capable of growth and development over time to meet social, political and historical realities often unimagined by its framers ....."

104. This Petition in question will be giving a panoramic view of the principle of separation of powers. The principle of the "separation of powers" refers to the division of a democratic state into three institutions or branches of government: the legislature, the executive and the judiciary. The rationale being that each branch acts as a "check and balance" on the others, with no branch exercising more power than either of the other two. Such a separation, it has been argued, limits the possibility of arbitrary excesses by government, since the sanction of all three branches is required for the making, executing, and administering of laws. Such a division helps to prevent abuses of power and is essential to a healthy democracy.

105. The principles of separation of powers remain the cornerstone of any constitutional democratic system. But what does it take to achieve separation of powers in a country? This is a more difficult question to answer even from a judicial perspective than one might think, because the term "separation of powers" is fraught with ambiguity. One such ambiguity even for scholars concerns the word "powers," which could refer either to institutions such as the powers vested in the President, Prime Minister, Governor-General, or King or to the legal authority to perform certain acts, or alternatively to the functions of the Legislature,

Executive, or Judiciary. Another source of ambiguity lies in the word "separation," which can vary in both form and degree. This is why one may hear of "absolute" or "partial" separation. At times, holders of these respective offices have found it difficult to navigate between these ideals. It can be challenging to focus on the components of the doctrine of separation of powers without examining in greater detail the separation of institutions, the separation of functions, and the separation of personnel. In my considered view, functional separation lies at the heart of the doctrine. For example, if one considers the core branch of the Executive, one would think that it is the body that initiates rather than executes policies; for the courts, it is to adjudicate individual disputes, apply the law, uphold the rule of law and as is commonly observed hold other branches of government to account; and for the Legislature, it is to make laws. These inquiries form part of the interaction necessary to answer the issues raised by the Petitioner, and to give meaning to the correlation between the nature of a particular institution on the one hand, and the task that may be assigned to it by the Executive or other branches of government on the other.

106. The Supreme Court of Kenya in the various decisions has developed distinct approaches for interpreting the various decisions often prioritizing a living tree doctrine that allows for evolving interpretations to address the new dawn of our social, political, legal and historical realities. The Apex Court approach emphasizes a generous and purposive interpretation that considers the Constitution's fundamental principles and the context of the time. The general guidelines of interpretation include:

    - Purposive Approach; the court generally favours a purposive approach seeking to understand the underlying purpose of constitutional provisions rather relying primarily on literal interpretation.

- Contextual interpretation; the Apex court also considers the historical, social and political contexts in which the constitution was enacted as well as the specific contexts of the case before it.
- Protection of fundamental rights and freedoms- this same court has spoken severally in its decisions emphasizing the protection of fundamental rights and freedoms guaranteed by the Constitution often interpreting provisions specifically on the Bill of Rights in a way that advances these rights.
- Devolution- the court also emphasizes that the Kenyan people in 2010 laid down the basic structure on how they want to be governed by distilling the balance of powers between the National and the County Governments ensuring that neither level of government undermines the other.
- The other consideration is the doctrine of the living tree; the living tree doctrine tree allows the constitution to evolve with the society but it is not without its limitation. The court is therefore mandated to balance the need of flexibility with the need for stability and adherence to the text.
- For our purposes, the court has developed a nuanced approach in considering international law as entrenched in Article 2 (5 & 6) particularly on Human Rights Law when interpreting the Constitution but it also provides guidelines that constitutional courts may not be bound by international law and may depart from it when necessary in giving effect to constitutionalism of the republic.

107. The following issues arise for determination;

i) Whether the Petition meets the threshold for a constitutional petition

ii) Whether the establishment of the National Health Insurance Fund (NHIF) Pending Medical Claims Verification Committee vide a gazette notice dated 28th March 2025 usurps the powers and functions of independent commissions.

iii) Whether the 'handpicking' of members of the committee violates article 31 of the constitution

iv) Whether the establishment of the Committee violates articles 94, 95, 96 and 97 of the Constitution

v) Whether the process of the establishment of the committee was unconstitutional

vi) Whether the petitioners are entitled to the reliefs sought

a. Whether the Petition meets the threshold for a Constitutional Petition

108. The threshold for constitutional petitions was set in the case of **Anarita Karimi Njeru Vs Republic (1979) eKLR** where it was held that constitutional petitions should set out with a reasonable degree of precision the petitioner's complaint, the provisions of the constitution alleged to have been infringed and the manner in which those provisions of the constitution have been infringed. Similarly, in the case of **Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** the Court of Appeal stated that:

"It is our finding that the petition before the High court was not pleaded with precision as required in Constitutional petitions. Having reviewed the petition and Supporting Affidavit we have concluded that they did not provide adequate particulars of the claims relating to the alleged violation of the Constitution of Kenya and the Ethics and Anti- Corruption Commission Act, 2011, accordingly the Petition did not meet the standard enunciated in the Anarita Karimi Njeru Case"

109. It is settled law through numerous decisions of the Supreme Court of Kenya that questions of standing, public interest litigation and the interpretation of constitutional rights are well established. On the issue of standing, the Court has clarified who may bring a constitutional petition. It allows for individual standing where a person may be affected by the violation or infringement of the provisions on fundamental rights and freedoms. There is also public interest litigation, where individuals may sue on behalf of the public good. The

anchor provisions for this approach are Articles 22 and 258 of the Constitution, which allow individuals to approach the Court claiming a violation or threatened violation of the Constitution. See also **Bia Tosha Distributors Limited Vs Kenya Breweries Limited & 6 Others; Petition No 15 of 2020**.

110. From the pleadings, it is evident that the Petition arises from the establishment of a National Health Insurance Fund (NHIF) Pending Medical Claims Verification Committee vide a gazette notice dated 28th March 2025. The Petitioner alleges that the establishment of the said Committee violates Articles 2(2), 3, 10(2), 73, 94, 95, 96, 131, 132, 185(2), 186, 187, 189, 190, 201, 226, 229, 252, and 254 of the Constitution.

111. In my view, the Petitioners have set out the particulars that relate to the alleged violation of the constitution adequately. Therefore, there is no doubt whether the petition does not meet the threshold of being adjudicated within the framework of the Constitution. It does expound certain key provisions of the Constitution which have been infringed by dint of the executive order to establish the National Health Insurance Fund Pending Medical Claims Verification Committee.

112. This Court is clothed with jurisdiction to entertain, hear and determine the matter under Article 50(1) of the Constitution as read with Article 165 (3b, c, d (i, ii &iii). From a consideration of the Petition, responses and submissions, the following issues arise for determination;

i) Whether the establishment of the National Health Insurance Fund (NHIF) Pending Medical Claims Verification Committee vide a gazette notice dated 28th March 2025 usurps the powers and functions of Independent Commissions

113. The Petitioners aver that the formation of the committee is a usurpation of the roles and functions of other independent commissions. Specifically, the petitioners contend that the Committee is to perform functions that are the mandate of the Office of the Auditor

General. Before delving into the issues raised about the office of the auditor general, I must point out that the Petitioners, whether deliberately or by mistake, have misrepresented the terms of reference as set out in the Gazette notice appointing the committee to wit;

"a) Scrutinize/Audit and analyze the existing NHIF pending medical claims that have accumulated between the 1st July, 2022 and the 30th September, 2024 and make recommendations to the Ministry of Health on settlement of the same."

114. A reading of the impugned gazette notice reveals that the terms of reference are set out as follows;

"a) scrutinize and analyze the existing NHIF pending medical claims that have accumulated between the 1st July, 2022 and the 30th September, 2024 and make recommendations to the Ministry of Health on settlement of the same."

115. This discrepancy is important to note as the petitioners claim that the committee is to perform an audit. However, there is no such function created in the terms of reference.

116. The office of the auditor general is created under Article 229 of the Constitution as follows;

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

(2) To be qualified to be the Auditor-General, a person shall have extensive knowledge of public finance or at least ten years' experience in auditing or public finance management.

(3) The Auditor-General holds office, subject to Article 251, for a term of eight years and shall not be eligible for re-appointment.

(4) Within six months after the end of each financial year, the Auditor-General shall audit and report, in respect of that financial year, on;

(a) the accounts of the national and county governments;

(b) the accounts of all funds and authorities of the national and county governments;

(c) the accounts of all courts;

(d) the accounts of every commission and independent office established by this Constitution;

(e) the accounts of the National Assembly, the Senate and the county assemblies;

(f) the accounts of political parties funded from public funds;

(g) the public debt; and

(h) the accounts of any other entity that legislation requires the Auditor-General to audit.

(5) The Auditor-General may audit and report on the accounts of any entity that is funded from public funds.

(6) An audit report shall confirm whether or not public money has been applied lawfully and in an effective way.

(7) Audit reports shall be submitted to Parliament or the relevant county assembly.

(8) Within three months after receiving an audit report, Parliament or the county assembly shall debate and consider the report and take appropriate action.

