

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E223 OF 2023

BETWEEN

CHARLES MUGANE.....
PETITIONER

AND

ATTORNEY GENERAL1ST
RESPONDENT

SECRETARY TO THE CABINET2ND
RESPONDENT

CLEOPHAS MALALA.....3RD
RESPONDENT

DAVID NDII.....4TH
RESPONDENT

MONICA JUMA.....5TH
RESPONDENT

HARRIETTE CHIGGAI.....6TH
RESPONDENT

CONSOLIDATED WITH
CONSTITUTIONAL PETITION NO. E240 OF 2023

JACKJOHN OWINO.....
PETITIONER

AND

ATTORNEY GENERAL1ST
RESPONDENT

SECRETARY TO THE CABINET2ND
RESPONDENT

AND

CLEOPHAS MALALA.....1ST
INTERESTED PARTY

DAVID NDII.....2ND
INTERESTED PARTY
MONICA JUMA.....3RD
INTERESTED PARTY
HARRIETTE CHIGGAI.....4TH
INTERESTED PARTY

J U D G M E N T

Introduction

1. The Petitions challenge the President of Kenya's decision Executive Order No. 2 of 2023 that allowed persons named as the 3rd, 4th, 5th and 6th Respondents in *Petition No. E223 of 2023* and Interested Parties in *Petition No. E240 of 2023* to attend cabinet meetings.
2. The Petitioners contend that this decision is unconstitutional for contravening the set constitutional standards relating to Kenya's Cabinet.

Petition E223 of 2023

3. The Petition dated 2nd July 2023 is supported by the Petitioner's affidavit in support of similar date and a further affidavit dated 14th July 2023. The Petitioner seeks the following relief against the Respondents:

- i. A declaration that the inclusion into cabinet meetings of the 3rd, 4th, 5th and 6th Respondents is unconstitutional, null and void.***

- ii. An order of mandamus do issue against the 2nd Respondent to exclude the 3rd, 4th, 5th and 6th Respondents from cabinet meetings in strict adherence of the provisions of Article 154 of the Constitution.**
 - iii. An order of prohibition do issue against the 3rd, 4th, 5th and 6th Respondents prohibiting them from attending any cabinet meetings.**
 - iv. Costs of this Petition be borne by the Respondents herein.**
 - v. Such other orders this Court shall deem fit pursuant to Article 23(3) of the Constitution.**
4. The Petitioner avers that on 27th June 2023, the Cabinet approved a decision to have the 3rd, 4th, 5th and 6th Respondents attend cabinet meetings. These parties are said to have then taken an oath of secrecy on the same day at State House.
5. The Petitioner posits that this is contrary to Article 152 of the Constitution. It is noted that these persons are not members of the cabinet and further hold various positions in the Ruling Political Party, United Democratic Alliance (UDA).
6. The Petitioner asserts that the continuous attendance of cabinet meetings by these Respondents raises constitutional questions which require this Court's determination. The Petitioner also argues that their attendance is unlawful, illegal, null and void ab initio as was done in total disregard of substantive and procedural, constitutional requirements.

7. Moreover, it is postulated that their attendance in the cabinet meetings seeks to establish a government other than the one provided in the Constitution which is offensive to the principle of good governance and the rule of law. In addition, the Petitioner questions the motive of these Respondents inclusion in the cabinet meetings.
8. Considering this, it is stated that these Respondents' inclusion is unconstitutional as contravenes Articles 2 (1) (2), 3, 10, 129, 130, 131, 132, 152, 153, 154, 156 and 258 of the Constitution. Additionally, it is argued that the inclusion of these Respondents did not conform to principles espoused under Article 10 of the Constitution. Furthermore, that the action is in violation of the Petitioner's legitimate expectation that the 1st and 2nd Respondents would conduct their affairs in line with the Constitution.
9. In light of the foregoing, the Petitioner challenges the cabinet's decision as inclusion of these Respondents, who are deemed as strangers, did not adhere to the constitutional process. Similarly, it is argued that their inclusion does not have any legal basis neither founded in any law. Likewise, it is said that the cabinet's decision was done without the Parliament's involvement. In sum, the Cabinet's decision is adjudged to be unconstitutional and unlawful thus null and void.

