



**Kiiria & another v Kavua; Chirchir & 3 others (Interested Parties) (Petition E482 of 2024) [2026] KEHC 549 (KLR) (Constitutional and Human Rights) (29 January 2026) (Ruling)**

Neutral citation: [2026] KEHC 549 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E482 OF 2024  
LN MUGAMBI, J  
JANUARY 29, 2026**

**BETWEEN**

**FRANCIS KIIRIA ..... 1<sup>ST</sup> PETITIONER**

**OKOTH OWINO ..... 2<sup>ND</sup> PETITIONER**

**AND**

**BENEDICT KIEMA KAVUA ..... RESPONDENT**

**AND**

**DAVIS CHIRCHIR ..... INTERESTED PARTY**

**PUBLIC SERVICE COMMISSION ..... INTERESTED PARTY**

**ETHICS & ANTI- CORRUPTION COMMISSION ..... INTERESTED PARTY**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... INTERESTED PARTY**

**RULING**

1. This is a ruling in respect of the Respondent’s Notice of Preliminary Objection dated 17<sup>th</sup> October 2024 against the Petition dated 17<sup>th</sup> September 2024.
2. The Preliminary Objection is based on the grounds that:
  - i. The issue raised in the Petition is primarily a complaint regarding a public officer, which complaint and any investigations ensuing are a preserve of the Ethics and Anti-Corruption Commission as provided for under Section 11 (1) (c), (d) and (e) and Section 13 of the Ethics and Anti- Corruption Commission Act.



- ii. Article 79 of *the Constitution* establishes the Ethics and Anti-Corruption Commission which is vested with the powers under Article 252 (1) to conduct investigations on its own initiative or on a complaint made by a member of the public.
- iii. It is trite where there exist sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the Court should not be invoked until such mechanisms have been exhausted.
- iv. The Petitioner's Petition offends the principle of Constitutional avoidance for not setting out with a reasonable degree of precision the necessary link between the aggrieved party, the provisions of *the Constitution* alleged to be contravened and the manifestation of the contravention or infringement.
- v. The Petitioners' Petition does not meet the threshold for Constitutional Petitions, thereby failing the test of specificity as established in the locus classicus case of *Anarita Karimi v Republic (No. 1) [1979] 1 KLR*.
- vi. In the circumstances the Petitioners' Petition dated 17<sup>th</sup> September, 2024 is bad in law, fatally defective and an abuse of the Court process.

### **Respondent's Submissions**

3. Bashir and Associates Advocates on the Respondent's behalf filed submissions dated 29<sup>th</sup> November 2024 where Counsel underscored the key issues as: whether the Petition is incompetent for failing to meet the threshold of clarity and precision required of Constitutional Petitions and whether the Petition offends the doctrine of non-justiciability.
4. On the first issue, Counsel submitted that the threshold for constitutional provisions was set out in *Anarita Karimi Njeru (supra)* as, 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.
5. Equal reliance was echoed in *Consumer Federation of Kenya v Toyota Motors Corporation & 4 Others (2018) eKLR*, *Mumo Matemu v Trusted Society of Human Rights Alliance, Attorney General, Minister of Justice & Constitutional Affairs, Director of Public Prosecutions, Kenyan Section of the International Commission of Jurists & Kenya Human Rights Commission (2013) 445 KLR* and *Justus Kimeli Rotich v Governor, County Government of Nandi & 2 Others [2016] eKLR*.
6. Counsel submitted that the Petitioners in this matter had not stated the alleged constitutional provisions violated with reasonable precision, instead had cited omnibus provisions of *the Constitution* with no particulars of the alleged complaints, the manner of the alleged infringements or jurisdictional basis of the action before this Court. For instance, it was noted that the Petitioners allege that the Respondent's appointment was unconstitutional yet failed to demonstrate with reasonable precision how the Respondent's appointment as General Manager Procurement at the Kenya Railways was in contravention of *the Constitution*. Counsel stressed that this is prejudicial to the Respondent.
7. On the second issue, Counsel submitted that the Petition is bad in law, fatally defective and an abuse of the Court process as is not justiciable. Reliance was placed in *Wanjiru Gikonyo & 2 Others V National Assembly of Kenya & 4 others [2016] eKLR* where it was held that:

“Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases..... The court is prevented from determining an issue when it is too



early or is simply out of apprehension, hence the principle of ripeness. An issue before court must be ripe, through a factual matrix for determination.”

