REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E389 OF 2023

EKURU AUKOT.....1ST PETITIONER

MIRURU WAWERU.....2ND PETITIONER

THIRDWAY ALLIANCE KENYA.....3RD PETITIONER

VERSUS

THE NATIONAL SECURITY COUNCIL.....1ST RESPONDENT

INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE.....2ND RESPONDENT

CABINET SECRETARY MINISTRY OF INTERIOR AND NATIONAL ADMINISTRATION.....3RD RESPONDENT

SPEAKER OF THE NATIONAL ASSEMBLY....4TH RESPONDENT

ATTORNEY GENERAL.....5TH RESPONDENT

WILLIAM SAMOEI RUTO.....6TH RESPONDENT

AND

LAW SOCIETY OF KENYA.....INTERESTED PARTY

JUDGEMNT

Introduction

1. In July 2023, the Government announced that Kenya was ready to deploy 10000 police officers to Haiti to assist in curbing insecurity in that country. On 2nd October 2023, The UN Security Council passed Resolution 2699 (2023) approving deployment of a multinational security support to Haiti to be led by Kenya.

2. On 3rd October 2023, the President issued a statement hailing the passing of the Resolution for deployment of the Multinational Security Support (MSS) mission and Kenya's willingness to play its role. The Cabinet Secretary ministry of interior and national administration, (CS Interior), reiterated the fact that Kenya would deploy police officers to Haiti subject to parliamentary approval.

3. Following the announcement on the deployment, *Ekuru Aukot, Miruru Waweru,* and *Thirdway Alliance Kenya,* a political party, (Petitioners), filed a petition dated 6th October 2023 against the *National Security Council;* (the Council), *Inspector General of the National Police Service;* (IG); C S Interior); Speaker of the National Assembly (the Speaker); the Attorney General (Attorney General) and Dr. William Samoei Ruto, the President of the Republic of Kenya, (the respondents), challenging the decision to deploy police officers to Haiti as unconstitutional.

4. The Law Society of Kenya was joined in these proceedings as an interested party.

The Petitioners' case

5. The petitioners argue that the decision to deploy 1000 police officers to Haiti contravenes the Constitution and the law. The petitioners state that the President's statement hailing the UN Security Council's Resolution approving deployment of police officers, confirmed Kenya's decision to deploy police officers to Haiti.

6. The petitioners assert that police officers cannot be deployed outside the country and that the respondents are bound by national values and principles of good governance in articles 10 and 232(1) of the Constitution when discharging their mandate.

7. The petitioners state that the decision to deploy police officers is unconstitutional because it is only the Council that can deploy defence forces outside the country with approval of Parliament. The decision was also made without public participation, in breach of the constitution.

8. The petitioners rely on the decision in *Crown Berger Kenya Ltd v Kalpech Vasuder Devan and another* (Civil Case No. 246 of 2006 (UR) to argue that failure to file a replying affidavit to introvert facts, amounts to admission of those facts.

9. The petitioners again rely on *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR; *Raila Odinga v the Independent Electoral and Boundaries Commission and 3 others* [2013] eKLR and *Nicholas Kiptoo Arap Korir Salat v the Independent Electoral and*

Boundaries Commission and 6 others [2013] eKLR to support their position.

10. The petitioners further challenge the constitutionality of sections 107,108 and 109 of the National Police Service Act. It is the petitioners' case, that the National Police Service is a national service that operates within Kenya and cannot be deployed outside the country. The petitioners take the view, that by allowing deployment of the service outside the country under reciprocal arrangements, the sections are inconsistent with articles 240(8) and 243(3) of the Constitution which only allow Kenya Defence Forces to be deployed outside Kenya.

11. The petitioners also contend that there is no reciprocal arrangement between Kenya and Haiti, thus the respondents' decision is unlawful since there was no request from the government of Haiti for the deployment to that country even on reciprocal arrangement.

12. The petitioners invite the Court to appreciate the distinction between *"Forces"* and *"Service"* in articles 241 and 243 of the

Constitution and that the fact that functions of the national forces and national police service are distinct. In the petitioner's view, article 240 (8) is clear that only the national forces can be deployed outside Kenya.

13. The petitioners assert that the decision to deploy the national police service to Haiti did not comply with the principles of national security under article 238 (2) (b) of the Constitution and public participation in article 10 of the Constitution.

14. The petitioners rely on the principles of constitutional interpretation in articles 2, 159(2) (e) and 259 of the Constitution and the decisions in *re the Matter of Kenya National Commission on Human Rights* [2014] eKLR; *Attorney General v Law Society of Kenya & 4 others* [2019] eKLR; *U.S v Butler,* 297 U.S. 1[1936]; *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR to support their case.

15. The petitioners further rely on *Tinyefuza v Attorney General of Uganda,* (Constitutional Petition No. 1 of 1997 (1997 UGCC 3); *Ndyanabo v Attorney General of Tanzania* [2001] EA 495 and

Coalition for Reforms & Democracy & Others v Republic of Kenya & 10 others, (Petition No 628 of 2014 consolidated with Petition Nos 630 of 2014 & 12 of 2015), to argue that sections 107, 108 and 109 are constitutionally invalid.

16. On the respondents' contention that the petition offends the doctrine of ripeness and exhaustion, the petitioners argue that these doctrines are not applicable in this petition because the impugned decision is from the executive arm of the government and can only be challenged in court under Article 165 of the Constitution.

