

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E080 OF 2023

ELIUD KARANJA MATINDI

.....PETITIONER

VERSUS

H. E. THE PRESIDENT OF THE REPUBLIC OF KENYA.....1ST

RESPONDENT

HON. ATTORNEY GENERAL OF

THE REPUBLIC OF KENYA.....2ND

RESPONDENT

NATIONAL ASSEMBLY OF KENYA.....3RD

RESPONDENT

SALARIES AND REMUNERATION COMMISSION4TH

RESPONDENT

PUBLIC SERVICE COMMISSION5TH

RESPONDENT

AND

CONTROLLER OF BUDGET.....1ST INTERESTED

PARTY

MS. ANN WANJIKU MWANGI2ND INTERESTED

PARTY

MR. NICHOLAS NGABIYA RIOBA.....3RD INTERESTED

PARTY

MR. EDWIN SUDI WANDABUSI4TH INTERESTED PARTY

HON. SHARIF ATHMAN ALI5TH INTERESTED PARTY

HON. ISAAC MWAURA MAIGUA6TH INTERESTED PARTY

HON. REHEMA HASSAN7TH INTERESTED PARTY

HON. SAMUEL KUNTAI TUNAI8TH INTERESTED PARTY

HON. MILLICENT NYABOKE OMANGA.....9TH INTERESTED PARTY

HON. MOHAMUD ALI SALEH.....10TH INTERESTED PARTY

HON. ALFRED AGOI MASADIA.....11TH INTERESTED PARTY

HON. KIRUI JOSEPH LIMO.....12TH INTERESTED PARTY

HON. BEATRICE NKATHA NYAGA.....13TH INTERESTED PARTY

HON. JOASH ARTHUR MAANGI.....14TH INTERESTED PARTY

HON. CATHERINE WARUGURU.....15TH INTERESTED PARTY

HON. HUSSEIN TUNEYA DADO.....16TH INTERESTED PARTY

MS CHARITY NANYAMA KIBABA.....17TH INTERESTED
PARTY

HON. BENJAMIN JOMO WASHIALI.....18TH INTERESTED
PARTY

ENG. NICHOLAS GUMBO.....19TH INTERESTED
PARTY

HON. ONESMUS KIMANI NGUNJIRI.....20TH INTERESTED
PARTY

HON. VICOTR KIOKO MUNYAKA.....21ST INTERESTED
PARTY

MR. DENIS NJUE ITUMBI, HSC.....22ND INTERESTED
PARTY

MR. SIMON MWANGI KAMAU.....23RD INTERESTED
PARTY

MR. JAMES KIMANTHI MBALUKA..24TH INTERESTED
PARTY

HON. KHATIB ABDALLAH MWASHETANI.25TH INTERESTED
PARTY

MR. ELLY STEPHEN LOLDEPE.....26TH INTERESTED
PARTY

HON. MARK LOMUNOKOL27TH INTERESTED
PARTY

HON. ANAB MOHAMED GURE.....28TH INTERESTED
PARTY

MR. JACKSON KIPTANUI.....29TH INTERESTED
PARTY

MR. DANIEL WAMAHIU KIONGO.....30TH INTERESTED
PARTY

HON. EVANS ODHIAMBO KIDERO.....31ST INTERESTED
PARTY

HON. VINCENT KEMOSI MOGAKA.....32ND INTERESTED
PARTY

HON. LILIAN CHEPTOO TOMITOM.....33RD INTERESTED
PARTY

HON. [BISHOP] MARGARET WANJIRU.....34TH INTERESTED
PARTY

MR. AMOS CHEGE MUGO.....35TH INTERESTED
PARTY

HON. WESLEY KORI.....36TH INTERESTED
PARTY

HON. CHARLES NJAGUA KANYI.....37TH INTERESTED
PARTY

MS JACKLINE MWENESI LUKALO.....38TH INTERESTED
PARTY

HON. NYAGA JOHN MUCHIRI.....39TH INTERESTED
PARTY

HON. WILSON SOSSION.....40TH INTERESTED
PARTY

HON. REHEMA DIDA JALDESA.....41ST INTERESTED
PARTY

HON. CHRISANTUS WAMALWA.....42ND INTERESTED
PARTY

MR SUNYA ORRE.....43RD INTERESTED PARTY
HON. MARY YAINA SENETA.....44TH INTERESTED PARTY
HON. JOHN LODEPE NAKARA.....45TH INTERESTED PARTY
PROF. ELIJAH GITONGA RINTAUGU.....46TH INTERESTED PARTY
MS MWANAMAKA AMANI MABRUKI.....47TH INTERESTED PARTY
MS RAEL CHEIBSII LELEI48TH INTERESTED PARTY
MR. DAVID KIPKORIR KIPLAGAT.....49TH INTERESTED PARTY
HON. FREDRICK OTIENO OUTA.....50TH INTERESTED PARTY
MR. ALLAN KIBET KOSGEY.....51ST INTERESTED PARTY

DIRECTIONS

1. In this file are the following pleadings;
 - (i) *Petition dated 17th March 2023*
