



Benjamin v Gitiri & 4 others; Chairman Council of Legal Education & 4 others (Interested Parties) (Petition E485 of 2023) [2025] KEHC 1621 (KLR) (Constitutional and Human Rights) (13 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1621 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E485 OF 2023
LN MUGAMBI, J
FEBRUARY 13, 2025**

BETWEEN

DR. MAGARE GIKENYI J. BENJAMIN PETITIONER

AND

JENNIFER GITIRI 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

PUBLIC SERVICE COMMISSION 3RD RESPONDENT

ASSET RECOVERY AGENCY 4TH RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 5TH RESPONDENT

AND

CHAIRMAN COUNCIL OF LEGAL EDUCATION INTERESTED PARTY

KENYA LAW REPORTING COUNCIL INTERESTED PARTY

KENYA REVENUE AUTHORITY INTERESTED PARTY

WITNESS PROTECTION AGENCY INTERESTED PARTY

VICTIM PROTECTION AGENCY INTERESTED PARTY



JUDGMENT

Introduction

1. The Petition dated 29th November 2023 is supported by the Petitioner's affidavit in support of even date.
2. The Petition assails the 1st Respondent's alleged appointments to different public service positions and Boards. It is contended this state of affairs is an affront to the values and principles of *the Constitution* particularly Chapter six of *the Constitution* and the relevant laws governing public appointments.
3. The Petitioner thus prays for the following reliefs against the Respondents:
 - i. A declaration that the 1st Respondent as an employee of an independent parastatal (being 4th Respondent) cannot represent the 2nd Respondent on Boards of Directors.
 - ii. A declaration that the act of the 1st Respondent holding a total of 10 different jobs puts her in a position of conflict with regard to availability that she cannot discharge her public functions effectively and efficiently.
 - iii. A declaration that the appointment of the 1st Respondent by the 2nd Respondent on the Board of Directors of the 3rd Interested Party while she is working on the Board of Directors of Living Water raising revenue for Living Water raises a conflict of interest.
 - iv. A declaration that the 1st Respondent's use of her status as an employee of the Government of the Republic of Kenya on the website of Living Water juxtaposed with an invitation to donate funds to Living Water is in contravention of Article 10 and 73 of *the Constitution* and Section 13 of the *Public Officer Ethics Act*, of 2003 and Section 2 of the *Public Collections Act* Cap. 106, and Section 18 of the *Leadership and Integrity Act*, 2012 as it amounts to abuse of office.
 - v. A declaration that the appointment of the 1st Respondent by the 1st Interested Party as acting Chief Executive Officer and Secretary to its Board is unlawful, null and void as she does not meet the basic requirements for the job.
 - vi. A declaration that the 1st Respondent's appointment to the 1st, 2nd, 3rd, 4th and 5th Interested Parties Boards of Directors is null and void ab initio and stand quashed.
 - vii. An order compelling the 1st to 4th Interested Parties to render an account of all allowances and salaries that have been paid to the 1st Respondent by them for the entire period she has held the positions illegally.
 - viii. An order compelling the 4th Respondent to collect all the monies illegally paid to the 1st Respondent for purposes of reimbursing the exchequer by the 4th Respondent.
 - ix. This Court be pleased to grant such further Order or Orders as may be just and appropriate.
 - x. The costs of, and incidental to this Petition be awarded to the Petitioner against the Respondents and interested parties, jointly and severally.

Petitioner's Case

4. The Petitioner avers that the 1st Respondent public officer and a holder of multiple positions in the public service yet has no demonstrable skills that would entitle her to hold all these positions at once.



5. Particularly, he avers that she holds the following positions: Deputy Director, Legal Services of the 4th Respondent, Corporation Secretary of the 4th Respondent; Acting Chief Executive Officer of the 1st Interested Party; Acting Secretary of the 1st Interested Party; sits on the Board of Directors of the 2nd Interested Party as a Representative of the 2nd Respondent; sits on the Board of Directors of the 3rd Interested Party as a Representative of the 2nd Respondent; sits on the Board of Directors of the 4th Interested Party as a Representative of the 2nd Respondent and sits on the Board of Directors of the 5th Interested Party as a Representative of the 2nd Respondent. He adds that she also sits on the Board of Directors of private entities being: Living Water and ACAMS East Africa Chapter.
6. The Petitioner takes issue with this matter for a number of reasons. First, he argues that the 2nd Respondent blatantly displays favoritism and impunity in appointment of the 1st Respondent to 5 public Boards as its representative. Second, he avers that one can only sit on a Board to represent the 2nd Respondent if they are an employee of the 2nd Respondent. Third, the Petitioner asserts that the 1st Respondent does not have any unique skill or qualifications to make her a better suited candidate than the other State Counsels appointed in the 2nd Respondent's Office.
7. He further asserts that the 1st Interested Party was coerced by the 2nd Respondent with the participation of the 3rd Respondent to appoint the 1st Respondent as the Acting Chief Executive Officer (CEO) and Secretary of the 1st Interested Party. He in like manner asserts that she does not have the requisite qualifications to hold this position as required by the law.
8. It is in addition asserted that it is inconceivable and humanly impossible for the 1st Respondent to deliver on all the roles as she is perceivably overstretched. He avers that her unavailability and its effect is clearly evident in the manner in which she prosecuted Nairobi ACEC, Civil Suit No. E044 of 2022 Assets Recovery Agency Vs. Flutterwave Payments Technology Ltd and 2 Others.
9. He is further grieved that the 1st Respondent has been receiving salaries and allowances in view of these posts from the exchequer which is unfair and illegal. The Petitioner further faults the 3rd Respondent and 5th Interested Party for failing and neglecting to stop the 2nd Respondent from perpetuating the alleged impunity.
10. He as well avers that the 1st Respondent as a public officer has been using her position to raise monies through the private organization, Living Water for her own personal benefit in contravention of Article 10 and 73 of *the Constitution* as read with Sections 16 and 18 of the *Leadership and Integrity Act* and Section 13 of the *Public Officer Ethics Act*. Likewise, he asserts that this action is in conflict with her obligation as a Board Member of the 3rd Interested Party.
11. He contends that the 1st Respondent's status is illegitimate as signifies cronyism, favoritism and corruption by concentrating public power and responsibilities in one individual to the detriment of the 4th Respondent. He further decries that this act goes against the values of *the Constitution*. In view of the foregoing, he is apprehensive that if the Court does not intervene, the Respondents and Interested Parties will continue disregarding *the Constitution* and the law.