1st Respondent's Case

10. The 1st Respondent's response is neither in the Court file nor Court Online

2nd Respondent's Case

11. The 2nd Respondent's response and submissions are not in the Court file or in the Court Online Platform (CTS).

3rd Respondent's Case

12. The 3rd Respondent in reply to the Petition filed grounds of opposition dated 11th June 2024 on the premise that:

- i. The Petition and the offshoot Notice of Motion are still born, incompetent, bad in law and an abuse of the process of this Court.*
- ii. The Petition is imaginary, unfounded on unsubstantiated allegations with evidence heavily and/or solely gleaned on newspaper cuttings which is hearsay evidence pursuant to Section 86(1) of the Evidence Act, thus inadmissible and does not disclose any reasonable cause of action.*
- iii. The affidavit of the Petitioner, Charles Mugane, is incurably defective rendering the Petition incompetent as it contains hearsay evidence pursuant to Section 86(1) of the Evidence Act, in the nature of a newspaper article marked as annexure CM-1.*
- iv. The Petition is fatally incompetent as it is founded on false averments made in affidavit of the Petitioner. Charles Mugane, at paragraph 4 of the Affidavit in support of the Application and Petition that **"the Cabinet of the Republic of Kenya***

approved a decision to allow the 35 and if Respondents to attend cabinet meeting."

- v. *The Petitioner has not demonstrated infringement of any specific legal rights to warrant grant of orders sought.*
- vi. *It is meet and in furtherance of the overriding objectives of Article 159(2) of the Constitution and the Rules made thereunder for the timely disposal of proceedings that this Court peremptorily strike out the Petition and its offshoot Notice of Motion as an abuse of the process of the Court with costs to the Respondents.*
- vii. *The Petition neither discloses any constitutional violation by the 3rd Respondent nor demonstrated any prejudice that it will suffer if the orders sought are not granted.*
- viii. *The Petition is made in bad faith, the Petitioner has failed to bring to light any actions that amount to contravention of the spirit of the Constitution or any Act of Parliament, it has not proved the unconstitutionality of any portion and is frivolous and vexatious and a total waste of valuable judicial time resources.*
- ix. *The Petitioner has not provided any supporting evidence of the existence or possibility of breach of fundamental rights of any person and/or identifiable and likelihood of a breach or a threatened breach of a right, the issues raised are not justiciable and it is contra to an accepted tenement of law that a court of law is not expected to engage in abstract arguments merely out of apprehension.*
- x. *The provisions of Article 23(3) of the Constitution provides that it is in proceedings brought under Article 22 that a Court may grant appropriate*

relief, including a conservatory order, therefore, to the extent that the present petition is not premised on any allegation of denial, violation or threatened violation of the bill of rights there is no basis for issuance of the conservatory order sought.

13. The 3rd Respondent in addition filed his Replying Affidavit sworn on 11th June 2024. He informs that he is the Secretary General of the UDA Party. He states that as per the Party's Constitution, he is the spokesperson and manager of the Party. He as well calls for the Party meetings, supervises party policies and programs, writes and presents reports concerning the Party's activities.
14. He asserts that contrary to the Petitioner's assertions cabinet decisions are supposed to be made in writing. He claims that no such written decision and directive has been supplied by the Petitioner to substantiate his claims.
15. The 3rd Respondent depones that he has never attended any cabinet meeting including the 4th, 5th, and 6th Respondents. He notes that the same can be evidenced from the cabinet meeting minutes. Nonetheless, he argues that none of the cited Respondents are precluded from being invited or attending cabinet meetings.
16. In addition, he points out that the National Oaths and Affirmations are specifically provided for the President, deputy president, cabinet secretary, principal secretary,

judges, members of Parliament, speaker and deputy speakers. As such, he claims that it would be a legal fallacy to assert that a party not provided for in this provision, would undertake a similar oath. On this premise, he contends that the Petition is based on hearsay evidence which is not admissible.

17. That said, the 3rd Respondent posits that the Executive does not exist in isolation and the Cabinet is one of the mechanisms which the President uses to execute his mandate.
18. It is further stated that the Petitioner has not demonstrated the alleged infringement of any specific rights to justify grant of the sought orders. The 3rd Respondent as well argues that this Court does not have jurisdiction to direct the President on how to execute his constitutional mandate unless where there is outright abuse of power.
19. According to him, the Petition does not demonstrate any unlawfulness, illegality or unconstitutionality. To this end, he emphasizes that the Petitioner is not entitled to the sought reliefs and thus Petition ought to be dismissed.