8. Counsel submitted that the Petition was filed prematurely as the Petitioners rely on allegations of City Hall insiders who claim that the Respondent is under the radar of investigative agencies. Despite this it is claimed that they failed to submit evidence to substantiate these claims. Counsel as such maintained that the Petition is premature as was filed on the basis of apprehensions and speculation.
9. Secondly, Counsel submitted that the Petition offends the doctrine of constitutional avoidance. Reliance was placed in *CCK & 5 Others vs. Royal Medial Services & 5 Others* [2014] eKLR where it was held that:

“...a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion’ (Black’s Law Dictionary, 10<sup>th</sup> Ed. Page 377). Or, as per the Supreme Court; ‘...when a matter may properly be decided on another basis.’”

10. Like dependence was placed in *International Centre for Policy and Conflict & 5 others v Attorney General & 5 others* (2013) eKLR, *In Speaker of National Assembly V Njenga Karume* [2008] 1 KLR 425, *Anthony Miano & others v Attorney General & others* [2021] eKLR and *Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others* [2015] eKLR.
11. Counsel submitted that the 3<sup>rd</sup> Interested Party is required to conduct investigations by dint of Section 35 (1) of the *Anti-Corruption and Economic Crimes Act*. Correspondingly, Counsel stated that the 3<sup>rd</sup> Interested Party is mandated to report to the 4<sup>th</sup> Interested Party on the results of the investigation which report shall include any recommendation that a person be prosecuted for corruption or economic crime.
12. Counsel underscored that the Petitioners had not made a request for any investigations to be conducted on the Respondent thus matter not yet ripe to be determined by this Court. Counsel emphasized that the matters forming the Petition, fall within the mandate of the 3<sup>rd</sup> Interested Party as its mandate under Article 252(1) (b) of *the Constitution*, as is made manifest from the reliefs sought. As such, Counsel argued that the matter ought not to be canvassed by this Court. Even so, Counsel echoed that this Court has no jurisdiction to convict the Respondent for corruption and economic crimes as that jurisdiction is vested in the trial Court.
13. Counsel stressed that the Petitioners’ allegations would require investigations regarding the character of the Respondent by the 3<sup>rd</sup> Interested Party as made provide under Article 79 of *the Constitution*.
14. Reliance was placed in *Beth Wanjiku Kiura v Attorney General & 2 others* [2021]eKLR where it was held that:

“We need to remember that the 2<sup>nd</sup> respondent is established pursuant to the decree in Article 79 of *the Constitution* which mandated Parliament to enact legislation to establish an independent ethics and anti-corruption commission. Being a Commission, it is vested with the powers granted to

Commissions under Article 252 of *the Constitution*. Under Article 252 (1) (a), Commissions may conduct investigations on their own initiative or on a complaint made by a member of the public. The specific powers given to the Ethics and Anti-Corruption Commission are in Section 13 of the *Ethics and Anti-corruption Commission Act*, Act No. 22 of 2011.”



15. In sum, Counsel submitted that this matter ought to be determined on another forum and another basis other than a constitutional Petition.