1st Respondent's Case

12. In rejoinder, the 1st Respondent filed her replying affidavit sworn on 29th January 2024 wherein she avers that the Petition ought to be struck out as contains malicious falsehoods.
13. She informs that she possess the necessary qualifications being: an advocate of the High Court of Kenya and a Certified Public Secretary; currently pursuing a Doctor of Philosophy (PhD) in law from the University of Nairobi; holds a Master of Laws Degree in Public International Law from



- the University of Nairobi ;holds a Bachelor of Laws Degree from the University of Nairobi; holds a second Master of Laws Degree in Comparative Constitutional Law from the Central European University, Budapest; holds a certificate issued upon successful completion of the Human Rights Programme at the International Summer School, Master Level, of the University of Oslo; undertook a Senior Management Course and Strategic Leadership Development Programme at the Kenya School of Government; and currently serves as a Principal State Counsel at the 2nd Respondent's Office.
14. She contends that Petitioner failed to ascertain the veracity of his own claims before filing this suit. She is grieved that his false accusations have been injurious to her professional reputation.
 15. She informs that contrary to the Petitioner's allegations she is not gainfully employed by the various public bodies outlined in the Petition. She depones that her entire remuneration is solely received from the 2nd Respondent's Office. She stated that the position of Deputy Director Legal Services and Corporation Secretary fall under one job description.
 16. She further states that the 5th Interested Party does not exist as Section 31 of the *Victim Protection Act* establishes a Victim Protection Board as an unincorporated body and the same is not an alternate of the 2nd Respondent's office. She as well depones that she does not sit on the Board of Directors of the 2nd and 4th Interested Parties as a representative of the 2nd Respondent as claimed by the Petitioner.
 17. She depones that she serves on the 3rd Interested Party's Board as an alternate of the 2nd Respondent and stated does not receive any remuneration in this capacity. She states that this is clearly provided for under Section 52(a) of the *Interpretation and General Provisions Act* and Article 77(1) of *the Constitution*.
 18. She informs that statutes that create State entities, like the Attorney General, Solicitor General, Cabinet Secretaries and Principal Secretaries, sit on the boards of multiple State Corporations, Commissions, task forces, committees by virtue of the various legislation and thus cannot be construed as employment as advanced by the Petitioner.
 19. The 1st Respondent flowing from this, depones that she was deployed by the 2nd Respondent on special assignment in acting capacity to serve as the acting Secretary and CEO of the 1st Interested party for a period of no more than 6 months. This was in response to a crisis occasioned by the sudden resignation of the former CEO. In the appointing letter dated 17th October 2023, the 2nd Respondent emphasized that she would not receive any additional salary in view of this posting.
 20. She decries that as a result of the Petitioner's malicious and false accusations in this issue, her pictures were widely published and disseminated in both print and electronic media. She avers that she was portrayed as a public servant who does not have regard for the values and principles of public service. Moreover, she was subjected to hurtful online attacks, her right to privacy gravely violated causing her emotional distress. Additionally, in view of this matter, she is now also under investigations by the 5th Respondent.
 21. She in turn avers that while the Petitioner accuses her of holding both public and private roles, he too is a public servant employed by the County Government of Nakuru but also operates a private clinic known as Gikenyi Surgery Clinic. Additionally, it is noted that he is the Group Chief Executive Officer of the Mokonge Group of Companies.
 22. Additionally, the 1st Respondent filed her grounds of Opposition dated 2nd February 2024 on the grounds that:
 - i. The 2nd Interested Party is a non-existent entity. The 1st Respondent cannot thus be a member of the board of a non-existent entity.



- ii. The allegation that the 1st Respondent is gainfully employed by the 4th Interested Party is false. The 1st Respondent has never been a member of the 4th Interested Party's Board and the Petition is thus founded of falsehood.
- iii. The 5th Interested Party is a non-existent entity. The 1st Respondent cannot thus be gainfully employed or be a member of the board of a non-existent entity.
- iv. The 1st Respondent is not gainfully employed by the 1st and 3rd Interested Parties in the context of Article 77(1) of *the Constitution* and Section 26(2) of the *Leadership and Integrity Act*.
- v. This Petition violates the 1st Respondent's rights under Articles 28, 31 and 33(3) of *the Constitution* and is thus not only incapable of invoking the jurisdiction of this Court but has also been filed maliciously and thus for a purpose that is not sanctioned by law.
- vi. The Motion and the Petition are an abuse of the process of the Court to the extent that the two pleadings are founded on manifest falsehood.