4th Respondent's Case

20. The 4th Respondent's response and submissions are not in the Court file or Court Online Platform (CTS).

5th and 6th Respondents Case

21. These Respondents in opposition to the Petition filed their response dated 4th October 2024. They aver that the positions they hold being National Security Advisor and Women's Rights Advisor respectively, are vital for the operation and execution of specific government policies and objectives.
22. It is asserted that while the Constitution outlines the composition of the Cabinet under Article 152, it does not exclude the President from calling upon other advisors or officials such as themselves, to attend cabinet meetings in an advisory or consultative capacity.
23. Furthermore, it is argued that these advisory roles are in line with Executive functions. They state that their roles require interaction and collaboration with the cabinet to ensure effective governance.
24. These Respondents also aver that the Constitution allows for flexibility in the interpretation of executive powers. In this case, it is postulated that attendance of expert advisors, who are not formal cabinet members, falls within the scope of the President's executive authority under Article 131 of the

Constitution. In fact, it is noted that the said offices were in fact established pursuant to Executive Order No.2 of 2023.

25. Taking this into consideration, it is stated that there are no constitutional violations as alleged since their roles are strictly advisory and support the operations of the Executive. Nevertheless, it is stated that the Petitioner failed to specify the provisions which were violated in this matter.

Petition E240 of 2023

26. The Petition dated 7th July 2023 is supported by the Petitioner's affidavit in support of similar date. The Petitioner seeks the following relief against the Respondents:

i. A declaration that the decision to appoint and include the 1st, 2nd, 3rd and 4th Interested Parties into the business of the Cabinet with liberty to attend and participate in Cabinet meetings is unconstitutional, illegal and void ab initio.

ii. An order of prohibition barring the 1st, 2nd 3rd and 4th Interested Parties from attending any Cabinet meetings, Cabinet Committee meetings and/or discharging any functions of the Cabinet.

iii. Costs of the Petition.

27. This Petitioner equally depones that on 27th June 2023, the Interested Parties took an oath of secrecy at the State House and proceeded to attend the cabinet meeting on the same day.

28. The Petitioner decries this action as the Interested Parties are not members of the cabinet as envisaged under Article 152 of the Constitution. Their participation in cabinet affairs is thus deemed a breach of the Constitution.
29. Furthermore, he argues that the decision to include the Interested Parties contravenes Articles 3(2), 10 (2), 129, 130(1), and 152 (1) of the Constitution and violates the constitutional composition of the National Executive as set out under Article 130(1) of the Constitution.
30. The Petitioner additionally stresses that there is no legal justification for the Interested Parties inclusion in the cabinet and neither is the same founded in any law. Similarly, it is stated that the Interested Parties inclusion was not approved by the National Assembly and hence not clear how the Interested Parties will be supervised.
31. Correspondingly, the Petitioner avers that there was no public participation in making the decision to include the Interested Parties and thus decision was in violation of Article 10(2) of the Constitution.

Petitioner's Submissions

32. Mugane Law LLP filed submissions for the Petitioner in *Petition No. E223 of 2023* dated 30th May 2024. Counsel commenced by recapitulating that the 3rd, 4th, 5th and 6th Respondents' participation at cabinet meetings is illegal and

unconstitutional thus void. To support this claim, Counsel relied in Articles 132(2), 152, 153 and 154 of the Constitution.

33. Counsel submitted that these Respondents' appointment to the Cabinet was illegal since did not follow the due process outlined in the Constitution. It was stressed that these persons are strangers to the cabinet and do not constitute part of it. In addition, Counsel submitted that this decision was not supported by any law and neither approved by the Parliament.
34. On this basis, Counsel urged the Court to intervene owing to the apparent breach of the Constitution by the Respondents. Reliance was placed in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2015] KESC 15 (KLR)** where it was held that:
- "The Constitution should be interpreted in a holistic manner, within its context, and in its spirit."*
35. Like dependence was placed in **Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others [2013] KESC 7 (KLR)** and **Apollo Mboya v Attorney General & 2 others [2018] eKLR**.
36. Counsel stressed that all persons including the executive and its leadership must exercise State authority to the

extent expressly permitted by the Constitution and anything contrary as in this case, is illegal, null and void. Reliance was placed in **Affordable Medicines Trust and Others v Minister of Health and Another (CCT27/04) [2005] ZACC 3** where it was held that:

“The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive ‘are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law’. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.”

