



Kithunka v Cabinet Secretary for Youth, Sports and the Arts & 2 others (Petition E095 of 2023) [2024] KEHC 16471 (KLR) (Constitutional and Human Rights) (31 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16471 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E095 OF 2023
LN MUGAMBI, J
DECEMBER 31, 2024**

BETWEEN

DAVID NJOE KITHUNKA PETITIONER

AND

**CABINET SECRETARY FOR YOUTH, SPORTS AND THE
ARTS 1ST RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

KENYA CULTURAL CENTRE 3RD RESPONDENT

JUDGMENT

Introduction

1. The suit was initiated through a Petition dated 28th March 2023. The Respondents subsequently filed a Notice of Preliminary Objection dated 17th July 2023 which was ordered to be subsumed into and be determined simultaneously with the Petition.

The Petition

2. The Petition is supported by the Petitioner's verifying affidavit in support sworn on 28th March, 2023. The Petition principally challenges the validity of the appointment of the 3rd Respondent's Chairperson by the 1st Respondent.
3. Consequently, the Petitioner seeks the following reliefs against the Respondents:
 - i. A declaration that the 1st Respondent has failed in his duty to uphold the rule of law, *the Constitution* and to protect public interest and violated Section 3 (3) of the *Kenya Cultural*



Centre Act, Cap. 218 provides that; 'The Chairman of the Council shall be elected by the Council' by purporting to appoint Capt. Kungu Muigai, to be a member and Chairman of the Board of the Kenya Cultural Centre Council, for a period of two (2) years, with effect from the 20th January, 2023.

- ii. A declaration be issued that the purported appointment of Capt. Kungu Muigai, to be a member and Chairman of the Board of the Kenya Cultural Centre Council, for a period of two (2) years, with effect from the 20th January, 2023, was invalid, null and void ab initio.
- iii. An order be issued quashing the appointment of Capt. Kungu Muigai, to be a member and Chairman of the Board of the Kenya Cultural Centre Council, for a period of two (2) years, with effect from the 20th January, 2023.
- iv. A Permanent injunction to prevent Capt. Kungu Muigai, from assuming, acting, occupying and or holding office as the Chairman of the Board of the Kenya Cultural Centre Council.
- v. An order be issued authorizing Kenya Cultural Centre Council to elect its Chairman in accordance with Section 3 (3) of the Kenya Cultural Centre Act.
- vi. Any other or further orders that this Court may deem fit and expedient to grant in the interest of justice and public interest.
- vii. The Costs of this Petition be provided for in any event.

Petitioner's Case

4. The Petitioner depones that on 20th January 2023, the 1st Respondent vide Gazette Notice No. 654 appointed Capt. Kungu Muigai to be a member and the Chairman of the Board of the 3rd Respondent. This was for a period of 2 years with effect from 20th January 2023.
5. He asserts that in making this appointment, the 1st Respondent acted ultra vires as the power to elect the Chairman under Section 3(3) of the Kenya Cultural Centre Act is vested in the 3rd Respondent. It is contended that the 1st Respondent denied the 3rd Respondent an opportunity to elect the Chairman of the Council in contravention of the law hence the appointment was in violation of the rule of law principle enshrined in the Constitution.
6. The Petitioner further claims that Capt. Kungu Muigai was not a fit candidate. This is because he did not meet the integrity threshold set under Article 10 of the Constitution. This point was anchored on the fact that he was deported from the USA and India due to his undesired actions.
7. It is additionally averred that Capt. Kungu Muigai's appointment was not subjected to public participation and the principles of equity, transparency, merit and competitiveness. It is stated that the post was not advertised on the Respondents' website or any daily newspaper of nationwide coverage.
8. In a nutshell, the Petitioner decries Capt. Kungu Muigai's appointment as was in violation of Article 75 of the Constitution and the rules of natural justice. In like manner, the Respondents are accused of not abiding by the Mwongozo, the Code of Conduct for State Corporations, 2015 in making this appointment. The Petitioner is that emphatic that Capt. Kungu Muigai's appointment was unlawful and hence should be quashed by this Court.