1st Respondent's Cross Petition

23. The 1st Respondent in further opposition to the instant Petition filed a cross- Petition dated 29th January 2024. The 1st Respondent in the cross Petition relied on her averments in her Replying affidavit. For the reasons set out therein, the 1st Respondent seeks the following relief against the Petitioner:
- i. A declaration that the allegations set out in the Respondent's Petition are untrue and misleading.
 - ii. A finding that the untrue, sensationalized and misleading allegations about the Cross Petitioner set out in the Respondent's Petition and pervasively disseminated in both print and electronic media were made maliciously and without regard to the Cross Petitioner's constitutional rights set out in Articles 28, 31, 32(2) and 33(3) to the extent that the Respondent to this Cross-Petition made no or no meaningful prior effort to establish the truth before making his false allegations and attacking the CrossPetitioner's participation in a faith based work of charity.
 - iii. An order, pursuant to the provisions of Article 35(2) of *the Constitution* directing the Respondent to publish an apology and retraction of the false allegations in both print and electronic media.
 - iv. An order striking out the false allegations contained in the Respondent's Petition and Supporting Affidavits.
 - v. A declaration that the Respondent's Petition is an abuse of the Court's process.
 - vi. An award of compensation, in the sum of Kenya shillings Twenty million (Kshs 20 Million) for violation of the Cross-Petitioner's constitutional rights under Articles 28, 32(2), 31 and 33(3) of *the Constitution*.
 - vii. Costs be provided for.

2nd Respondent's Case

24. In response to the Petition, the 2nd Respondent through Dr. Ernest Alela filed their Replying Affidavit sworn on 24th January 2024.



25. It affirmed the 1st Respondent's qualifications. It explained that the 4th Respondent was initially established under the 2nd Respondent's office. He states that the 4th Respondent is not yet fully operationalized and hence is still getting support from the government. He as well states that there are 11 State Counsels seconded to the 4th Respondent's office from the 2nd Respondent including the 1st Respondent.
26. It stated that the 1st Respondent is a permanent and pensionable employee with the 2nd Respondent, is qualified for secondment and promotion within the 2nd Respondent's office in line with the set Regulations and Guidelines. Moreover, he depones that the 1st Respondent is remunerated by the 2nd Respondent.
27. That the 2nd Respondent is represented by experienced State Counsels in more than 170 public bodies which includes Authorities, Boards and Committees.
28. He informs that the 1st Respondent was appointed as the 2nd Respondent's representative to the 3rd Interested Party's Board of Directors vide a letter 10th January 2023. He states that Directors of Boards of State Corporations are not employees of the State Corporations and moreover do not have contracts of service with them neither is it a full-time engagement. Additionally, it is deponed that contrary to the Petitioner's allegation, the 1st Respondent does not represent the 2nd Respondent at the Boards of the 2nd, 4th and 5th Interested Parties.
29. It deponed that following unrest in the Council of Legal Education and the resignation of the former acting Chief Executive Officer, Mary Mutugi, the 2nd Respondent deployed the 1st Respondent to manage the institution in the interim for a period of not more than 6 months. This decision was made after the 2nd Respondent received a Petition from the Council of Legal Education Staff dated 27th September 2023 and a letter from its then Chairman Prof. Gitu Muigai dated 29th September 2023. He asserts that there is no requirement for one to possess a doctorate degree to be appointed as the CEO of the Council of Legal Education.
30. He states that the 1st Respondent having served as a Deputy Director with the 4th Respondent, had sufficient exposure to hold this position. Likewise, he states that her remuneration in this position is received from the 2nd Respondent. This was also communicated to the 1st Interested Party following his enquiry about her remuneration in a letter dated 11th October 2023.
31. The 2nd Respondent asserted that prior to institution of the instant Petition, the Petitioner did not make any enquiry vide any form of written communication concerning the 2nd Respondent's representation in the said public bodies. Considering this, he asserts that the Petition is actuated by malice as is full of falsehoods.

3rd Respondent's Case

32. In like manner, the 3rd Respondent filed its response through Dr. Simon K. Rotich sworn on 8th January 2024.
33. He depones that as per the 3rd Respondent's records, the 1st Respondent is a State Counsel serving in the office of the 2nd Respondent. Further that she has been serving on secondment at the 4th Respondent for a period of 2 years since 1st May 2022. He makes known that when a public officer is seconded from one public entity to another, that officer is under the management and responsibility of the Board of the said entity. As such, he avers that the 1st Respondent is an employee of the 4th Respondent for all intents and purposes



