



**Musyoka v Clerk Machakos County Assembly & 4 others; Sereka & 3 others (Interested Parties)  
(Constitutional Petition 2 of 2023) [2024] KEHC 4647 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4647 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CONSTITUTIONAL PETITION 2 OF 2023**

**MW MUIGAI, J**

**APRIL 11, 2024**

**IN THE MATTER OF: SECTIONS 55, 56, 57, 58, 59, 60, 61, 62, 63,  
64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74,75, 76, 77, 78, 79, 80, 81,82,  
83, 84, 85 AND 86 OF THE COUNTY GOVERNMENT ACT 2012**

**AND**

**IN THE MATTER OF: THE NOMINATION, APPOINTMENT, GAZZETEMENT  
AND SWEARING IN OF CHIEF OFFICERS WITHIN MACHACHOS COUNTY  
IN THE ABSENCE OF A PROPERLY CONSTITUTED PUBLIC SERVICE BOARD**

**BETWEEN**

**WILFRED MANTHI MUSYOKA ..... PETITIONER**

**AND**

**THE CLERK MACHAKOS COUNTY ASSEMBLY ..... 1<sup>ST</sup> RESPONDENT**

**THE SPEAKER MACHAKOS COUNTY ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

**MACHAKOS COUNTY ASSEMBLY ..... 3<sup>RD</sup> RESPONDENT**

**THE GOVERNOR MACHAKOS COUNTY ..... 4<sup>TH</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MACHAKOS ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**CECILIA MBINYA SEREKA ..... INTERESTED PARTY**

**STELLAMARRIS NDINDA MUTHOKA ..... INTERESTED PARTY**

**ONESMUS MUTISYA MUIA ..... INTERESTED PARTY**

**COUNTY PUBLIC SERVICE BOARDS NATIONAL CONSULTATIVE  
FORUM ..... INTERESTED PARTY**



## JUDGMENT

### The Petition

1. The petition dated and filed in court on 16<sup>th</sup> January, 2023 the Petitioner herein sought the following reliefs from the court:
  - a. An order of certiorari to remove to this court and quash the nomination, appointment and gazettelement of twenty-six county chief officers on 6/1/23.
  - b. A declaration that the entire process by the respondents leading to the nomination, appointment and gazettelement of twenty- six county chief officers on 6/1/23 was illegal, null and void
  - c. A declaration that any actions done by the twenty- six county chief officers be declared null and void their appointment having been unprocedural and illegal.
  - d. A declaration that all the actions done by the two remaining members of the now dysfunctional Machakos County public board namely John Kimeu Kumbo and Franklin Musila Makola purporting to be in exercise of the functions of the Public Service Board as enshrined in Section 59 of the *County Government Act* be declared null and void for want of quorum.
  - e. Any other order the honorable court may deem fit and expedient in the circumstances of the case
  - f. Cost of the petition be borne by the respondents

### Background

#### Supporting Affidavit

2. The Petitioner averred that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties were appointed as vice chairperson member and public secretary of the Machakos Public Service Board vide their gazettelement on 4<sup>th</sup> March 2020 and continued to perform their functions as prescribed by Section 59 of the County Government Act and that sometime around October 2022 , a request was made by the 4<sup>th</sup> respondent to recruit chief officers
3. He averred that during shortlisting by the now dysfunctional board in Mombasa, the 4<sup>th</sup> respondent sent Onesmus Kuyu (current CEC finance) and Dr Wycliff Miyienda(Chief Officer) to bring a list of preferred members and that non-compliance with the 1<sup>st</sup> , 2<sup>nd</sup> and 3<sup>rd</sup> interested parties with the 4<sup>th</sup> respondent's directive is what led to their removal from office on 30/11/2022.
4. He lamented that the board members were chaotically removed from office on 10/11/2022 by officers from the Machakos County Inspectorate Division acting on the instructions of the 4<sup>th</sup> respondent. And were immediately locked and thus barring the now dysfunctional Public Service Board from performing its functions including appointment of the County Chief Officers
5. He contended the chaotic removal of the staff and members of the now dysfunctional Public Service Board was reported to Machakos Police Station under OB/No/57/10/11/22 and that those members filed a petition No E2 of 2022 at the Employment & Labour Relations Court challenging the closure