37. Additional dependence was placed in **Wahome v Attorney General & 2 others [2021] eKLR**.

1st Respondent’s Submissions

38. The 1st Respondent through Senior State Counsel Christopher Marwa filed two sets of submissions dated 6th November 2023 and 9th July 2024. Counsel underscored the issues for discussion as follows: *the sub judice rule, whether the 3rd, 4th, 5th and 6th Respondents are Cabinet Secretaries and therefore bound by the provisions of Article 152 of the Constitution and whether the inclusion of the 3rd, 4th, 5th and*

6th Respondents' to attend Cabinet meeting is unconstitutional.

39. In the first issue, Counsel informed that subsequent to filing of this Petition, three other parallel Petitions being: *Nairobi High Petition No. E295 of 2023; Operation Linda Jamii (Publicly Known as Operation Linda Gatuzi) (Suing Through Its Officials) Vs. The Honourable Attorney General & 5 Others; Nairobi High Court Petition No. E299 of 2023; Prof. Fredrick Ogola & Another Vs. Hon. Ag & Others; and Nairobi Hcpt No. E240 of 2023; Jacjohn Owino Vs. The Hon. Attorney General & Others* were filed.
40. Counsel submitted that these Petitions were offensive to the doctrine of sub judice and thus urged that the same be stayed pending determination of this suit. Reliance was placed in **Migos-Ogamba & Co. Advocates v Kenindia Assurance Co. Ltd [2021] eKLR** where it was held that:

“The doctrine of sub judice prohibits courts from entertaining and adjudicating upon matters pending before courts of competent jurisdiction. The doctrine is codified in section 6 of the Civil

Procedure Act thus:

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim,

litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed”

41. Like dependence was placed in **Republic v Paul Kihara Kariuki, Attorney General & 2 Others Ex parte Law Society of Kenya [2020] eKLR, Darren Mutinda v Kisii University, Kisii University Council, Fredrick Wanyama, C.S. Ministry of Education & Attorney General [2022] eKLR** and **Leonard Omullo v National Land Commission [2021] eKLR**.
42. On the second issue, Counsel submitted that there was no decision of the cabinet pursuant to the provisions of Article 153(1) of the Constitution, to incorporate the 3rd, 4th, 5th and 6th Respondents as members of the cabinet neither did the President nominate them. As such, Counsel contended that the Petition was premised on a misunderstanding of the law and how the operations of the Cabinet are conducted.
43. Furthermore, Counsel submitted that by dint of Article 132(3) of the Constitution, the President is clothed with powers of directing and coordinating the functions of ministries and government departments and so may invite any person or persons to attend cabinet meetings in relation to any agenda item.

44. On the third issue, Counsel reiterating his argument submitted that the President under Article 132(3) of the Constitution is empowered to invite persons other than Members of the Cabinet to attend Cabinet meetings and that nothing in this Article supports the Petitioners allegations. Counsel noted that the 3rd to 6th Respondents play a critical role in enhancing delivery of quality advice to the President and to the Cabinet Secretaries.
45. Counsel submitted further that there is no law that precludes any person from attending Cabinet meeting and therefore the attendance of the 3rd to 6th Respondents to Cabinet meetings is prima facie legal and constitutional. To support this claim, Counsel relied on the General Power of Competence Principle which is derived from the legal maxim that states *“Everything which is not forbidden by law is allowed”*.
46. Counsel noted that while it is possible to abuse this principle, the Constitution provides robust and sufficient safeguards to ensure that this does not arise through the system of Checks and Balances which threads throughout the Constitution and ensures that the public interest is always protected at all times.
47. Equally, Counsel relying in the Stewardship principle submitted that the President can, by virtue of the

Stewardship Principle take necessary steps and measures to ensure that he discharges his function efficiently and effectively provided the same does not infringe on the rights of others and abrogate the rule of law. According to Counsel this includes invitation of the 3rd to 6th Respondents to attend cabinet meetings and provide professional advice. Finally, Counsel also noted that the Petitioner had not adduced any evidence to demonstrate that this decision had infringed any persons' rights.

