



**Awino v Macharia; Ethics and Anti-Corruption Commission
(Interested Party) (Petition E330 of 2023) [2024] KEHC 12476 (KLR)
(Constitutional and Human Rights) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12476 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E330 OF 2023
LN MUGAMBI, J
OCTOBER 17, 2024**

BETWEEN

FRANCIS AWINO PETITIONER

AND

NANCY MACHARIA RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

JUDGMENT

Introduction

1. The Petition dated 11th September 2023 is supported by the Petitioner’s affidavit in support sworn on even date. The crux of this Petition are the allegations by the Petitioner that the Respondent who is the Chief Executive Officer of the Teachers Service Commission (TSC) has violated the provisions of Chapter 6 of *the Constitution* through gross misappropriation and misuse of public funds that are entrusted to the Teachers Service Commission.
2. Consequently, the Petitioner seeks the following reliefs:
 - i. A declaration that the omissions and/or commissions of the Respondent as the CEO of the Teachers Service Commission (TSC) grossly violate *the Constitution* and other legislation.
 - ii. A declaration that the Respondent has committed acts of corruption, embezzlement of public funds and is culpable for the same.



- iii. An order of mandamus compelling the Interested Party to criminally investigate and if culpable, instruct the Director of Public Prosecutions (DPP) to criminally prosecute the Respondent for her flagrant breach of the law.
- iv. An order of declaration be issued that the Respondent is unfit to uphold any other public office because he has grossly violated *the Constitution* and other laws, and is guilty of gross misconduct.
- v. This Court be pleased to exercise its powers under Article 23(3) of *the Constitution*, to issue any other appropriate relief.
- vi. An order that the Respondent do pay the costs of this Petition.

Petitioner's Case

3. The Petitioner describes himself as a human rights defender. He asserts that there has been illegal, irregular, misappropriation and misuse of tax payers' money by TSC which the Respondent heads as confirmed by the Auditor General's Report.
4. He states that in the June 2021 Auditor General's Report, TSC was implicated in a Ksh.3 billion misappropriations of funds, an act facilitated by the Respondent. These monies are reported to have been utilized to overpay a section of its staff. It was equally reported that the Respondent had failed to remit Ksh.2 billion in taxes deducted from the staff. It was further reported that the some of the lost funds were premised on the existence and payment of ghost workers between the years 1988 to 2000.
5. It was likewise discovered that the Respondent had issued salary advances of Ksh.10.5 million that was recorded. Some of the other issued salary advances were not documented and neither were they recovered later on. In addition, it was noted that the Respondent continued to issue further salary advances without recovering the initial amounts. It is argued that these monies are irrecoverable. It is contended that upon being questioned over these glaring incongruities, the Respondent failed to grant an explanation.
6. He moreover claims that the Respondent who was allocated Ksh.2.5 billion to aid in bridging the teaching gap, went on to pay Ksh. 1 billion to non-existent schools during the 2018/2019 financial year. Additionally, the Government disbursed Ksh.14.6 billion to secondary schools as capitation funds. These funds were however used to overpay subsidy funds to the tune of Ksh.105.9 million paid out as grants to 331 public secondary schools arising from inflated enrolment data. The Report made a comparison of the disbursement schedules for the first and second term in 2019 with those of the third term in 2018. This revealed discrepancies between the data submitted by the schools and numbers released by the Ministry that was used to calculate the subsidy.
7. Likewise, the Report stated that there had been an irregular payment of Ksh.148 million out of the Ksh.25.4 billion allocated to other government agencies (for October and November 2018) to an improperly registered special needs education institution and post primary schools. It is said that some of the teachers that benefited from the kitty did not have TSC numbers and others had duplicate certificates of registration.
8. Equally, another irregular payment of Ksh.8 million was paid to a low-cost boarding school in excess, as a result of inflated enrollment figures, while Ksh.1.5 million was paid to schools not in the list of low-cost boarding schools. It is stated that some of the schools appearing on the low-cost boarding schools list did not receive the requisite funding of Ksh.8,544,000 thus denying this resource to these students.