- of their offices and seeking orders directing the 4<sup>th</sup> respondent to order re opening of the same however the offices were never reopened despite issuance of orders to that effect
6. It was stated that on 15/11/22 a member of the 3<sup>rd</sup> respondent tabled a motion seeking removal of four members of the Machakos Public service Board from office and the motion was subsequently passed and the 4 members appeared before the 3<sup>rd</sup> respondent when an investigation into their conduct was done.
  7. The Petitioner averred that as at 29<sup>th</sup> November 2022, the board constituted of Cecilia Mbinya Sereka, Stellamarris Ndinda Muthoka, John Kimeu Kumbo and Franklin Musila Makola this was after the Chairperson of the Board resigned and earlier resignation of another member Jane Mutheu Mutune and subsequently. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties were removed from office vide a vote cast by members of the 3<sup>rd</sup> respondent, prompting the letter of removal by the 4<sup>th</sup> respondent and subsequent gazette notice of the aforesaid removal.
  8. It was his position that after removal from the office, the board was left with only two members and that it is no longer properly constituted as per the provisions of Section 58 of the County Government Act 2012 and cannot purport to perform the functions of the public service board for want of quorum and cannot purport to conclude the exercise of appointing County Chief Officers.
  9. He contended that he was well aware that the interviews were conducted despite the absence of a functional and well constituted Public Service Board which culminated to the gazette of the 26 individuals as duly appointed chief officers.
  10. The Petitioner averred that in attempt to remedy the fact that as at the time of the interviews the Board was not well constituted, the 5<sup>th</sup> Respondent placed an advertisement in the dailies calling for interested applicants to apply for the position of Chairperson and 3 members of the public service board and the intended recruitment was stayed up vide a Constitutional Petition No 24 of 2022 and evidently the appointment of the 26 County Chief Officers was illegal and the same ought to be nullified.
  11. He averred that a close look at the list of shortlisted candidates vis a vis the gazette published it was evident that some of the gazette individuals were not appointed to work in the departments they applied to work in, some did not have proper academic qualifications and that the petitioner did a petition addressed to the second respondent addressing the cited irregularities for the 2<sup>nd</sup> respondent to stop the vetting exercise of the 26 county chief officers but no action was taken thus necessitating the filing of this petition.

### **1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents Replying Affidavit**

12. The Respondents on their Replying Affidavit dated 17th April,2023 sworn by Joseph Laban Mutisya on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents denied the allegations that they violated the Petitioner's constitutional right in the vetting /approval process which led to the approval of the chief officers into the 5<sup>th</sup> respondent and deposed that the Petitioner failed to specify the constitutional provisions violated by the Respondents.
13. Further he deposed that they executed their mandate in accordance with the law in the vetting process of the county chief officers and were satisfied that they were able to deliver on the job as expected.
14. He deposed that the 3<sup>rd</sup> respondent received a written petition which was on the subject of vetting of the nominated chief officers before their appointment which failed/ neglected to heed the call by the 3<sup>rd</sup> respondent through an advertisement issued inviting the public to submit any information or comments on suitability or otherwise of the nominees of the chief officer positions and that any person



who is dissatisfied or affected by the decision made by the County service Board may appeal to the Public Service Commission against the decision

15. He averred that the petitioner was therefore acting in vain as this court lacks jurisdiction to hear any matter regarding the decision of the Board and that the petition was thus an abuse of the court process thus ought to be dismissed with costs.

