



Shimekha v Council of Kaimosi Friends University & 6 others; Public Service Commission & another (Interested Parties) (Constitutional Petition E004 of 2024) [2025] KEHC 1884 (KLR) (6 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1884 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CONSTITUTIONAL PETITION E004 OF 2024**

AC BETT, J

FEBRUARY 6, 2025

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010,

AND

IN THE MATTER OF ARTICLES

1,2,3,10,19,20,21,22,23,41,47,48,50,73,74,75,77,78,79,

80,232,233,234,258,259,260 OF THE CONSTITUTION OF

KENYA 2010

AND

IN THE MATTER OF VIOLATION OF THE FUNDAMENTAL RIGHTS AND FREEDOM UNDER THE CONSTITUTION OF

KENYA 2010

AND

IN THE MATTER OF LEADERSHIP & INTEGRITY UNDER CHAPTER SIX OF THE CONSTITUTION OF KENYA 2010 &

THE LEADERSHIP&INTEGRITY ACT 2012

AND

HC. CONST. PETITION NO. E004/2025 – RULING PAGE 1 OF 24

IN THE MATTER OF THE CONSTITUTIONAL PRINCIPLES OF INTEGRITY, ACCOUNTABILITY & TRANSPARENCY UNDER

THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE PUBLIC SERVICE COMMISSION



ACT 2017 & THE PUBLIC SERVICE (VALUES AND
PRINCIPLES) ACT 2015

AND

IN THE MATTER OF ELRC PETITION NO E014 OF 2024
PROF. MANYASA J.O NANDI & EZEKIEL MACHOGU & 3

OTHERS

AND

IN THE MATTER OF UNIVERSITIES ACT 2012

BETWEEN

SIMON INDASI SHIMEKHA PETITIONER

AND

COUNCIL OF KAIMOSI FRIENDS UNIVERSITY 1ST RESPONDENT

BERNADETTE MUNGAI 2ND RESPONDENT

RODNEY O. OLUOCH 3RD RESPONDENT

FRANCIS BWIRE 4TH RESPONDENT

FAUZIYA B KARAMA 5TH RESPONDENT

PAUL WANDERI 6TH RESPONDENT

JOSEPHINE W. M KANYI 7TH RESPONDENT

AND

PUBLIC SERVICE COMMISSION INTERESTED PARTY

ATTORNEY GENERAL INTERESTED PARTY

RULING

1. This matter is before this court pursuant to an order of the Employment and Labour Relations court dated 15th January 2025 referring the matter to this court for the parties to argue the issue of jurisdiction. The matter was initially commenced in this court, but the court thought it fit to refer the matter to the Employment and Labour Relations Court, which in turn referred it back to this court with the directions that the parties argue on the issue of Jurisdiction.
2. The Petitioner herein filed this constitutional petition in this court against the Respondents seeking the following orders:-
 - (a) A Declaration that Respondents' failure to investigate the integrity issues raised against Prof. Manyasa J.O Nandi contravened the provisions of Chapter Six of the Constitution of Kenya, 2010 and Article 10 of the Constitution of Kenya, 2010.



- (b) A Declaration that the actions and omissions of the Respondents' in performance of their duties contravened Article 73 (1) of the Constitution of Kenya, 2010 that their assigned duties is a public trust to be exercised in a manner that is consistent with the purposes and objects of the Constitution of Kenya, 2010 and in a manner that demonstrates respect for the people; bring honour to the nation and dignity to the office, and promotes public confidence in the integrity of the office.
 - (c) A Declaration that the actions and omissions of the Respondents contravened Section 7, 8, 10, 11 of the Leadership and Integrity Act, 2012.
 - (d) An Order do issue that the Respondents having contravened the provisions of Chapter Six of the Constitution of Kenya, 2010 and Article 10 of the Constitution of Kenya, 2010, the recommendation dated 2nd January 2024 is null and void ab initio.
 - (e) An Order do issue quashing the Judgement in ELRC Petition No. E014 of 2024 Prof. Manyasa J.O. Nandi & Ezekiel Machogu & 3 OTHERS delivered on 19th of December 2024 and all the Subsequent Orders of the Court.
 - (f) Any other Order do issue in the furtherance of justice and fairness.
 - (g) Costs of the Suit.
3. The gravamen of the petition is that the Respondents failed to act on complaints raised by the public in recommending the appointment of Professor Manyasa J.O Nandi as Vice Chancellor, Kaimosi Friends University from among other shortlisted candidates thereby contravening the integrity of the public institution and public interest thus violating the provisions of Chapter 6 and Article 10 of the Constitution of Kenya by failing to ensure compliance with the constitutional principles of integrity, accountability and transparency.
 4. The Petitioner also filed an application dated 5th January 2025 seeking Conservatory orders suspending the implementation of the Recommendation of the 1st Respondent issued on the 2nd January 2024 and/or stay the judgement of the ELRC Petition No. E014 of 2024 delivered on 19th December 2024 and all the subsequent orders of the court.
 5. The court directed that the Petitioner files written submissions on the Issue of jurisdiction. Counsel for the Respondents and the Interested party left the matter to the court to decide.

