



**Kimaita v County Government Of Meru & 2 others; Mitu & 5 others (Interested Parties)
(Constitutional Petition E006 of 2023) [2024] KEHC 6191 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6191 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CONSTITUTIONAL PETITION E006 OF 2023**

TW CHERERE, J

MAY 16, 2024

BETWEEN

ERNEST KIMAITA PETITIONER

AND

COUNTY GOVERNMENT OF MERU 1ST RESPONDENT

COUNTY SECRETARY, MERU COUNTY 2ND RESPONDENT

MERU COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

AND

JULIUS KAINGA MITU INTERESTED PARTY

JULIUS KIAMBI ARITHI INTERESTED PARTY

HELLEN NKIROTE MUGAMBI INTERESTED PARTY

MARTIN MUTUMA KUBAI INTERESTED PARTY

JULIUS GITONGA KABUI INTERESTED PARTY

MBAABU M'INOTI INTERESTED PARTY

JUDGMENT

1. Petitioner herein, Ernest Kimaita, is a Kenyan citizen, resident of Meru County and an advocate of the High Court of Kenya.
2. The 1st Respondent is a County Government established under Article 176 of *the Constitution* of Kenya, 2010.



3. The 2nd Respondent is a public office established under section 44 (1) of the [County Governments Act, 2012](#) with the functions set out in section 44 (3) of the aforesaid act to including being the head of the county service board.
4. 3rd Respondent is a body corporate established under Section 12(1) of the County Government Act, 2012 pursuant to Article 176(1) of [the Constitution](#).
5. Interested parties are members of Meru County Public Service Board (3rd Respondent).

The Petitioner's case

6. The Petition is dated 04th April, 2023 and it is supported by the Petitioner's affidavit sworn on even date.
7. Petitioner challenges the Interested Parties. membership to the 3rd Respondent on the ground that the same violates the provisions of Article 27(8) and 175(c) of [the Constitution](#) for the reason that of the six members, only one is a woman.
8. Consequently, Petitioner seeks the following orders:
 1. A declaration that the whole process of nominating, appointment and approval of the 1st to 6th Interested Parties as chairperson and members of the 3rd Respondent herein was flawed, unprocedural and in clear violation of Article 27(8) and 175(c) of [the Constitution](#)
 2. A declaration that the nomination, appointment and approval of the 1st -6th Interested parties as the Chairperson and members of the 3rd Respondent respectively was also illegal, unprocedural and in violation of the law and particularly for failing to adhere with the provisions of section 58A (15) of the County Government Act/Section 58 (2) (now deleted) as then was.
 3. An order that the violation of [the Constitution](#) and the provisions of the [County Governments Act](#) on procedure for nomination and appointment of members of the 3rd Respondents renders the 1st -6th Interested parties' nomination and appointment as the chairperson and members of the Meru County Public Service Board (3rd Respondent herein) respectively illegal, unlawful and unconstitutional.
 4. An order that this court do disband and/or dissolve the 3rd Respondent and order for nominations and appointments to be made forthwith in accordance with [the Constitution](#) and other relevant laws.
 5. Costs of the Petition
 6. Such further orders may deem just and appropriate to grant.

Respondents' case

9. Respondents opposed the Petition by way of a replying affidavit sworn on 08th May, 2023 by Dr. Kiambi J.T. Atheru, the 2nd Respondent who conceded that in deed the composition of the 3rd Respondent did not comply with the constitutional two-thirds gender rule. Additionally, by an affidavit sworn by the 1st Respondent on 16th February, 2024, he deposes that one Virginia Kawira Miriti was on 01st September, 2023 appointed as the secretary and CEO of the 3rd Respondent thereby bridging the gap of the two-thirds gender rule that previously existed in the composition of the 3rd Respondent.



Interested Parties' case

10. Interested Parties similarly opposed the Petition by way of a replying affidavit sworn on 03rd July, 2023 by the 1st Respondent who deposed that the 3rd Respondent was on the progressive path of realizing the two-thirds gender.
11. It is also the Interested Parties' case that this court has no jurisdiction to determine this petition which they contend is labour related and falls within the jurisdiction of the Employment and Labour Relations Court.

