



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VIHIGA

CONSTITUTIONAL PETITION NO. 1 OF 2021

EVANS LADTEMA MUSWAHILI.....PETITIONER

AND

VIHIGA COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

THE GOVERNOR VIHIGA COURTY.....2ND RESPONDENT

THE COUNTY ASSEMBLY OF VIHIGA.....3RD RESPONDENT

AND

MARLEY EZEKIEL AYIEGO.....INTERESTED PARTY

RULING

1. The petition, dated 15th February 2021, was brought at the instance of Evans Ladtema Muswahili, to be known hereafter as the petitioner, citing several violations of the Constitution with respect to the recruitment and nomination of the Marley Ezekiel Ayiego, to be referred to herein as interested party, as County Secretary, by the respondents, all of which are units in the devolved government under the Constitution of Kenya 2010.

2. The factual background to the matter, as set out in the petition, is that the 2nd respondent had dismissed a County Secretary, known as Linnet Khasoha Abdalla, sometime in 2017. That dismissal was declared unlawful and illegal in *Linnet Khasoha Abdalla vs. Vihiga Public Service Board & another* [2017] eKLR, where it was found that the 2nd respondent had failed to set the terms and conditions of employment for the position of County Secretary. Linnet Khasoha Abdalla was replaced by Francis Angueyah Ominde, as County Secretary, who was also dismissed, leading to proceedings in *Francis Angueyah Ominde vs. Wilbur Ottichilo & 2 others; Henry Mangogo Lumbasio & 20 others (Interested Parties)* [2020] eKLR, where it was held that, although the 2nd respondent herein was in order to gazette the appointment of the County Secretary, it was the preserve of the 1st respondent, on advice from the Salaries and Remuneration Commission to set the terms and conditions of that office, and, therefore it was irregular for the 2nd respondent to unilaterally set the term limit for the tenure of the petitioner in that case. In both cases, the Employment and Labour Relations Court declared the acts of the 2nd respondent unconstitutional and unlawful. After the dismissal of Francis Angueyah Ominde, the respondents are said to have had gone ahead to recruit and appoint the interested party, under circumstances that the petitioner avers amounted to the similar violations identified in the suits filed by his predecessors. The advertisement for position of County Secretary was carried in the *Daily Nation* of 6th March 2021, and applications were to be received by 25th March 2020, nineteen days short of the two days stated in section 5 of the Public Appointments (County Assembly Approval) Act No. 5 of 2017 which required a notice of twenty-one days. The said advertisement did not specify the term of employment, but merely referred to "Terms of Service: Contract." The advertisement was also said to have had carried an additional minimum qualification for a master's degree, when the statutory minimum was a University Degree. It is also averred that contrary to section 5(2) of the Public Appointments (County Assembly Approval) Act on the twenty-one notice, the 3rd respondent had gone ahead and invited the interested party to appear before it and approved his appointment. It is submitted that despite the violations, the 2nd respondent had nominated and appointed the interested party as the County Secretary for Vihiga County.

3. The affidavit in support of the petition was sworn by the petitioner, and it is a regurgitation, word for word, of the averments made in paragraphs 34 to 46 of the petitioner. The petitioner has attached several documents to support his case. I will only recite the most crucial of those documents. The first is a copy of the judgment reported in *Linnet Khasoha Abdalla vs. Vihiga Public Service Board & another* [2017] eKLR. The second is the judgment reported in *Francis Angueyah Ominde vs. Wilbur Ottichilo & 2 others; Henry Mangogo Lumbasio & 20 others (Interested Parties)* [2020] eKLR. There is also the advertisement of the vacancy in the position of County Secretary, inviting applications by 25th March 2020. The other annexure is an undated document from the 1st respondent inviting applications for various positions, including that of County Secretary. The last document is the judgment in *Wambua Maithya vs. Pharmacy and Poisons Board, Pharmaceutical Society of Kenya & 2 others (Interested Parties)* [2019] eKLR.