117. Further to the above, **Section 7 of the Public Audit Act** provides as follows: -

(1) In addition to the functions and responsibilities of the Auditor-General as set out in Article 229 of the Constitution, the Auditor-General shall;

(a) give assurance on the effectiveness of internal controls, risk management and overall governance at national and county government;

(b) undertake audit activities in state organs and public entities to confirm whether or not public money has been applied lawfully and in an effective way;

(c) satisfy himself or herself that all public money has been used and applied to the purposes intended and that the expenditure conforms to the authority for such expenditure;

(d) confirm that—

(i) all reasonable precautions have been taken to safeguard the collection of revenue and the acquisition, receipt, issuance and proper use of assets and liabilities; and

(ii) collection of revenue and acquisition, receipt, issuance and proper use of assets and liabilities conforms to the authority;

(e) issue an audit report in accordance with Article 229 of the Constitution;

(f) provide any other reports as may be required under Article 254 of the Constitution; and

(g) perform any other function as may be prescribed by any other written legislation.

(2) Without prejudice to the generality of subsection (1), the Auditor-General may undertake any audits required under the Constitution, this Act or any other relevant law.

118. An audit is defined at page 161 of Black's Law Dictionary, 11th Edition as follows; *"A formal examination of an individual's or organisations' accounting records, financial situation or compliance with some other set of standards."*

119. I reiterate that the terms of reference of the committee do not refer to any audit exercises to be carried out by the committee. I read mischief in the mischaracterisation of the same by the petitioners when they pleaded that there was an audit function, when reproducing the terms of reference verbatim. It is my considered view that the allusion that the committee has usurped the functions of the office of the auditor general is moot. Additionally, there is no provision that limits the office of the auditor general from carrying out its functions with regards to the audit of the defunct NHIF. I must point out that audit reports are carried out after the expenditure has occurred. In the instant scenario, the purpose of the committee is to establish which pending claims are legitimate and make recommendations on the same. Therefore, there is no expense to be audited at this juncture.

ii) Whether the 'handpicking' of members of the committee violates Article 31 of the Constitution

120. Article 31 of the Constitution provides as follows;

Every person has the right to privacy, which includes the right not to have—

(a) their person, home or property searched;

(b) their possessions seized;

(c) information relating to their family or private affairs unnecessarily required or revealed; or

(d) the privacy of their communications infringed.

121. It is the petitioners' contention that the 'picking' of people who are not employees of the NHIF, public staff or staff of the office of the auditor general to look into sensitive information and medical records in the name of claim verification is against Article 31 of the Constitution of Kenya 2010.

122. From the aforementioned terms of reference in the gazette notice, the mandate of the committee's role is restricted to verification of medical claims. However, the question that arises is how there will be verification of medical claims without looking into patients' medical records? I draw attention to the term of reference(b) which states;

establish a clearly defined criteria for detailed examination and analysis of such pending medical claims with a view of determining the genuineness of each other or otherwise.

123. When determining the 'genuineness' of a medical claim, how would the committee be able to do this without knowing the identity of the patients and having a look at their personal records? In establishing the truthfulness of the records, they would most definitely be required to look at the records of a patient. Anonymization as per the Digital Health Act is defined as follows;

"*anonymization" means the removal of personal identifiers from personal data so that the data subject is no longer identifiable"*

124. To rely on anonymized data would be counterproductive to the goal of verification. I do not find it plausible that one can conduct a claim

verification exercise in the absence of medical records which provide vital information as to whether the patients exist or are fictitious.

125. Having established that the committee would have to access the records of patients, the next port of call is whether the access to these records, by the members of the committee, in their capacity as an Ad-Hoc committee, constitutes a violation of the right to privacy. Under the Digital Health Act, health data is defined as;

> *"health data" means data related to the state of physical or mental health of the data subject and includes records regarding the past, present or future state of the health, data collected in the course of registration for or provision of health services or data which associates the data subject to the provision of specific health services;*

126. Notably, the same act also provides for data verification as follows;

> *"data verification" includes the authentication and validation of gathered data, data quality checks, audit of the health data using the data quality protocols;*

127. From my analysis of the impugned notice, it emerges that there is a gap in terms of the uniformity of the language used to define its terms of reference, the mandate and the language used in the legislation governing health to wit the Digital Health Act. The language used in the notice is perhaps deliberately steeped in generalities and does not set out with reasonable precision what information the committee will use to carry out its exercise; what the verification exercise pertains to and what pertains to a scrutiny and analysis of the pending claims. Further, it is apparent that there is no criteria in place by the commission for the handling of the 'examination and analysis' of the pending claims as they are tasked with establishing said criteria. At this point in time, it is not known whether the criteria will involve access to medical records belonging to patients from whom the claims arise.