 - (ii) *Notice of Motion dated 17th March 2023 by the Petitioner*

*(iii) Notice of Preliminary Objection dated 21st March 2023
by 2nd Respondent*

*(iv) Notice of Motion dated 24th March 2023 seeking
empanelment of a bench of an uneven number of
Judges.*

2. The petitioner is challenging the creation of twenty seven (27) extra positions in the public office of Chief Administrative Secretaries (CAS). He is calling for nullification of Section 26(2) Salaries & Remuneration Act 2011 & SRC [Remuneration & Benefits of State and Public Officers] Regulations, 2013 Legal Notice No.2 of 2013] Kenya Gazette Supplement No. 6 (Legislative Supplement No.2)];
3. The Preliminary Objection dated 21st March 2023 raises three issues.

(i) That the Petition was filed prematurely

(ii) The 1st Respondent enjoys Constitutional immunity from the current proceedings

(iii) That this matter being an employment matter falls within the jurisdiction of the ELRC.

4. An issue concerning the service on the interested parties was also raised since it appeared a number of them had not been served.

PETITION NO.E084/2023

5. In this file are the following pleadings:
 - (i) Petition dated 23rd March 2023**
 - (ii) Notice of Motion dated 23rd March 2023 by the petitioner**
 - (iii) Notice of Motion dated 27th March 2023 by the 21st Interested Party**
 - (iv) Notice of Motion dated 27th March 2023 by the 18th Interested Party.**
6. The Petition is challenging the President's power to create offices in the Public Service under Article 132(4)(a) of the Constitution. It also questions the President's decision to create twenty seven (27) (CAS) positions besides the twenty three (23) recommended by the Public Service Commission. In other words the recruitment of the fifty (50) CASs is being challenged.
7. The two Notices of Motion dated 27th March 2023 have raised several issues, some which are:

- (i) Challenging the Court's jurisdiction over this petition*
- (ii) Seeking review of the conservatory orders herein on 24th March 2023.*
- (iii) Seeking to have the petition struck out*
- (iv) Questioning the enjoinder of this Excellency the President as a party in these proceedings.*

8. Mrs. Manani for the 2nd Respondent has requested to have this petition consolidated with Petition No. E080 of 2023 which raises similar issues as in this Petition. This request has been supported by almost all the parties who were present.
9. Mr. Ochiel for the 2nd & 3rd petitioners sought leave to amend the Petition to include one or two other prayers.

COURT DIRECTIONS

1. I have considered all these issues raised by counsel in their submissions on 28th March 2023, and I issue the following directions:
 - (i) The two petitions raise similar issues arising from the appointment of the fifty (50) Interested Parties to the position of CAS. The parties in the petitions are similar

save for one or two. I therefore allow the request for consolidation. The two petitions i.e. Petition No. E080/2023 & E084/2023 shall be consolidated and the lead file shall be Petition No. E080/2023 Parties shall appear as follows:

Eliud Karanja Matindi1st
petitioner

Law Society of Kenya2nd
petitioner

Katiba Institute3rd
Petitioner

Versus

*H. E. The president of the
Republic of Kenya*.....1st
respondent

The Hon. Attorney General.....2nd
Respondent

National Assembly of Kenya.....3rd
Respondent

Salaries & Remuneration Commission4th
Respondent

Public Service Commission.....5th
Respondent

And

*Controller of Budget1st Interested
Party*

*M/s Ann Wanjiku Mwangi.....2nd Interested
Party*

*Mr. Nicholas Ngabiya Rioba.....3rd Interested
Party*

*Mr. Edwin Sudi Wandabusi4th Interested
Party*

*Hon. Sharif Athman Ali5th Interested
Party*

*Hon. Isaac Mwaura Maigua6th Interested
Party*

*Hon. Rehema Hassan7th Interested
Party*

*Hon. Samuel Kuntai Tunai8th Interested
Party*

*Hon. Millicent Nyaboke Omanga.....9th Interested
Party*

*Hon. Mohamud Ali Saleh.....10th Interested
Party*

*Hon. Alfred Agoi Masadia.....11th Interested
Party*

*Hon. Kirui Joseph Limo.....12th Interested
Party*

*Hon. Beatrice Nkatha Nyaga.....13th Interested
Party*

Hon. Joash Arthur Maangi.....14th Interested Party

Hon. Catherine Waruguru.....15th Interested Party

Hon. Hussein Tuneya Dado.....16th Interested Party

Ms Charity Nanyama Kibaba.....17th Interested Party

Hon. Benjamin Jomo Washiali.....18th Interested Party

Eng. Nicholas Gumbo.....19th Interested Party

Hon. Onesmus Kimani Ngunjiri.....20th Interested Party

Hon. Vicotr Kioko Munyaka.....21st Interested Party

Mr. Denis Njue Itumbi, HSC.....22nd Interested Party

Mr. Simon Mwangi Kamau.....23rd Interested Party

Mr. James Kimanthi Mbaluka..24th Interested Party

Hon. Khatib Abdallah Mwashetani.....25th Interested Party

Mr. Elly Stephen Loldepe.....26th Interested Party

Hon. Mark Lomunokol27th Interested
Party

Hon. Anab Mohamed Gure.....28th Interested
Party

Mr. Jackson Kiptanui.....29th Interested
Party

Mr. Daniel Wamahiu Kiongo.....30th Interested
Party

Hon. Evans Odhiambo Kidero.....31st Interested
Party

Hon. Vincent Kemosi Mogaka.....32nd Interested
Party

Hon. Lilian Cheptoo Tomitom.....33rd Interested
Party

Hon. [Bishop] Margaret Wanjiru.....34th Interested
Party

Mr. Amos Chege Mugo.....35th Interested
Party

Hon. Wesley Kori.....36th Interested
Party

Hon. Charles Njagua Kanyi.....37th Interested
Party

Ms Jackline Mwenesi Lukalo.....38th Interested
Party

Hon. Nyaga John Muchiri.....39th Interested
Party

Hon. Wilson Sossion.....40th Interested Party

Hon. Rehema Dida Jaldesa.....41st Interested Party

Hon. Chrisantus Wamalwa.....42nd Interested Party

Mr Sunya Orre.....43rd Interested Party

Hon. Mary Yaine Seneta.....44th Interested Party

Hon. John Lodepe Nakara.....45th Interested Party

Prof. Elijah Gitonga Rintaugu.....46th Interested Party

Ms Mwanamaka Amani Mabruki.....47th Interested Party

Ms Rael Cheibsii Lelei48th Interested Party

Mr. David Kipkorir Kiplagat.....49th Interested Party

Hon. Fredrick Otieno Outa.....50th Interested Party

Mr. Allan Kibet Kosgey.....51st Interested Party

(ii) On the issue of service it's noted that a good number of the Interested Parties are yet to enter appearance and the reason could be want of service on them. The petitioners are directed to re-serve the interested parties who are yet