Petitioner's Response

12. By a further supporting affidavit sworn by the Petitioner on 12th July, 2023, Petitioner deposes that by virtue of section 58(1) (c) as read with Section 59(2) of the County Government Act, the secretary of the 3rd Respondent is not a member of the Board but is an ex-officio member and her appointment does not cure the two-thirds gender rule parity acknowledged by the Respondents and Interested Parties.

Petitioner's submissions

13. Petitioner submitted that the dispute herein is not one of the disputes whose jurisdiction is conferred to the Employment and Labour Relations Court under the provisions of section 12(1) of the [Employment and Labour Relations Court Act](#) and that this court therefore has jurisdiction to determine it.
14. In support of this proposition, Petitioner relied on the Court of Appeal case in Attorney General & 2 Others versus Okiya Omtatah and 14 Others [2020] eKLR, where the Court held that: -

“We have no doubt that ELRC and ELC have jurisdiction to interpret and apply [the constitution](#) as held by the High Court in United International University versus Attorney General and Others 2012 eKLR and this Court in Daniel N Mugendi versus Kenyatta University and others. However, the jurisdiction of those specialized Courts to interpret and apply [the constitution](#) is not original or unlimited like that of the High Court. It is limited to the constitutional issues that arise in the context of disputes on employment and labour relations or employment and land matters.”
15. Petitioner urged the court to find that the issues raised in the petition raise numerous and weighty issues that go beyond employer and employee issues and thus reject the preliminary objection dated 18th April, 2023.
16. Concerning composition of the 3rd Respondent, Petitioner made reference to Section 58A (15) of the County Government Act No. 17 of 2012 and submitted that the 3rd Respondent is made of 5 men and one female recruited under Section 12 (3) (d) of the Act and thus violates Article 27 (8) and 175 (c) of [the Constitution](#) that provides that no elective or appointive body shall have more than two third of either gender. Reliance was placed on Kenneth Muriuki v Meru County Assembly Service Board & another, Jacob Karari & another (Interested Parties) [2021] eKLR, where the court held that the composition of the 3rd Respondent made up of 5 men and one woman violated the legal requirements of Article 27(8) of [the Constitution](#).
17. Petitioner additionally submitted that the appointment of the members of the 3rd Respondent also violated Section 58A (15) of the County Government Act which provides that in nominating or



appointing a person as a member of the County Service Board, the national values and principles set out in Articles 10, 27 and 232 of *the Constitution* must be factors.

18. In conclusion, Petitioner urged the court to find that the composition of the 3rd Respondent was null and void and grant the orders sought in the Petition.

Interested parties' submissions

19. In support of the Preliminary Objection, the Interested Parties argue that the petition seeks disbandment of the 3rd Respondent which is their employer and is thus an employment and labour relations dispute. In support thereof, Interested Parties placed reliance on Section 12 of the *Employment and Labour Relations Court Act* and Attorney General & 2 Others versus Okiya Omtatah and 14 Others (supra), Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696 and Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1.
20. Interested Parties further argue that the Petition offends the provisions of section 58(5) of the *County Governments Act* and Article 251 (1) of *the Constitution* for it seeks to remove them from the office without following the procedures laid down in those provisions.
21. Interested Parties contend that this petition is premature on the ground that Petitioner ought to have filed the petition with the County Assembly of Meru under the provisions of Section 15(2) of the *County Governments Act* and Standing Orders No. 196 and 198. In support of the contention that Petitioner has not exhausted other available alternative dispute mechanisms, the Interested Parties cited Christopher Mutinda Mutua & another v Alfred Nganga Mutua & 11 others [2019] eKLR - Petition 13 of 2018, Anthony Miano & others v Attorney General & others [2021] eKLR, Speaker of the National Assembly v Karume (Civil Application 92 of 1992) [1992] KECA 42 (KLR) 425, Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR among many others where the doctrine of exhaustion was discussed.
22. With reference to the Petition, Interested parties contend that it comprises of rhetorical invocations of the constitutional provisions and lacking in particulars and thereby fails to meet the threshold of constitutional petitions settled in the case of Anarita Karimi Njeru v R (No 1) 1979 KLR 154.
23. Interested parties also contend that their nomination, approval and appointment complied with Section 58 of the *County Governments Act* and Article 175(c) of *the Constitution* as it is made up of two women and 5 men and therefore meets the requirements of the two third gender rule.