9. In sum, the Petitioner contends that owing to the outlined irregularities, it is certain that the Respondent failed to utilize these resources in a lawful and meaningful manner as stipulated under Article 229(6) of *the Constitution*. Equally that the Respondent failed to comply with the effective internal controls, risk management and governance principles. In light of this, he asserts that there is need to remove the Respondent from office for her violation of the Articles 10, 73, 229(6) and 232 of *the Constitution* and other laws.

Respondent's Case

10. In objection, the Respondent in its grounds of opposition dated 6th October 2023 opposed the Petition on the basis that:
- i. The Application is misconceived, scandalous, vexatious and an abuse of this Court's process.
 - ii. The Application and the Petition are bad in law, incompetent and fatally defective as they based on misrepresentations, falsehoods, ambiguity and misapprehension of the principles of constitutional and employment law.
 - iii. To the extent that the Petition seeks termination of the Respondent's contract of employment through removal from office and pursuant to Article 165 (5)(a) of *the Constitution*, this Court lacks jurisdiction to entertain the Petition.
 - iv. This Court lacks jurisdiction to hear and determine the Application and the Petition as the same contravenes the mandatory procedural process set out in Section 17 of the *Teachers Service Commission Act* No.20 of 2012.
 - v. The Petition and the instant Application are premature as the Petitioner has not filed any complaint with the Respondent's employer as envisaged in Section 17 of the TSC Act. In the premises, this Court ought to invoke the principle of constitutional avoidance and decline to exercise its constitutional jurisdiction as there are alternative remedies under statute law.
 - vi. The Application and the Petition lacks specificity, particularity and does not meet the threshold of constitutional pleadings test espoused in the Anarita Karimi vs. Republic (No.1) (1979) 1 KLR 15 and Mumo Matemu vs. Trusted Society of Human Rights Alliance, Civil Appeal No.290 of 2012 (2013) eKLR cases.
 - vii. By his own admission, the Petitioner confirms that the alleged violations of *the Constitution* have not been investigated by any competent investigative authority or institution. In the premises, the instant Application together with the Petition has been filed in bad faith and violates the Respondent's right to fair labour practice, fair administrative action, access to justice and fair hearing set out in Articles 41, 47 and 48 of *the Constitution*.
 - viii. The Petitioner has come to court with unclean hands, is guilty of material non-disclosure and deliberate distortion of facts with intention to mislead the Court hence undeserving of any equitable remedies and the orders sought.
 - ix. The Notice of Motion Application and the Petition has not raised any cause of action anchored in *the Constitution*. The subject matter pertains to contractual grievances within the ambit of statutory law (*Employment Act*) disguised as a constitutional Petition.
 - x. The Petitioner has failed to provide a cogent, rational and objective basis for the prayers set out in the Motion and the Petition. The Petition is bereft of material evidence to support the allegations set therein.



- xii. In the premises, the Notice of Motion and the Petition are ripe for dismissal with costs as they are devoid of merit and is otherwise an abuse of the Court's Process.
11. The Respondent further filed her Replying Affidavit sworn on 22nd November 2023. In addition to her grounds of opposition, she depones that she was appointed as TSC's CEO in 2015 and later reappointed for another term in July 2020. She details her diligence in carrying out her duties whilst outlining the number of achievements she has attained in her role.
12. Attacking the form of the Petition, she avers that it lacks specificity to enable her understand the case against her and to supply an adequate response. She on the other hand denies all the allegations levelled against her. In fact, she depones that she appeared before the Public Accounts Committee of the National Assembly on 14th July 2021 to adduce evidence on the Audited Financial Statements for TSC for the financial year 2018/2019. She informs that the Committee concluded that there were no material issues relating to effectiveness of internal controls, risk management and governance as alleged by the Petitioner.
13. She also avers that the Petition lacks supporting documentation to buttress the incriminating allegations other than the Auditor General's report. She as well takes issue with the allegations as the issues raised primarily revolve around the function of the Ministry of Education not the TSC. Further the allegations accuse her of losses that occurred long before her tenure in office which she avers is malicious. For this reason, she is convinced that the Petition is incompetent.
14. She reiterates that this Court lacks jurisdiction to entertain this Petition. On this premise, she avers that the TSC Act expressly provides for the procedure for the removal of the CEO under Section 17 which was not invoked by the Petitioner. Furthermore, owing to the misappropriation allegations, TSC as an independent Commission has the power to conduct investigations either on its own initiative or on a lodged complaint by a member of the public as envisaged under Article 252 (1)(a) of *the Constitution*. This mechanism was also not invoked prior to filing of this suit and neither was the TSC even joined as a party in this suit. She avers that this also applies to the mandate of the Interested Party under Section 11(1) (d) of the *Ethics and Anti-Corruption Commission Act, 2011*. Accordingly, she stresses that where the law provides a mechanism, a party has an obligation to utilize the same before approaching the Court.
15. According to her, the Petition lacks a legitimate cause as the Petitioner in addition to stating falsehoods against her, failed to engage the relevant investigative authorities to ascertain these claims. Additionally she claims that the issues raised in this Petition were addressed by the National Assembly. Considering these averments, she urges the Court to dismiss the Petition with costs.