128. A health system is defined under the Digital Health Act as;

"health system" means an organization of people, institutions and resources that deliver health care services to meet the health needs of the population, in accordance with established policies;

129. In this context, the NHIF is considered a health system as it served the purpose of delivering health care services hence the pending medical claims. Under section 24 of the Digital Health Act, it is provided as follows;

24. (1) The Cabinet Secretary shall be responsible f or Security, privacy the confidentiality, privacy and security of all sensitive personal data held in the system.

(2) Sensitive personal data held in the system shall not be disclosed to a third party unless—

(a) the data subject is unable to give informed consent for the disclosure and such consent is given by a person authorised by the data subject in writing to grant consent;

(b) the disclosure has been authorised by the implementation of written law or the enforcement of a court order;

(c) a health service without informed consent as authorised by written law or court order is being provided;

(d) the data subject is being treated in an emergency situation;

(e) failure to treat the data subject, or a group of people which includes the data subject, would result in a serious risk to public health; or

(f) a delay in providing a health service to the data subject may result in death or irreversible damage to the health of the data subject and the data subject has not expressly, by implication or by conduct ref used that service.

2. The Cabinet Secretary shall be responsible for the privacy of the data held in the system during all the data

(4) Where the data held in the system data is Intended to be used for research and planning, the Cabinet Secretary shall be the data controller for the purposes of section 53 of the Data Protection Act, 2019.

130. The Respondents contend that the committee is formed pursuant to the transitional provisions of the Social Health Authority Act which expressly empowers the Cabinet Secretary to facilitate an orderly and lawful transition from the former NHIF framework to the new Social Health Insurance Scheme. Ironically, the Respondents do not cite this express provision that gives these powers. They rely on paragraph 3 of the first schedule of the Social Health Insurance Act which provides;

> *On the appointed day, all rights, powers, liabilities and duties, whether arising under any written law or otherwise, which immediately before the appointed day were vested in, imposed on or enforceable by or against the Government for and on behalf of the Fund shall, by virtue of this paragraph, be transferred to, vested in, imposed on or enforceable by or against the Authority.*

131. This merely states the status of the rights, powers and liabilities of the National Health Insurance Fund. It does not give the cabinet secretary powers to disclose health data to third parties.

132. It is my considered view that the Respondents have not convinced this court that the right to privacy of the patients from whom the pending medical arise will be protected by allowing the committee to conduct the said 'verification exercise' on their medical records. The Respondents have not laid out a proper explanation as to how they will conduct verification of claims and identify fraudulent claims without having access to the personal information of the patients who are subject of the medical claims. It is therefore my considered view that the establishment of the committee to the extent that their actions expose patients' sensitive and confidential data to third parties without their consent contravenes Article 31 of the Constitution and Section 24 of the Digital Health Act.

iii) Whether the establishment of the Committee violates articles 94, 95, 96 and 97 of the Constitution.

133. Articles 94, 95, 96 and 97 of the Constitution of Kenya provide as follows in the said Articles;

Role of Parliament

(1) The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.

(2) Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty.

(3) Parliament may consider and pass amendments to this Constitution, and alter county boundaries as provided for in this Constitution.

(4) Parliament shall protect this Constitution and promote the democratic governance of the Republic.

(5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.

(6) An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause

(5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.

95. Role of the National Assembly

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

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

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

(4) The National Assembly—

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

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

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

(5) The National Assembly—

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

(b) exercises oversight of State organs.

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

96. Role of the Senate

(1) The Senate represents the counties, and serves to protect the interests of the counties and their governments.

(2) The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113.

(3) The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments.

(4) The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145.

134. I have considered the contents of the gazette notice and it is my considered view that the roles and functions of the committee are not similar to those of the senate and national assembly. The only

commonality is that they all appear to have oversight roles but for the committee, the role is more towards a transitional role that serves a purpose of recommendation upon conducting 'scrutiny' of pending claims which is more concentrated on the National Health Insurance Fund. It follows that there is no violation of the constitution in this regard.

iv) Whether the process of the establishment of the committee was unconstitutional

135. The main question under this head is whether the cabinet secretary for health has the power to appoint an Ad-Hoc committee to verify pending medical claims from the NHIF. I wish to put reliance in Article 152 of the Constitution which establishes the office of a cabinet secretary as follows;

> *(1) The Cabinet consists of—*
>
> *(a) the President;*
>
> *(b) the Deputy President;*
>
> *(c) the Attorney-General; and*
>
> *(d) not fewer than fourteen and not more than twenty-two Cabinet Secretaries*

136. The cabinet secretary's mandate as per Section 9(3) of the National Government Coordination Act is provided as follows; *(3) A Cabinet Secretary shall be responsible for policy formulation and guidance and, where required, implementation of the policy in respect of the respective Ministry, State departments or agencies under him or her*.