Analysis & Determination

24. I have carefully considered the affidavit evidence on record and the submissions filed on behalf of the Petitioner and the Interested Parties, the Respondents having not filed any and I have deduced the issues that arise for determination to be as follows:
 1. Whether this court has jurisdiction to determine this petition
 2. Whether the Petitioner is in breach of the doctrine of exhaustion
 3. Whether the Petition meets the threshold of constitutional petitions
 4. Whether the composition of the 3rd Respondent complies with the two thirds gender rule



1. Whether this court has jurisdiction to determine this petition

25. The locus classicus on Preliminary Objection is the celebrated case of Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696, where Law J.A. stated:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

26. Sir Charles Newbold, President stated in the same judgment as follows: -

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

27. Nyarangi JA in the case of The Owners of the Motor Vessel Lilian 'S' v. Caltex Kenya Limited (1989) KLR 1 stated that

“..... jurisdiction is everything without it; a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

28. Section 12 of the [Employment and Labour Relations Court Act](#) which the Interested Parties contend ousts this court's jurisdiction provides as follows:

The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of [the Constitution](#) and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

- (a) disputes relating to or arising out of employment between an employer and an employee;
- (b) disputes between an employer and a trade union;
- (c) disputes between an employers' organisation and a trade union's organisation;
- (d) disputes between trade unions;
- (e) disputes between employer organisations;
- (f) disputes between an employers' organisation and a trade union;
- (g) disputes between a trade union and a member thereof;
- (h) disputes between an employer's organisation or a federation and a member thereof;
- (i) disputes concerning the registration and election of trade union officials; and



(j) disputes relating to the registration and enforcement of collective agreements.

29. A reading of the petition as filed discloses that the claim is not one of the disputes set out under Section 12 (1) cited above and in dismissing the preliminary objection, I find succor in the words of Newbold V.P. in *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd* (supra) where he observed that the improper raising of points by way of preliminary objection does nothing but unnecessarily increase cost and on occasion, confuse issues. This improper practice should stop.

2. Whether the Petitioner is in breach of the doctrine of exhaustion

30. Although the Petitioner seeks a declaration that the whole process of nominating, appointment and approval of the 1st to 6th Interested Parties as chairperson and members of the 3rd Respondent herein was flawed, unprocedural and in clear violation of Article 27(8) and 175(c) of *the Constitution*, the gravamen in this petition is non-compliance of the 3rd Respondent's composition with the two thirds gender rule.

31. The matter for determination neither relates to removal of the members of the 3rd Respondent nor on matters of enacting, amending or repealing any legislation and the argument that the Petitioner ought to have petitioned the County Assembly under the provisions of section 15 (2) and 58 (5) of the *County Governments Act* and Standing Orders No. 196 and 198 is therefore misplaced.

(3) Whether the Petition meets the threshold of constitutional petitions

32. One cannot discuss constitutional petitions without reference to the threshold for a competent constitutional petition established in *Anarita Karimi Njeru -vs- The Republic* (1979) eKLR which principle was later restated by the Court of Appeal in the case of *Mumo Matemo -vs- Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR.

33. The principle requires that a Constitutional petition should set out with a degree of precision the petitioner's complaint, the provisions infringed and the manner in which they are alleged to be infringed.

34. A reading of paragraph 23 through 27 of the Petition discloses that the Petitioner has pleaded with precision and provided particulars of alleged infringements of the provisions of Articles 27(8) and 175(c) of *the Constitution*. The responses by the Respondent and the Interested Parties leave no doubt in the mind of the court that the precision in which the Petition is pleaded has enabled them to respond to and/or answer to the Petitioner's allegations.

