



Gikundi v Mwangaza & 2 others; Guantai (Interested Party) (Constitutional Petition E011 of 2023) [2023] KEHC 21981 (KLR) (1 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21981 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CONSTITUTIONAL PETITION E011 OF 2023**

EM MURIITHI, J

AUGUST 1, 2023

**IN THE MATTER OF ARTICLES 2(1), 3(1),10,19,20,21,22,23,73
AND 260 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF CHAPTER SIX OF THE CONSTITUTION
OF KENYA ON LEADERSHIP AND INTEGRITY**

AND

**IN THE MATTER OF HIRING MIRIAM KARWIRWA GUANTAI, THE SISTER
OF THE GOVERNOR AS A PERSONAL ASSISTANT OF THE GOVERNOR**

AND

**IN THE MATTER OF CONSPIRACY BY THE GOVERNOR KAWIRA
MWANGAZA TO IMPROPERLY CONFER BENEFIT TO HER SISTER MIRIAM
KARIRWA GUANTAI AGAINST SECTION 43 AS READ WITH SECTION 48
OF THE ANTICORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003**

BETWEEN

JOSEPH GIKUNDI PETITIONER

AND

H.E. KAWIRA MWANGAZA 1ST RESPONDENT

ETHICS AND ANTICORRUPTION COMMISSION 2ND RESPONDENT

COUNTY GOVERNMENT OF MERU 3RD RESPONDENT

AND

MIRIAM KARWIRWA GUANTAI INTERESTED PARTY



RULING

Introduction

1. Before the Court is a Petition 24th May 2023 dated for specific reliefs as follows:

“YOCCRpetitioner therefore prays that:-

1. A Declaration that the act of the 1st Respondent having the Interested Party, her sister as a personal Assistant is violation of chapter 6 of the Constitution on Leadership and Integrity and section 24 of the Leadership and Integrity Act, 2012.
2. A declaration that it is unconstitutional and a violation of chapter 6 of the Constitution on Leadership and Integrity and section 24 of the Leadership and Integrity Act, 2012 for any state officer to cause the hiring of their family members as personal Assistants.
3. In the alternative to the above, a declaration that hiring or influencing the hiring of one’s biological sister or brother into a public office does not amount to nepotism.
4. A declaration that the 2nd Respondent violated Section 4 of the Leadership and Integrity Act by failing to enforce and watching as the 1st Respondent violated provisions of the Leadership and Integrity Act, 2012.
5. A declaration that the 1st Respondent is in breach of Chapter SIX of the Constitution and therefore not fit to continue holding the office of the Governor of Meru County.
6. A declaration that the continued holding of office by the. Interested Party is in furtherance of nepotism and a violation of the Constitution. An order of revocation of the appointment of the Interested Party as a Personal Assistant-in the office of the Governor.
7. Costs of the Petition and any other order as the Honourable Court may deem fit to grant.”

2. Two Preliminary Objections were taken by the Respondents. The 1st respondent raise a Preliminary Objection dated 6/5/2023 as follows:

“Notice of Preliminary Objection.

Take Noticethat the pt and 3rd Respondents shall Raise the following Preliminary Objection(s) against the Petitioner's Petition dated May 24, 2023 ("the Petition"):

1. Thatthe Petition Contravenes the Doctrine of Exhaustion of remedies.
2. Thatthe petition is defective and incompetent for non-joinder of the County Public Service Board, a necessary party which has the exclusive mandate to hire and appoint County Government employees as provided under section 59 of the County Government Act, 2012.



3. That the petition is in contravention of provisions of the County Public Service Board to wit Section 59 (4) (f) & (g) of the County Government Act, 2012 which mandates the board to investigate a complaint on violation of natural values and principles and recommend necessary action to be taken.
4. The Petition does not disclose any or reasonable justification for judicial intervention in an inchoate legislative process and thus doesn't meet the legal threshold set out in Anarita Karimi Njeru v Republic, High Court (Nairobi) Misc Cri App No. 4 of 1979.
5. That given the objections set out in Paragraphs 1 to 4 above, this Honorable Court has no Jurisdiction at the moment to issue the prayers sought in the Petition and thus the petition should be dismissed with costs to the 1st and 3rd respondents.”