17. The petitioners therefore urge that the petition is well founded and meets the threshold in *Anarita Karimi Njeru v The Republic* [1979] eKLR and *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.

18. Regarding joining the President in this petition, the petitioners stress that the President has been sued in his official capacity and not in a personal capacity.

19. The petitioners contend that the respondents' actions have been made in disregard of the Constitution and the law. They seek the following reliefs:

i. *A declaration that the act of deploying police officers to Haiti is unconstitutional illegal and void.*

ii. *A declaration that police officers cannot be deployed outside Kenya.*

iii. *A Declaration that Sections 107,108 and 109 of the National Police Service Act, which provide for deployment of the service under reciprocal arrangements with reciprocating countries, are unconstitutional since they offend Articles 240(8) and 243(3) of the Constitution which provide respectively that only Kenya Defence Forces can be deployed out Kenya and that the National Police Service is a national service and shall function throughout Kenya.*

iv. An Order prohibiting the Respondents from deploying police officers to Haiti or any other country other than within the boundaries of Kenya.

v. Costs of the Petition.

vi. Any other orders that the court may deem just and fit to grant as the justice of this case may permit.

CS Interior's case

20. The CS Interior opposes the petition through a replying affidavit and written submissions. The CS Interior argues that the petitioners have misconceived the government's action because no determination had been made on the deployment of the police officers to Haiti, making the petition is premature, bad in law and an abuse of Court process.

21. The CS Interior states that the government of Haiti through Prime Minister, appealed to the UN Security Council for deployment of a

Multinational Security Support Mission to assist its national police in countering organized crime which had caused political impasse, deteriorating security and humanitarian situation.

22. Following a meeting of the Council of Ministers, a decision was made which adopted a resolution authorizing the call for assistance from international partners.

23. A letter dated 8th October 2022 was sent to UN Security Council which the UN Secretary-General passed on to the President, outlining options for enhancing security support for Haiti. Establishment of an international police task force and the multinational special force were deemed appropriate options. Some countries responded to the call, including Kenya, Jamaica, Barbados, Antigua and Barbuda.

24. The CS Interior states although the process had stalled due to absence of a country to lead a Multinational Security Support Mission, on 29th July 2023, Kenya's Foreign Affairs Minister announced the Government's acceptance to positively consider leading a

Multinational Force to Haiti and to deploy 1000 police officers to Haiti to assist Haitian police to restore normalcy.

25. The CS Interior further states that on 21st September 2023, the President addressed the 78th Un General Assembly and underscored the urgent need for global solidarity and collaborative action to address the suffering of the people of Haiti.

26. According to CS Interior, UN Security Council passed Resolution 2699 (2023) on 2nd October 2023 authorizing deployment of a Multinational Security Support (MSS) Mission, headed by Kenya, in close cooperation and coordination with the government of Haiti, for an initial period of 12 months, with a review after nine months.

27. O 8th October 2023, the CS Interior informed the public that the request to deploy police officers to Haiti would be subject to Parliamentary approval in accordance with the Constitution.

28. The Council then made a decision on 13th October 2023 to deploy police officers to Haiti and the decision was transmitted to

Parliament for consideration in accordance with Article 240(8) of the Constitution.

29. The CS Interior argues, therefore, that since the process of approval was pending before Parliament, the petition offends the principle of ripeness, and the doctrine of separation of powers which enjoin courts to show deference to the independence of Parliament.

30. The CS Interior urges the Court not to intervene at this stage and allow parliamentary process to conclude. The petitioners have an opportunity to raise their concerns before Parliament in accordance with the Parliamentary Standing Orders.

31. The CS Interior relies on the Supreme Court decision in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* [2014] eKLR, to argue that the petitioners' concerns can be dealt with during the Parliamentary deliberations in accordance with article 119 of the Constitution and the Standing Orders.

32. On whether police officers can be deployed outside the country, the CS Interior answers in the affirmative, asserting that a holistic interpretation requires that article 240 (8) be read alongside article 239 of the Constitution. The CS Interior takes the position that national forces referred to in article 240 (8) means the Kenya Defence Forces, National Intelligence Service and the National Police Service, collectively.

33. The CS Interior maintains that the Council has power to deploy any of the three security organs outside the country under the circumstances enumerated in article 240 (8) (a).

34. On the constitutionality of sections 107,108 and 109, the CS Interior argues that the petitioners' interpretation is not in line with the principle that the Constitution be interpreted in a holistic manner as espoused in *Communications Commission of Kenya decision* (supra).

35. The CS Interior takes the view, that the National Police Service Act was enacted pursuant to article 239 (6) of the Constitution and for that reason, the object of the Act, (as stated in section 3), was to give

effect to articles 238, 239, 243, 244 and 247 of the Constitution, but not article 240 (8). The Council's mandate to deploy the National Police Service is guided by article 240 (8) and not the provisions of the Act.

36. The CS Interior takes the further view, that the relief sought against deployment invites the Court to interfere with the process before Parliament. The CS Interior relies on the Supreme Court decision in *Justus Kariuki Mate & another v Martin Nyanga Wambora & another* [2017] eKLR, that the doctrine of separation of powers requires that no arm of government should encumber another thereby causing a stall in the dispensation of a constitutional mandate.