34. He states that as per the law, all State corporations, state agencies and public universities provide for membership of principal secretaries in their Boards. In this case, he informs that the 2nd Respondent usually appoints relevant staff to represent its Office on the various Boards of State Corporations.
35. He however points out that Clause 1.6 of the Mwongozo Code of Governance for State Corporations provides that a Board Member shall not hold such position in more than 2 State Corporations at any one time to ensure effective participation in the Board. Considering this, he avers that if indeed the 1st Respondent sits on more than 2 Boards, the same would be irregular. Moreover, he avers that an officer on secondment is a full-time employee of the public body to which the officer is seconded and so such an officer cannot be appointed to represent the 2nd Respondent in a Board of a State Corporation.
36. He further avers that Article 77(1) of *the Constitution* as read with Section 26 and 52 of the *Leadership and Integrity Act* makes known that it is unlawful for a public officer to serve in two full time employments whether in the public or private sector. In this regard, he asserts that if the 1st Respondent is serving both as a Deputy Director at the 4th Respondent and acting CEO of the Council of Legal Education while getting remuneration in both, the same would be unconstitutional and unlawful. Equally, he adds that it would not be possible for one to serve in both roles as required between the working hours from 8am and 5pm.
37. That said, he avers that the 3rd Respondent is not aware of the 1st Respondent's appointment as the acting CEO of the Council of Legal Education as approval for the same or consultation was not sought from the 3rd Respondent. In any event, he adds that for one to be appointed in acting capacity they must hold a doctorate degree in law as provided under Section 34(2) of the *Public Service Commission Act*. He avers thus that the 1st Respondent does not qualify for appointment to the said position and if indeed was appointed the same is irregular and unlawful.
38. Nonetheless he states that the 1st Respondent would not have qualified to be appointed as such as is already appointed on secondment at the 4th Respondent. He informs that even if the secondment period had lapsed, Regulation 37(10)(b) of the Public Service Commission Regulations provides that one is not eligible for another secondment within a period of three years from the last secondment.
39. He additionally states that the Petitioner ought to have filed a complaint with the 3rd Respondent to enable it address the issues raised in the Petition before filing this Petition. He avers that in effect the 3rd respondent not being aware of the alleged averments was not able to take any remedial action. Considering this, he avers that the Petitioner acted in bad faith and violated the doctrine of exhaustion.

4th Respondent's Case

40. The 4th Respondent through Dorothy Ntarah filed its Replying Affidavit sworn on 8th January 2024.
41. She states that pursuant to Executive *Order No.1 of 2023*, the 4th Respondent is classified as an institution of the 2nd Respondent. As such, the staff were deployed from various public entities to support the 4th Respondent's establishment and operationalization.
42. She depones that the 2nd Respondent's staff including the 1st Respondent were also deployed to the 4th Respondent. She informs that the 1st Respondent was seconded to the 4th Respondent as the Deputy Director Legal Services and also the Corporation Secretary both being part of the same job description. In addition, the 1st Respondent maintained her terms and conditions of employment as provided in the Public Service Commission Guidelines and continue to receive her remuneration from the 2nd Respondent.



43. It is asserted that the 1st Respondent has undertaken her duties in a professional and exemplary manner which has in turn resulted in successful recovery of proceeds of crime.
44. It was further argued that the Petitioner's claims of neglected duties were baseless and that the Petitioner did not have any right to raise any issue on its behalf.

5th Respondent's Case

45. In response, the 5th Respondent filed its Replying Affidavit by Jackson Gichuki Mwai sworn on 6th February 2024.
46. He depones that the 5th Respondent's investigations are still ongoing in this matter however in the interim, they have unearthed that, the 1st Respondent joined the Office of the 2nd Respondent following her appointment as State Counsel II vide a letter dated 15th November 2012. Her appointment was subsequently confirmed on a permanent and pensionable basis on 24th March 2014. Thereafter she was promoted to State Counsel I vide a letter dated 10th July 2014 and later to Senior State Counsel on 7th August 2017.
47. It is deponed that the 1st Respondent was deployed to the 4th Respondent vide a communication dated 17th April 2019 by the 2nd Respondent. She was afterward promoted to Principal State Counsel on 18th March 2021.
48. Following approval by the 4th Respondent's Human Resource personnel, the 1st Respondent underwent a suitability interview on 26th April 2022 and was successful. As a result, she was appointed as Corporation Secretary and Deputy Director Legal Services vide a letter dated 22nd May 2022. She served in the role on a contract basis for two years from 1st May 2022.
49. He avers that on 28th September 2022, the 3rd Respondent approved secondment of 20 officers including the 1st Respondent from the office of the 2nd Respondent and Department of Justice to the 4th Respondent.
50. He informs that on 29th September 2023, following the resignation of the Council of Legal Education's CEO, the Council sought secondment of a senior officer from the Office of the 2nd Respondent. The 1st Respondent was subsequently seconded to the role on 9th October 2023.
51. In the Council's Board meeting held on 9th October 2023 a resolution was made to appoint the 1st Respondent as the acting Secretary and CEO until the position was filled substantively. He contends that this was done erroneously and probably due to a misinterpretation of the 1st Respondent's secondment role. This is because as Section 32 of the *Public Service Commission Act* provides that an officer shall not be appointed to hold a public office in acting capacity unless the person satisfies all the prescribed qualifications for holding the public office and that an acting appointment shall be in favour of a public officer who is duly qualified and competent to perform the duty.
52. He avers that soon after on 11th October 2023, the Council of Legal Education wrote to the 2nd Respondent inquiring about the 1st Respondent's remuneration. In response, the 2nd Respondent advised that the 1st Respondent had not been appointed in the post substantively and that her nomination was only to aid its transition. Further the 2nd Respondent informed that the 2nd Respondent would continue receiving her remuneration from its Office while the Council of Legal Education would be responsible for her travelling, subsistence and other relevant allowances. As such, the Council of Legal Education was required to recruit a substantive CEO for the position within 6 months.