3. The Interested Party and the 3rd Respondents filed a Preliminary Objection dated 5/6/2023 in similar terms as follows:

“Notice of Preliminary Objection.

Take Notice that the Interested Party & 3rd Respondent herein; shall, at the earliest possible opportunity raise a preliminary objection to the sustainability of the petition dated May 24, 2023 in its entirety on the ground tailored as follows:

1. That the petition is premature and unripe for determination as the Honourable Court has no jurisdiction and capacity to hear and entertain the petition by dint of Article 79 & 252(1) of the Constitution of Kenya 2010 as read together with Section 11(1) of the Ethics and Anti-Corruption Commission Act, 2011 and section 4 of the Leadership and Integrity Act, 2012 which grants the Ethics and Anti-Corruption Commission the exclusive mandate to hear and settle all complaints and/or disputes involving breach of national values and principles.
2. That the petition is fundamentally and incurably defective in form and in substance since there is an established procedure under the Constitution, the Leadership and Integrity Act, 2012 and the Ethics and Anti-Corruption Commission Act, 2011 for dealing with the allegations in the nature of those complained of in this petition.
3. That the petition is sub-judice and there is imminent risk of double jeopardy as the Ethics and Anti-Corruption Commission is investigating the allegations complained hereto.
4. That the petition is defective and incompetent for non-joinder of the County Public Service Board, a necessary party which has the exclusive mandate to hire and appoint county government employees as provided under section 59 of the County Governments Act, 2012. The petition is thus void for faulting the decision of the County Public Service Board which is not a party to this proceedings and issuing the orders sought would contravene the fundamental principles of natural justice.



5. That the petition seeks to usurp the powers of County Public Service Board and offends the provision of Section 59(4)(f) & (g) of the [County Governments Act](#), 2012 which mandates the board to investigate a complaint on violation of national values and principles and recommend necessary action to be taken.
6. That the petition is therefore bad in law, incompetent, premature, speculative, incurably defective and abuse of the court process.”

Submissions.

4. Counsel for the parties made submissions. Urging the Preliminary Objections, Counsel for the 1st Respondent Mr. Ashaba cited Nakuru High Court Pet. No. 30 of 2014 [Nakuru County Human Rights Network v. Nakuru County Government & Anor.](#) and Nakuru High Court Petition No. 17 of 2014 [James Akelerio Alias Muguu & Anor. v. Moses Kasaine Lenolkilal & 3 Ors.](#) and Nairobi Court of Appeal Civil Application No. Nai. 92 of 1992 (NAI 40/92 UR) [Speaker of the National Assembly v. James Njenga Karume](#), and submitted that the Petitioner had his avenue for seeking redress elsewhere and consequently the court had no jurisdiction. Counsel relied on section 77 of the [County Governments Act](#) and section 42 of the [Leadership and Integrity Act](#) and urged that the Petitioner had not exhausted alternative remedies, and the petition was not ripe. The ouster provisions of section 87 (2) of the [Public Service Commission Act](#) were also cited.
5. Counsel for the 2nd Respondent Commission Mr. Kiambi supported the Preliminary Objection and pointed out that section 42 of the Leadership and Integrity Act sets out the steps for the enforcement of the Act with section 43 of the Act providing for the investigations by the public body and report to the 2nd respondent among other agencies, and concluded that the Petition was premature.
6. Counsel for the Petitioner Mr. Maranya urged that the Petition was brought under Articles 23 and 165 of the Constitution seeking to enforce Articles 19, 20, 21, 73, 232 and 260 of the Constitution and objected that section 77 of the County Governments Act only related to employment matters. It was submitted that the Petition

“Petition is under Article 22 which gives any Kenyan right to apply for enforcement of fundamental rights. The Petitioner is not an employer and the 1st respondent is not an employee. The Interested Party is an employee which is not a party. None of the parties is an employer of the County Public Service Board. There is no employer – employee relationship between the parties. It is enforcement of Bill Rights which the Court has jurisdiction. I rely on Article 23 of the Constitution for redress of denial or threat of fundamental right. The public service Commission only hears appeals. The word use is “may” gives choice to appeal. The tribunal under PSC has no jurisdiction. The Court has original and the section [87(2) of the Public Service Act] cannot oust court’s jurisdiction.”