## Submissions

### The Petitioner's Submissions

16. The Petitioner's filed in their submissions dated 31<sup>st</sup> July,2023 and filed in court on 4<sup>th</sup> August,2023, counsel for the petitioner raised the following issues for determination:
- Which Board is mandated to establish and abolish offices in the County Public Service and appoint persons to hold or act in the established offices
  - What is the proper composition of the Board referred to in (a) above.
  - Whether in the absence of a well constituted board any appointments can be legally effected and the same be recognizable in law.
  - Whether individuals appointed by an improperly Constituted board can legally purport to hold and act in the offices that they are assigned to specifically the 26 county chief officers
  - Who should bear the costs.
17. Reliance was made to the provisions of Article 159 of the *Constitution* of Kenya 2010 on judicial authority, that had the 2<sup>nd</sup> respondent considered the merit of the petition filed as opposed to limiting itself to procedural technicalities as to the applicable format when petitioning, the vetting process of the sworn in county chief officers would have been halted thus preventing the glaring illegality and that the duty to vet and verify the academic credentials was the sole mandate of the Public service Board which couldn't sit for lack of forum.
18. It was submitted that Section 57 of the *County Governments Act* provides for the establishment of the Public Service Board and Section 59 of the *County Government Act* provides for its functions and that it was clear that the Public Service Board has the mandate to establish offices within the County Public Service Board and not a reserve of the 4<sup>th</sup> respondent thus her act of handpicking the 23 officials was *ultra vires* and an outright illegality.
19. It was the position of the petitioner that in the absence of chairperson of the board and a certified public secretary evidently the board was ill constituted to carry out its mandate. Reliance was made to Section 58 of the *County Government Act* which provides for the composition of the Public Service Board and that with only two members retaining their position, the board fell short of the requisite number of 3 members as prescribed by the *Act*.
20. It was submitted that the Public Service Board having been ill constituted for want of quorum, none of the key objectives were achievable including conducting of interviews to determine the suitability of the County chief officers. Reliance was placed on Section 45 of the *County Government Act* which provides that the chief officers are sourced competitively and recommended to the Governor by the County Public Service Board which was not the case as they were handpicked by the 4<sup>th</sup> respondent and this automatically invalidates the subsequent appointment and swearing in of the county chief officers.



21. Reliance was made to the case of *David Ogega Kebero & Another vs Kisii County Public Service Board & another* [2017] eKLR to emphasize on the provision of Section 45 of the *County Government Act*.
22. It was submitted that the county chief officers are not fit to hold office pursuant to their irregular/illegal appointment and thus the need for an order of certiorari to remove and quash the nomination, appointment and gazettement of the 26 county chief officers.

### **1<sup>st</sup> 2<sup>nd</sup> And 3<sup>rd</sup> Respondents Submissions**

23. Via submissions dated 12<sup>th</sup> June 2023, it was submitted that the issues for determination that relates to them were
  - a. Whether the 3<sup>rd</sup> respondent violated the constitutional rights of the petitioner by failing to allow the petition which was filed on 20.12. 2022.
  - b. Whether the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents discharged their mandate in ensuring vetting took place as prescribed by law.
24. Reliance was placed on Section 7(10) (11) of the *Public Appointments Act* No 5 of 2017 which states that any person may prior to hearing approval by a written statement on oath provide the clerk with evidence contesting the suitability of a candidate to hold office to which the candidate has been nominated.
25. It was submitted that the Petitioner was required to petition the 3<sup>rd</sup> Respondent via a written statement on oath but opted to file a petition. Reliance was made to the case of *County Assembly Forum & 6 others v Attorney General & 2 Others* on the application of the doctrine of public participation. That the Petitioner knew the procedure but decided to ignore it and instituted a petition instead of a written statement under oath.
26. According to the Respondents, the goal of the overriding objective which advocates for adherence to procedure is to ensure justice is served to all. Reliance was made to the case of *Republic vs Returning Officer of Kamukunji Constituency and The Electoral Commission of Kenya*.
27. It was submitted that the remedy was that the petitioner to institute proper sworn affidavit within the time limits described by the advertisement in order to compel the authority of the 2<sup>nd</sup> respondent.
28. On whether the respondents discharged their mandate reference was made to section 7(9) of the *Public Appointments (county assemblies approval) Act* No 5 of 2017 which guides the county assembly committee in charge of vetting candidates on what areas they are specifically should conduct vetting on. The First Schedule Part 14 zone into the educational background of the candidates which is the main issue herein. It intended the county assembly to note the institution of learning the candidates attended, when they attended, the academic award they obtained and confirm the degree was awarded and the dates thereof in which the 3<sup>rd</sup> respondent noted as required.
29. It was submitted that the 3<sup>rd</sup> respondents did their due diligence in administering their role as described by the first schedule in the *Public Appointments Act* No.5 of 2017. Reliance was made to the case of *Law Society of Kenya v Mwenda & 5 Others*.
30. It was further submitted that there was nowhere in the first schedule which required the 3<sup>rd</sup> respondents to confirm or investigate the validity of the qualifications or if there is forgery and that the 3<sup>rd</sup> respondents confirm that they acted in good faith and followed due procedure by accepting these candidates for vetting. Reliance was on the case of *Omtatah v Kinyua, Public Service Commission &*