Respondents' Case

9. In rejoinder, the Respondents filed a Replying Affidavit sworn by the 3rd Respondent's Chief Executive Officer, Michael Pundo on 3rd January 2024.



10. He affirms that the appointment of Capt.Kungu Muigai was procedurally done in accordance with the [Kenya Cultural Centre Act](#) and the [State Corporations Act](#). He points out that contrary to the Petitioner’s allegation, the power to appoint the Chairman of the Council as per the Act is vested in the 1st Respondent. In particular Section 3(1) of the [Kenya Cultural Centre Act](#) as read with Section 6(1) (e) of the [State Corporations Act](#).
11. The Respondents countered that pursuant to the [State Corporations Act](#), Section 6(1) and the Mwongozo Code of Governance for State Corporations, the appointment of a Chairperson and members of Boards for State Corporations is designated to be made by the President and the Cabinet Secretary. As such, Section 3(3) of the [Kenya Cultural Centre Act](#), 1951, according to the Respondents, is contradictory to the contemporary best corporate governance practices.
12. He maintained that Capt. Kungu Muigai’s appointment was constitutionally compliant and was founded on fair competition, and merit based as guided by the principles set out in the [State Corporations Act](#) and Mwongozo Code of Governance for State Corporation. He thus denied the Petitioner’s allegations.
13. Further, that the Petitioner failed to specifically set out the manner his constitutional rights were violated and thus lacks locus to institute this suit. On this foundation, it was contended that the Petition lacks merit.

The Preliminary Objection

14. The Respondents also filed a Notice of Preliminary Objection dated 24th July 2023 on the following grounds:
 - i. The Petition does not disclose any constitutional questions for the determination by this Court neither does it meet the principles on pleadings in constitutional petitions as enunciated in *Anarita Karimi Njeru v Republic* [1979] 1 KLR 154 and augmented in *Mumo Matemu v Trusted Society of Human Rights Alliance* [2013] eKLR.
 - ii. In the Application and Petition, the laws relied upon fail to constitutionally support the averments of the Application and Petition raised namely:

Article 27 of [the Constitution](#), which provides for Equality and freedom from discrimination
15. The Respondents referred to the case of *Sarka Angel Walkins Singh v. the Governing Body of Aberdare Girls High School, and Another* [2008] EWHC 186, where Justice Silber considered how indirect discrimination may be established prescribing the steps to guide in establishing the proof. That is:
 - “(a) to identify the relevant ‘provision, criterion or purpose’, which is applicable;
 - (b) to determine the issue of disparate impacts, which entails identifying a pool for the purpose of making a comparison of the relevant disadvantage;
 - (c) to ascertain whether the provision, criterion or practice also disadvantages the claimant personally; and
 - (d) to consider whether the policy is objectively justified by a legitimate aim; and to consider (if the above requirements are satisfied) whether this is a proportionate means of achieving such a legitimate aim.”
16. They also cited *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013* and *Petition 12 of 2019 Samson Gwen & others vs Kenya Medical Research*



Institute & 30 others for the proposition that the Petitioner ought to tender evidence of discrimination alleged for the burden to shift to the Respondents of which the Petitioner has failed to do or demonstrate accordingly.

Article 42 on Right to clean and healthy Environment

If the Petitioner states that the above provision was violated then the Petitioner ought to have filed this Petition in the right court. This is because this Court lacks the Jurisdiction to hear matters under this provision as outlined under Article 165(5) of *the Constitution* which contends that “The High Court shall not have jurisdiction in respect of matters- (b) falling within the jurisdiction of the courts contemplated in Article 162 (2)”. However, the Petitioner has failed to establish why this provision was cited and how it was violated.

