



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CONSTITUTIONAL PETITION NO. 19 OF 2020 (FORMERLY PETITION NO. 449/2019 CONSTITUTION AND HUMAN RIGHTS DIVISION-MILIMANI LAW COURTS-NAIROBI)

IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS AND CONSTITUTIONAL VALUES AND PRINCIPLES

AND

IN THE MATTER OF ARTICLES 1,2,10,27,47 AND 232 OF THE CONSTITUTION OF KENYA 2010 AS READ WITH THE COUNTY GOVERNMENT ACT, THE FAIR ADMINISTRATIVE ACTION ACT, THE PUBLIC APPOINTMENTS (COUNTY ASSEMBLIES APPROVAL) ACT AND ALL OTHER ENABLING PROVISIONS OF THE LAW

BETWEEN

COUNTY ASSEMBLY OF KITUI.....PETITIONER

VERSUS

THE GOVERNOR, KITUI COUNTY GOVERNMENT.....1ST RESPONDENT

JOSHUA KIMWETICH CHEPCHIENG.....2ND RESPONDENT

AND

THE KITUI COUNTY PUBLIC SERVICE BOARD.....1ST INTERESTED PARTY

THE PUBLIC SERVICE COMMISSION.....2ND INTERESTED PARTY

J U D G E M E N T

1. On 5th August, 2019, the **Hon. The Governor Kitui County Government**, the 1st Respondent herein, offered employment to **JOSHUA KIMWETICH CHEPCHIENG**, the 2nd Respondent, as the County Secretary. The said appointment met resistance from County Assembly of Kitui the Petitioner herein, who lodged this petition to challenge the appointment citing *inter alia* that the appointment was done secretly, arbitrary and without adhering to Constitutional and statutory requirements like involvement of people among other dictates of the law.

2. The Petitioner has therefore sought the intervention of this Court and is seeking the following reliefs: -

(i) **A declaration**

That the appointment and/or secondment of Joshua Kimwetich Chepchieng as the Kitui Government County Secretary is illegal, unconstitutional, null and void as it is contrary to **Articles 10(2) (a), (b) and (c), 28, 47, 73 and 232 (1) (d) (e) and (f) of the Constitution of Kenya 2010 and Section 44 of the County Government Act 2012.**

(ii) **An Order of Certiorari** to issue pursuant to **Article 23(3) (6)** of the Constitution quashing the decision by the Governor, Kitui County appointing and/or accepting the purported secondment of one, Joshua Kimwetich Chepkieng, as County Secretary of the Kitui County Government.

(iii) Cost of this petition.

(iv) Any other Order, and directions that this court may consider appropriate and just to grant for the purpose of the enforcement of

the Petitioner's fundamental rights and freedoms.

3. The Petitioner's Case

The Petitioner contends that the appointment of the 2nd Respondent was done in secrecy without following the stipulated procedures such as advertisement of the post and subjecting candidates or applicants to selective and competitive process as required under **Section 44 of the County Government Act No. 17 of 2012**. It has faulted the 1st Respondent for acting unilaterally without involving the Petitioner. It submits that by doing the 1st Respondent acted without transparency, accountability and/or involvement of the people of Kitui or their chosen representatives contrary to **Section 44(2) of the County Government Act**, the spirit of the Constitution and the values and principles of Governance enshrined under **Article 10** and the values and principles of **Public Service as contained in Article 73 and 232 of the Constitution**.

4. It submits that the 2nd Respondent's appointment was illegal and contrary to **Section 44** which provides for the qualifications of the person holding the said office to include a person who is competitively sourced from among persons who are University graduates with at least 10 years' experience in Administration and Management.

5. It claims that the cited law above required the Governor to competitively source and nominate one nominee before forwarding the nominee for approval by the Petitioner. It points out that under **Section 4 of the Public Appointment (County Assemblies Approval) Act**, the law states that;-

'no appointment shall be made unless approval has been sought from the County Assembly.'