53. Furthermore, he informs that the 1st Respondent was appointed as the 2nd Respondent's representative to the 3rd Interested Party's Board on 10th January 2023. He notes that it is the only Board position which she currently holds.
54. It was stated that the 1st Respondent served as a member of the 2nd Interested Party's Board from 31st January 2017 to 6th July 2023. However, vide a letter dated 18th December 2023, the 4th and 5th Interested Parties confirmed that the 1st Respondent was not a member of their Boards nor had she ever been.

1st Interested Party's Case

55. The 1st Interested Party's response and submissions are not in the Court file or Court Online Platform (CTS).

2nd Interested Party's Case

56. In rejoinder, the 2nd Interested Party filed its Replying Affidavit by Prof. Jack Mwimali sworn on 5th January 2024.
57. He denied the existence of a public entity known as Kenya Law Reporting Council but acknowledged the existence of the National Council for Law Reporting as established under the *National Council for Law Reporting Act*.
58. He deponed that Linda Murila, a Chief State Counsel is the alternate to the 2nd Respondent's at the Council not the 1st Respondent as alleged. He avers that this information is publicly shared and is available at its website Kenyalaw.org.
59. He contends that the Petitioner never wrote to the 2nd Interested Party seeking any information regarding the 1st Respondent or the person nominated by the 2nd Respondent as the alternate in the Council. Considering this, he argues that the Petition is malicious and ill-motivated.

3rd Interested Party's Case

60. The 3rd Interested Party's response and submissions are not in the Court file or Court Online Platform (CTS).

4th and 5th Interested Parties Case

61. These Respondent filed their Replying Affidavit by Jedidah W. Waruhiu, sworn on 8th January 2024. She informs that in addition to being the 4th Interested Party's Director, she is also Secretary of the Victim Protection Board.
62. She depones that the 4th Interested Party does not have Board of Directors but has the Witness Protection Advisory Board. She states that the 2nd Respondent is not a member of this Board neither that of the 5th Interested Party.
63. Additionally, she states that the 1st Respondent is not a member and has never been a member of these Boards in any capacity. Equally, it is asserted that prior to filing of this Petition the Petitioner did not seek any of this information from the 4th Interested Party.



Parties' Submission

Petitioners' Submission

64. The Petitioner filed submissions dated 30th December 2023 and identified the issues for determination as:

“whether it is practical for the 1st Respondent to discharge her statutory/constitutional duties in all the 10 Offices; whether the Corporation Secretary/Deputy Director of Legal Services of the 4th Respondent may contemporaneously be appointed Acting Chief Executive Officer of the Council of Legal Education; whether the 1st Respondent qualified to be appointed as Acting Chief Executive officer of the 1st Interested Party; whether the 1st Respondent may represent the 2nd Respondent on any of the Boards of Directors of the 2nd, 4th and 5th Interested Parties; whether the 1st Respondent's position of Director of Living Water conflicts with her position of Director of the 2nd Interested Party and whether the 1st and 2nd Respondents together with the 1st Interested Party should be surcharged for salaries and allowances paid to the 1st Respondent.”

65. On the first issue, the Petitioner submitted that it was inconceivable that one person could discharge duties in numerous positions and capacities as is the 1st Respondent's case. He argued that inevitably one would be stretched thin as can be seen with the 1st Respondent's neglected duty at the 4th Respondent in prosecuting Civil Suit No. E044 of 2022. Accordingly the Petitioner faulted the 2nd Respondent for appointing and nominating the 1st Respondent to the various posts. He argued that this was an act of favoritism and cronyism which is in utter violation of Article 10 and 73 of *the Constitution*.

66. To buttress this point reliance was placed in *Republic v Vice Chancellor Moi University & 2 others Ex parte Benjamin J. Gikenyi Magare* [2019] eKLR where it was held that:

“An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law....It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to do so exercise such power arbitrarily and capriciously or in bad faith.”

67. Like dependence was placed in *Associated Provincial Picture Limited v Wednesbury Corporation* [1947] 2 All ER 680 [1948] 1 KB 223; and *Wambua Maithya v Pharmacy and Poisons Board; Pharmaceutical Society of Kenya & 2 others (Interested Parties)* [2019] eKLR.

68. On the second issue, the Petitioner noted that a Chief Executive Officer under Section 30 of the *State Corporations Act* and Clause 1.19 (1) (a) of the Mwongozo Code is responsible for the day-to-day operations of the organization. The Petitioner reasoned hence that for the 1st Respondent to hold this post, she would be required to be present at work during the usual work hours whilst also being required to tend to her role as the Deputy Director of the Legal Services during the same hours. Counsel asserted that this was improbable. To support this point, reliance was placed in *Associated Provincial Picture Limited* (supra) where it was held that:

“For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from consideration matters which are irrelevant to the matter that he has to consider.



If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably” ...Similarly, you may have something so absurd that no sensible person could ever dream that it would lay within the powers of the authority...”

69. The Petitioner further submitted that Section 34 of the *Public Service Commission Act* provides that an appointment in an acting appointment role is restricted to existing officers of the same organization as also emphasized in ELRC Petition No. E134 of 2023 Consolidated with Petition No. E124 of 2023: Dr. Magare - Gikenyi and Kenya Union of Clinical Officers Vs Susan Nakhumicha, Cabinet Secretary MOH & Others.

