



REPUBLIC OF KENYA



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**Mweresa v County Government of Vihiga & another (Constitutional Petition
E003 of 2025) [2025] KEHC 12845 (KLR) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12845 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CONSTITUTIONAL PETITION E003 OF 2025**

JN KAMAU, J

SEPTEMBER 18, 2025

**IN THE MATTER OF THE PRINCIPLES OF PUBLIC SERVICE &
STAFFING OF COUNTY PUBLIC SERVICE UNDER ARTICLE 232 & 235**

AND

**IN THE MATTER OF THE COUNTY PUBLIC SERVICE
UNDER THE COUNTY GOVERNMENTS ACT**

AND

**IN THE MATTER OF THE STATUTORY POWER OF THE COUNTY
PUBLIC SERVICE BOARD TO ESTABLISH AND ABOLISH AN OFFICE
UNDER SECTION 60 OF THE COUNTY GOVERNMENTS ACT**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 177,
232, 235 OF THE CONSTITUTION OF KENYA AND CONTRAVENTION
OF SECTIONS 36, 46, 59, 59A, 60, 61 AND 62 OF THE COUNTY
GOVERNMENTS ACT AND SECTION 19 OF THE HEALTH ACT**

AND

**IN THE MATTER OF THREATENED VIOLATION OF THE RIGHT
TO HEALTH; THE PRINCIPLES OF PUBLIC FINANCE; SECTION
14, 20 AND 21 OF THE FACILITY IMPROVEMENT FINANCING
ACT; SECTION 14 OF VIHIGA COUNTY HEALTH SERVICES ACT**

BETWEEN

DR CLARENCE EBOSO MWERESA PETITIONER

AND

COUNTY GOVERNMENT OF VIHIGA 1ST RESPONDENT

VIHIGA COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT



RULING

DIVISION - Introduction

1. In his Petition dated 24th February 2025 and filed on 25th February 2025, the Petitioner herein sought the following orders:-
 1. Pursuant to Article 23(3)(a) (sic), a declaration that the acts of the Respondents herein threaten human rights of the citizens of Vihiga under *the constitution* including:
 - i. The citizen's right to the highest standard of health
 - ii. The patients' right to health as per the *Health Act*
 2. Pursuant to Article 258(1), 165(3d) (sic), a declaration that the creation of the office of Chief Executive Officer of the County Referral Hospital is inconsistent with and in contravention of *the Constitution, County Governments Act, Health Act* and Facility Improvement Financing Act.
 3. Pursuant to Article 23(3f) (sic) an order of judicial review quashing the decision of the County Government of Vihiga creating the office of Chief Executive Officer of the County Referral Hospital.
 4. Pursuant to Article 23(3b) (sic) a permanent injunction be issued against the County Public Service Board barring them from further processing any applications or proceedings to fill any vacancy pursuant to the advertisement for position of Chief Executive Officer of Vihiga County Referral Hospital.
2. He also filed a Notice of Motion application of even date seeking temporary injunction orders barring the 2nd Respondent from filling the vacancy of the Chief Executive Officer (hereinafter referred to as the "CEO") of Vihiga County Referral Hospital (hereinafter referred to as the "facility").
3. On 27th February 2025, the Respondents herein filed a Notice of Preliminary Objection of even date in opposition to the Petitioner's said Petition and application.
4. They averred that the Petitioner was bereft of the required locus standi to maintain or prosecute this Petition and the application thereon and that the same had been lodged and sought to be maintained for the sole interest and benefit of an individual namely the Medical Superintendent whose address for service and letter of appointment had been used without any authorisation.
5. They contended that the Petition was unsustainable for violation of Rule 10(2)(d) of the "Mutunga Rules" [*The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice Procedure Rules 2013]. They added that the Petition remained incompetent and fatally defective for failure to disclose constitutional issues that would invite the Constitutional jurisdiction of the court anticipated in Articles 22, 23 and 258 (sic). They further argued that the Petition did not satisfy the requirements for a constitutional petition set out in Muruatetu and Wombara Cases.
6. They were categorical that this court lacked the required jurisdiction to entertain the Petition on the ground that if there were any constitutional issues emerging in the Petition, which was not the case as there was none, then the same were employment related and fell within the exclusive jurisdiction of the Employment and Labour Relations Court (ELRC) under Article 165 of *the Constitution*.