Petitioner's Submissions

6. The Petitioner submitted that this court has the exclusive jurisdiction to deal with matters of violation of fundamental rights as per the provisions of Article 23 as read with Article 165 of the Constitution of Kenya. The Petitioner argued that the action of the Respondents of nominating Prof. Manyasa J.O Nandi without conducting any investigation despite complaints being raised against him by members of the public is in total contravention of Chapter 6 and Article 10 of the Constitution and the Leadership and Integrity Act.
7. The Petitioner asserted that Section 12(1) of the Employment and Labour Relations Court Act provides for instances where the Employment and Labour Relations Court is bestowed with jurisdiction. They posited that there exists no employer-employee relation between the Petitioner and the Respondents and that none of the instances provided under Section 12(1) of the Employment and Labour Relations Court Act apply to the Petitioner to warrant the Employment and Labour Relations Court to assume jurisdiction.



8. They further submitted that they approached this court, being a constitutional court, in an endeavour to defend the Constitution of Kenya as envisaged under Article 3(1) of the Constitution and in the public interest as envisaged under Article 23 of the Constitution of Kenya. They averred that Article 22(1) of the Constitution apports to every person the right to institute court proceedings when a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened. They further asserted that Article 21(1) of the Constitution envisages that it is the fundamental duty of the state and every state organ to observe, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.
9. The Petitioner relied on the case of Andrew Nthiwa Mutuku Vs Court of Appeal, Director of Public Prosecution, Director of Criminal Investigations, Inspector General of Police & Attorney General [2021] eKLR where the court held that the High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of or threat to a right or a fundamental freedom in the Bill of Rights. They also relied on the case of Protus Buliba Shikuku Vs Attorney General [2012] eKLR to support their case.
10. The Petitioner asserted that the judgement and the enforcement of the resultant decree of the Employment and Labour Relations Court has the import of effectively removing the Cabinet Secretary of Education from the process of recruitment and appointment of senior university managers hence the said judgement is in contravention with the Universities Act 2024 thereby amending the said Act ,a duty purely bestowed on the National Assembly.
11. The Petitioner cited the case of Jasbir Singh Rai & 3 others Vs Tarlochan Sigh Rai Estate & 4 others [2013] eKLR where the Supreme Court emphasized the exclusive jurisdiction of the High Court to deal with matters of violation of fundamental rights as envisioned under Article 23 as read with Article 165 of the Constitution.
12. The Petitioner prays that this court makes a determination that it has the exclusive jurisdiction to deal with the matters of violation of fundamental rights as provided under Article 23 as read with Article 165 of the Constitution. The Petitioner also prays that their application dated 30th of December 2024 be allowed as prayed to avoid miscarriage of justice since the Petition may be rendered nugatory if the Conservatory orders sought in the interim are not issued in the first instance.