The Petitioner claims that no such approval was sought in this instance which in their view renders the appointment a nullity in law.

6. It further claims that the 1st Respondent in appointing the 2nd Respondent exercised powers she did not have and that she could not bypass a procedure and purport to arbitrarily select and/or second/appoint the 2nd Respondent and that by doing so, her action was unreasonable, illegal and contrary to the Provisions of **Article 47 of the Constitution** as read with the provisions of **Fair Administrative Action Act**.

7. The Petitioner urges this court to, in the interest of justice, intervene to arrest the illegality and the violations of the law. The Petitioner faults the 1st Respondent for failing to table evidence in this court showing steps/measures taken in an attempt to comply with the Constitutional values and principles of Public Appointments.

8. It avers that, the Petitioner holds and exercises powers in trust for the people and in its view, is under an obligation to adhere to the law at all times and uphold integrity. It relies on the decision in **TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE –VS-NAKURU WATER & SANITATION SERVICES CO. & ANOTHER (2013) eKLR**, in its submissions that the appointment and/or secondment of the 2nd Respondent fails the Constitutional test under **Article 10, 73 and 232 of the Constitution of Kenya 2010**.

It has further cited the decision in the case of **OKIYA OMTATA OKOITI –VS-THE ATTORNEY GENERAL & 2 OTHERS (2019) eKLR** and the case of **BENSON RIITHO MUREITHI –VS-J.W. WAKHUNGU AND 2 OTHERS (2014) eKLR** to buttress its submissions that the appointment of the 2nd Respondent did not adhere to the National values and principles set out in **Article 10 of the Constitution**.

It is the contention of the Petitioner that the Respondents' actions in the impugned appointment are a nullity and has urged this court to decline the invitation by the Respondents to sanction or sanitize an illegality.

9. It insists that the 1st Respondent did not subject the 2nd Respondent to vetting as required by law and opted for **secondment without clarifying the difficulty faced in complying with the law**. It submits through Counsel that the 1st Respondent has not attached any evidence to show that the County Assembly of Kitui was difficult and allege that even the Speaker of Kitui County Assembly did not know that there was a County Secretary appointed.

10. The Petitioner further claims that, even if the Respondents claim that the 2nd Respondent was seconded, the process of secondment was not followed. It points out that **Article 176 of the Constitution**, provides that a County Government comprises a County Assembly and County Executive and in view of that, if there was a cooperation between the National Government and a County Government, both parties (the Petitioner and 1st Respondent) were supposed to be involved. It faults the 1st Respondent for unilaterally hand-picking the 2nd Respondent contrary to the Provisions of **Section 4 of the Public Appointment (County Assemblies Approval) Act, 2014**.

11. The Respondent's and Interested Party's Case

This Petition has been opposed by the Respondents and the Interested Party. This Court notes that while Kitui Public Service Board was included in the Petition as the Interested Party, the Respondents appear to have included the Public Service Commission as the 2nd Interested Party without a formal order from this court. Any decision reached by this court will therefore not affect the Public Service Commission because it is not a party in this petition.

12. The Respondents and the Interested Party have joined hands in opposing this petition through a replying affidavit by one Alex Kimanzi

sworn on 5th December, 2019 and the written submissions dated 28th October, 2020 filed through their learned Counsel Oloo and Oloo Advocates.

13. The Respondents aver that **Section 42(1) of the Public Service Commission Act** vests the Public Service Commission with the powers and authority to second an Officer in the Public Service upon request of an authorized Institution or entity.

14. They further claim that the 2nd Respondent was engaged by the 1st Respondent as an employing agency on secondment and that the said employment is only temporary for a period of 3 years and therefore not bound by the provisions of **Section 44(2) of the County Government Act 2012**.

15. They further claim that the **Intergovernmental Relations Act** establishes a framework for consultation and cooperation between the National and County Government and that the same is anchored on **Article 6 and 189 of the Constitution**.

