



**Alwala & another v Otichilo; Vihiga County Government & 2 others (Interested Parties)  
(Constitutional Petition E004 of 2021) [2022] KEHC 14247 (KLR) (25 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 14247 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CONSTITUTIONAL PETITION E004 OF 2021  
PJO OTIENO, J  
AUGUST 25, 2022**

**BETWEEN**

**JOSECK ALWALA ..... 1<sup>ST</sup> PETITIONER**

**CYRIL MUKHUJI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**H.E GOVERNOR DR WILBUR OTICHILO ..... RESPONDENT**

**AND**

**VIHIGA COUNTY GOVERNMENT ..... INTERESTED PARTY**

**VIHIGA COUNTY PUBLIC SERVICE BOARD ..... INTERESTED PARTY**

**VIHIGA COUNTY ASSEMBLY ..... INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The describing themselves as residents of Vihiga county, public spirited in the defence of the Constitution, promotion of national values and principles of governance and observance of the rule of law, filed petition dated April 10, 2021 asserting the right to mount the petition as an obligation to defend the Constitution and its norms then invokes the courts power to determine if any fundamental freedom in the bill of rights has been denied, violated, infringed or threatened and also determine if anything said to have been done under the authority of the Constitution or under any law is inconsistent with or in contravention of the Constitution or the law.
2. There are set out seven pillars to erect the petition. The seven are said to be ; wilful failure to comply with the procurement procedures and guidelines, illegal and irregular purchase of land for the construction of the Governor’s residence, avoidable losses of county resources, abuse of office,



- disobedience of court orders, violation of the two-thirds gender principle and failure to submit mandatory statutory reports.
3. The facts pleaded to show contravention of the Constitution and the law were that the respondent had signed a memorandum of understanding with Kenya Literature Bureau for the printing and supply of educational book contrary to the Constitution and the statute governing procurement of goods and services. It is alleged that by use of an executive order the respondent avoided the use of open tendering system against the procurement law that ought to be transparent, fair equitable and competitive under both the constitution and the Public Procurement and Asset Disposal Act. The respondent was also accused of supervising the buying two-acre parcel of land for the construction of the governor's residence without same being captured in the procurement plan for the financial year, at an exaggerated price and against the procurement law hence was informal and irregular.
  4. There was then the accusation against the respondent of exposing the government to avoidable losses of resources by failure to comply with court orders issued against the county government and the case of Galexone Kenya Ltd v county Government of Vihiga cited as an example. In that matter it alleged that in spite of the fact that judgement was entered on March 28, 2019 in the sum of Kshs 21,798,450, the decree was never settle thus accumulating interests of over Kshs 12,000,000 as at the date of the petition. A second case of Global Exhibition Incorporated Ltd v the county government was also cited where the court awarded the sum of Kshs 6,001,233 but no payment was made thus attracting interest in the sum of Kshs 2,164,043. The third case cited is that of Evans Muswabili Ladtema v County Government of Vihiga where the respondent is accused of having ignored a decision of the Employment and Labour Relations Court had quashed the appointment of Mr Aggrey Musiega as the county attorney. It is alleged that despite that order the said Mr Musiega continues to enjoy the benefits of the office while the respondent continues to superintend the executive of the county.
  5. The forth accusation alleges abuse of office by the respondent by personalisation of the state and public office and thrown accountability to the people out of the window. Instances are given to include conferring benefit upon a suspended county government employee by allowing the staff, one Noah Asanga Okaya, to accompany him on official trip to Canada. It is also alleged that that office, chief of staff, was created by the respondent and not the Public Service Board subject to approval by the County Assembly, as the law requires. On the same score the respondent is accused of creating and appointing people to the offices of the sub-county liaison officer, Youth Liaison officers and public relations officer without adherence to the law under the County Government Act and without participation of the County Service Board. To petitions, the appointment to those offices duplicates the offices of the sub-county administrators' merely to serve the purpose of engaging political mobilisers and campaigners.
  6. The respondent is accused additionally of acting *ultra vires* by appointment of two named persons to the County Public Service Board without competitive process, without interviews and thus contrary to the law.
  7. The fifth accusation regards violation of the two- third gender rule by only incorporating three female members to the 10-member county execute committee.
  8. The last complaint is that the respondent has failed to submit the mandatory statutory reports on the implementation of the county policies and plans to enable oversighting by the county assembly and thus has failed in the statutory obligation under the County Government Act.
  9. To support the allegations, the petitioners exhibited to court the Auditor General's report showing the finances and the two decisions finding the County Government and obligating it to pay its judgment creditors.