7. Counsel relied on Catherine Mwhaki Ngambi v. International Leadership University (2022) eKLR, Deepak Lalchand Nichani v Kenya Revenue Authority & another [2021] eKLR and Nairobi Employment and Labour Relations Court No. E951 of 2011 Robert Khamala & 8 Ors v. Acting Clerk of the Nairobi City County Assembly (2023) eKLR, and urged that before the court were constitutional issues which the court as a constitutional court had jurisdiction to entertain and determine within the exception to the rule on exhaustion of alternative remedies.



Determination

8. The law is settled since the Speaker of the National Assembly v Karume (Civil Application 92 of 1992) [1992] KECA 42 (KLR) (29 May 1992) (Ruling) that -

“[T]here is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

9. It is respectfully noted that this position is reiterated by the Court of Appeal in Geoffrey Muthinja & Anor. v. Samuel Muguna Henry & 1756 (2015) eKLR as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.

We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed. We think there were sufficient safeguards in place for a valid determination of the various plaintiffs’ disputes had they filed them within the church set up. And there was always the right, acknowledged by the learned Judge, of approaching the courts after exhaustion of the church mechanisms. By failing to do so, and quite apart from the force of their apprehensions, the appellants effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits prematurely.”

10. Even if the 1st respondent has conducted herself in the manner alleged in the petition, and such conduct being in contravention of the Chapter Six of the Constitution, the lawful procedure for dealing with the matter is prescribed under the very chapter Six at Article 75 (2) of the Constitution as follows:

“75. Conduct of State officers

1. A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids—
 - a. any conflict between personal interests and public or official duties;
 - b. compromising any public or official interest in favour of a personal interest; or
 - c. demeaning the office the officer holds.
2. A person who contravenes clause (1), or Article 76, 77 or 78(2)—
 - a. shall be subject to the applicable disciplinary procedure for the relevant office; and



- b. may, in accordance with the disciplinary procedure referred to in paragraph (a), be dismissed or otherwise removed from office.
3. A person who has been dismissed or otherwise removed from office for a contravention of the provisions specified in clause (2) is disqualified from holding any other State office.”
4. It is clear that the enforcement of compliance with Chapter six of the Constitution is through the mechanism of specialized Commission under statute enacted by Parliament for that purpose under Article 79 of the Constitution which expressly provides as follows:

“79. Legislation to establish the ethics and anti-corruption commission

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, the provisions of this Chapter.”

11. It is not for the Court to interrogate the conduct of a state officer, the Governor in the case (as defined in Article 260 of the Constitution); and finding it wanting, consequently, make the declaration of unsuitability prayed for in the Petition. This is the disciplinary mandate of the responsible institutions as charged in the Constitution and the law. The Constitution itself has ordained the procedure for enforcement of the principles of integrity under Chapter Six of the Constitution.

The Present Petition

12. The end result prayed for by the Petition is the finding that the Governor is unsuitable to hold office and the removal of the Governor’s sister from her position as the Governor’s personal assistant. These reliefs, with respect, have their procedure for enforcement elsewhere, and the Court, on the doctrine of constitutional avoidance, is obliged to restrain itself from acting on a matter which can be remedied by alternative process. It is practical application of the very principle of non-exhaustion of alternative remedies, and the Speaker of National Assembly v. Karume principle of strict observance of the constitutional and statutory procedure prescribed for specific redress. There is in the Petition before the Court, with respect, no issue of enforcement of the Bill of Rights, as urged by the Counsel for the Petitioner.