Attorney General and Article 234(2)(d)(i) of the Constitution on the mandate of the Public Service Commission and that the petitioner ought to appeal there.

31. Reliance on the case of Kenya County Government Union Workers vs County Public Service Board of Nyeri to buttress this point and affirmed in the case of Akelerio v Kasine & 3 others.

32. The Court was urged to dismiss the petition with costs.

#### **4<sup>th</sup> and 5<sup>th</sup> Respondents Submissions**

33. Via submissions dated 24<sup>th</sup> July, the 4<sup>th</sup> and 5<sup>th</sup> respondents through their Counsel submitted that the issues for determination were whether the petition meets the threshold set in Anarita Karimi case on constitutional petitions, whether the court can make adverse orders against parties who are not persons to the petition, whether the county public service can duly execute its functions despite a vacancy in its membership.

34. It was submitted that the petitioner had not disclosed any provisions of the Constitution that was alleged to have been violated and that the petitioner's case is that the respondents had acted in violation of sections 59A, 30 and 31 of the County Governments Act thus the petition is premised on an alleged violation of a statute which cannot constitute a constitutional petition.

35. Reliance was made to the case of Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka- Executive Director of the Kenya Bankers association & Another [2018] eKLR which expounded on matters the founding of constitutional petitions on statutes.

36. It was submitted that the petitioner did not set out the manner in which the provisions of the Constitution mentioned had been violated to warrant an intervention from the Court.

37. Reliance was made to the case of Turkana County Government & 20 others v Attorney General & 4 others [2016] eKLR. It was submitted that the petitioner had failed to demonstrate a clear link between any alleged violations and the provisions of the Constitution violated by stating with a degree of precision how his rights were infringed.

38. Reliance was placed to the case of Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR to buttress the threshold to be met in a petition alleging constitutional violations and in the case of Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2021 [2013] eKLR. It was prayed that the application be dismissed for failing to meet the threshold.

39. It was submitted that the petition herein seeks adverse orders against persons who are not parties to the present proceedings. The manner in which a chief officer may vacate office is set out in section 45(6) of the County Government Act, that the chief officers having been duly appointed into office, they can only be removed from office in a manner provided for under the law.

40. It was submitted that it would be contrary to the principles of natural justice and the right to a fair hearing if the court was to arrive at an adverse decisions against persons who have not been made parties to the proceedings and fails to accord them an opportunity to be heard and to make representation in the matter.

41. Reliance on the case of Kiai Mbaki & 2 others v Gichuhi Macharia & another [2005] eKLR to buttress the importance of the right to be heard and similarly in the case of Timothy Njoya v Attorney General & Another [2014] eKLR.