16. The Interested Party has deposed that Kitui County has not had a substantive County Secretary since 2017 and that the absence had greatly affected Public Service delivery. It claims that attempts to get a substantive person to fill the position have been thwarted by the County Assembly whom it accuses for serving self-interests rather than public interests. It accuses the Speaker County Assembly of Kitui for harboring vendetta against the 1st Respondent due to political rivalry. It claims that Petitioner has used every opportunity to frustrate her and that because of the frustrations, the 1st Respondent requested the National Government through the Ministry of Interior and Co-ordination National Government and Public Service Commission to second the 2nd Respondent who according to them, was by then the Secretary for Administration in the State Department of Cooperatives and best suited for the job. According to the Interested Party, Joshua Chepchieng is a Seasoned Administrator and a long serving Public Servant who has risen through ranks from District Officer, District Commissioner, County Commissioner to the Secretary for Administration in the Public Service. It justifies his appointment claiming that he has the requisite skills to hold the Office of County Secretary on secondment terms as the County searches for a substantive holder of that office.

17. The Respondents submit that the 2nd Respondent is already in office carrying out his official duties pursuant to the secondment. It is the Respondents view that issues raised by the Petitioner have already been overtaken by events. In their view there is no unmistakable right shown that is directly threatened or breached by the appointment and/or secondment of the 2nd Respondent to the position of County Secretary. They contend that this Petitioner has failed to establish a prima facie case indicating that a right has been infringed and have relied on the case of **MRAO LTD –VERSUS- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS (2003) eKLR**.

18. The Respondents further contend that the Petitioner, as a County Assembly carries out its legislative duties and exercises power of oversight over the County Executive but cannot on its own appoint officers. They aver that its role is only to approve after receiving notification for approval from an appointing authority and that because of the doctrine of separation of powers, the Petitioner cannot assume functions that are vested elsewhere. They have supported this view with a court of appeal decision in the case of **MUMO MATEMO – VERSUS- TRUSTED SOCIETY OF THE HUMAN RIGHTS ALLIANCE & 5 OTHERS (2013) eKLR** where the court stated that different arms of governments are empowered to provide checks and balances, on actions taken by the other organs of government.

19. They have faulted the Petitioner for trying to usurp the appointive powers of the 1st Respondent. They insist that the provision cited by the petitioner (**Section 44 of the County Government Act**) in their view only deals with appointment of a County Secretary. They contend the 2nd Respondent was brought on secondment and have cited the provisions of **Section 2 of the Public Service Act 2017** which in their view covers the engagement of 2nd Respondent. They submit that the 2nd Respondent brought critical skills needed to revamp Public Service delivery within Kitui County and that because the National Government pays his pension, the County government would not incur any financial losses.

20. The Respondents contends that the 1st Respondent under **Article 1(4) (b) of the Constitution**, can exercise delegated power from the people of Kitui County to liaise with National Government on matters secondment of County Chief Officers and that **Article 189 (1) of the Constitution** allows County Government to cooperate with National Government for purposes of exchanging information, coordinating policies, administration and enhancing capacity.

21. They further rely on **Section 42(1) of the Public Service Commission Act, 2012**, which in their view vests the Public Service Commission with the authority to second a Public Officer on the request of an authorized Officer or a Public entity and that in their case the 1st Respondent in exercise of delegated powers under **Article 1(4) (b) of the Constitution** requested the National Government through the Ministry of Interior and Co-ordination of National Government and Public Service Commission to second the 2nd Respondent to the position of County Secretary.

In their view, the secondment was done procedurally and that the 1st Respondent acted on the request of the Interested Party herein after consulting the 2nd Respondent. They argue that having consulted the relevant stakeholders in their case, the Interested Party and the 2nd Respondent, the 1st Respondent cannot be accused of having acted unilaterally. They contend that because the appointment was only temporary they did not need to consult the Petitioner.