Article 161 on judicial offices and officers

It is noted that the reason for citing this provision as a violation has not been established. The same applies to Article 201 of *the Constitution* which provides for Principles of public finance.

Considering this, the provisions cited on account of the alleged constitutional violations are wanting as In the Matter of the Kenya National Human Rights Commission [2014] KESC 33 (KLR) it was held that: “...what is meant by a holistic interpretation of *the Constitution*” It must mean interpreting *the Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what *the Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.”

- iii. Besides, it is important to note that what exists is a Public Participation Bill 2019 and not a Public Participation Act as cited.
- iv. The Petitioner purports to rely on provisions on State Corporations namely the State Corporation Act and the Mwongozo, the Code of Conduct for State Corporations of January 2015, yet the Kenya Cultural Centre is a semi-autonomous body under the Ministry of Youth, Culture and Arts and not a State Corporation as purported in the Petition.
- v. Additionally, the Petition assaults the said provisions on grounds of vagueness and uncertainty. Certainty is generally considered to be a virtue in a legal system while legal uncertainty is regarded as a vice. Uncertainty undermines both the rule of law in general and the law’s ability to achieve objective such as determining the averments of the violation both in the Application and the Petition so presented.
- vi. The instant Application and Petition are ripe for striking out with costs to the Respondents

Parties’ Submissions

17. The submissions hereunder constitute submissions to the Petition and the Notice of Preliminary Objection.

Petitioner’s Submissions

18. The Petitioner stated that he filed submissions to the Petition dated 4th July 2023. However, they were neither in the Court file nor in the Court Online Platform (CTS).
19. In opposition to the Preliminary Objection, the Petitioner through Kurauka and Company Advocates filed submissions dated 24th January 2024.



20. Counsel relying in *Mukisa Biscuit Manufacturing Co. Limited vs West End Distributors (1966) EA 696* and *Independent Electoral and Boundaries Commission vs Jane Cheperenger and 2 others (2015) eKLR* submitted that the Respondents preliminary objection does not raise any points of law and as such should be dismissed with costs.
21. Essentially, counsel pin-pointed the slip-ups in the instant preliminary objection that make unsustainable for the failure satisfy the threshold set out in *Anarita Karimi Njeru vs Republic (1979)1 KLR* and further affirmed in *Mumo Matemu vs Trusted Society of Human Rights Alliance (2013) eKLR*.
22. On the issue of locus, it was asserted that the Petitioner’s locus is premised on Article 258 of *the Constitution* while this Court’s has jurisdiction to entertain this matter is founded on Article 159, 162, 165(4) as read with Articles 22, 23 and 24 of *the Constitution*.
23. Counsel in the same manner emphasized that the Respondents breached *the Constitution* by making the purported illegal appointment of the Capt. Kungu Muigai’s as the 3rd Respondent’s Chairperson. To be specific, Counsel stressed that this appointment was in violation of Articles 10(2)(c), 48, 73, 232 and 259 (1) (d) of *the Constitution*.
24. Reliance was placed in *Okiya Omtatah Okoiti v Attorney General & 2 others; Francis K. Muthaura (AMB) & 5 others (Interested Parties) [2019] eKLR*, where the Court held that:

“The Court holds that state corporations may and are usually established as corporate bodies by statute but the constitutional and statutory provisions do not confer the board members a distinctive status separate from that of other public officers including those serving as staff in the state corporations - the difference amongst public officers being distinctiveness in the role played as vested by *the Constitution*, statute or terms and conditions of service and as based on the public or state office held by the individual. They are all governed by the general statutory and constitutional provisions on public or state service and paid out of monies provided by the taxpayer so that such “board members” are clearly different from or unlike the board members under the *Companies Act* whose service is clearly distinct from staff of a company registered under the *Companies Act*. The Court considers that the board members in a state corporation would not hold any better stakes in the state corporation (like KRA or its Board) than is held by other citizens and the allegiance of such board members is to the best public interest as provided in the applicable provisions of *the Constitution* and statute or lawful policies and practices. The Court finds accordingly.”