Analysis

13. The issues that arise for determination herein is whether this court has jurisdiction to entertain the instant petition and whether the application for Conservatory orders is merited.
14. The Supreme Court in Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 others [2012] eKLR while discussing the issue of jurisdiction rendered itself as follows:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to



set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

15. The jurisdiction of the High Court is granted by Article 165 of the Constitution which states as follows:

- “(3) Subject to clause (5), the High Court shall have-
- a. Unlimited original jurisdiction in criminal and civil matters;
 - b. Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - c. Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - d. Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - i. the question whether any law is inconsistent with or in contravention of this Constitution;
 - 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;
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - iv. a question relating to conflict of laws under Article 191; and
 - e. Any other jurisdiction, original or appellate, conferred on it by legislation.
- (4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
- (5) The High Court shall not have jurisdiction in respect of matters—
- a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - b. falling within the jurisdiction of the courts contemplated in Article 162 (2).
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.



(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

16. The Petition herein relates to the constitutionality of the process that led to the nomination of one Prof. Manyasa J.O Nandi for the position of Vice Chancellor of Kaimosi Friends University. The Petitioner avers that the failure of the University Council to conduct investigations concerning the complaints of the public against the nominee contravenes Article 10 and Chapter 6 of the Constitution.

17. It has been held by the High Court in *Protus Buliba Shikuku v Attorney General* (supra) while addressing the question of jurisdiction that:-

“(9) In a unique way the superior court is being asked to interfere with a decision of the court of appeal. We are in agreement that Article 23 of the current 2010 Constitution as read with Article 165(1) 3(a) (b) (d) (i) (ii) have donated the same mandate without exception to this superior court and for this reason of donation of jurisdiction without exception we feel confident that we are properly seized of the petitioner’s complaints which arise from an alleged act of omission or commission by the courts of this jurisdiction as laid out in the petition.

(10) That the petitioner’s complaints in the petition having been anchored on an alleged breach of a fundamental right, the legal prescriptions assessed under the Article 2(5) of the 2010 Constitution as emanating from International Law Best Practices are in agreement with the current Municipal prescriptions as assessed that there are key principles which should be taken into consideration when dealing with complaints such as those laid by the petitioner namely:-

- (a) Equality before the law courts, tribunals and equal protection of the law is a fundamental right.
- (b) A right to have one’s cause heard irrespective of its ultimate success is of paramount importance.
- (c) There is entitlement to a right to an effective remedy meaning one which is capable of enforcement with a leaning towards conferring of a right.
- (d) The sole purpose of enforcement of human rights is for purposes of preservation of the human dignity and enable the offending human being realize the full potential of himself/herself as a human being.
- (e) Adjudication of the rights are between the individual as the governed and the state as the governor and are not adjudicable as between individuals under private law.
- (f) As found by judges in the persuasive authority of *Reyes Versus the Queen* (supra) the call both at the international level as well as the Municipal level is for the courts to interpret the said bill of Rights broadly and liberally in order to give effect to the



enforcement of the right with an interpretation which favours the enjoyment of that is alleged to have been breached or has been threatened to be breached.

- (g) The interpretation should also bear in mind the need to observe respect and protect the dignity of the individual.
- (h) There is no prescribed period of limitation inbuilt either under the defunct section 84(1) Provisions or current Article 23 of the 2010 Constitution as to when one loses the right to pursue infringement to a fundamental right.
- (i) Even where no specific remedies were prescribed as being inbuilt in the defunct Section 84(1) Provisions, the courts had jurisdiction to grant appropriate remedies known in law. Some of which have now been entrenched in Article 23 with a rider that they are not exhaustive.”

18. The issue of jurisdiction of the High Court to question the Constitutionality of a decision of the superior court was considered by Odunga J (as he then was) in the Andrew Nthiwa Mutuku case (supra) when he held as follows:-

“...while an appellate court could well have found the sentence excessive, this Court in exercise of its jurisdiction as a Constitutional Court cannot interfere with the gravity of the sentence unless the same is unconstitutional or violates the Petitioner’s right to fair hearing. While this Court may well have taken a different view had the courts not afforded the Petitioner an opportunity to mitigate, in this case where that right was afforded but not utilised, to interfere with the sentence would amount to unjustifiably interfering with the Court of Appeal’s discretion in sentencing based on the material placed before it.” (Emphasis added)

19. Flowing from the foregoing decisions, is evident that Article 21 (1) of the *Constitution* binds the High Court which is a state organ to observe, respect, promote and fulfil the fundamental rights and freedom under the Bill of Rights.
20. Additionally, the Supreme Court pronounced itself on the issue of jurisdiction in the case of Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others (supra) when it held as follows:-

“(111) ...The Kenyan Constitution has given the High Court the exclusive jurisdiction to deal with matters of violations of fundamental rights (Article 23 as read with Article 165 of the *Constitution*). The High Court, on this point, has correctly pronounced itself in a judgment by Justices Nambuye and Aroni, in Protus Buliba Shikuku v R, Constitutional Reference No. 3 of 2011, [2012] eKLR.