4. The petitioner states that he brings his petition in public interest and for the protection of the rule of law with respect to exercise of duties and functions by public institutions. He avers that the recruitment of the interested party by the 1st respondent, nomination by the 2nd respondent and approval by the 3rd respondent had been conducted in an unconstitutional and illegal manner, and was null and void. He further avers that the 1st respondent had acted *ultra vires*, by making additional mandatory requirements for a Master's Degree when the statutory minimum qualification under the relevant law was a university degree. It further averred that the 1st respondent had not specified the contract period in the advertisement, hence it violated the constitutional requirements for transparency and accountability, and that the contract period had been fixed by the 2nd respondent after appointment and gazette, and contravened sections 55(b) and 59 of the County Governments Act, No. 17 of 2012, and Article 232 of the Constitution. It also averred that the advertisement did not indicate that the candidate was to appear before a committee of the 3rd respondent, contrary to section 5(1) of the Public Appointments (County Assembly Approval) Act. It is also complained that section 5(2) of the same Act was violated, as the advertisement allowed nineteen days for receipt of applications, instead of the twenty-one days allowed in law. It is averred that the 2nd respondent nominated and appointed the interested party despite the violations. It is submitted that the respondents had a duty under the Constitution to ensure protection of the rule of law and strict adherence to constitutional and statutory provisions.

5. The constitutional foundation for the petition is said to be Articles 1(1), 2(1), 3(1), 10, 73(1)(2), 232, 235(1), 258 and 259(1). The statutory provisions are said to be sections 44(1)(2)(3), 55(b), 59 and 75 of the County Governments Act; and sections 5(1)(2) of Public Appointments (County Assembly Approval) Act.

6. The Petitioner seeks the following reliefs:

- (a) a declaration that the process of the recruitment of the interested party by the 1st respondent, nomination and appointment by the 2nd respondent, and approval by the 3rd respondent, was unconstitutional, illegal, irregular, unlawful and consequently null and void;
- (b) an order of *mandamus* directed at the 1st and 2nd respondents to commence the appointment of a County Secretary for Vihiga County;
- (c) an order be issued against the 1st and 2nd respondents surcharging them for any loss that may have arisen in the impugned process, in accordance with Article 226 of the Constitution; and
- (d) any other relief that the court shall deem fit and necessary for upholding the Constitution and the rule of law.

7. Upon being served, the respondents reacted to the petition, by filing a Notice of Preliminary Objection, dated 17th September 2021, raising grounds that:

- (a) the High Court had no jurisdiction over the matter as it was employment-related, and jurisdiction was ousted by Article 165(5) of the Constitution;
- (b) the petition questioned the qualifications set in the County Public Service Board for appointment of a County Secretary, and an appeal lay with the Public Service Commission under section 77 of the County Government Act; and
- (c) the petition violates the provisions of section 85 of the Public Service Commission Act No. 10 of 2017,
- (d) the petition was frivolous and vexatious having been brought in evasion of the process of challenging the qualifications of the interested party in the manner provided in the Public Appointments (County Assembly Approval) Act; and
- (e) the petition amounted to a gross abuse of court process.

8. Directions were given on 18th March 2021, for disposal of the preliminary objection first; and on 22nd March 2021 it was further directed that the same be canvassed by way of written submissions. I have, before me, written submissions filed by both sides.

9. In their written submissions, the respondents argues on five points: one, lack of jurisdiction of this court to determine the petition, on account of Articles 162(2) and 165(5) of the Constitution; two, lack of jurisdiction of this court, on account of section 77 of the County Government Act; three, lack of jurisdiction of this court on account of section 85 of the Public Service Commission Act; four, the issues raised in the petition fell under the jurisdiction of the County Assembly, by virtue of the Public Appointments (County Assembly Approvals) Act; and five, that the totality of the above amounted to abuse of court process.

10. On jurisdiction, the first preliminary point, it is argued that Article 165(5) of the Constitution ousted the jurisdiction of the High Court with respect to matters that were reserved for the court envisaged under Article 162(2) of the Constitution to be of equal status with the High Court, with jurisdiction over matters relating to employment and labour relations. The respondents rely on the decision in *United States International University (USIU) vs. Attorney-General* [2012] eKLR, where the High Court held that it no longer had jurisdiction over employment and labour relations matters, in view of Articles 162(2) and 165(5) of the Constitutions. It was submitted that the petitioner was challenging the employment of the interested party, after the latter had taken office, and therefore the matter was purely a labour related dispute exclusively falling within the jurisdiction of the Employment and Labour Relations Court.