10. On account of those allegations the respondent is faulted for violating several provisions of the Constitution and the cited statutory provisions for which the petitioners pray for orders that: -
- (a) A declaration be and is hereby issued that the H E Governor Dr Wilber Ottichilo failed in his constitutional and legal obligation to ensure compliance with section 91(1) and (2) of the Public Procurement and Asset Disposal Act during tendering of the contract for printing and supply of books for the Technical And Vocational Education And Training (TVET) and Early childhood and Development and Education (ECDE) institutions to Kenya Literature Bureau.
  - (b) A declaration be and is hereby issued that H E Governor Dr Wilber Ottichilo failed in his constitutional and legal obligation to ensure compliance with guiding principles, procedures and guidelines on Public Procurement during the purchase and acquisition of the two acres of Land in Enderi Village for construction of the Governor's residence
  - (c) A declaration be and is hereby issued that by travelling to Canada with Mr Noah Asanga Okaya, a suspended chief of staff at the Governor's Office, at the expense of the County, H.E Dr Wilber Ottichilo violated article 10(2)(c) and 73(1) of the Constitution
  - (d) A further order be and is hereby issued directing H.E Governor Otichilo to personally pay back to the county treasury the travel expenses incurred by the county in respect Mr Noah Asanga Okayas trip to Canada
  - (e) A declaration be and is hereby issued that by establishing the office of chief of staff at the Governor's Office, sub county Liaison Officers, Youth Liason officers and Public Relations Officer contrary to the law, H. E governor Dr Wilber Ottichilo violated sections 59(1)(a) and 60(1) of the County Government Act
  - (f) A further order be and is hereby issued declaring that, for the avoidance of doubt, the office of chief of staff at the governor's office, sub-county liason officers, Youth Liason officers and a Public Relations Officer having been created contrary to the law, are illegal, null and void
  - (g) A further order be and is hereby issued directing H.E Governor Dr Wilber Otichilo to personally pay back to the county treasury the salaries and benefits earned by the holders of the impugned offices, namely the office of chief of staff at the governor's office, sub county liaison officers, Youth Liaison Officers and a Public Relations officer
  - (h) A permanent injunction be and is hereby issued prohibiting H.E Governor Dr Wilber Ottichillo from establishing offices in the Vihiga County Public Service without consultation and concurrence with Vihiga County Public Service Board
    - (i) A declaration be and is hereby issue that by appointing Dr Catherine Muloma Edalia and Dorice Kidiavi as members of the Vihiga County Public Service Board without due regard to the Law, H. E Governor Dr. Wilber Otichilo violated section 58A of the County Government Act as read together with section 4 of the Public Appointments (County Assembly Approval) Act, 2017
    - (j) A declaration be and is hereby issued that H.E Governor Dr Wilber Otichilo has failed in his constitutional and legal obligation to ensure compliance with orders issued Galexon Kenya Limited v Centre For Youth Linkages and Empowerment programmes and 2 others [2019]eklr and Global Exhibition Incorporated Limited v County Government of Vibiga[2017] eklr



- (k) An order of mandamus be and is hereby issued directing H.E Governor Dr Wilber Ottichilo to take steps to ensure compliance with orders issued in *Galexon Kenya Limited v centre for Youth Linkages and empowerment programmes and 2 others* (2019)Eklr and *Global Exhibitions incorporated Limited v County Government of Vihiga* [2017]Eklr
- (l) A consequential order be and is hereby issued that as a result of the above gross violations of the *Constitution* and applicable laws of the Republic of Kenya, H.E Governor Dr Wilber Ottichilo is unfit to hold public office
- (m) Costs of the petition
11. Upon service with the replying affidavit, the petitioners filed a supplementary affidavit sworn by the 1<sup>st</sup> respondent in which the position taken is that both petitioner are public spirited people and are not pursuing personal interests through the petition as means to settle scores with the County Government insisting that the subject petition is a public interest litigation hence any litigant including the 2<sup>nd</sup> petitioner may bring the matter to the attention of the Court to vindicate the rule of law and get any unlawful conduct stopped irrespective of where one resides. Reliance was placed on the constitutional provision that every person has a right to institute court proceedings claiming that the *Constitution* has contravened or is threatened with contravention.
12. In response to paragraph 10 of the replying affidavit he swore that the county's own generated revenue performance statement for the year ended June 30, 2018 the county own generated revenue was valued at Kshs 145,195,524 hence it cannot be true that the only source of revenue is the exchequer. On the allegation by the respondents as well as 1<sup>st</sup> and 2<sup>nd</sup> interested parties that the ineligibility of some of the pending bills were highlighted by the Auditors General in the annual audits and became the subjects of investigation by the senate and the Ethics and Anti-corruption Commission (EACC) is a shocking admission of deliberate and illegal financial mismanagement or losses of public funds contrary to the law.
13. In response to paragraph 15 of the replying affidavit, he stated that a state organ or any other public entity contracting goods and service , must only do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective and that the respondent failed in his constitutional and statutory duty to ensure compliance by the county executive with the applicable laws, procedures and guidelines relating to the allocation of the county resources procurement, tendering and purchase of the said property.
14. The deponent denies allegations that the contractors rushed to court to evade audit queries surrounding the procurement process as lacking merit while asserting that a company and its directors or the owners are separate and distinct legal persons. The allegation that Noah Okaya, the chief of staff was never suspended was denied together with allegations about the recruitment of the liaisons officers, youth liaison officer and public relations officer and that the petitioners are in any way jeopardizing any pending appeals and that to the contrary the petitioners are protecting the rule of law. Filing of the statutory reports was denied with a reinstatement that the respondent has in every sense violated constitutional and legal provisions. It was thus concluded that the respondent and 1<sup>st</sup> interested party's prayers be dismissed as lacking merit and orders sought in the petition be granted as prayed.

### **Respondent and 1st Interested Party Case**

15. The respondent and the 1<sup>st</sup> interested party filed a joint replying affidavit sworn by Ezekiel Ayiego on July 14, 2021 and a notice of preliminary objection.