Interested Party's Case

16. The Interested Party opposed to the Petition filed its grounds of opposition dated 29th September 2023 on the premise that:
 - i. By virtue of Article 79 of *the Constitution* the *Anti-Corruption and Economic Crimes Act, 2003* and the *Ethics and AntiCorruption Commission Act, 2011*, it is the Interested Party's legal mandate to investigate corruption and economic crimes.
 - ii. The Petitioner has not demonstrated to this Court that prior to the filing of this Petition that the Interested Party has without any proper or justifiable reason failed or refused to investigate



such complaints so as to warrant the issuance of orders to compel the Interested Party to investigate the Respondent.

- iii. The Petitioner as against the Interested Party is using this Court as the first port of call without approaching and using the available avenues exhaustively to address the allegations of corruption as raised in the Petition in the first instance.
- iv. The Petitioner has not demonstrated that he made any reports/complaints on allegations corruption to the Interested Party or any investigative body and that the reports/complaints have not been acted upon.
- v. The Petitioner has not presented factual or substantial claim, controversy or dispute that has arisen between himself and the Interested Party which calls for adjudication before this Court.
- vi. Similarly, no acts or omissions, attributed to the Interested Party, have been disclosed by the Petitioner which are in violation or are likely to be in violation of any part of *the Constitution*.
- vii. Furthermore, granting the Order sought against the Interested Party would contravene the provisions of Article 249 (2) (b) of *the Constitution* which guarantees the independence of Constitutional Commissions and independent offices.
- viii. Granting orders sought against the Interested Party would also infringe on the independence of the Commission under Section 28 of the Ethics and AntiCorruption Commission Act.
- ix. Notably, the Interested Party cannot instruct the Director of Public Prosecution to prosecute the Respondent as the DPP is an independent office and under Article 157(10) of *the Constitution* it cannot be directed by any person or authority.
- x. Based on the foregoing, the Petitioner has not made out a prima facie case to warrant the issuance of the order of mandamus sought against the Interested Party.
- xi. The Petition is therefore premature, the orders sought untenable and constitute an abuse of the court process.

Parties' Submissions

Petitioner's Submissions

17. The Petitioner filed submissions dated 26th February 2024 in support of his case. He identified the issues for determination as whether or not the Respondent had violated the dictates of *the Constitution*.
18. He submitted that *the Constitution* under Chapter 6 provides for leadership and integrity principles that should be adhered to by a person who holds a public office such as the Respondent. He asserted that the alleged Respondent's misappropriation of public funds clearly demonstrates that she failed to the principle of integrity in this Chapter.
19. Being that the office of the CEO is charged with the day to day running of the TSC, he submitted that the Respondent could not distance herself from the allegations in the Petition. According to him, the ultimate solution to this violation is removal of the Respondent from the said office.
20. The Petitioner further submitted that the Respondent had conducted its procurement processes and awarded the tenders in a discriminatory manner contrary to the dictates of *the Constitution*. In this regard, he relied in the cases of Kenya Transport Association vs The *Municipal Council of Mombasa and Another Petition No. 6 of 2011* and Erick Okeyo vs County Government of Kisumu Petition No. 1 "A" of 2014, where the Courts held that a contract involving substantial amounts of public money



must be procured in accordance with the Constitution and the Public Procurement and Disposal Act and also after public participation.