11. With regard to the second point, it is submitted that section 77 of the County Governments Act had ousted the jurisdiction of the court. It is submitted that that provision, at section 77(2), states that the Public Service Commission has jurisdiction to entertain appeals on any decision relating to employment of a person in a county government including a decision relating to recruitment, selection, appointment and

qualifications attached to any office. It is submitted that since the petitioner was challenging the qualification of the master's degree which the 1st respondent had attached to the position of County Secretary, which were matter appealable to the Commission in accordance with section 77(2) of the County Governments Act. The decision in *Secretary County Public Service Board & another vs. Hibhai Gedi Abdille*, where the Court of Appeal is said to have held that the judicial review proceedings had been initiated in disregard of the dispute resolution mechanisms availed under section 77 of the of the County Governments Act.

12. On point three, it is submitted that the jurisdiction of the court is ousted by section 85 of the Public Service Commission Act, which states that the Public Service Commission has mandate, under Article 234(2)(i) of the Constitution, to hear and determine appeals in respect of decisions relating to engagement of any person in a county government, including a decision in respect of recruitment, selection, appointment and qualifications attached to any office. Section 86 of the same statute allows any aggrieved person to challenge a decision made by any authority or person in respect of a County Government Service Board by way of appeal to the Public Service Commission against the decision. It is submitted that section 87(2) of the Act ousts the jurisdiction of the court, for it specifically states that a person no person should not file any legal proceedings in any court with respect to matters under the jurisdiction of the Public Service Commission unless the processes had been exhausted. It is submitted that the petitioner had contravened that provision, and ought to be denied audience. The decisions in *Claudia Chebet Kosgei & 2 others vs. Jubilee Party & 2 others* [2017] eKLR and *Jaldesa Tuke Dabelo vs. Independent Electoral Boundaries Commission & another* [2015] eKLR, both of which state the position that where there is a clear procedure for redress of any grievance prescribed by an Act of Parliament, that procedure should strictly be followed.

13. On the fourth point, it is argued that the issues raised in the petition fall under the County Assemblies under the Public Appointments (County Assemblies Approval) Act, which governs approval proceedings by county assemblies. Section 8 of the Act provides the issues for consideration at the approval hearing, which include the procedure used to arrive at the nominee, the constitutional or statutory requirements relating to the office in question, and suitability of the nominee for proposed appointment regarding his credentials abilities experience and qualities as against the needs of the body to which the nomination is being made. Section 7(10) allows any person to object to approval any nominee, by filing prior to the hearing a written statement on oath. It is submitted that such procedures are intended to obviate the eventuality of proceedings such as theses being brought after the person has been nominated, approved and appointed.

14. On the final point, about the petition being an abuse of court process., based on the argument that the totality of the other points meant that the petition was filed in abuse of process, and ought to be struck out.

15. Finally, it is argued that since the petitioner was not acting in good faith and not in public interest, he ought to be condemned to pay costs.

16. The petitioner submits on a single issue, lack of jurisdiction, under Article 162(2) of the Constitution and section 12 of the Employment and Labour Relations Court Act. It is argued that the two provisions vest jurisdiction on the Employment and Labour Relations Court deal with "employment." It is submitted that the petition was not about employment. The decision in *Wambua Mutisya vs. Pharmacy and Poisons Board; Pharmaceutical Society of Kenya & another (Interested Parties)* [2019] eKLR, is cited, where the facts were similar, introduction of a Master's Degree criteria which was not prescribed under the relevant Act. It was held that the matter for determination was not a recruitment issue, but a pure constitutional issue which fell squarely under Article 165(3) of the Constitution, around whether a statutory body had exceeded its mandate and in the process infringed on the rights of the petitioner and other potential applicant, which was not a labour issue, which were not exclusive questions for the Employment and Labour relations Court. The court found that recruitment of the officer in question did not meet the constitutional threshold, and issued an order of *certiorari*. It was pointed out that the officer in question had already been recruited to the position through the flawed process. The decision in *Attorney General & 2 others vs. Okiya Omtatah* [2020] eKLR is also cited, to make a similar point, that interpretation of the Constitution and statute on the constitutionality and the legality of an action of a public body, in recruitment into a public office, was the preserve of the High Court.

17. Although the respondents have split their preliminary objection to five points, there is really only one substantive issue raised in the preliminary objection, and that is whether I, sitting as a Judge of the High Court, have jurisdiction to hear and determine the petition before me. He argues that I have no jurisdiction over the matter.