16. The preliminary objection contends that the petition be struck out on the grounds that; the petitioners are advancing personal interests through the petition devoid of any public interest or defence of the Constitution; are dishonest and are guilty of non-disclosure of material fact being that they are involved in several suits against the respondent and the county government of Vihiga purely for personal interests some of which they are relying upon in this petition to advance the same personal pursuits; lack moral authority to maintain this petition for reasons that they are neither from Vihiga County nor residents in the county and as admitted in the deed of settlement signed by the 2<sup>nd</sup> petitioner and filed in Kisumu High Court Civil Suit No 18 of 2017 been involved in violation of constitution and the law for selfish ends and undertaken to subvert the justice system to support the mischief; the petition is *res judicata* and sub-judice as all the allegations are about disputes that have been determined by courts of competent jurisdiction or still pending hearing on appeals and thus amounts to gross abuse of the process of this honourable court.
17. In the replying affidavit, the deponent states on behalf of the two parties that the petitioners are businessmen and contractors who have traded with the county government; that the 2<sup>nd</sup> petitioner does not come from Vihiga County as he is from Kakamega County and that the petitioners are pursuing personal interests through the petition as a means to settle scores with County Government. The two parties therefore seek a determination of the court on the petitioners' legal capacity to bring the petition to bring down a sitting governor of a county is in general interest of the public and the people of Vihiga County or a pursuit of personal interests.
18. It was averred that when the respondent took over after the general elections 2017 the total indebtedness to the contractors was over Kshs 1.7 billion, most of which was questionable, there was a bloated public service with a wage bill consuming up to 45% of the annual allocation to the county of just Kshs 4 billion and therefore a need for a fresh audit to verify which were eligible before any payment would be made. As the process progressed the petitioner became impatient and rushed to court and obtained the cited judgments. Upon conclusion of the audit, the county government paid substantial part of the pending bills leaving a balance of Kshs 791 which could not be settled owing to the need to continue with implementation of the County Integrated Development Programme and the limited revenue from the exchequer.
19. The process of verification highlighted the impropriety/ineligibility of some of the pending bills in the annual audit reports and became subject of investigation by the senate and even by the Ethics and Anti-Corruption commission (EACC) and would not ordinarily be paid before the requisite clearance. Suits filed in court in connection with such bills and which ended up escalating the amounts due through legal costs and interest cannot be blamed on the respondent. It was then stressed that that all expenditures must be budgeted for and approved by the County Assembly which allocates funds which takes a long process before the payments which are also subject to the approval by the controller of budget can be released. Accordingly, the deponent asserts that the allegation against the respondent on the perceived financial mismanagement or losses contained in the petition remain untrue and misleading to the court.
20. Regarding the specific allegations raised in the petition, the deponent gave the explanations as follows;

#### **i) Wilful Failure to Comply with Procurement Procedures and Guidelines**

It was stated that an MOU signed between parties is not a procurement process and an MOU does not confer any contractual obligations to the parties. As a governor, there was no irregularity committed if he signed an MOU with Kenya Literature Bureau for future supply TVET and ECDE materials subject to the procurement



laws. He stated that an MOU is just an expression of good will and a welcome for any person with interest that is lawful in the county.

### **ii) Illegal and Irregular Purchase of Land for Construction Of The Governor's Residence**

It was stated that it is true the governor of Vihiga County was involved in meetings that discussed the construction of governors residence but nothing was irregular about such meetings given that the Salaries and Remuneration Commission had made a decision on that in order to ease the excess expenditure on providing rented premises to not only the governor but also the deputy governor and speaker of county assembly. The meeting did not amount to procurement as this process was being handled by the county treasury and the procurement office which was charged with the responsibility including requisite valuation from professional bodies. The deponent stated that the respondent was never involved in the actual procurement of land and bares no blame.

### **iii) Avoidable Losses of County Resources**

It was stated that the two cases referred by the Petitioner, namely *Galexon Kenya Limited v Centre for Youth Linkages and Empowerment Programmes & 2 others*[2019]KLR and *Global Exhibitions incorporated Limited v County Government of Vihiga* [2017]KLR are still pending before court and that the 2<sup>nd</sup> petitioner is the Managing Director of Galexon Kenya Ltd who signed a settlement deed with two county government officials behind the respondents back to assist him secure payment from the county government for the market stalls and in that deed he admitted he had not signed any contract with county government to construct the stalls and had even violated procurement laws in the process.

It was stated that Global Exhibitions incorporated Limited, is a company associated with the 1<sup>st</sup> petitioner Joseck Alwala through his business associate Edwin Masivo who is the director. Both have been personally involved in the pursuit of the payment. Despite the payments to the companies being approved by the County Government in satisfaction of court decrees, the same has attracted EACC who have called for the files. He states that the respondent is not to blame in any a manner on the delay of payment for the county government had approved the payment but cannot do so when the EACC has intervened and called for the file for investigation.

### **iv. Abuse of Office**

It was denied that Noah Okaya, the chief of staff has ever been suspended by the County Public Service Board as alleged but that the county Public Service Board investigated the allegations of misconduct against the officer and exonerated him as shown by the report exhibited as EA-6 in the replying affidavit. The office was said to have been created by the Transition Authority at the commencement of devolved units and that prior to the respondent taking office, the office was held by on Gaylord Avedi whose term ended with that of the first governor

In response to paragraph 98-100 of the petition, it was stated and deponed that the creation of offices of the sub-county liasons officers, youth liason officer and public relations officer was as a result of requisition from the county executive committee which made the resolution and communicated the intents to the county public service board which recruited the officers. He stated that the law was followed in the recruitment process and exhibited documents in that regard marked EA-7.

In response to paragraph 101-104 on appointment of Dr Catherine Edalia and Dorice Mudeizi Kidiavai as members of the County Public Service Board the Respondent acted within the law in making the nomination to the county Assembly for approval. It was contended that both article 232(3) of the *Constitution* and section10(2)d of public Service (Value and principle) exempt competitive process in appointment to public



office when applying affirmative action it being added that Dorice Mudeizi actually applied for the position and was one of the 15 shortlisted candidates. Of

#### **v) Disobedience Court Orders**

In response to paragraph 105-106 of the petition he stated that the allegations are untrue as the decision of ELRC in the case of *Evans Muswahili Ladtema v Governor County of Vihiga & others (interested parties)* [2021]eklr with regard to the appointment of Aggrey B L Musiega as County Attorney is subject of two appeals to the court of appeal which are still pending as ; Court Appeal at Kisumu civil appeal No 48 of 2021 Aggrey B.L Musiega v Evans Muswahili Ladtema & others and Court of Appeal at Kisumu civil appeal No 53 of 2021 H.E the Governor, Vihiga County v Evans Muswahili Ladtema & others, hence it is not procedurally fair to raise it in this petition. The deponent then took the position that the Employment and Labour Relationship Court is divided on the question whether the subject appointment must be made competitively and cited a decision of the court in Malindi, ELRC, E001 of 2020. The parties thus urge that the decision in appeal be awaited by this court.