42. Reliance was made to the case of *Msagha vs Chief Justice & 7 others* Nairobi HCMCA No 1062 of 2004 on the rules of natural justice and in the case of *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*.
43. According to the 4<sup>th</sup> and 5<sup>th</sup> respondents, the court ought to adopt the position espoused in the above cases and find that the affected chief officers having not been made parties to the proceedings no adverse orders should be made against them without an opportunity to be heard.
44. The petitioner had a chance to amend his petition but elected not to thus cannot proceed to seek adverse orders against the persons he did not join in the proceedings
45. On whether the County Public Service Board can duly execute its functions despite vacancy in its membership, it was submitted that despite the vacancies in its membership occasioned by impeachment and resignation of some members, the vacancies could not affect the ability of the board to conclude the recruitment process and that the board had since been reconstituted with the appointment of a substantive chairperson and an additional member which has now ratified the decisions and appointment of the chief officers.
46. Reliance was made to section 53 of the Interpretations and general provisions Act which stipulates that a vacancy in the membership of a board does not affect the ability of such a board to perform its functions. In the case of *Okiya Omtatah Okoiti v Selection Panel for the National Land Commission & 3 others; Gershom Bw'omanwa & 10 others (Interested Party)* [2019] eKLR to put emphasis on Section 53 of the *Interpretations and General Provisions Act*.
47. It was their final submission that the Court dismisses the petition with costs.

### **Analysis and Determination**

48. I have considered the petition herein, the supporting and the Replying affidavits as well as the well as the submissions filed by the respective parties' advocates with the authorities as cited, the following issue emerge for determination:

### **Whether the Petition Met the Requisite Constitutional Threshold**

#### **Law Governing Constitution Petition**

49. Article 165 3 (b) as read together with Articles 22 and 23 of the *Constitution* govern the power, process, procedure and reliefs of a party seeking to enforce the Bill of rights.  
 Article 22 (3) CoK directs the Chief Justice to formulate rules to govern the institution and hearing of constitutional petitions and Sub-Rule 3 (b) CoK provides that formalities related to the proceedings to be kept to minimum and where necessary the court shall entertain proceedings on basis of informal documentation. Sub-Rule 3 (2) CoK requires the court to observe the rules of natural justice and shall not unreasonably be restricted by procedural technicalities.
50. Hence the *Mutunga Rules 2013* that regulate the form, contents and manner of the filing, service, amendments and the mode of hearing of a constitutional petition.  
 Rule 10 of *Mutunga Rules* thereof governs the form of a petition which includes the description of parties, facts relied upon, articles of the bill of rights (freedoms) infringed, particulars of the breaches, pending suits relating to the matter and reliefs sought.  
 Rule 3 (8) CoK grants the court inherent powers to make such orders as may be necessary for the ends of justice while Rule 5 grants the court power to order joinder, substitution and striking out of parties.



51. Under Rule 5 (b) (c) (d) and (e) CoK the court has wide powers to ensure a petition is not defeated on account of misjoinder or nonjoinder or where there is a mistake made in good faith and it is necessary for the determination of the matter in dispute the court may order with or without application of either party, require a party whose presence is necessary to enable the court to adjudicate upon and settle a matter be added. Upon addition of a party, the court has powers to order the petition to be amended and served upon the new respondent
52. The Respondents are opposed to the petition and deposed that the said petition did not meet the Constitutional threshold as required by law in that it only quoted the various provisions of the Constitution which allegedly had been violated but did not show how the violation had occurred or how the violation affects the petitioner.
53. The High Court in Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154 stated:
- “if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important(if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
54. Against the above outline, the Petitioner sought the orders on the face of the petition relying on the various Constitutional provisions; Articles 2,10,19,20,22,38,41,47,48,165,174,175,176,232,233,234,236 & 259. In the body of the Petition, the Petitioner relied on Articles 22, 236, 73 & 50 of Constitution the rest of the Constitutional provisions cited were/are not tied to the events deposed that culminated to violation of Bill of Rights of the Petitioner.