70. Furthermore, Counsel submitted that Article 77(1) of *the Constitution* as read with Section 26(1) and (2) of the *Leadership and Integrity Act* provide that a state officer cannot participate in any other gainful employment. In his view, the 1st Respondent’s appointment as acting CEO failed to meet this constitutional threshold thus an illegality. To support this point reliance was placed in Resley vs. The City Council of Nairobi [2006] 2 EA 311 where it was held that:

“In this case there is an apparent disregard of statutory provisions by the respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid...The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent’s statements that the Court’s role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed...If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of “chaos” and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty’s subjects. Public Bodies and Ministers must be compelled to observe the law: and it is essential that bureaucracy should be kept in its place.”

71. Comparable reliance was placed in Pastoli v Kabale District Local Government Council and others [2008] 2 EA 300.

72. Flowing from this, the Petitioner submitted in the third issue that the 1st Respondent by virtue of Section 34(1)(b) and (2) of the *Public Service Commission Act* was not qualified to be appointed as the acting CEO for the Council of Legal Education. He asserted thus that her appointment to the role was in direct violation to Section 10 (1) & (3) of the *Public Service (Values and Principles) Act* and Clause 1.18 (1)(b) & (c) of Mwangozo Code. Additionally, in violation of Articles 10, 73 and 232 of *the Constitution*.



73. Reliance was placed in *Real Deals Limited & 3 Others v Kenya National Highways Authority & Another & another* [2015] eKLR where it was held that:

“In my view where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority.”

74. Like dependence was placed in *Katiba Institute & another v Attorney General & another; Julius Waweru Karangi & 128 others (Interested Parties)* [2021] eKLR.

75. On the fourth issue, the Petitioner stressed that the 1st Respondent was not a State Counsel neither a Cabinet Secretary responsible for matter relating to justice but the Deputy Director at the 4th Respondent and as such cannot be the 2nd Respondent’s representative in this capacity. Considering this, Counsel submitted that the 1st and 2nd Respondents’ decisions were in blatant violation of the constitutional principles under Articles 10, 73 and 232 and so unlawful.

76. Reliance was placed in *Okiya Omtatah Okoiti & 3 Others vs. Nairobi City County & 5 others* [2014]eKLR where it was held that:

“It may seem that *the Constitution* has imposed an irksome and onerous burden on those responsible for making public appointments by requiring that they make the appointments on the basis of clear constitutional criteria; that they allow for public participation; and that those they appoint meet certain integrity and competence standards. This burden, however, is justified by our history and experience, which led the people of Kenya to include an entire chapter on leadership and integrity in *the Constitution*.”

77. Similar dependence was placed in *Community Advocacy and Awareness Trust & Others v Attorney General & 6 Others* [2012] eKLR and *David Kariuki Muigua vs. Attorney General & Another* [2012] eKLR.

78. The Petitioner in like fashion argued that the Petitioner’s role as a Director of the Living Water conflicts with her role at the 3rd Interested Party. This is said to be in breach of Section 16 and 18 of the *Leadership and Integrity Act*. Reliance was placed in *Republic v Attorney General & 2 others ex parte Tom Odoyo Oloo* [2016] eKLR where it was held that:

“One of the values and principles of public service under Article 232(1)(c) of *the Constitution* is impartial provision of services. In my view public services cannot be seen to have been impartially provided if the persons providing the same are patently conflicted. Similarly, conflict of interests calls into question whether the person is capable of being transparent and accountable....In my view the decision purporting to appoint the Interested Party as the Chairperson of the Agency cannot therefore be allowed to stand on two grounds. First, the process of appointment of the said Interested Party was tainted with procedural impropriety. Secondly, the appointing authority failed to take into consideration relevant materials to wit the Interested Party’s suitability for the said position taking into account his perceived conflict of interest.”

79. In view of the foregoing, the Petitioner was certain in the last issue that the 1st and 2nd Respondent including the other Respondents and Interested Parties ought to be surcharged the monies in form of salaries and allowances that were paid out to the 1st Respondent as a result of the multiple roles in line with Article 226 (5) of *the Constitution*.



1st, 2nd, 3rd and 5th Respondents' Submission

80. These Respondents' submissions are not in the Court file or Court Online Platform (CTS).

4th Respondent's Submissions

81. Principal State Counsel, Esther Muchiri filed submissions dated 1st February 2024 and highlighted the issues for determination as: whether the Petitioner has demonstrated violation of constitutional rights and whether the 1st Respondent as the 4th Respondent's Deputy Director Legal Services and Corporation Secretary discharged her duties.
82. On the first issue, Counsel relying in *Anarita Karimi Njeru Vs- The Republic (1976-1980) KLR 1272* submitted that anyone who alleges constitutional violations must plead the same with precision and demonstrate the manner in which the constitutional provisions were violated as alleged. Equal dependence was placed in *Meme Vs Republic & Anor [2004] eKLR*.
83. According to Counsel, the Petitioner had not demonstrated how the constitutional rights had been violated or even threatened. As a result, Counsel submitted that the Petitioner had not met the set threshold and therefore not entitled to the orders sought in this matter.
84. On the second issue, Counsel relying on the 4th Respondent's averments in the affidavit submitted that the 1st Respondent had carried out her duties in an exemplary manner. Counsel noted that this was also indicative from the staff performance Appraisal.
85. Counsel also submitted that the Petitioner's allegations that the 1st Respondent had neglected her duties at the 4th Respondent to the extent that the 4th Respondent withdrew the proceedings in Civil Suit No. E044 of 2022 were false, baseless, malicious and unsubstantiated. Moreover, that the Petitioner lacks the capacity or the knowledge to speak on behalf of the 4th Respondent. Accordingly, these accusations were argued to be geared towards maligning the 1st and 4th Respondents' good reputation.
86. Reliance was placed in *Uhuru Highway Development Ltd -Vs- Central Bank of Kenya & 2 Others*, Civil Application Number 140 of 1995 where it was held that:
- "A man who is prepared to deceive a Court into granting him an order cannot validly claim that he has a meritorious case and would have been entitled to the order anyway, if the case is meritorious there can be no reason for concealing some parts of it to the Court."
87. Like dependence was placed in *John Ole Kanchuel-Vs- Philip Lemiso Kanchuel & Another (2011) eKLR*.