In their view, the County Assembly do not approve officers employed on secondment and that such officers only need approval of the County Service Board.

22. On the question of lack of Public participation in the appointment/secondment of the 2nd Respondent, the Respondents contend that Public participation would have not been necessary in the appointment process as opposed to secondment which in their view did not warrant public scrutiny because it was a temporary measure taken to fill a gap. They argue that the 2nd Respondent was already a serving civil servant and had undergone the requisite procedures in appointment of civil servants. They rely on decisions in **TRUSTED SOCIETY OF HUMAN RIGHTS –VERSUS-NAKURU WATER & SANITATION SERVICE LIMITED & ANOTHER (2013) eKLR AND SILAS**

KIPRUTO & ANOTHER –VERSUS- COUNTY GOVERNMENT OF BARINGO & ANOTHER (2014) eKLR.

In their view, the two decisions support their proposition that secondment of Public Officers do not need to be subjected again to competitive recruitment process as the County Government.

23. Analysis and Determination

This court has considered the Petitioner's case on one hand and the Respondents and the Interested Party's position on the other. The main issue for determination in my view is basically whether or not the appointment of the 2nd Respondent by the 1st Respondent was done procedurally in accordance with the relevant law(s) and whether the appointment/secondment of the 2nd Respondent from the National government to the County Government of Kitui exempted the 1st Respondent from statutory requirements in appointment of County Officers.

24. This court shall begin by outlining the legal position with respect to the issues at hand before looking at the facts. There is a contestation between the Petitioner and the Respondents as to whether the engagement of the 2nd Respondent as the County Secretary Kitui County is "appointment" or "secondment".

Before I delve into what I can term as a matter of semantics, it is perhaps useful to have a look at the legal framework that guides County Executive in the appointment of Public Officers that serve within the County Government.

25. The provisions of **Article 235 of the Constitution of Kenya 2010**, clearly sets out how staffing of County Government should be done. It states as follows: -

"A County government is responsible, within a framework of uniform norms and standards prescribed by an Act of Parliament, for-

(a) establishing and abolishing offices in its Public Service;

(b) exercising disciplinary control over and removing persons holding or acting in those offices....."

26. In view of their mandate to operationalize the above constitutional requirement, parliament came up with the legislation to guide County Government on issues related to staffing. This court believes that, that is what informed Parliament in passing various legislation to address the issue. The enactment of **County Government Act. No. 17 of 2012** was aimed at providing *inter alia* functions and responsibilities of County governments in delivery of services to its people.

27. The provisions of **Section 44 of the County Government Act, 2012**, provides for establishment of the office of a County Secretary and how the Officer occupying that office is to be appointed. The Section reads;-

"There is establishment for each County, the office of County Secretary who shall be secretary to the County Executive Committee".

*(2) The County Secretary-(a) shall be **competitively sourced** from amongst persons who are university graduates with at least ten years' experience in administration and management.*

*(b) shall be nominated from **persons competitively sourced** under paragraph-(a) by the Governor and, with **approval of County Assembly, appointed by the Governor**.....". (emphasis added)*

The law therefore does not provide for any alternative way of filling a vacancy in the office of County Secretary or making an appointment thereof.

28. The Constitution of Kenya 2010, under Article 10 stipulates that national values and principles of governance binds all State Organs, State Officers, Public Officers and indeed all persons whenever a decision, step or anything is done in public affairs or making policy decisions or interpreting the law. What are these values? Again the Constitution of Kenya 2010 is clear on this. They include; -

a) patriotism, national unity, rule of law, democracy and participation of the people.

b) equity, inclusiveness, equality.

c) good governance, integrity, transparency and accountability.

d) sustainable development.