Removal of Governor state officer

13. If by the relief that “5. A declaration that the 1st Respondent is in breach of Chapter SIX of the Constitution and therefore not fit to continue holding the office of the Governor of Meru County” it is sought to remove the Governor from her position, the more efficacious remedy is the remedy of removal of Governor prescribed under Article 181 of the Constitution, which provides as follows:

“ 181 Removal of a county governor



1. A county governor may be removed from office on any of the following grounds—
 - a. gross violation of this Constitution or any other law;
 - b. where there are serious reasons for believing that the county governor has committed a crime under national or international law;
 - c. abuse of office or gross misconduct; or
 - d. physical or mental incapacity to perform the functions of office of county governor.
2. Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds specified in clause (1).”

14. The applicable legislation providing for the procedure of removal of a county governor is the County Government Act which provides for such procedure under section 33 thereof.

Exhaustion of remedies

15. In this case, it is not sought to enforce any fundamental rights of the petitioner as in *Deepak Lalchand Nichani v Kenya Revenue Authority & another* [2021] eKLR where Mrima, J. dismissed a Preliminary Objection on jurisdiction based on exhaustion of remedies and ruled

“35. This Court is, hence, satisfied that the Petition primarily seeks to enforce fundamental rights and freedoms and it is not demonstrated that the claimed constitutional violations are mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court.

36. The Petition is, therefore, not barred by the doctrine of exhaustion.”

16. With respect to Counsel, the issue of enforcement of Chapter Six of the Constitution as regards the 1st respondent is not one based on exhaustion of remedies but on the strict procedure provided for under the Constitution. Article 75 (2) provides for the mechanism of the EACC (2nd Respondent) enforcing compliance. The removal of the Governor from office cannot be effected by the Court because the due process established under section 33 the County Governments Act enacted under Article 181 (2) of the Constitution calls for a process through the County Assembly and later the Senate.

17. On this account, this matter is also different from the fundamental rights exception to exhaustion of remedies decision five judge bench in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR cited in *Catherine Mwihaki Ngambi v. International Leadership University* (2022) eKLR (Ongudi, J.) relied on by the Petitioner, where the Court identified exceptions to the doctrine of exhaustion of remedies:

“59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R. v Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance Kenya (NASA)* (supra), after exhaustively reviewing Kenya’s decisional law on the exhaustion doctrine, the High Court described the first exception thus:



What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others v Aelous (K) Ltd and 9 Others.*)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
 61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.
 62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”
18. As provided under section 41 and 42 of the Leadership and Integrity Act the procedure for removal of Governor is to be followed in cases of breach of the applicable Code of Conduct which must incorporate provisions against breach of section 24 of the Act relied on by the Petitioner herein, as follows:
- “41.
 - (1) Subject to subsection (2), a breach of the Code amounts to misconduct for which the State officer may be subjected to disciplinary proceedings.



- (2) Where an allegation of breach of the Code has been made against a State officer in respect of whom the Constitution or any other law provides the procedure for removal or dismissal, the question of removal or dismissal shall be determined in accordance with the Constitution or that other law.

42.

- (1) A person who alleges that a State officer has committed a breach of the Code, may lodge a complaint with the relevant public entity and the public entity shall register and inquire into the complaint.”

Removal of the Personal assistant public officer

19. While the exacting principles of integrity under Chapter six of the Constitution apply to public officers by virtue of Article 80 (c) of the Constitution, the responsible commission for public officers is the Public Service Commission which has the powers under Article 75 (2) of the Constitution. Sections 59 and 77 of the County Governments Act gives the personnel mandate to the County Public Service Board and provides for procedure to challenge decisions made in respect of employment of County Government staff including appointment, discipline and removal from office in the County Public Service. By Section 59 (4) (f) and (g) of the Act, the County Public Service Board relied on by the Respondents is empowered as follows (as relevant):

- “(f) investigate, on its own initiative or upon a complaint made by any person or group of persons, the violation of any values and principles;
- (g) recommend to the relevant lawful authority, any necessary action in view of the violation of the values and principles by any person or public body”.