Respondents’ Submissions

25. State Counsel Wanja Wanjiru on the Respondents behalf filed submissions in response to the Petition dated 9th July 2024 where the questions highlighted for discussion were: whether the appointment of the chairperson and member of the Kenya Cultural Center Governing Council is merited; whether the Petition has been pleaded with specific particularity thus meeting the set threshold on how the 1st, 2nd and 3rd Respondents have violated the Petitioner’s rights; and whether both the Application and the Petition offend the provisions of Sections 106 and 107 of the *Evidence Act* on the burden of proof.
26. Counsel in the first issue, submitted that the Section 4 and 6 of the *State Corporations Act, 2023* makes clear that the appointment of the 3rd Respondent’s Chairperson and member of the Board is mandated to the 1st Respondent. This position is equally echoed under the Chapter one of the Mwongozo Code of Conduct. It is on this basis that the impugned appointment was made.



27. In the next issue, Counsel submitted that the Petitioner had not pleaded his case with precision as did not demonstrate how Articles 1, 2, 3, 10, 19, 22, 23, 27, 35, 42, 48, 56, 73, 156, 159, 161, 162, 165, 201, 232, 233, 234, 235 and 258 of *the Constitution* were violated by the Respondents in line with the principle in Anarita Karimi Njeru (supra). Reliance was placed in Kamal Jadval Vekeria vs Director General, Kenya Citizens and Foreign National Management Service (2016) eKLR where it was held that:

“I note in that regard that the petitioner alleges that the Respondent’s actions and/or omissions violated his rights as articulated in Article 27, 28, 29, 38, 39, 41 and 47 of *the constitution*...further the Supporting Affidavit sworn by the petitioner is silent on those alleged violations and it is impossible to specifically tell how these rights are applicable to this petition. Without more than merely stating those rights, I have no material to delve into them.”

28. Equal dependence was placed in Daniel Chacha Muriri vs Attorney General (2012) eKLR.

29. Finally, Counsel submitted that the Petitioner had not adduced any evidence to support its claims to justify grant of any the orders sought. Reliance was placed in Hassan Ahmed Ibrahim v Kenya National Bureau of Statistics & 2 others [2019] eKLR where it was held that:

“It is a well- established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. In this regard, Section 107(1) of the *Evidence Act* provide that “whoever desire any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exists”. It is of the Petitioner to prove by credible evidence the infringement of rights by the Respondents, and in the manner he alleges. The required standard which applies in civil cases as the present one in this regard is that of proof on a balance of probabilities. The evidentiary threshold in constitutional petitions was also stated by the High Court in Anarita Wairimu Njeru vs Republic [1979] eKLR as follows;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the constitution*, it is important (if to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

30. Comparable dependence was placed in Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR and Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR.

Analysis and Determination

31. Having reviewed the pleadings and submissions by the parties, it is my humble view that the issues that arise for determination are as follows:

Preliminary Issues:

- i. Whether the Respondents’ Preliminary Objection dated 24th July 2023 meets the legal threshold.
- ii. Whether the Petition raises a constitutional question in light of the doctrine of constitutional avoidance and exhaustion.

Substantive issues:



- iii. Whether the constitution was violated by the Respondents' in view of the impugned appointment.
- iv. Whether the Petitioner is entitled to the reliefs sought.

Whether the Respondents' Preliminary Objection dated 24th July 2023 meets the legal threshold

32. The locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd (supra) laid out the essential characteristics of a proper Preliminary objection. That decision was subsequently reaffirmed by the Supreme Court in Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others (2014) eKLR which reiterated thus:

“(31) To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors (1969) EA 696:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

33. In Dismas Wambola v Cabinet Secretary, Treasury & 5 others (2017) eKLR, the Court observed as follows:

“A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.