## **2<sup>nd</sup> Petitioner's Submissions**

16. The 2<sup>nd</sup> Petitioner filed submissions dated 1<sup>st</sup> July 2025 and underscored the issues for discussion as: whether the Respondent has breached Chapter 6 of *the Constitution*, whether the appointment of the Respondent and the criteria used in appointment met the threshold and whether the Respondent's appointment is discriminatory and unconstitutional.
17. The 2<sup>nd</sup> Petitioner submitted that the Respondent failed to meet his constitutional and statutory obligations in line with Chapter six in the context of this case and as such in violation of Articles 2, 3, 10, 19, 20, 21, 22, 23, 27(1), 27(3), 27(8), 40, 42, 60, 64, 131(2), 132(2)(f), 159, 165, 232, 233, 234, 249, 258, 259 and 260 of *the Constitution*.
18. On the second issue, the 2<sup>nd</sup> Petitioner submitted that the appointment of the Respondent ought to have met the threshold established in *the Constitution* and relevant laws. That is, assessing whether the appointment process adhered to the principles of transparency, accountability, public participation, and merit, while also ensuring the appointee possesses the necessary qualifications and integrity for the position.
19. In his view, the Respondent did not outline how the public participation exercise was conducted prior to his appointment. He asserted that the Respondent's appointment was merely a reward for his support of the Managing Director, Philip Mainga thus his appointment illegal. The 2<sup>nd</sup> Petitioner urged that this Court has the legal mechanism to correct such errors, ensure fairness and uphold the integrity of the appointment process.
20. On the third issue, the 2<sup>nd</sup> Petitioner stressed that Article 27 of *the Constitution* guards against discrimination and envisages equality. In this case, the 2<sup>nd</sup> Petitioner submitted that the Respondent did not have a practicing license at the point of shortlisting, yet the Board turned a blind eye to this. In addition, it is alleged that the Board as enabled by the Managing Director also overlooked background information concerning the Respondent prior to his appointment. The 2<sup>nd</sup> Petitioner added that the selection model also discriminated against certain communities in the sense that it did not provide for competent and qualified Kenyans including those living with disabilities and the youths.
21. As such, his appointment is argued to have been discriminatory as echoed by the Supreme Court in *Gichuru vs Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR). Like dependence was placed in *Centre for Minority Rights Development (CEMIRIDE) & 2 others v Attorney General & 2 others; Independent Electoral and Boundaries Commission (Interested Party)* [2022] KEHC 955 (KLR).
22. To this end, the 2<sup>nd</sup> Petitioner urged that the Respondent's appointment be nullified as this Court has the jurisdiction to assess whether the process of that appointment met the standards in Article 232 of *the Constitution* as read with the preamble and Articles 2, 10, 27 and 56 of *the Constitution*.

## **Other Parties Responses**

23. The other parties' response or submissions are not in the Court file or Court Online Platform (CTS).



## Analysis and Determination

24. Having considered the pleadings and submissions of the Parties herein, the issue that arises for determination is:

### Whether the Respondent's Preliminary Objection is merited.

25. The case of Mukisa Biscuits Manufacturing Ltd v West End Distributors (1969) EA 696 is the locus classicus case on what a preliminary objection entails. In the said case, the Court explained:

“... a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

8. Sir Charles Newbold P. elaborated further:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.”

26. The Preliminary Objection in this matter is founded primarily on the justiciability principle whereby the Respondent's argues that the Court should decline to exercise jurisdiction on the ground that the matter is premature and is also barred by the doctrine of constitutional avoidance. Further that the Petition does not meet the constitutional threshold required of a Constitutional Petition.
27. A jurisdictional issue raises a pure point of law for it does not require the Court to go into evidence to determine the matter, the pleadings suffice. Further, once the Court determines it has no jurisdiction, the matter ends without going into merits of the same. In so far as the jurisdictional issue is concerned, the Supreme Court explained in the Matter of the Interim Independent Electoral Commission [2011] KESC 1(KLR) as follows:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.”



28. This Petition questions appointment of the Respondent by the Kenya Railways Corporation as its General Manager, Procurement on the grounds, that, in his former position as the Procurement Manager, Nairobi Water and Sewerage Company, he had misappropriated public funds while serving in that position of the Procurement Manager and is thus unfit for violation of several fundamental constitutional principles that require adherence to public ethics.
29. The Respondent contends that this Court is untenably being invited to assume the 3<sup>rd</sup> Interested Party's constitutional and statutory mandate and thus ought to exercise restraint as such intervention is tantamount to interfering in a matter falling within the competence of another constitutional body.
30. The 3<sup>rd</sup> Interested Party is established under Chapter 6 of *the Constitution*.

Article 79 of *the Constitution* states:

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.

31. The functions of the 3<sup>rd</sup> Interested Party under Section 11(1) of the EACC Act are stipulated as follows:

In addition to the functions of the Commission under Article 252 and Chapter Six of *the Constitution*, the Commission shall—

- (a) in relation to State officers,—
  - i. develop and promote standards and best practices in integrity and anti-corruption;
  - ii. develop a code of ethics;
- (b) work with other State and public offices in the development and promotion of standards and best practices in integrity and anti-corruption;
- (c) receive complaints on the breach of the code of ethics by public officers;
- (d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of *the Constitution*;
- (e) recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct;
- (f) oversee the enforcement of codes of ethics prescribed for public officers;
- (g) advise, on its own initiative, any person on any matter within its functions;
- (h) raise public awareness on ethical issues and educate the public on the dangers of corruption and enlist and foster public support in combating corruption but with due regard to the requirements of the Anti-Corruption and Economic Crimes (Cap. 65) as to confidentiality;
- (i) subject to Article 31 of *the Constitution*, monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of



methods of work or procedures that may be conducive to corrupt practices;  
and

- (j) institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures including proceedings for the recovery of property or proceeds of corruption located outside Kenya.