20. The prescribed special procedure for addressing complaints with regard to the employment process for employees of County Governments, as properly held by Mshila J. in Nakuru High Court Pet. No. 30 of 2014 Nakuru County Human Rights Network v. Nakuru County Government & Anor. and Nakuru High Court Petition NO. 17 of 2014 James Akelerio Alias Muguu & Anor. v. Moses Kasaine Lenolkilal & 3 Ors., is by appeal to the Public Service Commission under section 77 in terms that –

“77. Appeals to the Public Service Commission

1. Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the "Commission") against the decision.
2. The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—
 - a. recruitment, selection, appointment and qualifications attached to any office;
 - b. remuneration and terms and conditions of service;



- c. disciplinary control;
 - d. national values and principles of governance, under Article 10, and, values and principles of public service under Article 232 of the Constitution;
 - e. retirement and other removal from service;
 - f. pension benefits, gratuity and any other terminal benefits; or
 - g. any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.
3. An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.
 4. The Commission shall not entertain an appeal more than once in respect to the same decision.
 5. Any person dissatisfied or affected by a decision made by the Commission on appeal in a decision made in a disciplinary case may apply for review and the Commission may admit the application if—
 - a. the Commission is satisfied that there appear in the application new and material facts which might have affected its earlier decision, and if adequate reasons for the non-disclosure of such facts at an earlier date are given; or
 - b. there is an error apparent on record of either decision.
 6. An application for review under subsection (5) shall be in writing and made within the time prescribed by the Commission in regulations governing disciplinary proceedings, but the commission may entertain an application for review later if, in the opinion of the Commission, the circumstances warrant it.”
21. The decision of Nairobi Employment and Labour Relations Court No. E951 of 2011 Robert Khamala & 8 Ors v. Acting Clerk of the Nairobi City County Assembly (2023) eKLR (Maureen Onyango, J.) found an exception to the doctrine of exhaustion of remedies with regard to appeal under section 77 of the County Governments Act in that case -
- “ 48. I find that there are indeed special circumstances to warrant the Claimants approaching this Court instead of appealing to the County Assembly Service Board where the Respondent sits as Secretary.
49. It is further my finding that the suit as filed by the Claimants does not fall under the purview of the Public Service Commission as provided under Section 77 of the County Governments Act as there was no decision of the Board capable of being presented as an appeal to the Public Service Commission. The prayers sought in the claim are also matters that neither the County Assembly Board or the Public Service Commission are authorised to determine.”



22. I should respectfully agree that as in Robert Khamala case, there is here no decision to be appealed from, and section 59 and 77 may well be irrelevant in the matter before the Court. However, as I understand the objection, it is that the petitioner ought to have moved the Public Service Board under the provisions of section 59 (4) (f) and (g) and thereafter the Public Service Commission on appeal, if necessary. The provisions of section 87 (2) of the Public Service Commission Act that “(2) A person shall not file any legal proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government public service unless the procedure provided for under this Part has been exhausted.” was not adequately canvassed for this court to return a finding thereon but would appear to merely express the doctrine of exhaustion of remedies.
23. However, the order for removal of the Interested Party is not based on anything that the 1st Interested Party is actively alleged to have done but rather on the misconduct of the 1st Respondent. The removal of the 1st Interested Party would appear to follow upon demonstration of violation of the principles of Chapter Six of the Constitution leading to as prayed in Prayer No. 1 of the Petition “A Declaration that the act of the 1st Respondent having the Interested Party, her sister as a personal Assistant is violation of chapter 6 of the Constitution on Leadership and Integrity and section 24 of the Leadership and Integrity Act, 2012.
24. The order for removal of the Interested Party, as sought in Prayer No. 6 of the Petition, being so connected to the proceedings against the 1st Respondent, must await a determination on the question of violation of the constitutional principles by the 1st Respondent. As this inquiry is to be made in accordance with procedure set in Article 75 (2) of the Constitution, the reliefs for declaration and order for removal sought under prayer 6 of the Petition in terms that “6. A declaration that the continued holding of office by the Interested Party is in furtherance of nepotism and a violation of the Constitution [and] An order of revocation of the appointment of the Interested Party as a Personal Assistant-in the office of the Governor” must await the determination of the issues raised against the 1st Respondent Governor by appropriate means.