37. Further reliance is placed on *Charity Kaluki Ngilu v County Assembly of Kitui & 2 others* [2020] eKLR for the same position.

Speaker's case

24 The Speaker also opposes the petition through grounds of opposition and the same position as CS Interior, that the petition is not justiciable and violates the doctrine of ripeness and exhaustion.

25 The Speaker argues that Parliament has to exercise its mandate under Article 240(8) of the Constitution with respect to approval of the deployment of police officers to Haiti. During that exercise, petitions may be presented over the issue during public participation. This petition, therefore, contravenes the doctrine of exhaustion and the Court ought to decline jurisdiction in deference to Parliament.

26 The Speaker relies on the decisions in *Wanjiru Gikonyo and 2 others v National Assembly of Kenya & 4 others* [2016] eKLR; *Justus Kariuki Mate*(supra) and *Law Society of Kenya v Attorney General & another; National Commission for Human Rights & another (Interested Parties)* [2020] eKLR to support its position.

27 Regarding the constitutional validity of the impugned sections, the Speaker maintains that the sections do not contravene article 240 (8) or any other article in the Constitution.

28 The Speaker again argues that the petition as pleaded does not comply with the principle that a petition should specifically plead the contraventions alleged as laid down in the *Anarita Karimi Njeru case* (supra). There is also no proof on how the impugned sections violate articles 238, 240(8), 118(1) (b) and 243(3).

29 The Speaker points out that according to article 239(1), national security organs are the Kenya Defence Forces, the National Intelligence Service and the National Police Service. The National Police Service Act permits deployment of Police officers outside Kenya on reciprocal arrangements to reciprocating countries.

Attorney General's case

30 The Attorney General also opposes the petition through grounds of opposition and written submissions. Just like the other respondents,

the Attorney General argues that the petition is premature and is non-justiciable on account of the legal principle of ripeness; the doctrines of exhaustion and constitutional avoidance. The Attorney General urges the Court to decline jurisdiction in deference to Parliament.

31 The Attorney General takes the view, that applicability of article 240 is not contingent upon any further legislation. The petition is, therefore, not ripe as parliament will have a say on the deployment.

32 The Attorney General places reliance on *Kiriro wa Ngugi & 19 others v Attorney General & 2 others* (Nairobi Constitutional Petition No. 254 of 2019, [2020] eKLR that a dispute is not ripe if it has not passed the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made.

33 The Attorney General further relies on the decisions in *National Assembly of Kenya & another v Institute for Social Accountability & 6 others* (Nairobi Civil Appeal 92 of 2015); [2017] eKLR and *Wanjiru Gikonyo* (supra).

34 The Attorney General again relies on *Speaker of National Assembly v Karume* [1992] KLR 21, that where there is a clear procedure prescribed by the constitution or a law for redressing any particular grievance, that procedure should be strictly followed

35 On the constitutional validity of the impugned sections, the Attorney General's position is that they are constitutional since the sections do not in any way limit the authority of either the Council to deploy national security organs or Parliament to approve such deployment.

36 According to the Attorney General, the President has a responsibility to ensure that the country fulfills its international obligations which is reflected in Part XIV of the National Police Service Act. The impugned sections ought to be construed with regard to the provisions of Part 1 section 7 of the Fourth Schedule to the Constitution, that police services are a constitutional function of the National Government.

37 The Attorney General takes objection to joining the President in this petition, arguing that the President enjoys constitutional immunity from civil proceedings.

38 The Attorney General relies on the Supreme Court decision in *Attorney-General & 2 others v Ndii & 79 others; Prof. Rosalind Dixon & 7 others (Amicus Curiae)* (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR), (*Ndii case*); *Matindi & 3 others v National Assembly of Kenya & 4 others; Controller of Budget & 50 others (Interested Parties)* (Petition E080, E084 & E150 of 2023 (Consolidated)), [2023] KEHC 19534 (KLR) (Constitutional and Human Rights) (3 July 2023) (Judgment).

Law Society's case

39 The Law Society supports the petition to the extent that the Council has no mandate to deploy police officers outside the country. This is because National Police Service's mandate is to promote national

security in accordance with the principles under article 238(2) and the dictates in article 243(3).

40 The Law Society, however, agrees with the respondents that under article 240 (8), the Council may, with the approval of Parliament, deploy national forces outside Kenya for regional or international peace support operations or other support operations. The Law Society notes, however, that this mandate does not apply to National Police Service.

41 The Law Society takes the position that police officers can only be deployed under reciprocal arrangement to a country with a reciprocal agreement with Kenya under sections 107 and 108 of the National Police Service Act

42 The impugned sections, the Law Society argues, outline conditions precedent before deployed of members of the National Police Service outside Kenya. Any deployment without fulfilling those conditions is illegal and void.

43 It is the Law Society's case, that Kenya and Haiti do not have reciprocal agreement as required by sections 107 and 108. The Law Society argues, therefore, that the proposed deployment is unconstitutional, illegal and void.

44 According to the Law Society, the Council's belated decision to deploy police officers was intended to side step this petition. Similarly, the communication by the Speaker was made on 25th October 2023 when the petition was already before court, hence the petition was properly filed.