Respondent's Submissions

21. Ongoya and Wambola Advocates for the Respondent filed submissions dated 13th March 2024. For the Respondent, it was submitted that the Petitioner was a busy body out to abuse the Court process as evidenced by numerous suits filed by the Petitioner. In particular Counsel relied in *Awino v Ecobank Kenya Limited (Petition 6 of 2022)* [2023] KEHC 17649 (KLR) (Anti-Corruption and Economic Crimes) (25 May 2023) (Ruling) where the Court held that:

“Applying the above principles to this case it is my finding that the Petitioner/Applicant has not met the threshold for grant of the interlocutory relief sought. This is because firstly there are already other matters touching on these accounts in other courts, secondly the entity which ought to apply for the orders sought is the Assets Recovery Agency (ARA) pursuant to Section 82 of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA) and indeed the Assets Recovery Agency had applied for a preservation order in regard to that account which it then withdrew. Thirdly the Applicant has not enjoined the holder of the accounts which he seeks to have frozen and it would be unjust and unfair to grant the orders without giving the owner of the account an opportunity to be heard. Further as a private citizen the Petitioner's role in so far as the alleged matters are concerned would in my view be that of an informer making a report to the Financial Reporting Centre established under Section 21 of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA) which entity would then treat the information as expected of it under Section 44 of the *Proceeds of Crime and Anti-Money Laundering Act*. To grant the order sought would clearly prejudice the holders of the accounts who are not parties to this case and as pointed out earlier the accounts are the subject of cases before another Division of the High Court. Moreover, the Petitioner/Applicant has not demonstrated any prejudice that he is likely to suffer were this application to be dismissed. The upshot is that the application has no merit and the same is dismissed with costs to the Respondent.”

22. The Respondent submitted that similar dismissals of the Petitioner's suits were also rendered in *Awino v Ecobank Kenya Limited (Petition 6 of 2022)* [2023] KEHC 22668 (KLR) (Anti-Corruption and Economic Crimes) (28 September 2023)(Judgment), *Petition E323 of 2023*; *Francis Awino v Hon. Timothy Wanyonyi; Ethics and Anti-Corruption Commission (Interested Party)*(unreported) and *Francis Odhiambo Awino v Attorney General & 5 others; Kennedy Omondi Adero & 2 others (Interested Parties)* [2022] eKLR.
23. The Respondent urged the Court to take judicial notice of the numerous suits filed in this Division alone by the Petitioner. In a nutshell, they include: *Petition E092 of 2024* regarding the CEO National Land Commission; *Petition E003 of 2024* regarding the CEO Rural Electrification & Renewable Energy Corporation; *Petition E006 of 2024* regarding the Chair Kenya Railways Corporation; *Petition E027 of 2024* regarding Cabinet Secretary Nakhumincha Wafula; *Petition E012 of 2024* regarding CEO Women Enterprise Fund; *Petition E425 of 2023* regarding Directors Megascope Healthcare (K) Limited; *Petition E276 of 2023* regarding the Director General KEMRI; *Petition E015 of 2024* regarding CEO Tana Water Works Development; *Petition E049 of 2024* regarding the CEO Water Resources Authority Board; *Petition E056 of 2024* regarding the Director General NEMA; *Petition E070 of 2024* regarding the Director General KENHA; *Petition E104 of 2024* regarding the Director General EPRA; *Petition E527 of 2023* regarding the Deputy Director Supply Chain Management



Kenya Urban Roads Authority and Petition 530 of 2023 regarding the CEO Micro & Small Enterprises Authority.

24. Moving on to the substantive issues, The Respondent submitted that the Petitioner's claims have no legal and factual basis. Referring to the contents of the Replying affidavit, the Respondent submitted that the Petitioner failed to appreciate that the Respondent and TSC are separate distinct entities. Further, that the Petitioner sued the Respondent for actions that were even carried out during the period she was not even the CEO.
25. Moreover, despite alleging that taxes were not remitted, the Petitioner had not filed a formal complaint with the Kenya Revenue Authority which as the case in *Awino v Ecobank Kenya Limited (Supra)*, where it was held that where a public body is mandated to enforce compliance in certain matters, it is the public body which ought to seek enforcement and the role of a private citizen would be that of an informant.
26. The Respondent faulted the Petitioner for raising fresh issues in his submissions. This is with regard to the allegation that the Respondent's procurement process was marred with discrimination hence in violation of *the Constitution*.
27. Further that the Petitioner's submissions were haphazard and poorly drawn. In that regard, the Respondent relied on *James Ndung'u Kero v Chief Land Registrar, Director of Survey & Attorney General (Environment & Land Case E046 of 2021) [2022] KEELC 1446 (KLR) (16 February 2022)* (Ruling) where it was observed that:

“The grounds on the face of the application were not spelt out clearly. The court was unable to identify the grounds as drafted. The paragraphs alleged to constitute grounds were drafted so poorly that they occasioned the court a lot of stress and agony in discerning what they brought out in terms of information in support of the application. It took a lot of judicial and private life time in trying to figure out what the applicant wished the court to rely on [...]

Some pleadings and actions of some parties are so bad that it pains the court when going through them and it wishes that they were never filed or done respectively. Actually, they depress the court, and that is not healthy at all.”
28. Turning to this Court's jurisdiction, Counsel submitted that the Petitioner's contention that the Respondent should be removed from office was in violation of Article 236 (b) of *the Constitution* as read with Section 17 of the TSC Act. The power to exercise that mandate is vested on TSC under Article 252(1) of *the Constitution*.
29. In addition, the Respondent contended that the Petitioner's corruption allegations are within the Interested Party's mandate under Section 11(1)(d) of the *Ethics and Anti-Corruption Commission Act, 2011* yet this law was not invoked.
30. Accordingly, the Respondent submitted that this Court cannot at this juncture exercise its jurisdiction over these matters as the same would be tantamount to usurping the authority of other public independent bodies and violating the Respondent's entitlement as a public officer to the due process of the law. In support of this contention, the Respondent relied on *William Kabogo Gitau v Ferdinand Ndung'u Waititu [2016] eKLR* where it was held thus:

“In my view, while this Court enjoys unlimited original jurisdiction in criminal and civil matters by dint of Article 165 (3) (a) of *the Constitution*, that is not a substitute for other first



ports of call in determining such civil and criminal matters. In the present case, the Petitioner alleges the commission of various criminal offences and thus concludes that the Respondent is guilty of the same and hence in violation of Articles 10 (2) and 73 of *the Constitution*.

49. I hold the view that the Petitioner’s contentions in regard to the commission of the alleged offences must be raised with the relevant authorities and this Court cannot at this juncture usurp the powers of such authorities. This Court cannot for instance sit to investigate matters of alleged forgeries of academic documents as invited by the Petitioner and neither can the Court make conclusions pertaining to those allegations in the absence of evidence for instance that the investigating agencies have made investigations and the relevant Court has made a finding as to the innocence or otherwise of the Respondent on those allegations.”

31. Further reliance was placed on Micheal Kojo Otieno & another v County Government of Homa Bay & 9 others [2017] eKLR.

32. In conclusion, it was the Respondents submission that the instant Petition is a perfect case of abuse of the Court process. The Respondent thus urged the Court to condemn the action by directing the Petitioner to pay costs to the Respondent citing in support the case of *Abmad & another v Kadhi Mombasa; Khalifa & another (Interested Party) (Judicial Review 4 of 2020)* [2021] KEHC 133 (KLR) (21 October 2021) (Ruling) where it was held that:

“It is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The Black’s Law Dictionary defines abuse as “Everything which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use.”

Interested Party’s Submissions

33. On 3rd April 2024, Counsel Purissima Wambugu filed submissions for the Interested Party. The Interested Party submitted the Petitioner formed the habit of seeking the mandamus order against the Interested Party in various suits before even affording it an opportunity to undertake its mandate, which act amounts to an abuse of the Court process. Nevertheless, it was argued that the Petitioner had not met the threshold set for grant of this order.

34. That in any case, the Petition does not meet the threshold for grant of mandamus order. The Interested Party relied on Republic vs. *Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996* where it was held that:

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done. in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application Is legally bound to perform. Where a general duty is imposed, a mandamus cannot require It to be done at once. Where a statute, which



imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid. a mandamus cannot command the duty in question to be carried out in a specific way ... These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done.”