Mere Declaratory orders

25. Moreover, apart from the order in the concluding part of Prayer No. 6 that “An order of revocation of the appointment of the Interested Party as a Personal Assistant-in the office of the Governor” all the reliefs sought in the Petition are for Declarations, without any follow up substantive orders making the while petition moot and academic. It is not appropriate use of judicial process to seek declarations that still require further constitutional process to give effect to the Governor’s removal from office.

Decision

26. The Court’s view is clear that while the suit in the petition before the court is primarily about alleged breach by the 1st respondent of constitutional provisions in Chapter six of the Constitution and the High Court as the Constitutional Court which has jurisdiction to deal with the issue, the doctrine of constitutional avoidance, exhaustion of remedies or the specific enforcement procedure of the Speaker of the National Assembly v. Karume case, all work to deny at this stage, jurisdiction on the matter.
27. The objection as to non-joinder of the County Public Service Board as employer authority of the County Government is without merit as preliminary objection in view of the joinder of the whole County Government as the 3rd Respondent, and the permissive provisions of Rule of the Mutunga Rules which permit joinder of parties suo moto or on application. I respectfully note that the Employment and Labour Relations Court (Maureen Onyango J.) similarly held in Nairobi Employment and Labour Relations Court No. E951 of 2011 Robert Khamala & 8 Ors v. Acting Clerk



of the Nairobi City County Assembly (2023) eKLR citing D.T. Dobie (K) Ltd. v. Joseph Mbarua Muchina (1980) eKLR.

28. The Court finds that while it has jurisdiction as a constitutional court to determine under Article 165 (3) (d) of the Constitution that is “jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of— (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...” as may be raised by the prayers of the Petition herein alleging primarily breach of the constitutional provisions in Chapter Six of the Constitution by the 1st Respondent Governor of the County of Meru, the enforcement of Chapter Six principles is provided under Article 75(2) of the Constitution and the statute made thereunder, the Leadership and Integrity Act, 2012, to require specific procedure and mechanism for discipline and or removal from office before the 2nd Respondent.
29. As regards the order for removal of the Interested Party as personal assistant to the Governor from office, being a public officer employed under the County Government, it is the specific procedure provided for under sections 59 and 77 of the County Governments Act that apply, and the matter may only reach this court thereafter upon judicial review of such process. There being no proceedings taken under the said provisions the court’s jurisdiction is premature, and the prayer for removal being tied to the finding of breach by 1st respondent of the provisions of Chapter Six of the Constitution and the Leadership and Integrity Act, the procedure allowed for this prior inquiry is to be made in accordance with procedure set in Article 75 (2) of the Constitution and section 42 of the Act should be followed.
30. The Preliminary Objection has considerable merit and it partly is allowed. The Court does not, however, strike out the Petition as prayed. The suit shall be held in abeyance awaiting determination by the 2nd Respondent of the petitioner’s complaint on the primary matter subject of this petition, should there remain alive an issue for determination by this court upon such decision.

Orders

31. Accordingly, for the reasons set out above, the Court makes the following orders
 1. The Preliminary Objection taken by the Respondents herein has merit and it is allowed.
 2. The Petition shall be held in abeyance to allow the 2nd respondent Ethics and Anti-Corruption Commission to discharge its mandate under Article 75 (2) of the Constitution.
 3. The costs of this Preliminary Objection shall be costs in the Cause.

Order accordingly.

DATED AND DELIVERED ON THIS 1ST DAY OF AUGUST, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Maranya Advocate for the Applicant.

Mr. Ashaba Advocate for the 1st Respondent.

Mr. Newton Munene Kiambi Advocate for the 2nd Respondent.

M/S OMK Advocates for the 3rd Respondent and the Interested Party.