### **Process of Appointment of County Assembly Chief Officers**

55. The Petitioner contests the process of nomination, interview, appointment and gazettelement of 26 County Chief Officers on 6/1/2023 was irregular /unlawful/illegal null & void on grounds of:- a) The County Public Service Board was not properly constituted and that it lacked quorum;
- b) Nomination was by picking of candidates by the 4<sup>th</sup> Respondent to the Board a role not provided by law to the 4<sup>th</sup> Respondent.
- c) Some of the gazetted individuals did not have proper academic qualifications for positions of County Officers and relied on fake documents to obtain Clearance Certificates.
56. In examining the grounds of the petition, it is clear the petition is about interviews being conducted by improperly constituted Public Service Board, nomination of the County chief officers, vetting of the nominated individuals and gazettelement and swearing in of the nominated officers. The Petitioner is challenging the process in which the chief county officers were interviewed and subsequently appointed.
57. As to the County Public Service Board, there is a copy of DE gazettelement of 1/12/2022 of the Chairperson and member following their resignation from the Public Service Board. Thereafter there was advertisement by 22/12/2022 of the Chief Officers Posts and re-advertisement and shortlisting on 4/11/2022. The invitation for Chief Officers interviews was scheduled on 8/12/2022. From the above, it is confirmed that the original 5 members of the Public Service Board were not in place during the recruitment exercise as required by Section 58 of County Government Act.



58. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents averred that they had performed their mandate as required of them and that it is the Petitioner who did not follow the right procedure and channel to address his complaint under Section 7(10) of Public Appointments Approval Act No 5 of 2017 that provides notice that any person before the Approval hearing would by written statement on oath (affidavit) provided to the Clerk with evidence contesting the suitability of a candidate.

The 4<sup>th</sup> and 5<sup>th</sup> respondents averred that the Petitioner's petition had not met the threshold for a constitutional petition and he had not shown how his rights under the Constitution had been infringed or violated.

59. The Court's view is that the acts complained of by the petitioner as against the Respondents do not amount to infringement of right or freedom under the Constitution but are mainly statutory infractions. The issue of 4<sup>th</sup> Respondent's request to the now dysfunctional Public Service Board to recruit County Officers contrary to Section 45 (1) of the County Government Act, is not proved on the required standards of proof as in the annexed Supporting Affidavit by Onesmus Mutisya Muia at paragraph 11 it was alleged that it is the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants who sought delegated powers from the Board to recruit staff for the Office of the Governor and such power was granted.

60. In the absence of consistent proof this Court cannot make an informed decision one way or the other who did what and therefore who is responsible or culpable of breach of statutory provision or violation of constitutional requirement.

61. The alleged irregularity by the Public Service County Board that the Board was not properly constituted and may have tainted the appointments of County Chiefs is contrary to statute. The quorum issue is a statutory issue (under Section 57 of the County Government Act of 2012) which provides for the composition, duties and powers and conduct of business of the Public Service Board.

62. In the case of Okija Omutata Okoiti vs Selection Panel for Land Commission & 3 Others, Gershom Otachi Bw'omanwa & 10 Others (Interested Party) [2019] it was observed that although the Panel was improperly constituted, the omission to have all eligible members included was explained above[they had not yet been appointed through the laid down process] Reliance was placed on Section 53 & 55 of the Interpretation and General Provisions Act

Section 53 provides;

Power of board, etc., not affected by vacancy, etc.

Where by or under a written law a board, commission, committee or similar body, whether corporate or un-incorporate, is established, then, unless a contrary intention appears, the powers of the board, commission, committee or similar body shall not be affected by-

- (a) a vacancy in the membership thereof; or
- (b) a defect afterwards discovered in the appointment or qualification of a person purporting to be a member thereof.

Section 55 of the Act provides;

Power of majority to act

Save as is otherwise expressly provided by a written law, where an act or thing may or is required to be done by more than two persons, a majority of them may do it.