45 The Law Society further argues that UN Security Council Resolution 2699 (2023) could not be the basis for the deployment of police officers since the Resolution does not bind Kenya in terms of international law obligations, given the conditions precedent in section 108 which must be satisfied before deployment of police officers outside Kenya. The deployment must also be to a reciprocating country under section 107 of the Act.

46 In the circumstances of this petition, the Law Society argues, a bilateral treaty should have been in place in order to operationalize a reciprocal agreement and give effect to sections 107 and 108, thus pass the requirement under article 2(6) of the Constitution and the Treaty Making and Ratification Act.

47 The Law Society asserts that without complying with the law, the President did not satisfy the reciprocal provisions under Part XIV of the National Police Service Act and, therefore, Haiti is not a reciprocating country for purposes of deploying police officers to that country.

48 It is the Law Society's further assertion, that statements by the President and CS Foreign Affairs were seen to have created international obligations which was a threat to the Constitution within the meaning of articles 22(1) and 258(1) of the Constitution. This is because the statements were representations of Kenya's commitment to the Republic of Haiti whilst aware that police officers cannot be deployed without complying with sections 107 and 108.

49 The Law Society cites the decision of the Constitutional Court of South Africa in *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* (CCT 19/07) [2008] ZACC that:

> *Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude.*

50 The Law Society emphasizes that deployment of police officers must pass the test of the rule of law as required by the Constitution. The general rules of international law are subordinate to the Constitution and a decision made under international law should be in accord with the Constitution.

51 On the argument that UN Resolutions are not binding on Kenya, the Law Society cites the decision in *Legal Consequences for States of*

the continued Presence of South Africa (South West Africa) notwithstanding Security Council Resolution 276(1970) (The Namibia Advisory Opinion Case) (para 114) and *The Rapertoire of the Practice of the Security Council.*

Determination

52 I have considered the pleadings, arguments by parties as well as the decisions relied on. I have distilled three issues determination, namely: whether the petition is premature, whether the impugned sections are unconstitutional and whether police officers can be deployed outside the country.

53 Before delving into the main issues, let me dispose of the question raised by the Attorney General, that the President should not have been joined into these proceedings.

54 The Attorney General, though not appearing for the President, has raised this issue, drawing this Court's attention to the Supreme Court decision in the *Ndii case*.

55 The Attorney General takes the position that the President has a constitutional immunity and, therefore, civil proceedings cannot be brought against the President while in office.

56 The petitioners argue that the President has been sued in his official capacity and not in a personal capacity, thus the office is properly sued.

57 Whether the President can be sued or not was dealt with in the *Ndii case* at the High Court and the Court of Appeal where both Courts held that civil proceedings can be instituted against the President while in office if the President has acted outside the Constitution.

58 On further appeal to the Supreme Court, the Supreme Court reversed holding by the High Court and the Court of Appeal. The Supreme Court held that civil proceedings cannot be instituted in any court against the President or the person performing the functions of

the office of the President during their tenure of office in respect of anything done or not done under the Constitution.

59 The Supreme Court further held that article 143(2) of the Constitution grants immunity to the President by protecting the President from civil proceedings during his tenure in office for actions or omissions connected with the office and functions of that office.

60 Following the holding by the Supreme Court, it is settled law that the President cannot be sued while in office for anything done or not done while in that office. For that reason, the petitioners could not lawfully include the name of the President in these proceedings, whether in his personal or official capacity. The President's name is struck out from these proceedings.

Whether the petition is premature

61 The respondents argue that the petition is premature, thus offends the doctrine ripeness. The respondents further argue that the petition offends the doctrine of exhaustion. According to the respondents, the

petition was filed before Parliament determined the issue of deployment and, therefore, this Court should decline jurisdiction and allow Parliament to consider the issue in exercise of its constitutional mandate under article 118 of the constitution and the parliamentary Standing Orders.

62 The petitioners and the Law Society disagree and take the position that this Court has jurisdiction because the issues raised are on the constitutionality of the actions complained of and only the Court can determine those issues.

63 The petition was filed on 6th October 2023 following the statements by the President and CS Interior that Kenya would deploy police officers to Haiti after the UN Security Council passed a Resolution on deployment of a multinational security service mission to Haiti.

64 The statements from both the President and the CS Interior gave the impression that a decision to deploy police officers had already been made. This prompted the petitioners to file this petition to challenge that decision.

65 The petition, as filed, seeks declarations that the act of deploying police officers to Haiti is unconstitutional, illegal and void; that police officers cannot be deployed outside Kenya and that sections 107,108 and 109 of the National Police Service Act are constitutionally invalid, among other reliefs.

66 A reading of the petition and the reliefs shows that the petition seeks interpretation of the Constitution and the law to determine whether the position taken by the petitioners is correct or not. Whether police officers can be deployed outside Kenya and whether the impugned sections are unconstitutional, are issues that only the Court determination and not Parliament.

67 Even if the respondents argue that a decision to deploy police officers to Haiti had not been made when the petition was filed, that alone cannot make the petition premature or violate the doctrine of ripeness.

68 Regarding exhaustion, the position is that for the Court to defer jurisdiction because of the doctrine of exhaustion, the alternative

body, in this case Parliament, must be in a position to give an effective remedy to the petitioners' claim(s). Where the remedy would be inadequate or ineffective, the Court cannot defer jurisdiction.