7. They further contended that the allegations raised in the Petition related to County Government Public Service (CGPS) and, therefore, exclusively, fell under the jurisdiction of the Public Service Commission (PSC) by way of appeal under Article 234(2)(i) of *the Constitution*, Section 77 of the *County Governments Act* and Sections 85 and 86 of the *Public Service Commission Act*. They added that the matter herein also fell within the exclusive jurisdiction of the County Assembly as an oversight body over the executive.
8. They were categorical that the Petition was premised on deliberate falsehood within the pleadings which were material to the cause namely the Office of “County Director of Health” which was non-existent presently.
9. They further argued that both the Petitioner’s Petition and the Notice of Motion application were incompetent for dependence on incurable and fatally defective affidavits sworn and filed in violation of Rule 20(1)(a) of the “Mutunga Rules” [*The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice Procedure Rules 2013] and Sections 7 and 17 of the *Oaths and Statutory Declarations Act* and that specifically, he had described himself as being a female adult in his Supporting Affidavit and a male adult in his Verifying Affidavit both sworn on 24th February 2025.
10. Their Written Submissions were dated 12th May 2025 and filed on 13th May 2025 while those of the Petitioner were dated and filed on 13th April 2025. The Ruling herein is based on the said Written Submissions that both parties relied on in their entirety.

Legal Analysis

11. This court considered the grounds of the Respondents’ Preliminary Objection under the following distinct and separate heads.

I. Locus Standi

12. The Respondents submitted that Articles 22 and 258 of *the Constitution* conferred the right on citizens to lodge constitutional petitions in court and expected that a petitioner had to fall in one of the two (2) classes namely, where he was acting in person and for personal interest or where he was pursuing public interest litigation in which he was representing the interest of the public at large. They argued that the two (2) causes of action could not be mixed up.
13. They pointed out that Article 158(2), 22(2) and Rule 4(2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules underlined the legal capacity in which a litigant could approach the court.
14. They contended that in the present case, the Petitioner claimed in his own description that he was suing on behalf of the residents of Vihiga County yet in the entire pleadings he advanced the personal interests of the Medical Superintendent, Dr Victor Zimbulu Mudembei and even went to the pain of securing his appointment letter without any legal authority to use the same as an annexure in court to build his case.
15. They asserted that being a public officer in the employment of the Respondent, the Petitioner was bound by the leadership and integrity provisions of *the Constitution* and the law which restricted him to conduct himself in a manner that upheld the integrity and honour of the office he held.
16. They further questioned whether the Petitioner had purportedly dragged his employer to court on official decisions taken according to his standing as a doctor and whether he should continue to serve after he had gone to the extent of accessing protected data of employees to use in court. To buttress



- their point, they asserted that courts had held that employment letters were confidential documents protected by law relating to data protection as was held in the case of *John v Bayer East Africa Limited* [2022] KEELRC 1426 (KLR).
17. On his part, the Petitioner submitted that a preliminary objection must raise a pure question of law or where it relies on facts, the facts must be uncontested or obvious from the pleadings and that the question of law raised or the uncontested facts must be dispositive of the suit as was held in the case of *Mukisa Biscuit Manufacturers Limited v Westend Distributors Limited*[1969]EA 696. He added that the Supreme Court had reiterated the above holding and pointed out that the court had to satisfy itself that there was no proper contest of facts as held in the case of *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 Others* [2015]eKLR.
 18. He argued that any assertion which claimed to be a preliminary objection and yet bore factual aspects calling for proof or seeks to adduce evidence for its authentication should not be allowed to proceed as was held in the case of *Oraro v Mbaja & John Makali v Speaker County of Bungoma & 4 Others*[2015]eKLR.
 19. He asserted that he had filed the Petition herein on his own behalf and on behalf of the residents of Vihiga and that the Respondents' claim that he had filed the same on behalf and for the sole benefit of a person that was the Medical Superintendent was, therefore, obviously a matter of contested fact.
 20. Article 258 (1) and (2) of *the Constitution* of Kenya stipulate as follows:-
 1. Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention
 2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by:-
 - a. a person acting on behalf of another person who cannot act in their own name
 - b. a person acting as a member of, or in the interest of, a group or class of persons;
 - c. a person acting in the public interest; or
 - d. an association acting in the interest of one or more of its members.
 21. The aforesaid provision has also been re-stated in Section 22(1) and 22(2) of *the Constitution* of Kenya.
 22. Although the Petitioner herein had lodged a Petition on his own behalf and on behalf of the people of Vihiga County, his affidavit evidence seemed to be alluding to the current holder of the office of the Medical Superintendent, as the aggrieved party and who was not a party in the Petition herein. The said person did not also swear any affidavit in support of the Petition herein.
 23. Be that as it may, this court had due regard to the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013]eKLR where the Court of Appeal settled the issue of locus standi in constitutional petitions. It held that locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history and that today, by dint of Articles 22 and 258 of *the Constitution*, any person could institute proceedings under the Bill of Rights, on behalf of another person who could not act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest.
 24. The Court of Appeal, however, cautioned that courts must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting bona fide with a view



to vindicating the cause of justice. Where a person acted for personal gain or private profit or out of political motivation or other oblique consideration, the court should not allow itself to be seized at the instance of such person and must reject their application at the outset.