#### **vi) Violation of The Two Third Gender Rule**

Both respondent and 1<sup>st</sup> interested party take the position that the only appointment the governor makes are members of the committee who as per article 179 of *the constitution* are maximum of 10. In terms of compliance with the requirement of two third gender the county government Act, the respondent is compliant to the fullest extent possible with the appointment of 3 women out of 8 members subject to nomination.

#### **vii) Failure to Submit Mandatory Statutory Reports**

In response to paragraph 109-110 of the petition, it is asserted that it is in public domain and knowledge that the respondent has always submitted the reports and or information required by law to the County Assembly when and as the same fall due.

On the totality of the alleged violations of the *Constitution* and statutory provisions it was deponed that there has never been violation of any constitutional or legal provision and a prayer made that the petition be struck out and or dismissed with costs to the respondent and to the 1<sup>st</sup> and 2<sup>nd</sup> interested parties.

#### **2nd Interested Party's Case**

21. 2<sup>nd</sup> interested party filed replying affidavit sworn by its chairman, Amb Franklin Esipila on September 20, 2021. In the affidavit the deponent swears that the questions challenging establishment of the office of chief of staff in the office of the governor of Vihiga County and appointment of Noah Asanga Okaya to the position is barred under the sub judice rule, set out under section 6 of the *Civil Procedure Act*. He stated that the issues raised in the petition are also directly and substantially in issue in Vihiga High Court, Petition No E004 of 2021, *Noah Asanga Okaya v Vihiga County Assembly, Vihiga County Public Service Board and the Governor, Vihiga County*.
22. He stated that the claim challenging the legality of the appointment of Dr Catherine Muloma Edalia as a member of the Vihiga County Public Service Board is res judicata because the issue was raised and determined in the Kisumu Employment and Labour Relations Court constitutional petition No 1 of 2020 where the case was dismissed.
23. He stated that Dr Catherine Muloma Edalia can only be removed from office through the procedure envisaged under section 58(5) of the *County Government Act* and article 251 of the *Constitution* of Kenya, 2010. He added that the challenge over the creation of sub-county Liaison Officers, a Youth Liaison Officer and a Gender Liaison Officer is res judicata as it was directly in issue in Kisumu employment and labour relations court constitutional petition No E016 of 202 where the case against



the Vihiga County Public Service Board was dismissed by the court. He further averred and swore that in law, the establishment or that abolition of any office of Public Service, of a county government and appointment of persons to hold or act in such offices is, by dint of section 60, 61 and 62 of the County Government Act as read with articles 235 of the Constitution, the exclusive function of the County Public Service Board and not the governor with approval of the assembly. To support the assertions of there being active matters and other concluded matters before other courts prior to this petition, the deponent exhibited to court the pleadings and the said three petitions with the annexures and the decision in ELRC Pet No E016 of 2020. In essence the deponent on behalf of the 2<sup>nd</sup> interested party assert being in control of its statutory docket, absolves the respondent from interference with such docket and swears to have acted with the law in matter concerning the public service in Vihiga County.

### **Petitioners Written Submissions**

24. The petitioners filed written submissions on September 1, 2021 and expressed the opinion that the petition raised the following seven issues for determination;

- a) Whether there is a competent preliminary objection before this honourable court?
- b) Whether the petitioners have *locus standi* to institute the present suit?
- c) Whether the respondent committed gross violations of the Constitution and of statute law?
- d) Whether the respondent ought to personally pay back to the county treasury the salaries and benefits earned by the holders of the impugned offices, namely the office of chief of staff at the Governor's Office, Sub-County Liaison Officers, Youth Liaison Officers and a Public Relations Officer and travel expenses incurred by the county in respect Mr Noah Asanga Okaya's trip to Canada?
- e) Whether as a result of the above gross violations of the Constitution and applicable laws of the Republic of Kenya, the respondent is unfit to hold public office?
- f) What principles should guide the court in resolving the matter at hand?
- g) What are the appropriate remedies in this case?

25. The petitioners after rehashing the pleadings on record addressed their said issues seriatim as below:

#### **25.1 Whether there is a competent Preliminary Objection before this Honourable Court?**

The petitioners relied on Mukisa Biscuit Manufacturing Co Ltd and West End Distributors Ltd [1969] EA 696 to demonstrate that the first ground of the preliminary objection does not meet the threshold of preliminary objection as the facts are contested and are not pure points of law. On the second limb alleging the issues to be res judicata and sub judice, the petitioners argue that the issues here were never substantially and directly in issue in the previous litigation just as the parties were not the same on all. The decision in Royal Bank of Scotland Ltd v Citrusdal Investment Ltd [1971] 3 ALL ER 558)509 was cited to show the two obvious pre-requisites necessary to stay a suit have not been met in the present petition as the matters are not directly in issue in any other pending suit and the parties to the petition are not the same as in matters referred to.



Petitioners further relied on the case of *William Charles Fryda v Lance P Nadeau & another* [2015] eKLR for the proposition that res judicata should only be invoked in constitutional litigation in the clear of the clearest of cases. *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited and Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR was cited on the elements of res judicata it being contended that parties are not litigating under the same title and none of the issues raised in the petition have been determined in a former suit by a court of competent jurisdiction. They submitted that the preliminary objection raises matters of evidence which require the court to ascertain and thus not suited to be dealt with as preliminary objections.

## 25.2 Whether the Petitioners have locus standi to institute the present suit?

There is reliance on articles 258(1) and 22(1) of the *Constitution* on the provision that every person has a right to institute court proceedings for which the decisions in *Benson Riitho Mureithi v J Wakhungu & 2 others* (2014) Eklr, *Priscilla Nyokabi Kanyua v Attorney General & Another* [2010] eKLR and *Albert Ruturi, J.K Wanywela & Kenya Bankers Association v The Minister of Finance & Attorney General and Central Bank* were cited to persuade the court that petitioners have locus standi to move the honourable court to vindicate the rule of law.