2nd, 3rd, 4th and 5th Interested Parties Submissions

88. On 6th February 2024, Chief State Counsel, Emmanuel Bitta filed submissions for these parties.
89. Relying on these Parties responses, Counsel submitted that it was evident that the Petition was full of willful untruths. Moreover, Counsel stressed that all the Interested parties affirmed that the Petitioner had not bothered to seek the requisite information from them before filing this Petition. According to Counsel this was a clear indication of an improper motive on the Petitioner's part. As such, Counsel asserted that the Petition was not sustainable as is actuated by malice and devoid of a credible basis.



Analysis and Determination

90. In the light of the grievances raised in this Petition, this Court conceives the issues for determination to be as follows:
- i. Whether in view of specific mandates of the relevant constitutional and/or public bodies this Court should assume primary jurisdiction over the allegations raised in this Petition.
 - ii. Whether the allegations of violation of *the Constitution* particularly Articles 10, 73 and 232 of *the Constitution* were established particularly as against the 1st Respondent or all the Respondents generally.
 - iii. Whether with reference to the Cross – Petition, this Court should exercise its Constitutional jurisdictional to determine the grievances for breaches of Constitutional rights of the 1st Respondent by the Petitioner, and if the answer is in the affirmative, whether the Petitioner violated the 1st Respondent’s rights under Articles 28, 31, 32 (2) and 33 (3) of *the Constitution*.
 - iv. Whether or not the Petitioner or the 1st Respondent are entitled to the relief sought in their respective Petitions/cross-petition.

Whether in view of specific mandates of the relevant constitutional and/or public bodies this Court should assume primary jurisdiction over the allegations raised in this Petition.

91. This essentially raises a jurisdictional issue that the Court needs to ascertain so as to assure itself before venturing into the issues raised in the Petition. As was held by the Supreme Court in the Matter of the Interim Independent Electoral Commission [2011] KESC 1 (KLR);

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent.”

92. The jurisdiction to hear and determine Constitutional disputes is granted to this Court by *the Constitution* in particular, Article 165 (3) (d) of *the Constitution* which provides as follows:

Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

- ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
93. In adjudication of constitutional disputes, the court ensures that it does not usurp the powers and responsibilities of other constitutional or public bodies hence under the justiciable principle, the court can examine if the matter properly falls within its scope or is a mandate of another constitutional organ or public body.
94. If it is apparent to the Court that the matter deserves to be considered elsewhere rather than before the Court, it will decline the invitation to entertain the matter the court does not exist in Constitutional vacuum.



95. The above position resonates with the holding of the Supreme Court in *Benson Ambuti Ambega & 2 Others v Kibos Distillers Limited* (2020) eKLR where the Court observed thus:
- “(51) Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism...”
96. Applying the same principle, the High Court in the case of *Law Society of Kenya v Attorney General & Another; National Commission for Human Rights & Another (Interested Parties)* (2020) eKLR held as follows:
- “...Where *the Constitution* has reposed specific functions in an institution or organ of the State, the Court must give those organs sufficient time or leeway to discharge their constitutional mandate and only accept an invitation to intervene when those organs or bodies have demonstrably been shown to have acted contrary to their constitutional mandate or in contravention of *the constitution*...”
97. Courts are thus careful not intrude into matters that generally fall within the area of responsibility of other institutions or agencies of Government.
98. The substratum of the present Petition is violation of values and principles that govern public service and is thus majorly founded on provisions touching integrity under Chapter 6 of the constitution hence the Petition rotates around violation of provisions of Article 10, 73 and 232 of *the Constitution*. Pointedly, the Petitioner makes reference, and rightly so, to the Sections 10 (1) & 2 (b) of the *Public Service (Values and Principles) Act*, as well as the *Leadership and Integrity Act* and the Public Officers and Ethics Act.
99. *The Constitution* under Article 79 provides for enactment of legislation for the establishment of the Ethics and Anti-Corruption Commission which shall have the powers and status of a Commission under Chapter 15 for purposes of ensuring compliance with, and enforcement of, provisions of Chapter Six of *the Constitution*. The preamble to the *Ethics and Anti-Corruption Commission Act* states that it is “An Act of Parliament to establish the Ethics and Anti-Corruption Commission pursuant to Article 79 of *the Constitution*, to provide for the functions and powers of the Commission, to provide for the qualifications and procedures for the appointment of the chairperson and members of the Commission, and for connected purposes.”
100. Under Article 80 of *the Constitution*, Parliament is required to, and has enacted, the *Leadership and Integrity Act*. Article 80 (b) provides that the legislation shall prescribe the penalties, in addition to penalties referred to in Article 75, that may be imposed for contravention of this Chapter. Article 80 (c) provides that the Act will also apply to public officers with necessary modification, hence it is not restricted to state officers as public officers such as the 1st Respondent are included. The preamble to the Leadership and Integrity Cap 185A provides that it is ‘An Act of Parliament to give effect to, and establish procedures and mechanisms for the effective administration of Chapter Six of *the Constitution* and for connected purposes.’