25. The Petitioner approached this court by virtue of being a Kenyan, a medical professional based at the facility subject of this Petition and a resident of Vihiga County. As a resident of Vihiga County, he stood to benefit from the facility. Pursuant to Articles 22 and 258 of *the Constitution* of Kenya, he was entitled to maintain the instant proceedings. In the premises, this court found and held that the Petitioner was seized of the requisite locus standi to sustain the proceedings.

II. Competence Of The Petition

26. The Respondents invoked Rule 10(2)(d) of the “Mutunga Rules” [*The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice Procedure Rules 2013] and asserted that the Petitioner did not adhere to the said requirements and that he had not shown the injury he would suffer by having the CEO appointed for the facility other than his argument that the Medical Superintendent was performing similar function.
27. They were categorical that the Petition was incompetent and fatally defective for failure to disclose constitutional issues that would invite the constitutional jurisdiction of the court in Articles 22, 23 and 258 of *the Constitution* of Kenya. In this regard, they relied on the case of Anarita Karimi Njeru v Republic (1979) KLR 154 and Communication Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others (eKLR citation not given) where the common thread was that where a person sought redress from the High Court on a matter which involved reference to *the Constitution*, it was important that he should set out with a reasonable degree of precision that of which he complained, the provisions said to be infringed and the manner in which they were alleged to be infringed. In that regard, they further contended that there was no link between the Petitioner as the aggrieved party and the provisions of *the Constitution* alleged to have been infringed and the manifestation of the infringement.
28. The Petitioner did not submit on this issue. A perusal of his Petition dated 24th February 2025 and filed on 25th February 2025 indicated that he laid out Articles 10, 174, 201, 232 and 235 of *the Constitution* of Kenya together with related statutory sections of the law and laid out how the said Articles had been allegedly violated by the Respondents’ action.
29. Without belabouring this point, it was this court’s considered view that the Petition had met the threshold required of a competent petition as was held in the case of Anarita Karimi Njeru v Republic (Supra).

III. The Doctrine Of Exhaustion Of Remedies

30. The Respondents submitted that it was obvious that it was the advertisement rolled out by the 2nd Respondent for the appointment of the CEO of the facility that prompted the Petitioner to institute this Petition. They added that prayer 4 of the reliefs sought in the Petition showed that the Petitioner was seeking orders to stop employment of the said CEO.
31. They argued that that was a remedy that this court was prohibited from entertaining as it fell within the province of the ELRC by application of Article 162 and 165(5) and of *the Constitution* of Kenya.
32. They further added that the allegations raised in the Petition related to CGPS and, therefore, exclusively fell under the jurisdiction of the PSC by way of appeal under Article 234(2)(i) of *the Constitution*, Section 77 of the *County Governments Act* and Sections 85 and 86 of the *Public Service Commission Act*.



33. They pointed out that Section 87(2) of the Public Service Commission (sic) further prohibited any person from filing a suit in court before exhausting the appeal process provided in the Act. They asserted that the Petitioner did not appeal the decision to create a new office of the CEO for the facility to the PSC. They were emphatic that this court, therefore, lacked the necessary jurisdiction to entertain this matter. In this regard, they cited the case of *Mokua v Nyasani & 4 Others*[2024] KEHC 3213 (KLR) where it was held that it was imperative that where a dispute resolution mechanism existed outside courts, the same had to be exhausted before the jurisdiction of the courts could be invoked.
34. On his part, the Petitioner contended that the provisions of law that related to the PSC were decisions that were within its jurisdiction and the same related to the employment or engagement of a person in the county public service including the recruitment, removal from office amongst others.
35. He argued that his Petition related to the establishment and abolishing of an office(s) in the County Public Service, a function that was reserved for the County Public Service Board under Section 59(a) of the *County Governments Act*.
36. As the Respondents had invoked the doctrine of exhaustion of remedies in relation to the 2nd Respondent's functions. It therefore found it prudent to deal with the doctrine of exhaustion as its determination would inform whether the Petitioner had the capacity to approach the courts in the first instance.
37. Notably, Article 235 (1) of *the Constitution* of Kenya stipulates that a county government was responsible, within a framework of uniform norms and standards prescribed by an Act of Parliament for:-
- a. establishing and abolishing offices in its public service;
 - b. appointing persons to hold or act in those offices, and confirming appointments; and
 - c. exercising disciplinary control over and removing persons holding or acting in those offices.
38. The PSC was established under Article 233 of *the Constitution* of Kenya. It was one of the Commissions that was provided for under Chapter 15 of *the Constitution* of Kenya on Commissions and Independent Offices as per Article 248 (2) (g) of *the Constitution* of Kenya.
39. Under Article 234 (2)(i) of *the Constitution* of Kenya, one of the powers and functions of PSC is to:-
- “hear and determine appeals in respect of county governments’ public service.”
40. In addition, Article 249 (1) of *the Constitution* of Kenya provides that the objects of the commissions and independent office are to:-
- a. protect the sovereignty of the people;
 - b. secure the observance by all state organs of democratic values and principles; and
 - c. promote constitutionalism.
41. Article 249(2) of *the Constitution* of Kenya further stipulates that the commissions and independent offices were only subject to *the Constitution* of Kenya and the law. They were independent and not subject to direction or control by any person or authority.
42. On general powers and functions of constitutional commissions, Article 252 of *the Constitution* of Kenya stipulates that each commission and holder of an independent office:-