## 25.3. Whether the Respondent committed gross violations of *the Constitution* and of statute law?

On the onus and incidence of proof of the existence of the memorandum of understanding alleged to have been done to circumvent the principles of public procurement, the petitioners relied on the decision in *Paul k.Ssemogere & 2 others vs AG* (constitutional appeal No.1 of 2022) and section 112 of the *Evidence Act* for the proposition that where a fact is within special knowledge of a party, the onus shifts hence here the burden of proving or disproving whether the MOU was signed was upon the respondents. To petitioners the procurement envisaged by the memorandum of understanding contravened article 10,46,47,201 and 227 of the *Constitution* and the statute hence the procurement was unconstitutional, irregular, illegal, invalid null and void.

The acquisition of 2 acres of land at Enderi village for construction of governor's residence without adherence to *Public Procurement and Asset disposal Act*, the creation of the office of chief of staff at the Governor's office bypassing the County Public Service Board and County Assembly of Vihiga, the creation of offices of sub-county Liaison Officers, Youth Liaison officers and Public Relations officer allegedly not established in the Vihiga County Public Service and subsequently appointed persons to the new offices contrary to the law and procedure for employment in the county public service were all asserted to prove gross violation of the *Constitution* and the law. They cited the case of *Okiya omtatah Okiiti and Another v Public Service Commission & 173 others* [2021]eKLR to show that public officers must be appointed with criteria set out in chapter 6.

## 25.4 Whether the Respondent ought to personally pay back to the county treasury the salaries and benefits earned by the holders of the impugned offices, namely the office of Chief of staff at the Governor's Office, Sub-County Liaison Officers, Youth Liaison Officers and a Public Relations Officer and travel expenses incurred by the county in respect Mr.Noah Asanga Okaya's trip to Canada?

The petitioner submit that the respondent having acted contrary to the purposes and objects article 73 (1) (a) of the *Constitution* and therefore having breached the public trust entrusted to him should be enjoined from continuing with such conduct and penalised by an order that he refunds to the government funds and resources lost out of his unlawful act by personally effecting the refunds of sums thereby lost. *Felix Kiprono Mategei v Attorney General & 3 others* [2016] eKLR and *Deneva Company Limited v Kenya National Highways Authority*[2014] eKLR was then cited for the proposition that the respondents ought to be personally liable to pay lost public resources which have been so lost as a result of his privileged position to



deliberately engage in acts that violate his oath of office and his failure in constitutional and legal duty to obey the Constitution and written laws mandatory requirement and duty to the Public.

### **25.5 Whether as a result of the above gross violations of the Constitution and applicable laws of the Republic of Kenya, the Respondent is unfit to hold public office?**

The petitioners submit that the respondent failed in the discharge of his official functions as the governor and violated the constitutional responsibilities stipulated under article 73 and 179(4) of the Constitution, section 30(3)(f) of the County Government Act among others for which reason the court was urged to find the respondent, being in gross violation of the Constitution and other laws, unfit to hold a public office.

### **25.6. What principles should guide the court in resolving the matter at hand?**

The petitioners cited several provisions of the Constitution, County Government Act, Public Procurement and Asset Disposal Act, Public Appointments (County Assembly Approval) Act and the Access to Information Act to provide the guiding principles to held court determine the petition. The decision in Nancy Makhokha Baraza v Judicial Service Commission was cited for the proposition that the Constitution donates to court wide and extensive powers, inclusive rather than exclusive, and creates room for the court to make orders and grant remedies as situations may demand in each case. The court was consequently urged to allow the petition as prayed.

### **26. Written submissions for the respondent and the 1<sup>st</sup> interested party**

Respondent and the 1<sup>st</sup> interested party filed written submissions on October 4, 2021 by which eight issues are isolated to seek determination with a conclusion that the matter meets not the threshold as a constitutional matter, that the issues are both res sub-judice and *res judicata* and deserves being dismissed with costs. The issues the respondent and 1<sup>st</sup> interested party deem due for determination are as follows:

1. Whether the pleadings meet the threshold of a constitutional petition?
2. Whether the petition is competent
3. Whether the petition have requisite locus standi in the matter
4. Whether the petition meets the requires standards of public interest litigation
5. Evidence and proof
6. Res judicata and sub-judice
7. Frivolous and vexatious
8. Non-disclosure of material facts
9. Cost

26.1. The case of Anarita karuthi Njeri v Attorney General [1979] KLR 154 was cited for the contention that one has to set out the provisions of the constitution that are infringed with the reasonable precision and being applied to the pleadings here to reveal that the petitioners have pleadings not set out the provisions which have been infringed by the governor. It was maintained that meet the petition here revolves around alleged violation of procurement and employment laws and the failure to satisfy decrees through payment of amounts in cases filed by the petitioner against threshold county government which do not meet the thresholds. David Gathu Thuo v Attorney General of a constitutional petition?



Another [2021] eKlR was additionally cited for the same proposition that constitutional violations must be pleaded with reasonable degree of precision.

26.2. It was submitted that the petition does not conform to the mandatory requirements in Rule 10(2)(d) of the Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 with reference to the specifics of the class of persons on whose behalf the petition has been brought. It is submitted that the complaints are about alleged violation of statutory provisions and not constitutional. I like Public Procurement and Asset Disposal Act 2015, Employment Act, 2007 and cited George Owino Odhiambo & 13 others v Kenya Railways Corporation & Another [2020] eKlR where it was held that violation of statutory provisions do not automatically transform to violation of the Constitution and ought to be legislated in the usual manner as directed by the statute or in the usual civil way and not by a constitutional petition. It was underscored that the court's jurisdiction under the bill of rights and the interpretative jurisdiction should not be invoked where other remedies lie.

26.3. The petition is viewed as seeking the removal of the respondent from office under section 33 of the County Government Act which is a preserve of the electorate through the elected members of the county assembly and stands that the petitioners lack the requisite *locus standi* to ask the court to take over that power of the assembly and the petition thus demonstrates a vendetta process employed by the petitioners to wrestle individual scores with the governor.