3rd Respondent's Submissions

48. The 3rd Respondent's submissions are not in the Court file or Court Online Platform (CTS).

5th and 6th Respondents' Submissions

49. On 5th October 2024, these Respondents through Lumumba Ayieko Advocates filed their submissions.
50. According to Counsel, the attendance of the cabinet meetings by these Respondents is justified under the Constitution, relevant laws, and international best practices.
51. To commence with Counsel submitted that the Constitution under Article 131(1)(b) of the Constitution vests the President with executive authority which is to be exercised in a manner compatible with the principle of service to the

people of Kenya and for their well-being and benefit as enunciated in Article 129(2).

52. Counsel noted that one of the ways in which this is done is by virtue of Article 132(4) of the Constitution which grants the President an opportunity to express his executive authority through performing any other executive function provided for in the Constitution or in national legislation.
53. In this matter, Counsel submitted that the appointment of these Respondents was purely advisory in nature and contrary to the Petitioners' assumptions, they do not form part of the Cabinet within the meaning under Article 152 of the Constitution. It was further averred that the Constitution does not prohibit the President from seeking advice from individuals who are not formal members of the cabinet but possess the necessary expertise to inform executive decisions. Counsel thus stated that the inclusion of these Respondents was not unconstitutional.
54. Counsel submitted that the Constitution under Article 259 directs that it should be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights and permits the development of the law; and contributes to good governance.

55. Reliance was placed in **Apollo Mboya (supra)** where it was held that:

“Constitutional provisions are to be ‘broadly, liberally and purposively’ interpreted so as to avoid what has been described as the ‘austerity of tabulated legalism.’ It is also true to say that situations may arise where the generous and purposive interpretations do not coincide. In such instances, it was held that it may be necessary for the generous to yield to the purposive...”

56. Comparable reliance was placed in **Trusted Society of Human Rights Alliance v. Attorney General & 2 Others [2012] eKLR, Peter O. Ngoge v. Francis Ole Kaparo & 5 Others [2007] eKLR, and International Centre for Policy and Conflict & 5 Others v. Attorney General & 4 Others [2013] eKLR.**
57. Counsel submitted that Article 239(1) of the Constitution underscores the importance of national security in the governance of the Country and the President’s authority to make decisions concerning national security. It is noted that the 5th Respondent being the National Security Advisor provides crucial information and guidance on security matters, making her attendance at cabinet meetings a necessity.
58. Counsel averred that such attendances are not unique to Kenya as many other countries such as the United States of America, the National Security Advisor though not a formal

member of the cabinet, attends cabinet and National Security Council meetings to provide the President with specialized advice on national security. Counsel noted that President's wide powers was also acknowledged by the U.S. Supreme Court in **Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)** which was cited in support.

59. A similar experience is seen in Canada as also acknowledged by its Supreme Court in (**Prime Minister) v. Khadr, 2010 SCC 3**). In addition, Counsel highlighted a comparative analysis of the same as seen in Ghana, South Africa, Nigeria, France, United Kingdom, Germany, Rwanda and Somalia.
60. Parallel sentiments were also submitted with reference to the 6th Respondent's role as Advisor on Women Rights. Reliance was placed **in Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR** where the Supreme Court emphasized the importance of gender inclusivity in governance.
61. Counsel further submitted that the national values and principles of governance outlined in Article 10 of the Constitution promote inclusivity, participation of the people, human dignity, equality, and good governance. It was argued that the participation of the 5th and 6th Respondents at cabinet meetings reflects these values by ensuring that

critical issues related to national security and women's rights are adequately considered in the executive decision making.

62. To buttress this point reliance was placed **in Republic v. Independent Electoral and Boundaries Commission IEBC) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR** where the Court recognized the importance of involving expert advisors in executive decision-making processes.
63. To that end, Counsel submitted that jurisprudence emanating from the precedents reinforce the argument that the Constitution allows for flexibility in the President's execution of executive functions. Considering this, the attendance of these Respondents as advisors is within the President's discretion and is consistent with the principles of inclusivity, good governance, and effective decision-making and also consistent with global practices. On this foundation, Counsel concluded that the Petitioner's claim lacks merit and so should be dismissed.