18. Jurisdiction of the High Court, generally, is stated in Article 165 of the Constitution. Under Article 165(3), the High Court has unlimited original jurisdiction in criminal and civil matters; jurisdiction to determine questions as to whether a fundamental right or freedom in the Bill of Rights has been denied or violated or infringed or threatened; jurisdiction to hear appeals from decisions of constitutional tribunals set up to remove a person from office, save for that set up under Article 144; jurisdiction to hear questions relating to interpretation of the Constitution; and any other original or appellate jurisdiction conferred by the Constitution. A variety of statutes have also conferred both original and appellate jurisdiction on the High Court, and there could be some that have restricted the jurisdiction of the High Court over certain matters. Article 165(5) of the Constitution has set out areas where the High Court has no jurisdiction, and that is with respect to matters reserved for the exclusive jurisdiction of the Supreme Court and the courts envisaged in Article 162(2) of the Constitution.

19. The matter before me is a petition, brought under a variety of constitutional provisions, which I have narrated or recited in paragraphs 4, 5 and 7 of this ruling. The preliminary objection, as framed, in my view, is, challenging the jurisdiction of the High Court to entertain a constitutional petition.

20. I have narrated, above, the jurisdiction of the High Court as vested by Article 165 of the Constitution. What is of relevance, at this stage, is jurisdiction relating to constitutional petitions. That is what Article 165(3)(b)(d) is about: that is the jurisdiction to hear and determine questions relating to fundamental rights and freedoms, and with respect to interpretation of the Constitution.

21. The constitutional provisions upon which the petition before me is premised are Articles 2(1), 3(1), 10, 73(1)(2), 226, 232, 235(1), 258 and 259(1).

22. Articles 2(1) and 3(1) are located in Chapter One of the Constitution, which covers sovereignty of the people and supremacy of the Constitution. Article 2(1) states that no person may claim or exercise State authority except as authorised under the Constitution; while

Article 3(1) states that every person has an obligation to respect, uphold and defend the Constitution. Article 2(1) underlines the supremacy of the Constitution, and the fact that State authority, usually claimed by institutions created by the Constitution, such as the respondents, is to be exercised under the Constitution. Under Article 3(1), an obligation is given to any person, including the petitioner to defend the Constitution.

23. Article 10 is located in Chapter Two of the Constitution, which declares and defines what makes up the Republic of Kenya. Article 10 articulates the national values and principles of governance that underpin the Republic of Kenya. The values and principles include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance; and sustainable development. It is declared that these national values and principles of governance bind all State organs, State officers, public officers and all person whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.

24. Article 73(1)(2) is located in Chapter Six of the Constitution, which is about leadership and integrity. Article 73(1)(a) defines the authority assigned to a State officer. It is a public trust to be exercised in a manner that is consistent with the purposes and objects of the Constitution; demonstrates respect for the people; brings honour to the nation and dignity to the office; and promotes public confidence in the integrity of the office. Article 73(1)(b) states that such authority vests in the State officer or institution the responsibility to serve the people, rather than the power to rule them. Article 73(2) lists the guiding principles of leadership and integrity. They include the selection of officers on the basis of personal integrity, competence, and suitability, or election in free and fair elections; objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices; selfless service based solely on public interest; accountability to public decisions and actions; and discipline and commitment in service to the people. The emphasis is on accountability, competence, suitability, integrity, respect for the people, honour, dignity, public confidence, objectivity, impartiality, among others.

25. Articles 232 and 235(1) are housed in Chapter Thirteen, on public service, and they state the values and principles that underpin public service. Under Article 232, these include high standards of professional ethics; efficient, effective and economic use of resources; responsive, prompt, effective, impartial and equitable provision of services; involvement of the people in the process of policy making; accountability for administrative acts; transparency and provision to the public of timely accurate information; fair competition and merit as the basis of appointments and promotion; representation of Kenya's diverse communities, among others. Article 235 is about staffing of county governments, and states that a county government, guided by statute, has responsibility to establish and abolish offices in its public service; appoint persons to hold or act in those offices and confirm those appointments; and exercise disciplinary control over and remove persons holding or acting in those offices.

26. Articles 258 and 259 are in Chapter Seventeen of the Constitution, which carries general provisions. Article 258 is on enforcement of the Constitution, and it gives every person a right to institute civil proceedings, claiming that the Constitution has been contravened or threatened by the intervention. It also states that the person seeking enforcement of the Constitution may be acting on behalf of another who cannot act in their own name; or acting as a member of or in the interest of a group or class of people; or acting in public interest; or an association acting in the interest of one or more of its members. Article 259 is about construction of the Constitution. Article 259(1) states that the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law and human rights and the fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance.