63. The fact of the Public Service Board not being properly constituted by virtue of 2 members resigning and lack of quorum, was not *ultra vires* unless expressly provided for in such circumstances where



- some members resign and the mandate of the County Public Service Board ought to be carried out, the members were/are entitled to proceed with appointments and ratify when properly constituted in light of the provisions of the *Interpretations & General Provisions Act*. [Section 53 and 55 outlined above]
64. The finding that the County Public Service Board was not properly constituted to handle the interviews of the Chief County officers was not a constitutional issue but an issue under the *County Government Act 2012*.
56. In *Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another* [2018] eKLR, the Court (Mativo J as he then was ) held as follows;
64. Regarding the 2nd respondent, the allegation raised against it is primarily that it has neglected its mandate to enforce the statutory provision which the petitioner contended amounted to a violation of Constitutional rights and fundamental freedoms. I do not agree with this view. Failure to enforce a statutory provision is only failure but is not unconstitutional. The 2nd respondent did not fail to enforce a Constitutional provision and therefore did not act unconstitutionally neither did such failure amount to unconstitutional acts or conduct that violated the *Constitution* or rights and fundamental freedoms of bank customers.
66. Thirdly, the issue of challenging the County Public Service Board ought to have been ventilated first before the Public Service Commission as provided for by Article 232 of the *Constitution* and Section 87 (2) of the *Public Service Commission Act* and/or if in Court now that the County Chiefs are in office, they are joined as parties to the dispute and heard before the Employment & Labour Relations Court by virtue of Article 162(2) of the *Constitution* and Section 12 of *Employment and Labour Court Act*.
67. On qualifications of the candidates/ nominees subject of vetting and appointment of Chief County officers, save for the Public Service Board not fully constituted, the advertisement was made to comply with public participation and ensure transparency and accountability as prescribed by Article 10 of the *Constitution*.
68. However, with regard to the allegation that some candidates/nominees, the 1<sup>st</sup> 2<sup>nd</sup> & 3<sup>rd</sup> Defendants discharged their legal mandate under Section 7(9) of the *Public Appointments (County assemblies Approval) Act* No 5 of 2017 on the vetting criteria set out in Schedules 1 & 2 of the *Act* that include educational background which they complied with but could not vouch on validity and/ or forged certificates/degrees.
69. The Issue of fake/forged degrees presented by candidates ought to have been challenged through the Vetting Interview Process or if later be taken up against the specific individual candidates who presented fake/forged degree Certificates through Law Enforcement Agencies, EACC,DCI, University Examination Council, Academic Registrars of the specific Universities. The mandate of the Public Service County Board is to require and request for educational background and testimonials from prospective candidates as prescribed by *Act* No 5 of 2017 and if in compliance with the law and procedure the County Public Service Board approved but the issue of validity of the testimonials unless glaringly fake/forged it was outside the mandate of the County Public Service Board.

## Conclusion

70. It follows, therefore, that despite the petition having set out the Articles of the *Constitution* which it alleged to have been violated by the Respondents, it did not provide with precision the acts which the Respondents had done which were in breach of the said provisions and further, the manner in which



its rights had been infringed by the said actions even if the said actions amounted to an infringement of a Constitutional right or freedom, the petitioner did not further set out with precision, the manner in which its rights had been infringed by the said actions. Thus this petition fails the threshold or test set in the *Anarita Njeru (supra)* case.

### **Disposition**

71. ..

1. In the upshot the petition lacks merit and is therefore dismissed.
2. Each Party to bear own Costs.

**JUDGMENT DELIVERED DATED SIGNED IN OPEN COURT IN MACHAKOS HIGH COURT  
ON 11/4/2024. (VIRTUAL / PHYSICAL CONFERENCE)**

**M. W. MUIGAI**

**JUDGE**

In the Presence/absence of:

Ms Kombo h/b Mr. Muthusi - for the Respondent

No Appearance - for the Petitioner

No Appearance - for the Interested Party

Geoffrey/Patrick – Court Assistant(s)