26.4. To the respondent and the 1<sup>st</sup> interested party, the sole goal of the petitioners is the execution of the decrees in Galexon Kenya Ltd v Centre for Youth Linkages and Empowerment Programmes & 2 others, and Global Exhibition Incorporated Ltd v County Government of Vihiga through a public instant petition as the two petitioners are associated with the decree-holder and involved in interest chasing payments in the two cases. The decision in Okiya Omutata Okiot & 2 others v Attorney General & 3 others [2014] eKLR was relied on for the proposition that it is inappropriate and undesirable to pursue personal and financial interest in a manner devoid of public interest and present such as public litigation with a caution that such should not be entertained by the court. Reliance was then put in the Indian Supreme Court decision in the State of Uttar Pradesh v Balwant Singh Chauhan & others, CA-1134-1135 of 2021 where the court urged great care and circumspection on the judiciary to see that behind the beautiful veil of public interest an ugly private malice, vested interests and/or public seeking is not lurking so that the court avoids the abuse of its processes.

26.5. The respondent and 1<sup>st</sup> interested party assert and aver that there is no linkage, by way of evidence, of the allegations in the petition to the governor stressing that the evidence on record falls below what is required to prove a constitutional petition. They cited David Gathu Thuo v Attorney General and Another [2021] eKlR for the law that litigants bear burden of proof and further that presentation of clear evidence in support of constitutional violation of a constitutional right is not a mere technicality but the essential for proper consideration of the petition so that such decisions are not made in factual vacuum.

26.6. The petition is faulted for breaching the two doctrines as well as rule 10 of the Mutunga Rules by failing to disclose the pendency and or prior conclusion of previously filed petitions and instead using such litigation as the basis of this petition. The respondent and 1<sup>st</sup> interested party submit that the court cannot allow itself to be called upon to consider cases pending before other courts and the Court of Appeal after High court has made judgements. The case challenging the establishment of sub-county liaison offices and public relations offices and recruitment to those offices was said to have been active before the employment and labour relations court when this petition was filed but has since been decided and dismissed hence it is *res judicata* just like the two cases challenging the recruitment of Doris



Mudeizi Kidiavai and Aggrey Musiega were decided but pending before the court of appeal. On the same vein the two cases with monetary decrees were said to be concluded and only waiting settlement and that is what the petitioners seek to achieve by this petition.

SUBPARA 26.7. Petition being frivolous, vexatious and abuse of court process of the court and material non-disclosure of relevant facts

The link between the two petitioner and the management and control of the two companies with decrees against the county<sup>1</sup> was highlighted to be the basis they want constitutional redress against the governor yet those decrees were not as against the governor in a manner that is not only vexatious but also frivolous and abusive of the court process. it was then added that there is no disclosure of critical issues by the 2<sup>nd</sup> petitioner who is accusing the governor of violating the constitution which non- disclosure should be determined against the petitioners as ground for the court to dismiss the petition.

## 2nd Interested Party's Written Submissions

27. By its submissions filed submissions on October 21, 2021, the 2<sup>nd</sup> respondent identifies three issues to submit on to be; creation/ establishment of offices in the county public service, appointment of a member to the county public service Board and appointment of the sub-county liaison officers, then takes the position and view that those allegations are just but allegation with no factual backing or just grounded upon misapprehension of the facts and law and in avoidance of the doctrine of res sub judice.
28. The question regarding the legality of the establishment of the office of the Chief of staff in the Office of the Governor of Vihiga County is asserted to be a matter active before the court Vihiga High Court constitutional petition No E004 of 2021, Noah Asanga Okaya v Vihiga County Assembly, Vihiga County Public service Board and the Governor of vihiga County, and therefore sub judice and consequently the court lacks the jurisdiction to adjudicate over the same issue pursuant to section 6 of the Civil Procedure Act. The decisions in Kenya Commission on Human Rights v Attorney General Independent Electoral & Boundaries Commission & 16 others (interested parties) (2020) eKLR, Republic v Registrar of societies –Kenya & 2 others Ex-parte Moses Kirima & 2 Others [2017] eKLR, Thiba Min Hydro co Ltd v Josphat Karu Ndwiga [2013] eKLR, Barclays Bank of Kenya Ltd v Elizabeth Agidza & 2others [2012] eKLR were cited on the definition and application of the provision.
29. On the other hand the question on the legality of the appointment of Dr.Catherine Muloma Edalia as a member of Vihiga County Public Service Board is submitted to be *res judicata* having been determined by a court of competent jurisdiction and consequently the court lacks jurisdiction to adjudicate over the said issue. The decisions in Evans Muswajhili Ladtema v Governor, Vihiga County; County Public service Board, Vihiga & 2 others (interested Parties) [2021] eKLR where the issue was decided as well as Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board & another, Kinyanjui Njuguna & Company Advocates & Another (interested parties [2020] eKLR, E.T v Attorney General & Another [2012] eKLR were cited on the bar on a court to re-litigate a decided matter and the rationale and objects of the doctrine of res judicata.
30. The last issue challenging the legality of the appointment of five sub county liaison officers, a youth liaison officer and a gender liaison officer, it was stated that the issue is equally res judicata as the matter was heard and determined in the case of Evans Muswajhili Ladtema v Governor, Vihiga County; County Public service Board, Vihiga & 2 others (interested Parties) [2021] eKLR. The case of Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR was cited on the elements of res judicata then it urged that the petition be dismissed with costs.