137. I also make reliance in Article 153 of the Constitution which provides as follows;

> *(1) A decision by the Cabinet shall be in writing.*
>
> *(2) Cabinet Secretaries are accountable individually, and collectively, to the President for the exercise of their powers and the performance of their functions.*

(3) A Cabinet Secretary shall attend before a committee of the National Assembly, or the Senate, when required by the committee, and answer any question concerning a matter for which the Cabinet Secretary is responsible.

(4) Cabinet Secretaries shall—

(a) act in accordance with this Constitution; and

(b) provide Parliament with full and regular reports concerning matters under their control

The respondent's contention is that the establishment of the committee was an administrative measure, placing reliance on Article 21(2) of the Constitution which provides;

(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.

138. Article 43 of the Constitution provides as follows;

(1) Every person has the right—

(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

(b) to accessible and adequate housing, and to reasonable standards of sanitation;

(c) to be free from hunger, and to have adequate food of acceptable quality;

(d) to clean and safe water in adequate quantities;

(e) to social security; and

(f) to education.

(2) A person shall not be denied emergency medical treatment.

*(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants***.**

139. The Respondents further contended that the committee is an administrative measure under Article 21(2) as read with Article 43(1)(a) of the Constitution. There is no express provision that guides the formation of ad hoc committees by the Cabinet secretary. Ordinarily, ad hoc committees are formed by a resolution of the national assembly to perform specific functions for a specific period. However, Article 154(b) of the Constitution provides as follows;

(4) Cabinet Secretaries shall—

(a) act in accordance with this Constitution; and

(b) provide Parliament with full and regular reports concerning matters under their control.

140. It is not in dispute that the transition from the NHIF to the SHA is under the control of the Cabinet Secretary for health. Being a national insurance service provider, the issues of health being a devolved function are moot. It follows that there was no legal basis for the establishment of the committee. The transitional provisions of the Social Health Insurance Act do not provide for the formation of any committees to establish the liabilities of the NHIF. There are no statutory provisions that provide the cabinet secretary with the power to establish an ad hoc committee, keeping in mind that the members of the committee will draw allowances at the expense of the tax payer.

141. Article 73 of the Constitution provides as follows;

(1) Authority assigned to a State officer—

(a) is a public trust to be exercised in a manner that—

(i) is consistent with the purposes and objects of this Constitution;

(ii) demonstrates respect for the people;

(iii) brings honour to the nation and dignity to the office; and

(iv) promotes public confidence in the integrity of the office; and

(b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

(2) The guiding principles of leadership and integrity include—

(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;

(b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;

(c) selfless service based solely on the public interest, demonstrated by;

(i) honesty in the execution of public duties; and

(ii) the declaration of any personal interest that may conflict with public duties;

(d) accountability to the public for decisions and actions; and

(e) discipline and commitment in service to the people.

142. The decision of the cabinet secretary to appoint a committee without any solid legal basis is a violation of Article 73 of the constitution which violation this court cannot allow to stand. I once again draw attention to the transitional provisions as per the fourth schedule of the SHI Act which provides;

1. In this Schedule-

"appointed day" means the day appointed for the coming into operation of the Social Health Insurance Act, 2023;

"Fund" means the National Health Insurance Fund existing immediately before the appointed day.

2. (1) On the appointed day, all the funds, assets and other property movable and immovable which immediately before that day, were held for and on behalf of the Fund in the name of the National Health Insurance Fund Board shall, by virtue of this paragraph and without further assurance, vest in the Authority.

(2) Every public officer having the power or duty to effect or amend any entry in a register relating to property or to issue or amend any certificate or other document effecting or evidencing title to property, shall, without payment of a fee or other charge and upon request made by or on behalf of the Authority, do all such things as are by law necessary to give final effect to the transfer of the property mentioned in subparagraph (1).

3. On the appointed day, all rights, powers, liabilities and duties, whether arising under any written law or otherwise, which immediately before the appointed day were vested in, imposed on or enforceable by or against the Government for and on behalf of the Fund shall, by virtue of this paragraph, be transferred to, vested in, imposed on or enforceable by or against the Authority.

4. On and after the appointed day, all actions, suits or legal proceedings pending by or against the Government for and on behalf of the Fund shall be carried on or prosecuted by or against the Authority.

5. (1) On the appointed day, the Fund shall not provide enhanced benefits schemes and packages.