29. To pose there for a moment, I have perused through the pleadings filed and one of the undeniable fact is that the Petitioner is not challenging the engagement of the 2nd Respondent by the 1st Respondent on account of his qualifications. Looking at the Resume (CV) of the 2nd Respondent, one can hardly find any fault in so far as his qualifications are concerned. Alex Kimanzi, the Deputy County Secretary in his affidavit sworn on 5th December, 2019 exhibited the 2nd Respondent's resume and the same is clearly impressive. This is a person with a PHD in Project Planning and Management from University of Nairobi and Masters in the same field from the same University. He has also

served in Public Service most of which was in the Provincial administration for over 25 years. So looking at the Statutory prescription in respect to academic and experience, the qualification of the 2nd Respondent to the position of County Secretary is by any standard competitive.

30. However, the Petitioner has challenged his appointment not on the basis of his qualification but on the manner in which he was appointed. The Petitioner has faulted the 1st Respondent for acting in an arbitrary manner without seeking the requisite approval as provided by the law and have cited **Section 4 of the Public Appointment (County Assemblies Approval) Act and Section 44 of the County Government Act 2012.**

31. This Court has looked at the provisions of **4 of Public Appointments (County Assemblies Approval) Act, 2017** which deals with *inter alia* the procedure for approval of Public appointment by County Assemblies.

The Section reads: -

“An appointment under the Constitution or any other written law for which the approval of a County Assembly is required shall not be made unless the appointment is approved by the relevant County Assembly” (emphasis added)

The statute then goes ahead to provide how approval/vetting of nominees should be conducted.

32. My further reading of **Article 235(1)** cited above shows that the responsibility of appointment of Public Officers to serve in the County level of government rests on the County Government and going by **Article 176 of the Constitution**, County Government consists of a County assembly and a County Executive. This means therefore, that strictly speaking appointment of County Officers therefore has to be done in concurrence by the two arms of the County Government. The legislature in its wisdom provided clear legislative framework with regard to the appointment of the said officers giving each arm specific role. As seen above **Section 44 of the County Government Act**, the law obligates the Governor to competitively source a qualified person to be nominated as County Secretary and send the nominee for the approval of the County Assembly. The approval itself is not just a formality, because the County Assembly is obligated to vet the nominee and that is where the Public participation as envisaged under **Article 10 of the Constitution** kicks in.

The provisions of **Sections 7 and 8 of the Public Appointments (County Assemblies Approval) Act, 2017** gives guidelines on how members of the public should be notified through two newspapers of national circulation and other medium, and establishment of modalities and platforms for citizen participation.

33. The process of appointing a County Secretary is therefore comprehensive and is far from being a private affair or engagement of two or three people. The approach is participatory in nature and the members of public must be involved in order to meet constitutional threshold as stipulated under **Article 10 of the Constitution** which has been cited above. Any other appointment done outside the law as clearly stipulated under **Section 4 of the Public Appointment Act (County Assemblies approval)** is void because it is against the letter and spirit of the law.

34. There is no doubt and as a matter of fact, it is not contested that the appointment or the engagement of the 2nd Respondent as County Secretary of Kitui County was done in circumvention of **Sections 4 of Public Appointment (County Assemblies Approval) Act** and the Procedural Requirements stipulated under **Section 44 (1) and (2) of the County Governments Act 2012**. The 1st Respondent and the Interested Party have justified their omissions by asserting that the 2nd Respondent was engaged on secondment and that his appointment was not substantive but a temporary measure to address a public need. They have cited the provisions of **Section 42 and Article 1 (4) (b)** of the court in that the provisions absolve them from blame of not adhering to procedural requirement under **Section 44 of County Governments Act**. The contention by the 1st Respondent poses the question. What is secondment? And does it really provide a leeway for alternative way of appointment of Public Officers to the County Government?

35. The **Public Service Commission Act, 2017** under **Section 2** defines secondment as: -

“an arrangement in which a pensionable employee is temporarily released from an organization within the Public Service to another organization which does not have reciprocal pension arrangements to provide critical skills or acquire new skills or while preserving the pension rights of the employee.....”