- a. may conduct investigations on its own initiative or on a complaint made by a member of the public;
 - b. has the powers necessary for conciliation, mediation and negotiation;
 - c. shall recruit its own staff; and
 - d. may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by *the Constitution*.
43. Within that constitutional background and with respect to the PSC’s powers and functions under Article 234 (2) (i) to hear and determine appeals in respect of county governments’ public service, the Parliament had enacted various statutory provisions. Part XV of the *Public Service Commission Act*, 2017 provided for hearing and determination of appeals in respect of county governments. It is some of the provisions under that part that are impugned in the present Petition.
 44. Section 77 of the *County Governments Act* Cap 265 (Laws of Kenya) also provided for appeals to the PSC against decisions of the CPSB, like the 2nd Respondent herein, or a person in exercise or purported exercise of disciplinary control against any county public officer. The said Section 77 of the *County Governments Act* further stated that the PSC shall entertain appeals on any decision relating to employment of a person in a county government
 45. Litigants ought to appreciate that statutes did not just happen to be in place. There was a rigorous legislative process, preceding enactment of statutes. The process involved many hours of parliamentary debate by Legislators and rigorous public engagement.
 46. In every litigation, courts were required to presume statutes enacted by Legislature to be valid and constitutional. The dispute resolution mechanisms under the *County Governments Act* and the *Public Service Commission Act*, had constitutional anchorage under Article 234(2)(i) of *the Constitution* of Kenya which could not be wished away.
 47. Alternative administrative remedies and processes had to be exhausted, before judicial process was invoked. The PSC was not limited to dealing with disputes such as the one before this court. Its mandate under Article 234(2)(i) of *the Constitution* of Kenya was broad. It included the mandate to make provisional and final decisions. Any party aggrieved by the decision of CPSB could, therefore, apply to it for the granting of provisional and/or final measures.
 48. The Public Service Commission [County Appeals Procedures] Regulations, 2022 provided for the procedure for the appeals. It provided for preliminary proceedings, interim applications and preliminary objections. Regulation 13 allowed any party to the Appeal, to apply for any orders or directions to the Commission, before the Appeal was heard and determined. Conservatory measures could be sought before the Commission.
 49. The aforesaid Regulations have enhanced the procedure and ensured all person including the Petitioner herein had full access to the 2nd Respondent and the PSC when aggrieved by the 2nd Respondent.
 50. Section 45(1)(a) of the *County Governments Act* provides that:-

“The Governor shall nominate qualified and experienced county chief officers from among persons competitively sourced and recommended by the County Public Service Board.”