(112) The Shikuku Case fell within the criminal justice system; it involved a claim of violation of the petitioner’s fundamental rights by the Court of Appeal, in a final appeal. The trial Court failed to impose against the petitioner the least sentence available in law, at the time of sentencing. On the issue of jurisdiction, the learned judges, relying on Articles 20, 22, 23 and 165 of the *Constitution*, rightly held that the High Court had jurisdiction to redress a violation that arose from the operation of law through the system of courts, even if the case had gone through the appellate level. In so holding, the High Court stated



with approval the dicta of Shield J, interpreting the provisions of the 1963 Constitution in *Marete v. Attorney General* [1987] KLR 690:

“The contravention by the State of any of the protective provisions of the Constitution is prohibited and the High Court is empowered to award redress to any person who has suffered such a contravention.”

(113) Thus, in answer to Mr. Nowrojee’s first two questions posed to the Supreme Court, my answer is this: There is no injustice that the Constitution of Kenya is powerless to redress.”

21. In view of the fact that the issues raised by the Petitioner are constitutional in nature, I find that the matters encapsulated in the instant petition fall under Article 165 (3)(d)(ii) of the Constitution which falls well within the jurisdiction of this court.
22. The Petitioner has averred that Prof. Manyasa J.O Nandi has written a letter to the University demanding that the decision of the Environment and Labour Relations Court be implemented .I agree with the Petitioner that such implementation would bypass the Cabinet Secretary for Education against the mandatory requirements of Section 35(1) (a)(v) of the Universities Act,2024 which stipulates that the University Council do appoint a Vice Chancellor in consultation with the Cabinet Secretary.
23. Coupled with the averments that the Respondents flouted the Constitution in recommending the appointment, it is clear that the Petitioner’s apprehension that in the absence of conservatory orders, the petition will be rendered nugatory and reduced to a mere academic exercise are well founded.
24. It must be reiterated that where there is imminent danger that the Constitution may be violated, the court is obligated to issue such orders as are necessary to prevent the violation. In the case of *Gatiran Peter Munya v. Dickson Mwenda Kithinji & 2 others* [2014] eKLR, the Supreme Court held as follows:-

“Conservatory orders bare a more decided public-law connotation: for they are orders that facilitate orderly functioning within public agencies, as well as uphold the adjudicatory authority of the Court in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues like “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay.

Conservatory orders ought to be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”
25. In my considered opinion, the Petitioner has demonstrated that the intended appointment of Prof. Manyasa J.O. as the Vice Chancellor Kaimosi Friends University without investigating the integrity issues raised against him contravenes Chapter 6 and Article 10 of the Constitution. In the event it is eventually established that the appointee is a person of integrity, the appointment can proceed but in the event the converse is established, if he would have been appointed, our constitutional values would have been breached. It is therefore in the public interest that conservatory orders do issue to forestall any imminent threat of violation of the Constitution.
26. Accordingly, I hereby make the following orders: -



- a. Pending the hearing and determination of the Petitioner's Application, a conservatory order be and is hereby issued suspending the implementation of the recommendation of the 1st Respondent issued on the 2nd of January 2024.
- b. Pending the hearing and determination of the Petitioner's Application, an order of stay of execution be and is hereby issued staying execution of the Judgement and the resultant decree issued in ELRC Petition No. E014 OF 2024 delivered on 19th December 2024.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 6TH DAY OF FEBRUARY 2025.

A. C. BETT

JUDGE

In the presence of:

No appearance for the Petitioner

No appearance for the Respondent

Court Assistant: Polycap