27. The cause before me is, in my view, framed as a constitutional petition, for it is properly anchored on constitutional provisions. Articles 2(1) and 3(1) are cited to underline the supremacy of the Constitution, and the fact that all persons and institutions have a duty to protect, defend, respect and honour it. Articles 10, 73, 201(d), 232 and 235(1) are cited to support the argument that the respondents conducted themselves in a manner that did not accord with national values and principles of governance, the principles governing public finance, and the values and principles that ought to govern public service. Articles 258 and 259(1) are cited to support the case that the petitioner was entitled, under the Constitution, to bring a constitutional petition, to allege its contravention or a threat of contravention. They are also meant to urge that in construing its provisions, the court ought to be bound to promote its purposes, values and principles; advance the rule of law, human rights and fundamental rights and freedoms; permit development of the law; and contribute to good governance.

28. The case by the petitioner, as I understand it, is not so much about violation of fundamental rights and freedoms, or human rights, but that the respondents acted in a manner that did not measure up to the constitutional values and principles required of public bodies by the Constitution. That is to say that they violated the Constitution itself in the process of doing whatever they were required to by the relevant legislation. I am of the persuasion that the petition before me is properly anchored in the Constitution, and to a large extent it meets the standard of what a constitutional petition should be about. Whether it meets the standard set in *Anarita Karimi Njeru vs. Attorney General* (1979) KLR 154, *Meme vs. Republic* [2004] eKLR and *Trusted Society of Human Rights Alliance vs. AG. & 2 others* [2012] eKLR, in terms of meeting the minimum test for pleadings in this realm, is something that I shall revert to at the tail end of this ruling. The court in *Anarita Karimi Njeru vs. Attorney General* (1979) KLR 154, which I believe is still the cause classicus in this area, despite more recent decisions, and the criticisms it has elicited, 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 reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed."

29. As stated above, Articles 10, 73, 232 and 235(1), are about values and principles of governance generally and in relation to public finance and public service, which would bring the petition within the realm of Article 165(3)(ii), with respect to the jurisdiction to interpret the Constitution, and specifically in relation to determining questions whether anything said to be done under the Constitution, or any law, was consistent with or contravention of the Constitution. In my view, the matters raised in the petition bring the same within the jurisdiction of the High Court.

30. The respondents are created by the Constitution. They are bound by the values and principles articulated by the Constitution, and they are under an obligation to act fully in accordance with its provisions. They are accountable under the Constitution. Any person, who is aggrieved

by any of the acts of the respondents, whether done under the Constitution or any other law, has a right to challenge the said conduct under Article 165(3)(b)(d), by dint of Article 258, where the respondents have conducted themselves in a manner inconsistent with or in contravention of the provisions of the Constitution. That is what the petitioner alleges in his petition, and, in that respect, the High Court has jurisdiction to entertain the petition.

31. There is the argument that the dispute arises with respect to an employment matter, and the High Court, by dint of Articles 162(2) and 165(5) of the Constitution, has no jurisdiction over the matter, given that it falls generally over an area of law that has been preserved for the courts envisaged under Article 162(2). I find the argument in *United States International University (USIU) vs. Attorney-General* [2012] eKLR, compelling, that the jurisdiction vested in the High Court by Article 165(3) is not absolute, and is subject to Article 165(5), which forbid the High Court from exercising jurisdiction over matters falling within the jurisdiction reserved for the courts envisaged in Article 162(2). I agree, Article 165(3) does not give the High Court exclusive jurisdiction over constitutional matters, and that jurisdiction can also be exercised by the other courts, within the context of the matters falling within the jurisdiction of those courts. However, with respect, I am not persuaded that Article 165(5) ousts the jurisdiction of the High Court when it comes to matters reserved for the courts envisaged in Article 162(2). The jurisdiction granted under 162(2), to the Employment and Labour Relations Court, relates to hearing and determining disputes relating to employment and labour relations matters. The jurisdiction under Article 165(3) is to determine the constitutionality, or otherwise, of acts or conduct of public officers and institutions. The fact that the underlying dispute falls under Article 162(2), does not, in my view, take away the jurisdiction of the High Court to exercise jurisdiction under Article 165(3). The use of “subject to clause 5” in Article 165(3), in my understanding, merely raises the flag, that when the High Court exercises jurisdiction under Article 165(3), on the constitutionality of some action or conduct of or by a State officer or institution, where the underlying dispute falls under Article 162(2), must be alive to the fact that its remit is limited to the constitutional question, and that it has no jurisdiction to look at anything else beyond that. It is a fine line. I am not persuaded that the High Court does not have jurisdiction with respect to such matters, nor that venturing into such matters to cash with constitutional questions would amount to exercising supervisory jurisdiction over the courts contemplated under Article 162(2) of the Constitution. I agree entirely with the position stated in *Wambua Maithya vs. Pharmacy and Poisons Board, Pharmaceutical Society of Kenya & 2 others (Interested Parties)* [2019] eKLR, that there is jurisdiction, in cases of this nature, so long as the High Court confines itself to determining the question as to whether the recruitment process undertaken by the respondents met the requisite constitutional threshold. I may add that the Employment and Labour Relations Court would have complementary jurisdiction. In fact, its jurisdiction would be broader than the High Court, it can address the employment aspects of the dispute, as well as the constitutional aspects. In that sense, the petitioner herein would be better off before the Employment and Labour Relations Court, but that is not the same as saying that the High Court lacks jurisdiction.