(2) Notwithstanding the provisions of subparagraph (1), all enhanced benefits schemes and packages which immediately before the appointed day, were being provided by the National Health Insurance Fund shall, by virtue of this paragraph and without further assurance, vest in the Authority until the lapse of the existing contracts.

143. It follows that all liabilities including claims were transferred to the Social were transferred to the Social Health Authority the moment the act came into force. Under the said act, there exists a claim settlement process under sections 35 and 36 of the Act as follows;

(1) There is established within the Authority an office to be known as the Claims Management Office which shall review and process the claims made under this Act.

(2) The Claims Office shall be responsible for—

(a) reviewing, processing and validating medical claims from healthcare providers and healthcare facilities;

(b) appraising medical claims based on the benefit package;

(c) issuing pre-authorizations for access to healthcare services based on the benefit package;

(d) developing an e-claims management system;

(e) undertaking quality assurance surveillance in respect of claims;

(f) establishing systems and controls for detecting and identifying fraud appropriate to the Fund's exposure and vulnerability;

(g) sensitizing claimants on the consequences of submitting false and fraudulent claims;

(h) collecting and analysing data for purposes of claim management;

(i) preparing quarterly reports on submission to the to the Board and the Cabinet Secretary; and

(j) performing any other functions as may be necessary for the better carrying out of its functions under this Act.

(3) The Claims Management Office may delegate the performance of its functions under subsection 2(a) and (b) to a suitable entity.

(4) The entity referred to under subsection (3) shall be a medical insurance provider and a claim settling agent as defined and licensed by the Insurance Regulatory Authority under the Insurance Act, (Cap. 487):

Provided that a suitable number of entities shall be contracted to manage the claims from the zones identified in the manner prescribed in the Regulations.

(5) The Cabinet Secretary shall make regulations for the better carrying out of the provisions of this section.

36. Settlement of claims

(1) The Authority shall make payments to a contracted healthcare provider or healthcare facility upon submission of a claim by the Claims Management Office.

(2) The Cabinet Secretary shall make regulations for the better carrying out of the provisions of this section.

144. Therefore, there exists a process for the settlement of claims which would include the verification of the same under the act. It follows that the establishment of the committee is unnecessary as there is a statutory provision that provides for the settlement of claims. The prudent thing for the Cabinet Secretary to do is to establish regulations for the better carrying out of the settlement of claims. Further, given that there is no statutory provision empowering the cabinet secretary to establish ad hoc committees, the impugned committee was clearly unconstitutional.

v) Whether the petitioners are entitled to the reliefs sought

145. Having established the unconstitutionality of the establishment of the committee, I now delve into the reliefs sought by the petitioner, specifically those of judicial review orders.

146. The impugned decision which is the subject matter of this petition emanates from a member of the Cabinet in charge of the Ministry of Health whose docket is being overseen and strategically led by Hon. Aden Bare Duale, EGH. The scrutiny and justification for establishing an Ad Hoc Committee is what the Petitioners are aggrieved about both in terms of procedure and the substantive orders to that effect including

the selection of various cadres of Kenyan citizenry to carry out the terms as referenced in the Kenya Gazette. The dictum in *Julius Nyarotho v Attorney General & Others* (2013) eKLR, though focusing primarily on the Office of the Presidency, sets out predominant principles that can be nuanced to the facts of this petition. Why is this so? The Office of the Cabinet Secretary is a creature of the Constitution. As the Constitution makes clear in Articles 1(3), 129, and 130, executive authority is derived from the people and must be exercised in accordance with the Constitution. The Executive Office of the Presidency, which includes the Cabinet where the Cabinet Secretary in charge of Health sits, is bound by the Constitution to defend it, adhere to it, promote it, and protect it, as guided by Article 10 on National Values and Principles of Governance. Therefore, in the event of an infringement or violation, this Court is clothed with constitutional jurisdiction to issue prerogative writs of prohibition, certiorari, or mandamus, depending on the specifics of the petition.