69 In this petition, there is no doubt that Parliament cannot determine whether the impugned sections are unconstitutional. Parliament cannot also determine whether deployment of police officers outside Kenya is unconstitutional. Parliament's mandate is to approve or decline to approve deployment of police officers to Haiti. It cannot determine the constitutionality of the action.

70 Unlike Parliament, the Constitution has under article 165 (d) (i) and(ii) conferred on the Court jurisdiction to check governmental action and it is the solemn duty of the Court to keep the organs of state within the limits of the power and mandate conferred on them by the Constitution, determine whether any law is inconsistent with or in contravention of the Constitution and whether anything said to be done under the authority of the Constitution or of any law is inconsistent with or in contravention of the Constitution or the law.

71 It is, therefore, within the mandate of the Court to determine the issues raised in the petition in exercise of its jurisdiction. Even if it were possible for the Court to defer jurisdiction because Parliament had not made a decision to approve deployment, Parliament would still not determine the rest of the issues in the petition.

72 Furthermore, the issues in the petition cannot be split so that some are dealt with by the Court and others by Parliament. Where there is an allegation of violation or threat to violate the Constitution, it is within the Court's mandate to determine the issue and not any other body.

73 The petitioners have instituted this petition on the strength of article 2-supremacy of the Constitution and article 3 which obligates every person to respect, uphold and defend the Constitution, calling on the Court to respond to the issues in the petition in exercise of its jurisdiction in article 165(3).

74 It is the finding of the Court that the petition is not premature, does not offend the doctrines of ripeness, exhaustion or separation of

powers. The petitioners properly approached the Court, heeding the call in article 3 (1) on their obligation to defend the Constitution.

Sections 107, 108 and 109

75 The petitioners challenge constitutional validity of sections 107, 108 and 109 of the National Police Service Act. The petitioners argue that the sections fail constitutional test of validity because they allow deployment of police officers outside the country contrary to the Constitution.

76 In advancing their case, the petitioners take the view, that the impugned sections violate the purpose and intent of article 240 (8) which, according to the petitioners, only permits deployment of national forces outside Kenya. The petitioners take the positon, that the National Police Service functions within Kenya and, therefore, police officers cannot be deployed outside the country.

77 In allowing deployment of police officers outside the country, the impugned sections fall afoul the constitution and in particular, article 240(8)(a).

78 The respondents take the opposite view, and contend that the sections are constitutional are not inconsistent with the Constitution. The Law Society partly agrees with the position taken by the respondents that the sections are constitutionally valid, but argues that deployment should only be done as permitted by the impugned sections.

79 To resolve this issue, one must bear in mind the import of article 2(4) of the Constitution that any law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. A law enacted by Parliament must be consistent with the constitution short of which it will be declared unconstitutional.

80 Before embarking on the discourse to ascertain the constitutional validity or otherwise of the impugned provisions, it is important to

remind ourselves the principles that the court should bear in mind in determining constitutional validity of a statute or its provisions.

81 A statute or statutory provision is presumed to be constitutional and the burden is on the person alleging constitutional invalidity to prove that invalidity.

82 In *Ndynabo v Attorney General of Tanzania* [2001] EA 495, it was held that an Act of Parliament is constitutional, and the burden is on the person who contends otherwise to prove the contrary.

83 The Court should also examine the purpose or effect of the statute or provision. The purpose of enacting a legislation or the effect of implementing that legislation may lead to nullification of the statute or its provision if found to be inconsistent with the constitution.

84 In *Olum and another v Attorney General* [2002] EA, the court stated;

> *To determine the constitutionality of a section of a statute or Act of parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose*

does not infringe a right guaranteed by the Constitution, the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional.

85 In *The Queen v Big M. Drug mart Ltd,* 1986 LRC (Const.) 332, the Supreme Court of Canada stated that;

Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity.

86 In *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR, the Court observed that in determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned Act which should be discerned from the intention expressed in the Act itself.

87 The National Police Service Act was enacted to give effect to articles 238, 239 243, 244 and 247 of the Constitution. Article 238 is on national security, that is; protection against internal and external threats to Kenya's territorial integrity, sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests.

88 Article 239 identifies national security organs which are the Kenya Defence Forces; the National Intelligence Service and the National Police Service. The primary object of national security organs is to promote and guarantee national security in accordance with the principles in article 238 (2).

89 Article 243 establishes the National Police Service, consisting Kenya Police Service and Administration Police Service.

90 Article 244 then provides for the objects and functions of the National Police Service. These are: to strive for the highest standards of professionalism and discipline among its members; prevent corruption and promote and practice transparency and accountability; comply with constitutional standards of human rights and fundamental freedoms; train staff to the highest possible standards of competence and integrity and respect to human rights and fundamental freedoms and dignity and foster and promote relationships with the broader society.

91 Parliament may enact legislation establishing other police services under the supervision of the National Police Service and the command of the Inspector-General of the Service (article 247). In other words, National Police Service supervises officers of the service, while Inspector-General commands the service.

92 The impugned sections (Part XIV) are on reciprocal arrangement. Section 107 defines reciprocating country as the country which the President may, on being satisfied that it has a law containing provisions reciprocal to those of Kenya, declare a reciprocal country for purposes of the Act. Notice on such declaration has to be published in the Kenya Gazette.

93 Section 108(1) authorizes the President, on application by the government of the reciprocating country, to order a number of police officers he considers necessary, to proceed to the reciprocating country for service in that country for purposes of assisting the police service of that country in a temporary emergency.