- to enter appearance by placing an advert in one of the popular newspapers within the next 5 days.
- (iii) The 2nd & 3rd petitioners sought to amend their petition to include one or two prayers overlooked. This request was made on 28th March 2023 just four (4) days after filing the petition. Responses to the petition are yet to be filed. I hereby grant the leave sought. The amended petition to be filed and served within three (3) working days.
- (iv) Parties who have filed applications and preliminary objection should have the same served on all parties within three (3) working days. I had initially given directions on the preliminary objection filed by the Attorney General in Petition No. E080/2023, to the effect that upon filing of submissions by the Attorney General and the Petitioner the Court would give a Ruling date. That cannot be the position now since the Petitions have been consolidated and more parties have entered appearance. They too need to respond to the said Preliminary Objection.

- (v) Upon service of the various applications the respondents should file and serve their responses within five (5) working days.
- (vi) Applications and the preliminary objection to be canvassed by way of brief written submissions limited to 6 pages within six (6) working days of service of the responses.
- (vii) I have holistically considered the pleadings, the applications, preliminary objection and the submissions. I am aware of the 1st petitioner's application dated 24th March 2023 seeking for empanelment of an expanded bench. This Court would have asked parties to address it on the same, but given the nature of the matter and the time constraints involved the Court will exercise its discretion in line with the Court of Appeal decision in **Stephen Boro Githia v. Family Finance Building Society & 3 others [2009] eKLR** and deal with the issue of empanelment. Also see (i) **Okiya Omtatah Okoiti & another vs. Anne Waiguru Cabinet Secretary, Devolution & Planning & 3 others.**

(viii) In **Philomena Mbeti Mwilu v. Director of Public Prosecutions & 4 others [2018] eKLR** the Court stated:

“29. I fully agree with the above views on the jurisprudential value of decisions by a bench or a single judge of this Court. Although the present petition can be heard by a single Judge of this Court and also being fully aware that a bench would sometimes require resources both personnel and financial as well as more time to resolve a petition than if it were heard by a single Judge, the present petition is the kind of petition that this Court should exercise its discretion in favour of an expanded bench due to its public importance and significance in our Constitutional democracy. The issues sought to be decided are not mere questions of law, they are substantial questions of law and their resolution will have a material bearing on the 1st respondent’s decision to arrest and prosecute the petitioner and the independence of the Judiciary.”

(ix) In the case **of Kibunja vs. Attorney General & 12 others (No.2) [2002] 2 KLR 6** it was appreciated that:

“In exercising that discretion several factors have to be taken into account including but not limited to the complexity of the case and the issues raised, their nature, their weight, their sensitivity if any and the public interests in them if any.”

(x) Bearing the above principles in mind and considering what has been presented, this Court would like to point out that; this matter is of great public interest especially in the economic times Kenya is operating in; the powers of the President in establishing offices in the public service vis-a-vis those of Public Service Commission are being questioned, and this brings to play the interpretation of Article 234 of the Constitution. What does the Constitution say about the creation of offices in the Public Service? The jurisdiction of this Court in hearing an employment and labour related matter is also being challenged; was this matter prematurely filed and should His Excellency the

President be struck out of these proceedings? These are just but a few of the issues the Court will have to address.

(xi) I therefore find that this matter will answer to a number of issues for the posterity of our Nation and our own jurisprudence.

(xii) The above being the position I find that the best way forward is to refer this matter to the Hon. The Chief Justice for the empanelment of a multi-Judge bench.

(xiii) All the pending applications and preliminary objection will be dealt with by the expanded bench. The interim conservatory orders are extended until then.

(xiv) In view of the urgency of the matter the Court makes the following directions;

(a) The consolidated Petition No. E080/2023 (lead file) and Petition No. E084/2023 raise novel substantial questions of law.

(b) This matter is hereby referred to the Honourable Chief Justice of the Republic of Kenya to assign an uneven number of Judges in terms of Article 165(4) of the Constitution.

- (c) Mention on 21/4/2023 before the expanded bench for further directions.

Orders accordingly.

Delivered virtually, dated and signed this 31st day of March, 2023 in open Court at Milimani, Nairobi.

H. I. Ong'udi
Judge of the High Court

ORIGINAL