This court has looked at the correspondences between the 1st Respondent and the Office of the President, the Ministry of Interior and Coordination of National Government and there is no doubt in my mind that the engagement of the 2nd Respondent was by way of Secondment as per the definition of the Section above. The only issue for determination is whether the secondment was lawful or proper.

36. The answer to the above critical question lies in the interpretation of **Section 42 (1)** of the **Public Service Commission Act, 2017** that provides as follows: -

“The authority to second a Public Officer shall vest in the commission and shall be carried out on the request of an authorized officer or a Public Officer”.

I have looked at the letter requesting for secondment of the 2nd Respondent and letter of acceptance and find that the letters were done by authorized officers yes but the big question is, was it sufficient and lawful for the 1st Respondent to unilaterally request for secondment of an officer to come and fill a position which have clear statutory guidelines on how the position should be filed?

37. This court takes the view that any authorized person, whether he/she is a Public Officer or a State Officer can only exercise power in accordance with the Constitution of Kenya and the relevant laws. Sovereign power belongs to the people and can only be exercised in accordance with the Constitution. The State Officers like say the Governors are only stewards of the people who elected them and vested the power to them.

On the same breadth, the members of County Assemblies have powers delegated to them by same Constitution by virtue of being elected to those offices. The powers assigned to each of the state actors have to be exercised in accordance with the Constitution. As I have observed above **Article 10 of the Constitution** sets out national values and principles which bind all state officers and organs and therefore the question posed is did the action by 1st Respondent to engage the 2nd Respondent in the manner she did meet the Constitutional threshold?

Again as I have observed above the answer is in the negative given the fact that the action taken by the 1st Respondent was clearly arbitrary and unilateral. She never consulted the County Assembly for whatever reason. It was submitted that she faced hostility from the Petitioner owing to some political differences but the law in my view caters for such scenarios because under **Section 10 of the Public Appointment (County Assemblies Approval) Act**, it provides that where the County Assembly rejects a nominee, the appointing authority is required to forward another one. The 1st Respondent has not tabled any evidence showing that she was frustrated in her quest to appoint a qualified person to fill the vacant position of County Secretary.

38. The provisions of **Article 189 (1) of the Constitution of Kenya 2010**, in my view relates to the cooperation between the National and County Government but it will be reading too much into the said provision to mean that the cooperation includes appointment of Public Officers to serve in the County Government. The appointment of staff to work at the County level are well spelt out under **Article 235 (1) of the Constitution** as cited above.

39. The appointment of staff or Public Officers to serve a County Government must be done in accordance with the Law which I have clearly set out above. The unilateral approach taken by the 1st Respondent in my view was lopsided and ill-advised. This is because the appointee was not subjected to the stipulated rigorous procedures to ensure that the person appointed met the legal requirements and Public expectation / confidence in the discharge of his/her duties. The decision in **PETER KYALO –VERSUS-ALFRED MUTUA GOVERNOR MACHAKOS COUNTY & 6 OTHERS (2018)** in my view does not support the action taken by the 1st Respondent rather, it puts emphasis on the need for Public participation and public scrutiny in the appointment process of public officers. It matters not, whether the appointment of the 2nd Respondent was done in an effort to save public funds which I doubt. What was crucial was to adhere to the procedural requirements as stipulated by law. If anything going by what is obviously an impressive resume, the 2nd Respondent might have stood heads and shoulders above the other would be candidates for the job. The law only required the 1st Respondent to “*competitively source*” from among qualified persons, a person, of her choice and forward it to the Petitioner for approval in accordance with **Section 44(2) (b) of the County Government Act 2012**. The 1st Respondent had no other legal option to circumvent that requirement and by trying to use the option of secondment, she ran a foal of both the **Constitution Article 1, 10, 176(1) and 235(1)** and the legislative framework stipulated under **Section 4 Public Appointment (County Assemblies Approval) Act and Section 44 of County Government Act, 2012**.