94 Under section 108 (2), a police officer who is punished in the reciprocating country under any provisions of the Act (our Act) applied by the reciprocating country to the police office while in that country, for an offence committed while in that country under reciprocal arrangements, the officer will be deemed to have been punished in Kenya for a similar offence if committed in Kenya.

95 Section 109 is the opposite of section 108. It allows the President to apply to a reciprocating country for police officers to come to Kenya under reciprocal arrangements similar to those under section 108(1), when circumstances for requesting the officers exist.

96 The petitioners' case is that the impugned sections are constitutionally infirm because they allow deployment of police officers outside Kenya contrary to 243(3) of the Constitution.

97 I have read article 243 which establishes the National Police Service. Article 243(3) states that National Police Service is a national service and is to function throughout Kenya. Sub article (3) does not state that police officers serving within the National Police Service cannot be deployed outside Kenya but that the service shall function throughout the country.

98 My understanding of the import of article 243(3) is that National Police Service functions in all areas within Kenya. As a national service, National Police Service serves the whole country and not

specific areas, counties or regions., otherwise it would not be a national service.

99 I have also read articles 238, 239, 244, and 247 which the National Police Service Act gave effect to. None of these articles states in express terms or by implication, that police officers cannot be deployed outside Kenya.

100 The petitioners having not shown that these articles expressly or by necessary implication prohibit deployment of police officers outside Kenya, they cannot rely on article 243(3) to support their argument that police officers cannot be deployed outside the country, simply because the service functions throughout Kenya. The language used in article 243(3) does not support the petitioners' assertion.

101 The petitioners also cite Article 240(8) to support their argument that the sections are unconstitutional because they allow deployment of police officers outside the country. In their view, only national forces can be deployed outside Kenya.

102 I have again read article 240(8) and I find nothing that prohibits deployment of police officers outside Kenya. I will, however, say more on article 240(8) later in this judgment.

103 Article 243(4) mandated Parliament to enact legislation to give full effect to Article 243. Parliament then enacted the National Police Service Act in response to that mandate. Sections 107, 108 and 109 (Part XIV) of the Act provide for reciprocity and when and under what circumstances National Police Service officers may be deployed outside Kenya.

104 It is for that reason that the Law Society parts ways with the petitioners on deployment of police officers outside Kenya. The Law Society takes the position that the impugned sections are constitutional since they provide for a mechanism under which reciprocal arrangements may be undertaken. That is, any reciprocal arrangements must comply with procedures in sections 107, 108 and 109 for deployment out of the country or into the country. For instance, a notice must be published in the Kenya Gazette on the reciprocating countries for purposes of accountability.

105 Article 2(4) of the Constitution is unequivocal that a law will be void if it is inconsistent with the Constitution. Where a provision is said to be inconsistent with the Constitution, the inconsistency must be plain and clear when the provision is laid against the article of the Constitution it is said to be inconsistent with.

106 I have gone through the various articles of the Constitution the sections are said to be inconsistent with. I have not been able to find any inconsistency between the impugned sections and those articles.

107 Where it is alleged that a statutory provision is inconsistent with the constitution, the Court embarks on fact finding by laying the sections against the articles of the Constitution said to be offended and determine the infirmity, if any. Invalidity may be on the purpose for which the statutory provision was enacted or the effect of its implementation.

108 If the Court finds infirmity or inconsistency in the challenged section(s), it has no option but to declare the section(s) invalid as decreed by article 2(4).

109 The petitioners have not demonstrated any invalidity in the impugned sections. In any case, the import of the impugned sections is to allow mutual reciprocity between Kenya and other countries. Section 109 mandates the President to request a reciprocating country to send police officers to Kenya where circumstances similar to those under section 108 exist. The benefit would be to both reciprocating countries. I see no inconsistency with the Constitution.

Deployment of police officers under article 240(8)

110 The petitioners and Law Society argue that because National Police Service functions within the Kenya its officers cannot be deployed outside Kenya under article 240(8). Their position is that only "national forces" can be deployed outside Kenya but not National Police Service because it is not a "force".

111 The petitioners and Law Society assert that article 240 (8) only allows the Council, with approval of Parliament, to deploy national forces

outside Kenya for regional or international peace or other support operations. The national forces referred to in article 240(8), they contend, does not include National Police Service.

112 The respondents maintain that a holistic reading and interpretation requires that article 240 (8) be read alongside article 239 of the Constitution. In their view, national forces referred to in article 240 (8) refers to the Kenya Defence Forces, National Intelligence Service and the National Police Service, collectively.

113 The respondents assert, therefore, that the Council has power to deploy any of the three security organs outside the country under the circumstances contemplated in article 240 (8) (a).

114 The decision on this issue turns on the interpretation of article 240(8) of the Constitution.

115 In determining this issue, the Court must be aware of its obligations under article 159(2)(e) when exercising its judicial authority, including that of interpreting the Constitution, to ever have present in mind

the obligation to protect and promote the purpose and principles of the Constitution.

116 Similarly, article 259 calls on the Court to adopt an interpretive approach that promotes the purposes, values and principles of the Constitution; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law and contributes to good governance.