<sup>1</sup> Galaxon Kenya ltd v Centre for Youth Linkages and Empowerment Programmes & 2 others and Global Exhibition incorporated ltd v County Government of Vihiga



## Issues, analysis and determination

31. The court has had the benefit of reading not only the pleadings embodied in the petition, affidavits and the exhibits annexed thereto as well as the able submissions by counsel for the parties. From that perusal and appreciation of the dispute, the court discerns the issues for determination to be broadly two fold. The first issue is on the preliminary objection challenging the propriety and suitability of the dispute as a constitutional claim including the standing of the petitioners. Should this preliminary objection succeed, the court would have to stop there by striking out the petition? However, if the objection fails then, the merits of the matter would be delved into by addressing the second broad issue going to the merits. Broadly put as two issues, in specifics, the court isolates the issues as follows: -
- i) Whether the preliminary objection is on pure points of law?
  - j) Whether the petitioners have the standing to mount the petition?
  - k) Whether the respondent committed gross violations of the *Constitution* and of statute law?
  - l) Whether the respondent ought to personally pay back to the county treasury the salaries and benefits earned by the holders of the impugned offices, and travel expenses incurred by the county in respect Mr.Noah Asanga Okaya's trip to Canada?
  - m) Whether as a result of the above gross violations of the *Constitution* and applicable laws of the Republic of Kenya, the respondent is unfit to hold public office?
  - n) What are the appropriate remedies in this case?

## The Preliminary Objection

32. The law on what amounts and qualifies as a preliminary objection, that it be on pure points of law and not facts which demand minute scrutiny, need not be rehashed. It is a well-trodden path with repeated caution to parties that an improper raising points that are factual and need production of evidence, does nothing but delay finalisation of cases and thus escalate costs hence must be discouraged. Those are the paraphrased words from Sir Charles Newbold, P, in *Mukisha Biscuits Co v West End Distributors Ltd* [1969] 696, at 701. The Judge said: -
- “The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs and, on occasions, confuse the issues. This improper practice should stop.”
33. In this matter the issues raised as preliminary objections based on the twin doctrines of *res judicata* and sub judice, that the petitioners are non-residents of the county pursuing personal interests and not public cause and therefore being vexatious, frivolous and abusive of the court process are matter that go to the proof or disproof of the claim and are therefore matter of evidence that are ill-fitted to be dealt with in limine. It reveals a contestation thus only capable of resolution at the end of the matter. The court finds that, as framed, the notice of preliminary objection is by itself, without more, not the kind that is able to dispose the matter, declines to deal with it a preliminary objection properly so called. The court shall however consider and deal with various points as an opposition to the petition and on the merits.



**ii) Whether the Respondent committed gross violations of the Constitution and of statute law?**

34. Collectively, the petitioners accuse the respondent of usurping the powers of other organs of the government being the County Public Service Board and the procurement department by going against the law on establishment of offices in the service and recruitment to such offices as well as purchase of land and procurement of academic publications without compliance with the law. All the petitioner did was to make the allegation then sit back without any evidence.
35. For the publication and printing for the academic materials, it was the duty of the petitioners, and an expectation by the court, to prove that after the memorandum of understanding was signed some procurement ensued. No evidence was led in that regard. It was thus not proved. Without proof, there is no material upon which the court can establish a violation of the constitutional and the statutory provisions on procurement. The same goes for the accusation of purchase of land to build the governor's residence. Having alleged that there was purchase contrary to the law no further effort was made to demonstrate how the law was contravened. It must be remembered that it is the duty of he who would fail, if no evidence was led at all, who bears the burden of proof. The respondent readily concedes the purchase and acquisition of the land in the replying affidavit but denies any impropriety while asserting that the purchase was approved by the Salaries and Remuneration Commission and actual procurement done by the department concerned. The respondent denied any involvement in the procurement and asserts being blameless. In response to that replying affidavit the petitioners filed a supplementary affidavit in which all that was done was to reiterate the averment in the affidavit of support as accurate. It was the unshifting onus of the petitioners to at least avail an iota of evidence that there had been a violation and in what manner the violation occurred so that the respondent be called for a rebuttal. In the absence of such proof there is nothing for the respondent to respond to and therefore no foundation upon which the court can base a decision that the law was flouted. The court in David Gatbu Thuo v Attorney General & Another [2021] eKLR reiterated the obligation for a petitioner to prove its case in a constitutional petition in the following words: -

“Decision on violation of the constitution should not and must not be made in a factual vacuum. To attempt to do so would trivialise the constitution an inevitable result is ill-considered opinions.

The presentation of clear evidence in support of violation of constitutional right is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decision on violation of constitutional rights cannot be based upon the unsupported hypothesis”

36. The interested party, Public Service Board, in its replying Affidavit respecting the three issues clarified and affirmed that it always remained true to its mandate; that the position of the chief of staff in the office of the governor was established and recruitment done before the tenor of the respondent; that the liaison offices were properly created and in any event the matter was res judicata just like the appointment of the members of the Public Service Board. The cases in which the question of creation and appointment to those offices were cited and copies availed to the court. Those assertions have not been controverted at all even after the opportunity to do so was provided and utilised in the supplementary affidavit. The court here finds and holds that there was never proof of violation of the Constitution and the law in the creation of the office of the Chief of Staff in the office of the Governor, the establishment of the offices of sub-county, youth and gender liaison offices in five sub-counties and the challenge against the appointments to those offices was improperly before the court because the



same had been dealt with and determined by a court of competent jurisdiction in matters previously filed hence the issues are barred from being urged afresh before this court.