32. The other argument by the respondents is that the jurisdiction of the High Court over the constitutional petition is taken away or limited by a number of statutes. I have a short response to this argument. The Constitution is the supreme law in Kenya, by dint of Article 2(1) of the Constitution. All other laws, including legislation, are inferior or subordinate to it, for they draw their legitimacy from it, and most of them are made by entities created by the Constitution itself. It would be strange for laws enacted by bodies created by the Constitution to be superior to the legal position stated by the Constitution itself. The supremacy of the Constitution is underlined by Article 2(4), which states that any law which is inconsistent with the Constitution is void to the extent of the inconsistency. I say so because Article 165(3) of the Constitution vests jurisdiction in the High Court, to entertain constitutional petitions, which raise questions about violations of the Constitution and which call for interpretation of the Constitution. It cannot be that legislation passed by Parliament, like County Government Act, the Public Service Commission Act and the Public Appointments (County Assembly Approval) Act, can oust the jurisdiction of the High Court, granted to it by Article 165(3) of the Constitution, to entertain claims that the Constitution has been violated or is threatened with violation. Any statute designed to limit jurisdiction of the High Court as vested by Article 165(3), to entertain constitutional petitions, around such matters, would run afoul of Article 2 of the Constitution, and would be unconstitutional.

33. The other argument that the respondents appear to be making, which, in my view, and with respect to them, has not been articulated elegantly, is that there exists alternative dispute resolution mechanisms, which the petitioner ought to have exhausted before filing the instant petition. The fact of existence of alternative processes, does not oust the jurisdiction of the High Court to entertain and determine constitutional petitions. Related to it, is the argument that the doctrine of exhaustion of remedies operates to oust the jurisdiction of the High Court to determine constitutional petitions, where the other remedies have not been exhausted. I doubt that that doctrine applies to constitutional petitions. I submit that that can only apply to other causes at the High Court, say ordinary civil suits and applications for judicial review, which are governed by the Civil Procedure Act and other legislation, but not constitutional petitions founded on Article 165(3) of the Constitution. The respondents did not cite *John Kakindu Makau vs. County Government of Makueni & 6 others* [2018] eKLR, which is one of the decisions where that argument was made. I am not, with respect, persuaded by that argument. I am more persuaded by *Republic vs. Independent Electoral and Boundaries Commission and Another Ex Parte Coalition for Reform and Democracy & 2 others* [2017] eKLR, that existence of alternative mechanisms does not oust the jurisdiction of the High Court over a constitutional petition over a matter that could have been taken through the alternative mechanisms. The High Court retains jurisdiction, despite existence of the alternative mechanisms, after all it has supervisory jurisdiction over all subordinate courts and quasi-judicial tribunals, by dint of Article 165(6) of the Constitution, and it has unlimited original jurisdiction in criminal and civil matters, by virtue of Article 165(3)(1) of the Constitution. There is complementarity or overlap of jurisdiction, as between the jurisdiction exercisable by the High Court under the Constitution and that exercisable by courts and tribunals under legislation. Even then, the jurisdiction of the High Court, under Article 165(3)(b)(d), is specific and unique, and it cannot be exercised through the alternative mechanisms established by legislation, hence those mechanisms cannot possibly oust it. The jurisdiction to entertain a petition that raises constitutional questions is granted by Article 165 of the Constitution. It cannot be that there is no jurisdiction to entertain such petitions merely because the legislation has provided alternative, and more specific, dispute resolution mechanisms, or because the other mechanisms have not been exhausted. Those other mechanisms are not designed to address constitutional questions or to redress constitutional violations. They address other concerns relating to the same process or action or conduct, but they do not amount to or equal to the specific jurisdiction that the Constitution has granted the High Court, to address constitutional questions and redress constitutional violations.