Analysis and Determination

64. It is my considered take that the issues that arise for determination in this matter are as follows:

- i. *Whether there was inclusion of the 3rd, 4th, 5th and 6th Respondents into the Cabinet, and if so, whether it is unconstitutional.*
- ii. *Whether the Petitioners are entitled to the relief sought.*

Whether there was inclusion of the 3rd, 4th, 5th and 6th Respondents into Cabinet and if so, whether it is unconstitutional

65. The first limb of this issue is an assertion of fact which must be established by means of evidence whereas the second limb will be a question of application of those facts to the relevant constitutional provisions, where if the matter is not expressly covered could require constitutional interpretation.
66. In the affidavit in support of the Petition, the Petitioner in Petition E223 of 2023 deposed as follows in paragraphs 4, 5, 6 and 7 of the affidavit sworn on 2nd July, 2023:

“4. That on 27th June 2023 the Cabinet of the Republic of Kenya approved a decision to allow the 3rd, 4th, 5th and 6th Respondents to attend Cabinet meetings which act is unconstitutional by the meaning of Article 152 of the Constitution of Kenya 2010.

“5. That further and on the same day, the 3rd, 4th, 5th and 6th Respondent took an oath of secrecy to attend their first meeting.”

“6. That the said inclusion of the 3rd, 4th, 5th and 6th Respondent was widely reported in major newspapers of national wide circulation (annexure CM-1 dated 29/6/2023).”

67. Responding to the above deposition by the Petitioner, the 3rd Respondent refuted the allegations and stated that the Petition is based on imaginary, unfounded and unsubstantiated inadmissible hearsay statements contained in newspaper articles asserting that he has never attended any cabinet meeting that included the 3rd, 4th, 5th and 6th Respondent. He further pointed out a Cabinet decision as alleged by the Petitioner ought to have been contained in writing by dint of Article 153 (1) which the Petitioner had not provided.
68. It is trite law that he who alleges must prove. That principle has been upheld by the Courts in many judicial decisions. In **Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] KESC 66 (KLR)** the Supreme Court of Kenya stated thus:

“[49] Section 108 of the Evidence Act provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[50] This Court in Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

69. Similarly, in **Edward Akong'o Oyugi & 2 others v Attorney General [2019] KEHC 10211 (KLR)**, the Court held:

“73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd[38] :-

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such

prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.”

70. The question thus becomes, has the Petitioner established that the Respondents were included in the Cabinet based on the facts supplied in this case to enable the Court proceed to determine the constitutionality or otherwise of that decision?

71. Firstly, the Petitioner in paragraph 4 of the supporting affidavit asserts unequivocally as follows:

“4. That on 27th June 2023 the Cabinet of the Republic of Kenya approved a decision to allow the 3rd, 4th, 5th and 6th Respondents to attend Cabinet meetings which act is unconstitutional by the meaning of Article 152 of the Constitution of Kenya 2010”

72. That is a positive assertion that ought to have been established by credible evidence. Article 153 (1) of the Constitution provides as follows:

“A decision of the Cabinet shall be in writing”

73. Despite making the claim that the decision was a Cabinet decision, the written decision of the Cabinet envisaged by Article 153 (1) of the Constitution was not exhibited by the Petitioner to ascertain the allegation the decision was that of the Cabinet of the Republic of Kenya as asserted.

74. The Petitioner instead relied newspaper reports to prop up his claim. He states at paragraph 6 of the supporting affidavit:

“6. That the said inclusion of the 3rd, 4th, 5th and 6th Respondent was widely reported in major newspapers of national wide circulation (see annexure CM-1 dated 29/6/2023).”

75. In my humble view, while newspaper articles is the proof of what is reported, it is not the proof of truth of what is contained in that report. To get the truth, the primary source upon which the report is based is what should have been adduced. A newspaper report is secondary evidence and I agree with the 3rd Respondent it is not reliable as it can be prone to manipulation.

76. In essence, Petition stands on quick sand, it is not cogent and reliable evidence that the Court can comfortably rely on to arrive at a concrete finding. This finding is sufficient to dispose of this Petition because without the factual support, the Court may not now consider the legal implication of the alleged decision.