It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence....”

34. Additionally, in Oraro v Mbaja [2005] KEHC 3182 (KLR) stated:

“And to the same effect Newbold, P stated (p.701):

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily



increase costs and, on occasion, confuse the issues. This improper practice should stop.

I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.”

35. The Respondents Preliminary Objection is based on the pleadings as they are without any contest on factual account. It basically focuses on lack of sufficient information to support allegations of violations of some of the articles mentioned the confounding nature of the cause of action.
36. I am satisfied that the issues raised are perfectly within the proper parameters of proper preliminary objection. I will first deal with the lack of specificity and vagueness which relate to whether or not the Petition raises a reasonable cause of action and thereafter, jurisdictional question based on the doctrine of Constitutional Avoidance.
37. A constitutional petition must be pleaded with reasonable degree to enable the Party that is required to respond to the allegations of violation know with certainty what it is required to respond to. It must give clear and sufficient details that define the cause of action against the adverse Party to facilitate a fair trial based on clearly identifiable issues.
38. Courts have thus emphasized the need for Constitutional Petition to set out with reasonable degree of precision the provisions of *the Constitution* alleged to have been violated and the manner in which the violation is alleged to have taken place. This was the holding in the celebrated case of Anarita Karimi Njeru (1979) KLR where it was stated thus:

“... if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed...”
39. The Supreme Court reiterated the above principle in the Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (2014) eKLR by observing thus:

“(349) Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”
40. Having closely studied the instant Petition, I agree with the Respondents contention to a larger degree but not absolutely, that some of the violations pleaded lack the necessary supportive information to



indicating how the violation occurred. Some of these Articles of the Constitution are merely mentioned without any factual description of the alleged violation. For instance, the alleged violation of the right to clean and healthy environment under Article 42, Article 161 on judicial officers and offices, Article 201 of violation of public finance and Article 27 on discrimination are thrown about aimlessly without any attempt to provide a factual basis that demonstrates the relevancy of citing them in the Petition.

41. Nevertheless, all is not lost. There is one aspect of the Petition that is abundantly clear. The allegation that the appointment of the 1st Respondent is in violation of Section 3 (3) of the Cultural Center Act. I will only focus on this hence the next issue, which is, whether that particular aspect raises a Constitutional question.

Whether or not that raises a Constitutional question.

42. The doctrine of Constitutional avoidance is a jurisdictional issue. It has developed through precedents and is used by Courts as a principle of Constitutional Interpretation. The doctrine asserts that disputes or controversies that can conveniently be dealt with on any other legal basis other than the Constitution should be resolved without resorting to the Constitution. Consequently, controversies and matters that may be resolved on the basis of a statute or a regulatory regime are not Constitutional controversies.

43. In Ibrahim Wakhanyanga & 2 others v Chief Magistrate’s Court Kakamega & 2 others; Attorney General for Land Registrar Kakamega (Interested party) [2022] eKLR the Court held thus:

“...One of the instances in which a constitutional court loses jurisdiction is through the doctrine of constitutional avoidance. Thus, where there exist ample statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory options and decline to entertain such a dispute. A party seeking relief in a matter that can be addressed through interpretation of statutes and rules made thereunder must seek relief through an ordinary suit as opposed to a constitutional petition...”

44. Similarly, the Court in Hakizimana Abdoul Abdulkarim vs Arrow Motors (EA) Ltd & another (2017) eKLR held as follows:

“

“37. A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute... When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values. The issues stated above fall mostly in the realm of negligence, contract, breach of implied terms or conditions only to mention but some.

....