117 The Constitution should also be holistically and purposively interpreted in a manner that advances its purposes, gives effect to its intents and illuminates its contents *(Re the Speaker of the Senate & another v Attorney General & 4 others* – Supreme Court Advisory Opinion No. 2 of 2013 [2013] eKLR para 155-157).

(See also *Re the Matter of Kenya National Commission on Human Rights* –Supreme Court Advisory Opinion Reference No 1 of 2012 [2014] eKLR).

118 Constitutional provisions must be read and interpreted as an integrated whole, each provision supporting and not destroying the other. *(Tinyefuze v Attorney General of Uganda* (supra)).

119 In *Government of the Republic of Namibia and another v Cultura 2000 and another* 1994 (1) SA 407, the Court stated:

> *A constitution is an organic instrument...although it is enacted in the form of a statute, it is sui generis. It must be broadly, liberally and purposively interpreted so as to avoid the austerity of tabulated legalism and so as to enable it to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation in the articulations of the values bonding its people and disciplining its government.*

120 In *S P Gupta v Union of India & another* 1982 AIR 149; 1982(2) SCR 365, *P. N. Bhagwati, J.* writing for the Supreme Court of India, cautioned those on whom the duty to interpret a constitution falls, stating:

We can always find some reason for bending the language of the constitution to our will, if we want, but that would be rewriting the constitution in the guise of interpretation. We must also remember that the constitution is an organic instrument intended to endure and its provisions must be interpreted having regard to the constitutional objectives and goals and not in the light of how a particular Government may be acting at a given point of time. Judicial response to constitutional interpretation must not suffer from the fault of emotionalism or sentimentalism which is likely to cloud the vision when judges are confronted with issues of monumental importance.

121 This Court will, therefore, proceed on the basis of the above principles, determine the objectives and goals of article 240(8) and give true meaning to it.

122 Article 240 establishes the Council consisting of the President; the Deputy President; the Cabinet Secretary responsible for Defence; the Cabinet Secretary responsible for Foreign affairs; the Cabinet

Secretary responsible for Internal security; the Attorney-General; the Chief of Kenya Defence Forces; the Director-General of the National Intelligence Service and the Inspector-General of the National Police Service.

123 The Council exercises supervisory control over national security organs, (Kenya Defence Forces, National Intelligence Service and National Police Service), and performs any other functions prescribed by national legislation.

124 The objective and goal of article 240(8) was to provide for which security organ(s) can be deployed outside the country, by who and under what circumstances. In that spirit, the article identified "*national forces*" for deployment out of the country and assigned the mandate to deploy those *"forces"* to the Council, subject to approval by Parliament. The forces can only be deployed out of the country for regional or international peace or other support operations.

125 The petitioners and the Law Society argue that the mandate of the Council does not include deploying National Police Service outside

Kenya. They hold the view, that National Police Service is not a *"force."* for purposes of article 240(8).

126 The respondents take a contrary position, arguing that the Council can deploy the three national security organs, (Kenya Defence Forces, National Intelligence Service and National Police Service), outside Kenya subject to parliamentary approval.

127 There is no debate that the mandate conferred on the Council is to deploy "national forces" outside Kenya with approval of Parliament. The words, national forces, used in the Constitution are not defined. The position taken by the petitioners and the Law Society is that National Police Service not being a force cannot be deployed by the Council under article 240(8).

128 When called upon to interpret words used in the constitution or statute, the general principle if the words used are clear and unambiguous, they should be given their ordinary meaning. In interpreting the statute, both text and context are important. They are the basis of interpretation because "*if the text is the texture, context is*

what gives the colour." (*Reserve Bank of India v Peerless General Finance and Investment Co. Ltd* 1987 SCR (2) 1).

129 The court should also examine every word used in a constitution or statute in its context and use context in its widest sense. (*Commercial Tax Officer Rajasthan v M/s Binan Cement Ltd* [2014] SCR

130 Kenya has no forces other than the Defence Forces, comprising Kenya Army, Kenya Air force and Kenya Navy, otherwise called the military.

131 In the three national security organs mentioned in article 239(1), only Kenya Defence Forces are "forces." The other two national security organs, (National Intelligence Service and National Police Service) are service. From the constitutional text, one cannot legitimately argue that national security organs are the national forces, even though heads of the three security organs are members of the Council. one cannot also argue that national forces include National Intelligence Service and National Police Service.

132 Given that the Constitution permits deployment "forces", and applying a purposive and holistic interpretation of article 240(8), I find and hold that "national forces" as used in article 240(8) mean the Kenya Defence Forces, so that the Council may, with approval of Parliament, deploy Kenya army, Kenya Air force or Kenya Navy, (as national forces), outside the country for regional or international peace or other support operations, depending on the mission needs.

133 If the intention of the framers of the Constitution was that the Council should deploy Defence forces, National Intelligence Service and National Police Service, they could have easily stated so and mandated the Council to deploy *national forces and services,* or *national security organs,* to capture that intention.

134 In that respect, it is the holding of this Court the Council cannot deploy National Police Service outside the country under article 240(8) because the mandate of the Council is to deploy Forces, (Kenya Defence Forces) for regional or international support operations and not National Police Service.