34. What the High Court ought to do, where it is faced with a constitutional petition, over a matter in respect of which alternative dispute resolution mechanisms exist, under some other law, is not to pronounce itself impotent or bereft of jurisdiction, but to exercise restraint, and allow space to the other courts or tribunals, with alternative jurisdiction, to handle the dispute, where that can be done, without compromising the constitutional right of the petitioner to be heard by the High Court on his or its complaint on violation or threatened violation of the Constitution.

35. Let me go back to *Anarita Karimi Njeru vs. Attorney General* (1979) KLR 154, and ask myself whether the petitioner has set out, with

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. I have dealt with aspects of this elsewhere. The provisions have been identified, and the manner of the alleged infringement has also been set out. However, the factual background to the petition has not been set out. The facts of the case should form the bedrock of the petition, and without them the legal arguments would hang in the air. What is alleged to be a narration of that factual background of the case is incredibly sketchy, as set out in both the petition and the affidavit in support. Indeed, the petition, the Motion dated 15th February 2021 and the two affidavits in support of the petition and the Motion are replicas of each other. They only talk about the advertisement and its contents. There is no averment as to whether the interested party responded to the advertisement, whether he was subjected to a recruitment process by the three respondents and whether he was recruited, and took up office. No documents have been attached to support the actions or conduct of the respondents that is complained about, and which forms the basis for the petition. Indeed, it is from the filings by the interested party, that is to say the notice of preliminary objection and the written submissions, that one gets the sense that the recruitment happened, and that there was an appointment, a nomination and approval of the interested party by the respondents.

36. A party is bound by its pleadings. The foundation of the petitioner's case ought to be the facts upon which the petition is founded. A cause without a factual foundation or basis has no legs to stand on. A spectacular legal or constitutional basis cannot save it, for the constitutional or legal basis is, itself, supposed to be founded on a factual background. Lack of a factual basis embarrasses the respondents, in terms of what they are expected to respond to; and to the court in terms of understanding the actual or real issues in dispute. Parties should always be alive to the fact that they may, both sides, be privy to all the facts in the matter at hand, but the court is never privy to the same. It should not be expected that the court would somehow get to discover or unearth those facts. Kenya is not a civil law jurisdiction. It is not for the court to dig out the facts. It is up to the parties to them bring out, so as to assist the court do justice based on those facts. Where facts are not fully disclosed there is a gap, a deficiency, and it would be pretentious to assume that the court would do justice when it only has half of the facts. In this case, the three respondents are accused of violating the Constitution by either appointing or nominating or approving the nomination/appointment of the interested party. Yet these facts are not coherently pleaded, if at all, and there is no documentary material placed before the court to support the fact of the alleged conduct or action by the respondents. The case is not just about the advertisement, but about nomination, appointment and approval. The petitioner should have done more, in terms of pleading on these matters, and supporting those pleadings with relevant documentary material, relating to the nomination, appointment and approval.

37. In view of what I have stated above, it is my finding that the petitioner has not set out, with a reasonable degree of precision, that of which he complains. The basic standard, set in *Anarita Karimi Njeru vs. Attorney General* (1979) KLR 154, has not been met. There is no coherent factual background that can provide basis for allowing the petition herein to go for hearing. I shall not uphold the preliminary objection, on the grounds articulated, for I am not persuaded that the High Court has no jurisdiction to entertain the petition, but I will strike out the petition, which I hereby do, on the ground that it does not meet the threshold set in *Anarita Karimi Njeru vs. Attorney General* (1979) KLR 154. This being a constitutional cause, there shall be no order as to costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 9TH DAY OF APRIL, 2021

W MUSYOKA

JUDGE