40. The question of what constitutes a constitutional question was ably illuminated in the South African case of Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others in which Justice O’Regan recalling the Constitutional Court’s observations in S vs. Boesak notes that:-

“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions ofthe Constitution, constitutional matters must include disputes as to



whether any law or conduct is inconsistent with *the Constitution*, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of *the Constitution* are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of *the Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”

41. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation. At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore, the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before the Court.
42. The Petition before me does not raise any constitutional questions at all. This court abhors the practice of parties converting every issue in to a constitutional question and filing suits disguised as constitutional Petitions when in fact they do not fall anywhere close to violation to constitutional Rights.”

45. Equally, in *C O D & another vs Nairobi City Water & Sewerage Co. Ltd* (2015) eKLR the Court noted as follows:

- “ 11. Similarly, in *Papinder Kaur Atwal -vs- Manjit Singh Amrit Nairobi* Petition No. 236 of 2011 where after considering several authorities on the issue, Justice Lenaola remarked as follows:

“All the authorities above would point to the fact that *the constitution* is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes..... I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.” (Emphasis added)

12. The Supreme Court of India has also held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner or



as provided under statute. For instance, in *Re Application by Bahadur* [1986] LRC (Const) the Court expressed itself as follows at page 307;

“The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not under *the Constitution*. This case highlights the un-wisdom of ignoring that advice.... *The Constitution* sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and the actions of men. While an infringement of *the Constitution* might in certain cases give rise to the redress provided for at section 14, yet, as has been proclaimed by the highest Court in the land, it is not, “a general substitute for the normal procedures for invoking judicial control of administrative action.” (See *Harrikissoon v A-G* [1979] 3 WLR 62).

13. It was further observed in the case of *Minister of Home Affairs vs Bickle & Others* (1985) LRC Const (per (Georges C.J));

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

46. The dispute before this Court is an allegation by the Petitioner that the 1st Respondent contravened Section 3 (3) of the Kenya Cultural Center Act Cap 218 in appointing the Chairman of the 3rd Respondent. That the law instead provides for the election by the Board members.
47. On the other hand, the Respondents acted in accordance with the law citing Section 3 (1) of the *Kenya Cultural Centre Act*, 1951 as read with Sections 4 and 6 of the *State Corporations Act*, 2023 insisting that the appointment of the 3rd Respondent’s Chairperson and member of the Board is mandated to the 1st Respondent.
48. In my view, if indeed there is a conflict is brought about by provisions of different Statutes on how the Chairman of the 3rd Respondent is to be determined such inconsistencies would have adverse implication on the rule of law where different persons cite reliance with the law yet their actions are in conflict.
49. These inconsistencies potentially risk to cause uncertainty and unpredictability in the application of the law. Unless resolved this can undermine the principle of the rule of law which *the Constitution* embraces and reinforced its commitment to under Article 10 (2) (a). Its resolution therefore guarantees consistency and predictability in application of the law which is an essential ingredient for promoting Constitutional principles and values. Under Article 165 (3) (d) (ii) this Court has jurisdiction to hear and determine whether anything said to be done under the authority of any law is inconsistent with or in contravention of, *the Constitution*, which in my view includes its principles and values.
50. I thus find that in a scenario such as the one presented by this Petition, where it is alleged that there is conflict between statutes, and, different persons claiming compliance with either of the legislation are insisting that the law allows them to do the opposite of each other, this Court will be shirking its



constitutional duty to uphold the rule of law by allowing the situation to persist instead of resolving the matter to guarantee orderly functioning of institutions thereby promoting the principle of the rule of law under Article 10 (2) (a). I thus find that in the instant case, the doctrine of constitutional avoidance cannot hold.

51. It thus necessary to set out the impugned statutory provisions in the two statutes and resolve the alleged legal controversy in the application of the law.

The preamble to the *Kenya Cultural Centre Act*, Cap 218 provides that it is An Act of Parliament to incorporate the Kenya Cultural Centre and to confirm and extend its powers.