101. The definition of "Commission" under Section 2 of the Act is that it means the Ethics and Anti-Corruption Commission established under the [Ethics and Anti-Corruption Commission Act](#).
102. The guiding principles are specified under Section 3 of the Act. Section 3 (1) provides that the primary purpose of the Act is to ensure that State officers respect the values, principles and requirements of [the Constitution](#) and at sub-section 2 outlines them as follows:
- (2) A State officer shall respect the values, principles and the requirements of [the Constitution](#), including—
- a. the national values and principles provided for under Article 10 of [the Constitution](#);
 - b. the rights and fundamental freedoms provided for under Chapter Four of [the Constitution](#);
 - (c) the responsibilities of leadership provided for under Article 73 of [the Constitution](#);
 - d. the principles governing the conduct of State officers provided for under Article 75 of [the Constitution](#);
 - (e) the educational, ethical and moral requirements in accordance with Articles 99(1)(b) and 193(1)(b) of [the Constitution](#);
 - (f) in the case of county governments, the objectives of devolution provided for under Article 174 of [the Constitution](#); and
 - (g) in so far as is relevant, the values and principles of Public Service as provided for under Article 232 of [the Constitution](#).
103. Moving on, the Act provides in Section 4 (1) 'Every person has the responsibility of implementing the provisions of this Act to the extent required by this Act' but the body that has been specifically designated to oversee the implementation of the Act is the Ethics and Anti-Corruption Commission by dint of Section 4 (2). Indeed, in the exercise of that mandate, the Ethics and Anti-Corruption Commission may under Section 4 (3) and (4); require any public body to carry out such functions and exercise such powers as may be necessary under the Act and where the public entity fails to comply, then the Commission may make an application to the High Court Judge for appropriate orders requiring the public entity to comply.
104. Since the main complaint in this Petition is that the 1st Respondent actions violated the values and principles required of public officers by [the Constitution](#), it follows therefore that pursuant to the [Leadership and Integrity Act](#) that was enacted to ensure respect for values and principles of [the Constitution](#) by public officers, it is the Ethics and Anti-Corruption Commission that is legally mandated to oversee that public officers comply with the values and principles under Chapter 6 of [the Constitution](#) as well as other the related ones in Articles 99 (1), (b), 193 (1) (b), 174 and 232 among others that should have been the first port of call for the Petitioner to lodge a complaint. It is the body that has the primary responsibility to deal with those allegations. It was therefore premature for the Petitioner institute this Petition before giving the Ethics and Anti-Corruption Commission an opportunity to carry out an exhaustive inquiry into the allegations of breach of Chapter Six of [the Constitution](#) by the 1st Respondent.
105. This Court is constitutionally bound to accord deference to coordinate branches of government and public bodies to execute their respective legal mandates and its intervention can be properly invoked if the remedies if the public body concerned is proven to have failed or neglected to carry out its legal



obligation to the detriment of any person or the public. This Petition was instituted before seeking the intervention of Ethics and Anti-Corruption Commission on a matter that squarely falls within its purview and thus my opinion is not ripe.

Whether the allegations of violation of the Constitution particularly Articles 10, 73 and 232 of the Constitution were established particularly as against the 1st Respondent or all the Respondents generally.

106. In reference to this issue, having found that the Petition is prematurely before this Court for overlooking the Ethics and Anti-Corruption Commission that has the primary responsibility of dealing with the grievances such those raised in the Petition against public officers, it is my considered view that it would be unnecessary to delve further into any other issue in the petition.

107. In reference to the Cross – Petition the issue is:

Whether this Court should exercise its Constitutional jurisdictional to determine the allegations of violation of Constitutional rights against the 1st Respondent by the Petitioner, and if the answer is in the affirmative, whether the Petitioner violated the 1st Respondent’s rights under Articles 28, 31, 32 (2) and 33 (3) of the Constitution.

108. The 1st Respondent alleged that the Petitioner had through the false allegations made against her caused her images to be published widely in both print and electronic media as a person who has no respect for the values and principles of public service and by so doing, intruded into her privacy causing her great distress that has resulted in violation of her rights under Articles 28, 31, 32 (2) and 33 (3) of the Constitution.

109. I decline to consider this cross-petition on one fundamental reason, the doctrine of constitutional avoidance. The facts as presented by the 1st Respondent in the cross-petition strongly point to a claim founded on tort of defamation against the Petitioner though packaged as constitutional violations. The grievance by the 1st Respondent is not in my view so serious to the extent that it requires constitutional sanctions.

110. The doctrine of constitutional avoidance obliges the Court not to invoke the Constitution in resolution of disputes where it is possible to get a remedy without elevating the dispute into a constitutional issue as in cases where the remedies can be obtained under the common law or the statute.

111. As was held in *C O D & another vs Nairobi City Water & Sewerage Co. Ltd* (2015) eKLR

“... 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 Marshall. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof...”

112. In the light of the foregoing reasons, it the finding of this Court that both the Petition and the Cross-Petition have no merits.

113. I accordingly dismiss both the Petition and the Cross-Petition with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2025.

.....

L N MUGAMBI



JUDGE