35. The Interested Party maintained that the Petitioner cannot invoke this Court’s jurisdiction before exhausting the available mechanism provided in law. To buttress this point reliance was placed in *Francis Curukia v Peter Gatirau Munya & 2 others* [2017] eKLR where it was held that:

“And in accordance with the law I have stated above, allegations of corruption, financial impropriety, and breach of tenets of Integrity against a state or public officer should be reported to and be investigated at first instance by the EACC. The relevant law provides for steps to be taken by EACC on such complaints and action to be taken upon completion of investigation. Depending on the result of investigation EACC is required to forward the file to the DPP with specific recommendations and may recommend the file to be closed or charges be levelled or surcharge the person or make any other recommendation provided in law. The DPP Is the authority with the power to institute and undertake criminal proceedings against any person before the court as per article 157 of *the Constitution* and Section 5 of the *Office of the Director of Public Prosecutions Act*, 2013 [No. 2 of 2013].”

Analysis and Determination

36. Emerging from the pleadings and submissions of the parties, this Court finds the following to form the issues for determination in this case:
- i. Whether this Court can assume jurisdiction over the subject matter of this Petition given the specific mandates of other relevant Independent constitutional bodies.
 - ii. Whether the allegations of violation of *the Constitution* were established against the Respondent.
 - iii. Whether the Petitioner is entitled to the reliefs sought.

Whether this Court can assume jurisdiction over the subject matter of this Petition given the specific mandates of other relevant public bodies

37. This in essence is a jurisdictional question. The adjudicatory powers of the Court are circumscribed by the law or *the Constitution*. A court of law will not entertain a dispute where it is satisfied that it has no jurisdiction. As was held by the Supreme Court in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others* (2012) eKLR;

“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. We agree with counsels for the first and second respondents in his submission that 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.”

38. This Court’s jurisdiction to entertain matters is found in Article 165 of *the Constitution*. In line with this matter, Sub-Article 3 spells out 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.

39. This Court’s jurisdiction is barred in the following areas under Article 165 (5) of *the Constitution*:

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).

40. Justiciability is a judicial concept that is applied by courts to decide whether given the nature of a particular dispute, is one in which a Court of law can properly preside over and conclusively adjudicate upon the subject matter in question. For instance, the dispute might be premature (unripe) or it could be one where the Court considers that it would give due deference to coordinate bodies of government



to resolve as the matter is within their scope. In *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* (2016) eKLR the Court explained the word justiciability as follows:

“By justiciability it is meant a matter “proper to be examined in courts of justice” or “a question as may properly come before a tribunal for decision”: see Black’s Law Dictionary 9th Ed, pp 943-944. In other words, courts should only decide matters that require to be decided. Thus in *Ashwander –v- Tennessee Valley Authority* [1936] 297 U.S 288, the US Supreme Court stated that courts should only decide cases which invite “a real earnest and vital controversy”.

Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.

Conversely, the court is also prevented from determining an issue when it is too late. When an issue no longer presents an existing or live controversy, then it is said to be moot and not worthy of taking the much-sought judicial time...”

41. The Court went further to discuss as follows:

“The justiciability dogma and all principles under it are part of our Constitutional law and jurisprudence. The court in *John Harun Mwau & 3 Others vs AG & 2 others HCCP No. 65 of 2011* (unreported) stated as follows:

“We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret *the constitution* conferred under Article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy.”.....The extensive quotations were deliberate. It is clear from a review of the above case law that there is now a distinct and coherent jurisprudence within our jurisdiction on the justiciability dogma. There is settled policy with clear arguments as well as out of repetitive precedent that courts and judges are not advise-givers. The court ought not to determine issues which are not yet ready for determination or is only of academic interest having been overtaken by events. The court ought not to engage in premature adjudication of matters through either the doctrine of ripeness or of avoidance. It must not decide on what the future holds either.

It is however to be noted that the court retains the discretion to determine whether on the circumstances of any matter before it still ought to be determined.”