147. In answering this question as framed by the Petitioners, I place reliance in the case of **R Vs National Employment Authority & 3 Others Ex- Parte Middle East Consultancy Services Limited [2018] eKLR** where Hon. Mativo J. held;

> *"The grant of the orders of* Certiorari, Mandamus *and* Prohibition *is discretionary. The Court is entitled to take into account the nature of the process against which Judicial Review is sought and satisfy itself that there is reasonable basis to justify the orders sought. In this regard, it is important to mention that a serious issue arises, namely, whether or not the* ex parte *applicant is using Court processes to avoid the statutory laid down process. Applying the above tests to the facts and circumstances of this case, I find and hold that the applicant has not satisfied the above conditions. It follows that there is no basis at all for the Court to grant the Judicial Review orders of Certiorari and* Mandamus*."* See also ***Republic Vs Attorney General & 4 Others Ex Parte Diamond Hashim Lalji and Ahmed Hasham Lalji (2014) eKLR***

148. Similarly, in the case of **Municipal Council of Mombasa Vs Republic & Umoja Consultant Limited Civil Appeal No. 185 of 2001**, the Court of Appeal held:

> *"Judicial review is concerned with the decision -making process, not with the merits of the decision itself: The Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether making the decision the decision maker took into account relevant matters or did take into account irrelevant matters... The Court should not act as court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision... it is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it is a statutory body which can only do what is authorized by the statute creating it and in the manner authorized by statute."*

149. It is in my view, quite plain in our system of governance that when a Minister is entrusted with administrative as distinct from legislative functions, he or she is entitled to act through any authorised official of the department. The Minister is not bound to personally give his or her mind to every matter; however, whichever decision is made is one for which the Minister remains accountable, as illustrative of the provisions of Article 10 of the Constitution of Kenya 2010. He or she cannot rely on the question of agency or delegation to escape liability. It is also true that the functions given to Ministers are constitutionally provided for, as they are constitutionally responsible for the functions of their respective ministries. In the event that any delegation is rendered inappropriate, the Minister must be called upon to account on the floor

of Parliament, or an aggrieved citizen may file a constitutional petition seeking the grant of judicial review remedies.

150. Rather curiously, in the impugned decision, the doctrine of legitimate expectation arose on the facts of this petition on the basis that there were clear provisions setting out the same terms of reference as those given to the Ad Hoc Committee gazetted by the Cabinet Secretary in charge of Health. In all legitimate expectation cases whether substantive or procedural three practical questions arise. The first is what the public authority whether by practice or promise committed itself to; the second is whether the public authority has acted or proposes to act unlawfully in relation to its commitment; and the third is what the court should do in the circumstances. The decision in question may have been taken in good faith by the Cabinet Secretary, but it appeared to spill over into other areas of the government process and well-established constitutional organs. The contemporary jargon of transparency in administrative decision-making was therefore blurred for lack of accountability and openness. In particular, the Cabinet Secretary, as the decision-maker ought to have borne in mind the financial implications especially the potential savings of taxpayers' money, had he applied his mind to the already established watchdogs on government financial management such as the Directorate of Internal Audit and the Office of the Auditor-General.

151. In the fullness of time, upon examining the four corners of the instant petition and the objections raised by the Respondents, this Court is driven to respond to those objections through the doctrine of proportionality and the doctrine of certiorari within the context of judicial review. The central question is whether the decision made by the Cabinet Secretary elsewhere referred to as the Minister in this judgment was justified in creating the Ad Hoc Committee, particularly when there were other appropriate constitutional or statutory organs capable of carrying out the same mandate. Here, the Court is concerned with whether the action taken by the Office of the Cabinet Secretary was balanced having regard to the financial resources to be

expended and whether the decision was excessive in relation to the legitimate aim pursued at the time.

152. Proportionality analysis in constitutional law is a tool used by the Court to examine whether a particular measure is designed to achieve a certain value in a proportionate manner. I have used the term “value” in this discussion to encompass individual interests such as human rights, as well as the panoply of collective interests often assembled under the notion of public interest. In my view, it also includes what I call a vertical perspective such as when the State interferes with a value in which case one must draw from the fountain of values enshrined in Article 10 of the Constitution. That is not the end of the matter; there is also what I refer to as the horizontal dimension, for example, in cases where individuals in public service cause a disturbance in the free enjoyment of a value by other citizens raising the question of whether the State must intervene in some way. From my perspective on constitutionalism, the values affected whether positively or negatively by a measure at issue, such as in this case touching on the ministerial decision, must be clearly ascertained. That is the touchstone of this petition.

153. Proportionality in the strict sense applicable to this petition suggests a rational decision-making process that involves comparing the abstract and concrete weight of values in the factual situation faced by the Cabinet Secretary elsewhere referred to as the Minister. Upon evaluating the structural constitutional arguments, this Court finds that the means adopted were disproportionate to the legitimate aims sought to be achieved by the decision. I would therefore as I conclude reiterate some of the additional provisions of the constitution and other key jurisprudential principles towards making a finding on the issues raised in the petition.

154. Article 23 (3) of the Constitution provides: -

a. In any proceedings brought under Article 22, a court may grant appropriate relief including-

b. A declaration of rights;

c. An injunction;

d. A conservatory order;

e. A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

f. An order for compensation; and

g. An order of judicial review.