37. The next set of the accusations against the respondent are those alleging wastage in county resources by failure to pay decretals sums in time and for facilitating and affording to one Noah Okaya, the benefits and privileges of the office of the occupant and holder of the office of chief of staff in the Governor’s office while he was under suspension.
38. Whereas there are the report of the ad hoc committee of the assembly dated march 2019 recommending disciplinary action and the disciplinary report of the ad hoc committee of the county service board on the conduct of the officer dated June 17, 2019 absolving him from the charges against him and showing when the officer was suspended and absolved, no evidence and, indeed, no pleading was availed to show when he incurred any expenses at the cost of the government while so suspended. There was equally no evidence of how much the officer spent while on such a journey yet it was the duty and obligation of the petitioners to plead and prove such aspects noting that there is a prayer for payment of such funds to the government by the respondent. I find such to have been allegations thrown at the court with little effort towards proof. To accede to such a request would be to trivialise the onerous task the court is to execute in a matter alleging violation off the supreme law.
39. On the failure to obey court orders by payment of the decretal sums in the two cited matters, the courts learning is that a decree is executable, if not in the suit in which it was issued, in a manner stipulated by the law. That is the law under section 34<sup>2</sup> of the *Civil Procedure Act* whose exceptions include execution against government like Vihiga County Government. That exception however does not and ought not to take the form of a constitutional petition but need to be undertaken in terms of section 21 of the *Government Proceedings Act*. To ask the High court sitting as a constitutional court to enforce a decree of another court is to trivialise its mandate in such matters. In *Republic v Permanent Secretary Office of The President Ministry of Internal Security & another Ex-Parte Nassir Mwandihii* [2014] eKLR the court held, and I am fully persuaded that it is the reigning position of the law, that: -

<sup>2</sup> Sec 34. Questions to be determined by court executing decree

(1)	All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
(2)	The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.  “...whereas execution proceedings as are known to law are not available against the Government, the accounting officer for the Government department concerned is nevertheless under a statutory duty to satisfy a judgement made by the Court against that department.”



40. The procedure to enforce enforcement was settled in [\*Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security\*](#) (2012) where the court held as follows:

“When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in section 21(1) and (2) of the Government Proceedings Act (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.”

41. The court finds that there are provisions under the [\*Civil Procedure Rules\*](#) and [\*Government Proceedings Act\*](#) on how to execute the two decrees and that it is not open for this court sitting in a constitutional matter to superintend over those other matters. I find the approach to this court to pronounce itself on the conduct of the respondent regarding the enforcement of the two decrees to have been improperly taken. It remains the law that where there exist efficient and efficacious remedy to a grievance, this courts mandate as a constitutional court need not be invoked prior t exhaustion of such other remedies.

42. In any event, even if there was to be a demonstrated failure on the County Government to settle the decrees, there is the [\*Public Finance Management Act\*](#) which determines the County Executive Committee member in charge of finance to be the person with responsibility to appoint accounting officers for the county government entities. This question has been previously tackled by the courts and a determination made that the Governor is not the Accounting Officer in the county Government. In [\*Council of Governors & others v The Senate\*](#) petition No 413 of 2014 [2015] eKLR the court expressed itself as follows:

“... Parliament enacted the [\*Public Finance Management Act\*](#). The appointment and designation of a County Government Accounting Officer is provided for under section 148 of that Act, as follows;

1. A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.



Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.

It therefore follows that “an accounting officer” for a County Government entity is the person so appointed and designated as such by the County Executive Committee member for finance under section 148 of the [Public Finance Management Act](#). Indeed, section 148 (3) of the [Public Finance Management Act](#) mandates the County Executive Committee Member for Finance to ensure that each county government entity has an accounting officer as provided for under article 226(2) of the [Constitution](#)...

Having found as we have, it follows that the question posed by the petitioners as to whether the county governor is an accounting officer, must be answered in the negative. He is not an accounting officer and we have said why.”

43. Based on the position of the statute and the case law, the court determines that the respondent in his capacity as the governor was not the accounting officer and if there were to be questions faulting handling of county resources, such questions are due for answers by the accounting officers and not the respondent.
44. The other accusation is the allegations that whether the respondent has violated the two-thirds gender rule in the [Constitution](#) of the County Executive Committee. It is common ground that the respondent did appoint ten member to the County Executive committee of which three are women. The threshold on the composition of the committee is anchored in article 179 of the [Constitution](#) and section 35 of the [County Government Act](#). The law allows a governor to appoint the committee with the approval of the County Assembly. Even though the governor and his deputy are members of the committee, they are elected and not appointed. In the courts opinion, the liberty of the governor to appoint is limited to those appointed by him and not those elected by the constituents of the county. I therefore find that the act of appointing the executive committee members did not breach the constitutional dictate but was in compliance because one third of ten is not more than three.
45. However, affirmative action need not be implemented in the mechanical way of just meeting the very bare minimum. The minima provided should be the foundation to build upon and never the goal to be achieved. Therefore, while the respondent could have interpreted his obligation to satisfy the gender rule to be limited to the appointments he makes, appreciation must be given to the fact that once he makes that appointment, the ultimate product is the full committee including him and the deputy governor. The full committee subject of this decision which consisting of twelve members, with only three being women, obviously falls short of the constitutional threshold. It is unfortunate that this decision comes after the term of that committee is lapsed and regrettable that the petitioners seem to have focused more on the respondent rather than posterity. A concern for posterity would have sought a declaration against the composition of the committee but that is not the case here.
46. Taking judicial notice that the committee’s tenure refluxed ahead of this decision hence a consequential declaration would be of no efficacy, the court makes a determination that in effecting the appointment, and it is noted that the respondent has been re-elected into office, the gender of those elected as governor and deputy must be reckoned with so that not more than two-third are of one gender. Going forward, if the number of appointed members of the committee be retained at ten, the next committee must have at least four women, at the very least.
47. Consequently, therefore, none of the accusations of impropriety alleged against the respondent have been demonstrated and accordingly therefore, I do answer the 3<sup>rd</sup> issue in the negative. Flowing from



that conclusion, the other inevitable conclusion is that the fourth and fifth issues must be answered in the negative because there is no impropriety proved against the respondent to warrant the court placing upon him the obligation to reconstitute the resources allegedly lost and declared unfit to hold a public office.

48. In the end, and from the deductions foregoing, the petition is adjudged to lack merit and is dismissed. Each party shall bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA, THIS 25TH DAY OF AUGUST 2022.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:**

**Mr. Kimeu and Ogola for the Petitioners**

**Mr. Mukabi for the Respondent and 1st Interested Party**

**No appearance for 2nd Interested Party**

**Court Assistant: Kulubi**