Section 2. Establishment, objects and incorporation of Kenya Cultural Centre

- (1) The establishment of the Cultural Centre is hereby confirmed.
- (2) The Kenya Cultural Centre shall consist of such societies, institutions and organizations (in this Act referred to as “Constituent Members”) of a cultural, academic or philanthropic nature as are set out in the Schedule together with such other societies, institutions and organizations of a like nature as may be appointed as constituent members under section 7.
- (3) The objects of the Cultural Centre shall be to provide a centre for the use and enjoyment of the citizens of Kenya without distinction of race or creed, and to provide for the performance of music, drama and dancing, for the exhibition of works of art and craft and for the holding of meetings for discussion of matters of literary, historical, scientific or educational interest or importance, and such other purposes generally as may be approved by the Council, not being incompatible with the objects hereinbefore expressed.
- (4) The Cultural Centre shall be a body corporate under the style of the Kenya Cultural Centre, and shall have perpetual succession and a common seal, and may sue and be sued in its corporate name, and shall have power for the purposes of this Act to acquire and hold, mortgage, charge, lease, or let movable and immovable property and to sell, lease, dispose of or otherwise deal with movable or immovable property acquired by it and no longer required for such purposes.

Section 3. Constitution and proceedings of the Council

- (1) The Council shall consist of not less than five nor more than twelve persons, appointed by the Minister.
- (2) The Council shall act by a majority of the members present and voting at any meeting.
- (3) The Chairman of the Council shall be elected by the Council and shall, at any meeting over which he presides, in the event of an equality of votes, have a casting vote.
- (4) The Chairman shall hold office for a term of two years and shall be eligible for re-election, but shall cease to hold office if he ceases to be a member of the Council.
- (5) The persons appointed to the Council by the Minister shall hold office during the Minister’s pleasure.



- (6) The Council shall, from among its members, appoint one person to be Deputy Chairman of the Council, who if present shall preside at any meeting from which the Chairman is absent and, while so presiding, shall have all the powers of the Chairman.
- (7) If neither the Chairman nor the Deputy Chairman is present at a meeting of the Council, the members present shall elect their own chairman.
- (8) At any meeting of the Council three members present shall form a quorum.
- (9) The Council shall keep such minute and other books as may be necessary to record all resolutions and other business of the Council.

52. On the other hand, the relevant provisions of the *State Corporations Act* Cap 446 provide it is an Act of Parliament to make provision for the establishment of State corporations; for control and regulation of state corporations; and for connected purposes.

53. A state corporation" under section 2 of the Act means—

- a. a state corporation established under Section 3
- b. a body corporate established before or after commencement of this Act by or under an Act of Parliament or other written law

54. It is thus apparent that by definition, the Kenya Cultural Centre is indeed a State Corporation. The relevant provisions of the *State Corporations Act* which the respondents relied on to counter the position taken by the Petitioner are as follows:

Section 4: Ministerial responsibility for state corporations

The President shall assign ministerial responsibility for any state corporation and matters relating thereto to the Vice-President and the several Cabinet Secretary as the President may by directions in writing determine.

Section 6. Composition of Boards

- (1) Unless the written law by or under which a state corporation is established or the articles of association of a state corporation otherwise require, a Board shall, subject to subsection (4), consist of—
 - (a) a Chairperson appointed by the President who shall be non-executive unless the President otherwise directs;
 - (b) the chief executive;
 - (c) the Principal Secretary of the parent Ministry;
 - (d) the Principal Secretary to the National Treasury;
 - (da) the Attorney-General or his representative;
 - (e) not more than eleven other members not being employees of the state corporation, of whom not more than three shall be public officers, appointed by the Cabinet Secretary.