40. This court finds that the 1st Respondent’s action in appointment of the 2nd Respondent was done contrary to the law and to that extent unlawful. The claim by the Interested Party that the Public Service Commission recommended the 2nd Respondent to them for appointment on secondment lacks legal basis because under **Section 45 of the County Government Act 2012**, the Governor is granted power to appoint Chief Officers from Qualified Persons competitively sourced and recommended by the County Public Service Board. That means that the Interested Party can only recommend persons to be appointed Chief Officers (and the County Secretary does not fall into that category) who have been sourced competitively and with the approval of County Assembly. There are no shortcuts available here. The County Public Service Board cannot act unilaterally or arbitrarily in making appointment and if they do so then whatever appointment they make is a nullity in law. It matters not that the 1st Respondent consulted the Interested Party or the 2nd Respondent in the secondment. What matters is that the law had to be followed and the attendant procedures stipulated thereunder.

41. This court finds that where modalities and procedures in the appointments of Public Officers are well spelt out in Law like the appointment of County Secretaries, those appointments must be anchored in law. The attempts by the 1st Respondent to avoid the dictates of the law in the appointment of a County Secretary to fill a vacant position, was in my view unnecessary and ill informed. The appointment by the 2nd Respondent on secondment by whichever way other than that which is provided by law is irregular simply because secondment in the context upon which he has engaged was not anchored in law. You cannot fill a position that requires competitive sourcing, public scrutiny and approval from another independent body through secondment. The same was contrary to the principles of transparency, accountability, good governance and rule of impunity. Such practices are undesirable in the modern Constitutional dispensation and recipe for law and chaos. That in my view, have no place in an open democratic Society that cherishes the rule of law.

42. While it could be true that the appointment of the 2nd Respondent may have been well intended for the common good and on account of his impressive resume and wealth of experience, there is no doubt that key and crucial constitutional statutory procedures already highlighted above were overlooked. The same is obviously untenable and there is a sense in which Public State Officers and indeed everyone in Kenya need to wake up to the new realities obtained in the current constitutional dispensation that really makes it difficult, for good reasons, to overlook relevant constitutional and statutory provisions related to activities/policies being carried out.

43. The respondents opine that, that it was not necessary for the 1st Respondent to comply with **Section 44 of the County Government Act** when appointing the 2nd Respondent. However, I have observed I am not persuaded because what Respondents considers unnecessary and perhaps an inconvenience, is in fact a legal necessity and mandatory by law. The transitional clause cited by the Respondents and the **Public Commission Act 2011**, cannot aid them because of the mandatory requirements under **Section 44** as read with **Section 91 of the County Government Act**, which requirements are anchored on the **Constitution of Kenya Articles 10 and 234 of Constitution** particularly in relation to Public participation have special emphasis which means that the element of Public participation is important on matters such as appointments to Public Officers such as County Secretary cannot be done with it.

44. In sum, this court for the aforesaid reasons finds merit in this petition. It is allowed in the following terms: -

a) A **DECLARATION** is hereby made that the appointment and/or secondment of one Joshua Kimwetich Chepchieng PHD holder as the Secretary of the County Government of Kitui is illegal, unconstitutional, null and void for contravening **Articles 10, 176 (1), 232(1) and 235 (1) of the Constitution of Kenya 2010 and Sections 4 of Public Appointments (County Assemblies Approval) Act, 2017 and 44 of County Government Act 2012.**

b) An order of certiorari does hereby issue to quash the decision by the Governor, Kitui County in appointing and/or accepting the impugned secondment of the 2nd Respondent as Secretary to Kitui County Government.

c) The 1st Respondent to pay costs to the Petitioner capped at Kshs. 500,000.

DATED, SIGNED AND DELIVERED AT KITUI THIS 15TH DAY OF MARCH, 2021.

HON. JUSTICE R. K. LIMO

JUDGE