77. Nevertheless, I would still proceed and consider what would have been the result had the Petitioner been able to substantiate the fact of inclusion of non-cabinet members into the Cabinet as this is not a new phenomenon in this country since it is not the first time this question has found

its way into the High Court of this Country. The High Court was faced with a similar case, the case of **Alice Muthoni Wahome v Attorney General & 2 others (Petition E277 of 2020) [2021] KEHC 73 (KLR) (Constitutional and Human Rights) (23 September 2021) (Judgment)** where the facts were similar. In case that the 3rd respondent who was the Director-General of the Nairobi Metropolitan Services had taken an oath of secrecy that allowed him to attend Cabinet meetings and participate in Cabinet committee meetings. The petitioner contended that the 3rd respondent was not a member of the Cabinet as established under Article 152 of the Constitution and that his participation in Cabinet affairs was in breach of the Constitution.

78. This fact, unlike in the present case was established through an official press release issued on September 10, 2020 at State House by the Spokesperson, **Kanze Dena Mararo**, which was undisputed which read as follows:

“Taking of the Oath of Secrecy by the Director General of Nairobi Metropolitan Services”

His Excellency the President this morning witnessed the taking and sub-scription to the Oath of Secrecy by Major General Mohammed Abdalla Badi, the Director-General of the Nairobi Metropolitan Services (NMS), a requirement of all persons who attend Cabinet Meetings or participate in the conduct of Cabinet Business. The Director-General shall henceforth attend all

meetings of Cabinet and its Committees, pursuant to Executive Order No. 3 of 2020. The Ceremony conducted by the Head of the Public Service was a precursor to the Cabinet Meeting held at State House, Nairobi on this Tenth Day of September the Year of our Lord Two Thousand and Twenty.

79. No such acknowledgment was made by the Respondents in the instant Petition. Indeed, in the present suit, the Petitioner's claims were denied and proof of the allegations demanded.

80. In the former case, **Justice A.C. Mrima** then held:

"... If Kenyans had wanted to credit the President with the discretion to appoint any other person or persons into the Cabinet, I believe the Kenyans would have expressly stated so in the Constitution. The Constitution and/or the law would have further provided for inter alia the criteria and procedures for such appointments, the mandate of such persons among other pertinent considerations.

58. *The respondents readily admit that the 3rd respondent is not President, the Deputy President, the Attorney General or one of the Cabinet Secretaries. Further, apart from the constrained interpretation of Article 132 of the Constitution, the respondents have not made any reference to any law or decisional authority on the inclusion of the 3rd respondent into the Cabinet. In short, there is no legal justification for the 3rd respondent's presence in the Cabinet....*

60. *There is also no doubt that the appointment of the 3rd respondent into the Cabinet was not approved*

by the National Assembly. As such, it is unclear as to by whom and how the 3rd respondent will be oversighted. The term of office of the 3rd respondent in the Cabinet also remain an illusion...”

81. The issue of whether non-cabinet members can be appointed and allowed to attend Cabinet meetings is thus settled from a constitutional vantage point.
82. However, I think a thin line must be drawn between permanent inclusion of non-cabinet members attending meetings on regular basis and occasional invitation of experts or advisors into the meetings of the Cabinet on a need basis to advise on specific policy matters being considered by the Cabinet. The Cabinet should retain the power to make such discretionally invitations. Neither the Constitution nor any law that I am aware of expressly bars the Cabinet or the President from seeking counsel for purposes of having the Cabinet benefit from experts before making policy decisions on a matter before it. I do not therefore think that it is business of this Court to interpret that legal gap in a manner that constrains discretion of the Cabinet or even the President on an internal operational matter within the Executive Branch. A permanent inclusion allowing regular attendances of non-cabinet members into meetings of Cabinet, however would run afoul Article 152 (1)

of the Constitution as it is tantamount to an unconstitutional expansion of the Cabinet.

83. All in all, given that the Petitioner did not tender credible proof of permanent inclusion into the Cabinet meetings of the three respondents, this consolidated Petition must inescapably fail and is hereby dismissed.

84. I make no orders as to costs.

Dated, signed and delivered virtually at Nairobi this 13th day of August, 2025.

.....
L N MUGAMBI
JUDGE