55. From the plain reading of the above Section 6 (1) of the *State Corporations Act* on composition of Boards of State Corporation, it is crystal clear that this provision has a rider which explicitly limits the powers of the President where there exists a specific law providing for the different criteria in



- constituting the Board of a State Corporation. The [State Corporations Act](#) is a general regulatory statute which yields to a specific statute like the Kenya Cultural Center Act by expressly providing in case there is conflict in a matter regarding constitution of the Board as between the State Corporation Act and that other legislation, the other legislation shall take precedence hence obviating potential conflict in application of the law.
56. It therefore follows that the Respondents are responsible for deliberately creating unnecessary confusion by selectively reading the provisions of the [State Corporations Act](#) to make the appointment of the Chairman of the 3rd Respondent against the relevant legal requirements, that is, Section 3 (3) of the Kenya Cultural Center Act.
57. The 1st Respondent's act of appointing the Chairman of the 3rd Respondent is thus unlawful as it was in contravention of Section 3 (3) of the Kenya Cultural Center Act. It is an arbitrary act that not only threatens but also violates rule of law principle under Article 10 (2) (a) of [the Constitution](#).
58. However, let me clarify that the invalidation only applies to the aspect of appointing Captain Kungu to the position of the Chairman of the Kenya Cultural Centre, not as a member since the Petitioner did not provide any basis for invalidating his appointment as a member of the Council. The Petitioner alleged that his opposition to his membership was based on integrity concerns arising out of the fact that he was deported from USA and India in what he referred to as 'undesirable reasons'. The exact nature of 'undesirable reasons' is however not disclosed. I am not prepared to take such a general and speculative reason as proof of lack of integrity. Some foreign countries have been known to bar people from stepping in their soil merely because on grounds such as those persons have criticized the policies of their governments or their leadership. Others is because they may be deemed to be friends of political figures in those countries that are not in favour with the government of the day. To assume therefore that 'undesirable reasons' must only be associated with integrity concerns is to be naive. I thus decline the invitation to speculate on what undesirable conduct by a foreign government may entail.
59. In any event, under Article 79 of [the Constitution](#); the primary mandate for the enforcement of the provisions of Chapter Six of [the Constitution](#) lies with the Ethics and Anti-Corruption Commission. It is the first port of call for lodging of any complaint relating to ethical conduct that is considered to be in breach of Chapter 6 and not this Court. Such an issue should be taken up with Ethics and Anti-Corruption Commission in the first instance for a comprehensive inquiry to be made and appropriate recommendation in line with Section 4 (3), (4) & (5) to be made if need be. Consequently, I do not find any basis for invalidating the membership of Captain Kungu from the Council of Kenya Cultural Centre Council but as already observed, there are legal grounds to invalidate his appointment as the Chairman based on Section 3 (3) of the [Kenya Cultural Centre Act](#).
60. Having arrived at this conclusion, I need not consider any of the other issue.
61. The upshot is that this Petition partially succeeds. The Court thus grants the following reliefs:
1. A declaration that the 1st Respondent action of appointing the Capt. Kungu Muigai as the Chairman of the Kenya Cultural Centre Council with effect from 20th January, 2023 is an arbitrary act that contravenes Section 3 (3) of the Kenya Cultural Act as read with Section 6 (1) and a violation of the principle of rule of law under Article 10 (2) (a) of [the Constitution](#).
 2. A declaration is hereby issued that the purported appointment of Capt. Kungu Muigai, to be the Chairman of the Board of the Kenya Cultural Centre Council, for a period of two (2) years, with effect from the 20th January, 2023, is invalid, null and void.



3. An order is hereby issued quashing the appointment of Capt. Kungu Muigai, to be the Chairman of the Board of the Kenya Cultural Centre Council, for a period of two (2) years, with effect from the 20th January, 2023.
4. An order is hereby issued that the Kenya Cultural Centre Council shall elect its Chairman in accordance with Section 3 (3) of the *[Kenya Cultural Centre Act](#)*.
5. Each Party to bear its own costs.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY VIA EMAIL TO THE PARTIES/
ADVOCATES FOR THE PARTIES AT NAIROBI THIS 31ST DAY OF DECEMBER, 2024.**

.....

L N MUGAMBI

JUDGE