135 That the Council can only deploy Kenya Defence forces under article 240(8) finds support in the Kenya Defence Forces Act, 2012. Section 18 of the Act reiterates the functions of the Council in relation to the Kenya Defence Forces, thus:

> *The National Security Council shall, with respect to the Defence Forces, and pursuant to Article 240(3),(6), and (8) of the Constitution and provisions of the National Security Council Act, exercise supervisory control and perform the following functions:*
>
> *(a).....*
>
> *(b).....*
>
> *(c)deploy Defence Forces outside Kenya, with approval of Parliament for-*
>
> *(i)regional or international peace support operations,*
>
> *or*
>
> *(ii) other support operations*

(d) approve with the approval of Parliament, the deployment of foreign forces in Kenya.

136 The Kenya Defence Forces Act makes it clear, using the same words used in the Constitution, that the Council may deploy Defence Forces outside the country with the approval of Parliament. When enacting this Act, Parliament appreciated that article 240(8) permits the Council to deploy Defence forces outside the country and captured that intention in the Kenya Defence Forces Act.

137 Unlike the Kenya Defence Forces Act, section 6(2) of the National Police Service Act provides that the Council may deploy the service (National Police Service) or any part of the service in defence of Kenya during an emergency. That is the only time the National Police Serviced Act mandates the Council to deploy National Police Service.

138 Section 6(3) is also clear that for purposes of deploying the Service in case of emergency, *"the procedure under article 58 of the Constitution shall apply."* Other than as provided under section 6(2),

(3), the Council has no mandate to deploy National Police Service even within the country.

139 It is important to note that Parliament did not import article 240(8) into the National Police Service Act or National Intelligence Service Act as it did with the Kenya Defence Forces Act. In not doing so, Parliament recognized that the Constitution did not contemplate deployment of those services outside the country.

140 The petitioners maintain that because of the way section 6(1) of National Police Service Act is worded, deployment of the service can only in Kenya and, therefore, sections 107, 108 and 109 are inconsistent with article 240(8).

141 As I have already stated earlier in this judgment, article 240(8) does not preclude deployment of National Police Service outside Kenya. Similarly, section 6(1) does not preclude deployment of the service outside the country. Sections 107 and 108, (Part XIV) of the Act, properly provide how the service may be deployed outside the country, when and by who.

142 To be clear, article 240(8) does not mandate the Council to deploy police officers outside Kenya. Deployment should be as provided for in Part XIV of the Act and only to a reciprocating country.

143 The respondents argue that no further legislation was contemplated to give effect to article 240(8) on the deployment of national forces. That may be so, but it cannot be said that Parliament was wrong when it enacted the Kenya Defence Forces Act, reiterating the words in article 240(8) that the Council may deploy Defence force outside Kenya, subject to parliamentary approval.

144 The petitioners and Law Society argue, which is not contested, that there is no reciprocal arrangement between Kenya and Haiti and, therefore, there can be no deployment of police officers to that country. There can be no legitimate deployment of police officers to Haiti either under the National Police Service Act without complying with sections 107 and 108 of the Act.

145 I have read the replying affidavit by the CS Interior and the text of Resolution 2699(2023). They confirm that Kenya's Foreign Affairs CS

pledged Kenya's willingness to contribute forces towards assisting Haiti restore security and prevent a looming humanitarian crisis. Kenya also offered to lead the Multinational Security Support (MSS) Mission to Haiti.

146 It is no doubt a great honour for Kenya to offer to lead the Multinational Security Support (MSS) mission for Haiti. Similarly, Kenya has an obligation to join the community of nations in assisting Haiti as part of its international obligations. However, any endeavor towards that end must be in accord with the Constitution and the law. The effort and, in particular, the attempt to deploy police officers to Haiti, must fail for lack of constitutional and legal foundation.

Conclusion

147 Having considered the petition, responses, argument by parties, the Constitution and the law, I come to the conclusion that: first; the

petition is not premature, does not offend the doctrine of ripeness, exhaustion or separation of powers. The petitioners properly moved the Court in defence of the Constitution as the acts complained of were a threat to violate the Constitution and the law.

148 Second, Sections 107,108 and 109 of the National Police Service are constitutional. There is no inconsistency between the sections and the Constitution.

149 Third, National Security Council has no constitutional or legal mandate to deploy National Police Service outside Kenya under article 240(8) or any other law.

150 Article 2(4) of the Constitution invalidates any act or omission that contravenes the Constitution. In that regard, any purported decision by National Security Council to deploy police officers outside Kenya and any other action taken by any other state organ or state officer in furtherance of that decision, is invalid null and void.

Disposal

1. *A declaration is hereby issued that sections 107,108 and 109 of the National Police Act which provide for deployment of police officers outside the country under reciprocal arrangements to reciprocating countries, are constitutional and valid.*

2. *A declaration is hereby issued that National Security Council has no mandate to deploy police officers outside Kenya under article 240(8) of the Constitution or any other law.*

3. *A declaration is hereby issued that any decision by any state organ or state officer to deploy police officers to Haiti, and any further action or steps taken by a state organ or state officer in furtherance of such decision, contravenes the Constitution and the law and is therefore unconstitutional, illegal and invalid.*

4. *An order is hereby issued prohibiting deployment of police officers to Haiti or any other country, otherwise than in compliance with Part XIV-sections 107 and 108 of the National Police Service Act.*

5. This being a public interest litigation, I make no order on costs.

Dated, Signed and Delivered at Nairobi this 26th Day of January 2024

E C MWITA

JUDGE