(4) Whether the composition of the 3rd Respondent complies with the two thirds gender rule

35. Section 58 of the *County Governments Act* 2012 provides for composition of the County Public Service Board in the following terms:

- (1) The County Public Service Board shall comprise-
 - (a) a chairperson nominated and appointed by the county governor with the approval of the county assembly;
 - (b) not less than three but not more than five other members nominated and appointed by the county governor, with the approval of the county assembly; and



- (c) a certified public secretary of good professional standing nominated and appointed by the governor, with the approval of the county assembly, who shall be the secretary to the board.

36. Article 175 of *the Constitution* provides for principles of devolved government as follows;

County governments established under this Constitution shall reflect the following principles—

- a. no more than two-thirds of the members of representative bodies in each county government shall be of the same gender.

37. Additionally, Section 58A (15) of the County Government Act provides that in nominating or appointing a person as a member of the County Service Board, the national values and principles set out in Articles 10, 27 and 232 of *the Constitution* must be factors.

38. As at the time of filing their responses, the Respondents and Interested Parties conceded that the composition of the 3rd Respondent violated the two third's gender rule. As the case progressed 1st Respondent by an affidavit sworn on 16th February, 2024 deposes that one Virginia Kawira Miriti had on 01st September, 2023 been appointed as the secretary and CEO of the 3rd Respondent thereby bridging the gap of the two-thirds gender rule that previously existed in the composition of the 3rd Respondent.

39. Whereas there is evidence of appointment of a female secretary as a member of the 3rd Respondent, it has not been demonstrated that the appointment has been approved by the county assembly and the appointment therefore fails the test in Section 58 (c) of the *County Governments Act* 2012.

40. *The constitution* upholds the equality of both male and female genders in the society. Article 27 (3) states that 'women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

41. From the foregoing therefore, I find that It has been demonstrated that the membership of the 3rd Respondent violates the two-third gender rule set out under Article 27(8) and 175 (c) of *the Constitution* in that out of its 6 members, only one is a woman.

42. I have considered whether the gender parity in the composition of the 3rd Respondent by the Supreme Court advisory opinion In the matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR where the court stated that the implementation of the two-third gender rule in *the Constitution* would take a progressive mode of implementation.

43. The successive county governors and county assemblies of the County Government of Meru appear to have not only misinterpreted the foregoing advisory opinion but also abused it with impunity. I have come to this conclusion considering that this is the third petition challenging the composition of the third Respondent with the County Government appearing not take court orders with the seriousness they deserve.

44. In both *Kenneth Muriuki v Meru County Assembly Service Board & another, Jacob Karari & another* (Interested Parties) [2021] eKLR and *Kioga v Meru County Assembly Service Board & another (Constitutional Petition E029 of 2022)* [2023] KEHC 24448 (KLR) (26 October 2023) (Judgment), court found that the composition of the county Service Board violated the legal requirements of Article 27(8) of *the Constitution*.



45. This is the third petition challenging the composition of the 3rd Respondent. It is to be remembered that court orders are not made in vain. This was appreciated by Ojwang, J (as he then was) in B vs. Attorney General [2004] 1 KLR 431 that:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.

46. From the foregoing therefore, it is hereby ordered:

1. The court finds no evidence to support the claim that nomination, appointment and approval of the 1st to 6th Interested Parties as chairperson and members of the 3rd Respondent was flawed and unprocedural
2. The court however finds that the composition of the 3rd Respondent violates the provisions of Article 27(8) and 175(c) of *the Constitution*
3. On the strength of orders issued by this court in *Kioga v Meru County Assembly Service Board & another (Constitutional Petition E029 of 2022)* [2024] KEHC 3576 (KLR) (21 March 2024) (Ruling), the 3rd Respondent has six (6) months from 1st March, 2024 within which to ensure compliance with the two thirds gender rule enunciated under the provisions of Article 27(8) and 175(c) of *the Constitution*
4. Costs shall be in the cause

DELIVERED AT MERU THIS 16TH DAY OF MAY 2024

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

For Petitioner - Mr. Wambua for B.N.Mbuthia & Co. Advocates

For Respondents - Mr. Kaumbi for Kaumbi Kioga & Co. Advocates

For Interested Parties - Mr. Ngwele for Ngwele & Co. LLP. Advocates