42. In the instant case, the Petitioner anchor’s his case against the Respondent on the basis that she has violated Chapter Six of *the Constitution* owing to the alleged losses tabulated in the Auditor General’s Report at the Teachers Service Commission where she serves as the Chief Executive Officer. That report has however not been subjected to any further investigation to corroborate the assertions made and apart from the general conclusions, there are no authenticated annexures or witnesses’ testimonies to support the conclusions that in the eyes of the Court are basically hearsay statements that the Petitioner is relying on as the proof in his case against the Respondent. For that to happen, there ought



to have been an investigation commenced that would gather the evidence and support the allegations. In the absence of a credible investigation, this Court takes the view that the facts sought to be relied upon by the Petitioner in presenting this Petition have not sufficiently ‘ripened’ for this Court to exercise its adjudicatory authority.

43. The Petitioner further alleges that the Respondent has committed acts of corruption, embezzlement of public funds and is thus culpable. He thus seeks to have the interested Party compelled by an order of mandamus to investigate, and if culpable, instruct the DPP to criminally prosecute the Respondent for the fragrant breach of the law. The matters that are pleaded allege that these offences were committed by the Respondent. The above crimes are provided for both in the Ethics and Anti-Corruption [Act No. 3 of 2003](#) and the Penal Code, Cap 63 Laws of Kenya. The Ethics and Anti-Corruption Commission and the National Police Service are given the legal mandate to investigate these offences under their respective mandates. The National Police Service is established under Article 243 of [the Constitution](#) and [the Constitution](#) further gives Parliament in Article 245 (8) the authority to enact legislation to give full effect to these Constitutional provisions. Parliament thus passed the [National Police Service Act](#) No. 11 A of 2011 which under Section 24 (e) empowers the Police to investigate crimes.

By the same breath, [the Constitution](#) in Article 79 provide for enactment of legislation for establishment of the Ethics and Anti-Corruption Commission which shall have the powers and status of a Commission under Chapter 15 for purposes of ensuring compliance with, and enforcement of, provisions of Chapter Six of [the Constitution](#). The preamble to the Ethics and Anti-Corruption Act states that it is “An Act of Parliament to establish the Ethics and Anti-Corruption Commission pursuant to Article 79 of [the Constitution](#), to provide for the functions and powers of the Commission, to provide for the qualifications and procedures for the appointment of the chairperson and members of the Commission, and for connected purposes.” Under Section 13 (c), the Commission has among others, the power to conduct investigations on its own initiative or on complaint made by any person.

44. The Petitioner did not demonstrate he has taken up these matters which are in the nature of crimes allegedly committed by the Respondent with any of the constitutionally recognized bodies established for investigating those crimes. He has not sought the intervention of any Investigative Agency clothed with the power to undertake investigations before approaching this Court for remedies on matters that properly fall within the proper scope of substantive criminal law. In my view, the Petitioner cannot be allowed to run away from institutions that [the Constitution](#) and relevant statutes have created and granted the specific primary mandate over the issues raised in the Petition. This Court is constitutionally bound to accord deference to coordinate branches of government by allowing them the latitude to perform their respective legal mandates. The dicta expressed by the Court in *William Kabogo Gitau v Ferdinand Ndung’u Waititu* [2016] eKLR is thus relevant. The Court stated thus:

“In my view, while this Court enjoys unlimited original jurisdiction in criminal and civil matters by dint of Article 165 (3) (a) of [the Constitution](#), that is not a substitute for other first ports of call in determining such civil and criminal matters. In the present case, the Petitioner alleges the commission of various criminal offences and thus concludes that the Respondent is guilty of the same and hence in violation of Articles 10 (2) and 73 of [the Constitution](#).

49. I hold the view that the Petitioner’s contentions in regard to the commission of the alleged offences must be raised with the relevant authorities and this Court cannot at this juncture usurp the powers of such authorities. This Court cannot for instance sit to investigate matters of alleged forgeries of academic documents as invited by the Petitioner and neither can the Court make conclusions pertaining to those allegations in the absence of evidence for instance that the investigating agencies have made investigations and the



relevant Court has made a finding as to the innocence or otherwise of the Respondent on those allegations.”

Whether the allegations of violation of the Constitution were established against the Respondent.

45. As a starting point, a constitutional petition must be drawn with specificity and precision as established by the locus classicus case of Anarita Karimi Njeru (*supra*) where the Court stated:

“We would, however, again stress that 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.”