51. From the affidavit evidence of the Respondents, it was clear that the 2nd Respondent received an indent from the 1st Respondent for the establishment of the office of the CEO for the facility. The 2nd Respondent approved the request following which the qualifications were defined and an advertisement to that effect was rolled out in the national media. They had received seven (7) applicants before this court issued interim stay orders.
52. If the Petitioner was aggrieved with the decision of the 2nd Respondent it ought to have appealed at the PSC, it was obligated to have sought redress from the PSC in line with Section 77(1) of the County Governments Act. The said Section 77(1) and 2(a) of the said County Governments Act provides that:-
- “Any person (emphasis court) dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission.
- The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of:-
- recruitment, selection, appointment and qualifications attached to any office.”
53. Further, Section 87(2) of the Public Service Commission Act provides that:-
- “A person shall not file any legal proceedings in any court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from County Government Public Service...”
54. There was no clearer provision emphasising the doctrine of exhaustion in matters relating to recruitment, selection, appointment and qualifications attached to any office in the County Government before recourse could be sought in the High Court than Section 87(2) of the Public Service Commission Act.
55. This was a position that was now well settled in several decisions amongst them Hussein Wanyama Mulebo & 5 Others v County Public Service Board & 2 Others [2022] eKLR, County Government of Mandera & Another v Attorney General & Another; Hussein Dayow Abdullahi & 3 Others (Interested Parties) [2020] eKLR, Kisumu County Public Service Board & Another v Samuel Okuro & 7 Others [2018] eKLR and Secretary, County Public Service Board & Another v Hulbhai Gedi Abdille [2017] eKLR.
56. It was, therefore, clear that in matters of recruitment there was an elaborate structure of dispute resolution at the county government level. The powers of the court could not be invoked until an applicant had demonstrated that he or she had complied with the doctrine of exhaustion.
57. It is important to point out that even while parties were exhausting the dispute resolution mechanisms, the jurisdiction of the court was not ousted. It only awaited to be invoked at the appropriate time. In the case of Evans Ladtema Muswahili v Vihiga County Public Service Board & 2others; Marley Ezekiel Ayiego (Interested Party) [2021] eKLR, the court therein associated itself with the position stated in Wambua Maithya v. Pharmacy and Poisons Board, Pharmaceutical Society of Kenya & 2 others (Interested Parties) [2019] eKLR, that there was jurisdiction, in cases of this nature, so long as the High Court confined itself to determining the question as to whether the recruitment process undertaken by the respondents met the requisite constitutional threshold.
58. For the foregoing reasons, this court found and held that it did not have jurisdiction to hear and determine the Petition herein as the jurisdiction to hear the Petitioner’s dispute lay first with the 2nd



Respondent where after an appeal lay with the PSC. This court was therefore called upon to down its tools forthwith and decline to grant the Petitioner any of the reliefs it had sought in the Petition herein as the present Petition was premature by virtue of the fact that no recruitment had taken place.

59. Jurisdiction could be conferred either by *the Constitution* and/or an Act of Parliament. With regard to the landmark case *Owners of Motor Vessel Lillian S v Caltex Oil Kenya Ltd* [1989] KECA 48 (KLR), which held that jurisdiction was everything and without it a court could not move a step, it was this court's finding that it was not in its jurisdiction to hear and determine matters arising from the County Public Service Board.

IV. Affidavits

60. The Respondents cited Rule 20(1)(a) of the "Mutunga Rules" [*The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice Procedure Rules 2013) and Sections 7 and 17 of the *Oaths and Statutory Declarations Act* and contended that the *Oaths and Statutory Declarations Act* considers affidavits as evidence on oaths with the attendant penal consequences against those giving information which was not true. They asserted that when the Petitioner gave personal description that causes confusion as to his or her true identity, it rendered the affidavit as non-affidavit and not valid to support the petition and that that error could only be resolved through a further affidavit to clarify the same and not wished away whether the court knows him to be a man or not.
61. On his part, the Petitioner pointed out that the clerical error was corrected by filing the correctly edited affidavit in support. He argued that an affidavit did not constitute the pleading and it only adduced evidence to support the facts pleaded and was not mandatory as a defective one could be struck out and the suit proceeds on its own. He added that as a matter of law, *the Constitution* of Kenya allowed the filing of constitutional petitions on the basis of informal documentation provided it was reduced in writing. In this regard, it cited Articles 22 and 23 of *the Constitution* and Mutunga Rules.
62. As the Petitioner had admitted that the issue of stating he was female or male was a clerical error, this court did not belabour the point as it was alive to the fact the court could consider an affidavit as provided in Order 19 Rule 7 of the Civil Procedure Rules, 2010 which states that:-

“The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.”

Disposition

63. For the foregoing reasons, the upshot of this court's decision was that the Respondents' Notice of Preliminary Objection dated and filed on 27th February 2025 was merited and the same be and is hereby upheld. The effect of this is that Petitioner's Petition dated 24th February 2025 and filed on 25th February 2025 be and is hereby struck out for want of jurisdiction.
64. As this was a public interest litigation and it would be unconscionable to award costs to a government against its citizen, this court hereby directs that each party will bear its own costs of the Petition herein.
65. Orders accordingly.

DATED AND DELIVERED AT VIHIGA THIS 18TH DAY OF SEPTEMBER 2025.

J. KAMAU

JUDGE