155. On the application of orders for Judicial Review in Constitutional petition, in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others SC Petition No 14 Consolidated with 14A, 14B, & 14C of 2014 [2014] eKLR** the court held;

'*[355] However, notwithstanding our findings based on the common law principles of estoppel and res- judicata, we remain keenly aware that the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing their grievance as a constitutional question, the 1st, 2nd and 3rd respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the court and have their grievance resolved on the basis of articles 22 and 23 of the Constitution.*

156. In **SGS Kenya Limited v Energy Regulatory Commission & 2 others SC Petition No 2 of 2019 [2020] eKLR** the court observed as follows:

'*[40] The petitioner approached the High Court by way of the prescribed procedures under Judicial Review, which revolve around the paths followed in decision-making. Such a course, as the appellate court properly held, is not concerned with the merits of the decision in question. The law in this regard, which falls under the*

umbrella of basic 'Administrative Law', is clear enough, and it is unnecessary to belabour the point.'

157. **In Praxedes Saisi & 7 others v Director of Public Prosecutions & 2 others) (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment)** Praxedes Saisi case the court stated that:

'*It is our considered opinion that the framers of the Constitution when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority.*'

158. The petitioners have sought for an order of certiorari quashing the establishment of the impugned committee. In the case **of Republic v Kenya National Examination Council Ex parte Gathenji and others Civil Appeal No.266 of 1996}},** the Court of Appeal stated inter alia:

"*an order of certiorari can only quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause. It is trite law that the remedy of Judicial Review is not concerned with the merits of the case but the decision-making process. In order for an applicant to succeed in an application for Judicial Review, he must satisfy the court that a public officer has acted unprocedural, that his decision was unreasonable and that the impugned decision was illegal.*''

159. Given that it has been established that the decision of the Cabinet Secretary was unconstitutional and ultra vires, it follows that there is no option but to quash the establishment of the impugned committee. Subject to the provisions of the Constitution, and from the Petitioners' standpoint, there are primarily issues of budgetary compliance and financial preparedness by a ministry when making ad hoc decisions that were not captured as items in the yearly budget, as provided for in the legislative scheme and budget line items. The financial

implications of such decisions are likely to negatively impact other budgeted items of the ministry, particularly in light of the current economic outlook. In this case, it is not an overstatement to say that the implications of this omission and its effect on the resultant act of the Cabinet Secretary cannot be underestimated.

160. Upon considering the pleadings, submissions, replying affidavits and attendant authorities, I find that the Petition is merited. In the premises, the Petition succeeds to the following extent: in its broadest form, the grounds set out in the Petition encompass illegality and impropriety rendering the decision-maker liable to be impeached by dint of judicial review under Article 23 of the Constitution based on an error of law. The powers exercised though conferred by the relevant statutes or legislation were used for a purpose different from that envisaged by the law under which they were granted to the Cabinet Secretary. This was a void decision being invalid from its inception and from the standpoint of the Constitution, it has no legal effect. For those reasons, the following declarations shall abide the Petition: -

a) *That a declaration be and is hereby issued that the establishment of National Health Insurance Fund (NHIF) Pending Medical Claims `Verification Committee through Gazette Notice No.4069 Vol. CXXVII No 64 of 28th March, 2025 was in contravention of Article 31 of the Constitution of Kenya 2010 as read with the Social Health Authority Act.*

b) *That a declaration be and is hereby issued that the establishment of the National Health Insurance Fund (NHIF) Pending Medical Claims Verification Committee through Gazette Notice No.4069 Vol. CXXVII No 64 of 28th March, 2025 has no constitutional or statutory basis and is therefore unconstitutional in its entirety.*

c) *That a declaration be and is hereby issued that the Cabinet Secretary has no powers under the Constitution or the National Government and Coordination Act to empanel an Ad Hoc committee and specifically the National Health Insurance Fund*

(NHIF) Pending Medical Claims Verification Committee through Gazette Notice No.4069 Vol. CXXVII No 64 of 28th March, 2025 is in breach of the letter and spirit of the Constitution.

d) *That an order of certiorari be and is hereby issued quashing the establishment of National Health Insurance Fund (NHIF) Pending Medical Claims Verification Committee through Gazette Notice No.4069 Vol. CXXVII No 64 of 28th March, 2025 f0r being illegal and tainted with impropriety as per the law established.*

e) *The Petitioners shall have the costs of this Petition.*

f) *It is so ordered.*

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH AUGUST 2025

……

R. NYAKUNDI

JUDGE

In the presence of:

Dr. Magare Gikenyi