46. It was further affirmed by the Supreme Court in Communications Commission of Kenya (*Supra*) which stated thus:

“(349) ... Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

47. Proof of allegations set out in the Petition must then follow. The Petitioner is under a duty to tender evidence to prove any assertions made. This is a requirement of the law of evidence which places the burden of proof on the person that alleges the existence of a fact.

Section 107 of the Evidence Act Cap 80 provides thus:

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist?
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.



48. The Supreme Court affirmed the above position in *Samson Gwer & 5 others vs Kenya Medical Research Institute & 3 others* [2020] eKLR where held as follows:

“ 50. This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...”

49. Equally, in *Evans Otieno Nyakwana vs Cleophas Bwana Ongaro* (2015) eKLR it was held that:

“ 15. ... As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya)...

16. Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

17. The Court of Appeal in *Jennifer Nyambura Kamau Humphrey Mbaka Nandi* [2013]eKLR considered the applicability of these provisions as follows;

We have considered the rival submissions on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the *Evidence Act* provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

50. The question thus becomes, has the Petitioner established the allegations of Constitutional violations particularly that the Respondent violated Article 73, 10 (2) (b), 226 (5) of *the Constitution*. In my view, there was no evidence tendered to support these allegations. The excerpt of the Auditor General’s Report that the Petitioner annexed was bare without any supporting annexures or witnesses account



to back those conclusions. The report was not even confined to period the Respondent has been at the helm of Teachers Service Commission as its Chief Executive Officer taking into account her replying affidavit which the Petitioner did not rebut. The Petitioner did not even rebut the fact he was linking her to the alleged embezzlement of funds that had been allocated for free primary education which funds do not fall within the purview of Teachers Service Commission which she heads. Moreover, even assuming the alleged losses of money occurred at TSC, the Petitioner did not directly demonstrate her personal involvement and only relied on broad based allegations about those losses.

51. In my firm view, there was absolutely no iota of probative evidence that was presented to sustain these allegations against the Respondent. I find that the Petition not proved.

52. Moreover, the responsibility to undertake an inquiry as to whether or not there were violations of leadership and integrity provisions in Chapter Six of *the Constitution* should have first been raised with the Ethics and Anti-Corruption Commission first before seeking the intervention of this Court since the Constitutional and statutory duty to ensure compliance with Chapter Six is first a primary responsibility of the Ethics and Anti-Corruption Commission. Article 79 provides:

“Parliament shall enact legislation to establish an Independent Ethics and Anti-Corruption Commission, which shall be and have the status and powers of a Commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, provisions of this Chapter.”

53. The *Leadership and Integrity Act*, is an Act of Parliament enacted to “give effect to, and establish procedures and mechanisms for the effective administration of Chapter Six of *the Constitution* and for connected purposes” equally, under Section 4 (2), gives the responsibility for overseeing the implementation of the Act to the Ethics and Anti-Corruption Commission.

54. I concur with the observation of the Court in *William Kabogo v Ferdinand Ndung’u Waititu* (supra) where it held thus:

“51. The *Leadership and Integrity Act* specifically empowers the Ethics and Anti-Corruption Commission the role to oversee the implementation and enforcement thereof. It is thus incumbent that any person, who feels that the Act has been contravened, ought to move the relevant bodies charged with the mandate under the Act.

52. I must further state that this Court has the general jurisdiction to enforce Chapter Six of *the Constitution* pursuant to Article 165 but such jurisdiction is to be exercised subject to existing and especially derivative statutes, if any. The doctrine of subsidiarity would so dictate and in the instant case the *Leadership and Integrity act*, which was enacted to give effect to Chapter Six of *the Constitution* is the relevant statute. In the present case however, and for the above stated reasons, it would be premature for this Court to exercise its jurisdiction on matters that fall within the jurisdiction of other authorities specifically mandated under the *Leadership and Integrity Act*.”

55. On the issue of costs, the Respondent urged this Court to award costs. None of the prayers in the Petition sought any direct personal benefit to the Petitioner. I am of the humble view that each Party should bear its own costs of the Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF OCTOBER, 2024.



.....
L N MUGAMBI
JUDGE

