



Public Audit Act 2015 Petition No. 388/2016

Summary

Parliament in exercise of its legislative mandate enacted the Public Audit Act which was assented on 18th December 2015, the Act had a commencement date of 1st January 2016. The Act had serious ramifications on the proper functioning of the Auditor General as envisioned in the Constitution. It had proposals that could have affected the independency of the Auditor General both as a person and institution. On this premise, Transparency International Kenya approached the court seeking to have the controversial clauses declared unconstitutional, it was joined by the Auditor General and AfriCOG as the 1st and 2nd interested parties respectively while the Attorney General represented the government. Most of the Clauses TI Kenya and the interested parties had sought to be declared unconstitutional were duly declared in the recent judgment delivered by Justice E.C Mwita on 16th February 2018.

Analysis of the Public Audit Petition Petition NO. 388/2016		
Section contested	Provision / Arguments	Decision of the Court
Section 4(2)	<p>The Clause provides that there shall be an office and the Auditor-General as its statutory head and all other staff appointed by the Auditor-General as may be delegated in accordance with the Constitution</p> <p>TI Kenya as the Petitioners, Auditor General and AfriCOG as interested parties in the case argued that the Auditor General office is a constitutional office established under Article 225.</p>	<p>The Court in agreeing with the Petitioners and the interested parties stated that the position of the Auditor General is created by the Constitution and therefore calling a statutory i.e. an office established by an Act is unconstitutional.</p> <p>The court reiterated that you cannot reduce a constitutional office to a statutory</p>

S. 7 (l) (g)	<p>The Clause states that the Auditor General shall perform any other function as may be prescribed by any other written legislation.</p> <p>The petitioners argued that the effect of this Clause was to give the Auditor General other functions not contemplated under the Constitution.</p>	<p>The Court disagreed with the petitioners and interested party and stated that the Constitution under Article 252(1), requires commissions and each holder of independent offices to do any other functions as provided in the legislations.</p>
S. 8 (f)	<p>The Clause has the effect of subjecting Auditor General staff to the Public Service Commission i.e. in designing the organizational structure, recruiting, disciplinary, setting of remuneration and benefits.</p> <p>The Petitioners argued that allowing the PSC this function would affect the independence and mandate of OAG</p>	<p>The Court in agreeing with the Petitioners stated that the Auditor General cannot rely on PSC to recruit and discipline its staff since they are both independent offices. Allowing the PSC the said functions would affect the independence of the OAG as envisioned in the Constitution.</p>
S.9(1)(e)	<p>The Clause gives the Auditor General unrestricted access to audit various arms of the National government agencies but introduces a rider to the effect that <i>such access is reasonably necessary, in the opinion of the Auditor-General, in carrying out his or her functions</i></p> <p>The petitioners and interested parties argued that the qualification introduces limitation to what the OAG can access from various organs & levels of government.</p>	<p>The Court rejected this argument saying that the Clause would have been restrictive had it put the <i>'reasonable'</i> test on the state agencies/organs but as long as it is the Auditor General to determine what is reasonable in carrying out his duties, then there were no restrictions.</p>
S. 12	<p>The Clause is to the effect that if the Auditor General office is vacant, the PSC shall recommend the most senior officer in the office of the Auditor-General to the President to designate such a person as the acting Auditor-General to serve for 90 days</p>	<p>The Court agreed with the Petitioners while noting that the OAG is an independent body therefore PSC would have nothing in appointing in the event of vacancy.</p>

	<p>and the person designated shall have the same powers the Auditor General.</p> <p>The Petitioners argued that there is only one recognized Auditor General under the Constitution</p>	<p>The Court further stated the Constitution only recognizes the Auditor General and that any attempt to create a position of acting Auditor General and giving him powers of the Auditor General would be creating an unconstitutional office.</p>
S. 15	<p>The Clause establishes the position of Senior Deputy Auditor-General who shall be competitively recruited by the Advisory Board and appointed by the Auditor-General.</p> <p>The Petitioner argued that the position is unconstitutional since it is not recognized in the Constitution.</p>	<p>The Court disagreed with the Petitioner and stated that the Auditor General has powers to hire his own staff to on condition that the said person works under his/her directions.</p>
S. 16	<p>Assigns functions and duties to the Deputy Auditor General</p> <p>Argued that the position is not recognized in the Constitution</p>	<p>The Court disagreed with the Petitioners and stated that after looking the functions assigned, it was satisfied that the office holder could be working under the directions of the Auditor General and therefore there is nothing unconstitutional with the provision</p>
S.17	<p>The Clause is to the effect that OAG will recruit in consultation with PSC</p>	<p>The Court reiterated its earlier position that the Auditor General is an independent office and therefore in recruitment there is no need to seek authority from the PSC.</p>

<p>S. 18</p>	<p>The Clause proposed secondment of public officers from the OAG to state organs and vice versa</p> <p>The petitioner argued that such a secondment would defeat the core function of those staff i.e. to audit the same state organs and public bodies and in the long run affect their independence.</p>	<p>The Court agreed with the Petitioners that such a secondment would not only lead to familiarity but also erode the independence of the OAG.</p>
<p>S.19</p>	<p>The Clause states that Auditor-General may, subject to such conditions may impose in writing, delegate any power and assign any duty conferred on him or her to a subordinate officer.</p> <p>The Petitioner argued that such a delegation offends the Constitution</p>	<p>The Court disagreed with the Petitioner and noted that independence cannot be interpreted to mean the Auditor General will work alone.</p>
<p>S. 25,26 &27</p>	<p>The Sections establish, give functions and lay out the nature of holding meetings for the Audit Advisory Board, whose principal function is to advise the Auditor-General on the exercise of his or her powers and the performance of his or her functions under the Constitution and this Act.</p> <p>The Petitioners argued that the establishment of the Board was unconstitutional</p>	<p>The Court declined this argument and noted that the Board was necessary to enable the Auditor General carry out his functions efficiently.</p> <p>The Court however had a problem with Section. 27 in so far as its principal function.... <i>Advise the Auditor-General on the exercise of his or her powers and the performance of his or her functions under the Constitution and this Act.</i> The court found this an interference with his individual and institutional independence.</p>

<p>S. 40 & 42</p>	<p>The Sections require the Auditor General to hold pre- audit meeting to determine which areas to audit, how to handle confidentiality and vetting of auditors to undertake such an audit. It further goes on to state that the Auditor General cannot question the merits of policy objectives of national government or any other public entity.</p>	<p>The Court observed that the Auditor General cannot perform his functions if he has to seek permission from higher authorities before conducting audits and the vetting of his staff will have a negative effect on their independence as state organs will have hand in choosing who will audit them.</p> <p>On the issue of questioning policy objectives, the Court affirmed that a statute cannot limit the Constitutional mandate of the Auditor General. It further found the clause inconsistent with the national values and principles of governance including integrity, transparency and accountability.</p>
<p>S. 68</p>	<p>The Clause gives powers to the Minister to make Regulations to implement the Act.</p> <p>The Petitioner argued that this Clause was also unconstitutional</p>	<p>The Court rejected this argument and stated that should the Minister make unconstitutional Regulations, then they could be challenged in Court.</p>