32. Furthermore, the 3<sup>rd</sup> Interested Party's powers are provided under Section 13 of the Act as follows:

1. The Commission shall have all powers generally necessary for the execution of its functions under *the Constitution*, this Act, and any other written law.
2. Without prejudice to the generality of subsection (1), the Commission shall have the power to—
  - a. educate and create awareness on any matter within the Commission's mandate;
  - b. undertake preventive measures against unethical and corrupt practices;
  - c. conduct investigations on its own initiative or on a complaint made by any person, and
  - d. conduct mediation, conciliation and negotiation.
  - e. hire such experts as may be necessary for the performance of any of its function.

33. This Court has had an opportunity of dealing with a similar matter in the case of *Mwiti v Mainga; Ethics and Anti-Corruption Commission & another (Interested Parties)* [2025] KEHC 15420 (KLR) in which it opined as follows:

“36. In my considered view, the Respondent's Preliminary Objection primarily raises issues directed at the Court's assumption of jurisdiction, that is whether the Court has the requisite capacity to consider the grant the reliefs sought in this Petition.

37. In raising the issues, the Respondent does not provide any contrary factual position but only that he argues that given the facts as they are, this Court is legally incapable of assuming jurisdiction on the matter without transgressing on the established principles in Constitutional litigation. Being a jurisdictional issue, I thus find that the issues raised are pure points of law as if successful, they may dispose of the petition.

38. The Supreme Court in *Benson Ambuti Ambega & 2 Others v Kibos Distillers Limited* (2020) eKLR emphasizing on the need for the Court to respect the Constitutional mandates of Public bodies or organs explained thus:

“(51) Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such



determination, if there would be other appropriate legislatively mandated institutions and mechanism...”

39. Applying the same principle, the High Court in the case of *Law Society of Kenya v Attorney General & Another; National Commission for Human Rights & Another (Interested Parties)* (2020) eKLR held as follows:

“...Where *the Constitution* has reposed specific functions in an institution or organ of the State, the Court must give those organs sufficient time or leeway to discharge their constitutional mandate and only accept an invitation to intervene when those organs or bodies have demonstrably been shown to have acted contrary to their constitutional mandate or in contravention of *the Constitution*...”

40. The substratum of the present Petition are allegations that the Respondent has violated the principles under Article 10, 73 and 232 of *the Constitution* of Kenya by adopting unlawful and irregular procurement procedures as the Chief Executive Officer of Kenya Railways Authority, has conspired to make fictitious land payments in compensation claims, and is generally involved in embezzlement of public funds and corruption in violation of Chapter Six of *the Constitution*.”

34. This Court on to found as follows:

- “47. This Petition alleges that the Respondent actions violated the values and principles required of public officers by *the Constitution*. It means that going by the provisions of *Leadership and Integrity Act* as read with Article 80 of *the Constitution*, the body that the Petitioner ought to have raised this complaint with in the first instance ought to have been the Ethics and Anti-Corruption Commission as it is the one with the primary mandate to oversight public officers on matters of values and principles of governance under Chapter 6 of *the Constitution*.
48. The Petitioner argues that under the Constitutional framework, he can seek to have the court compel Ethics and Anti-Corruption Commission (EACC) to investigate a public official where the Commission has abdicated this responsibility. In the instant case, the Petitioner has not pleaded that he lodged any complaint with EACC against the Respondent prior to filing this Petition or even pleaded that EACC has neglected to investigate after filing the complaint with it.
49. It was therefore premature for the Petitioner institute this Petition before giving the Ethics and Anti-Corruption Commission an opportunity to carry out an exhaustive inquiry into the allegations of breach of Chapter Six of *the Constitution* by the Respondent. He wants this Court issue an order of mandamus compelling EACC to criminally investigate and instruct the Director of Public Prosecution to prosecute the Respondent for the flagrant breach of the law yet he has not presented any incriminating information against the Respondent to the EACC for preliminary assessment in the first place.
- ”



50. This Court is constitutionally bound to accord deference to coordinate branches of government or public bodies charged with responsibility to execute specific legal mandates and its jurisdiction can only be properly invoked where there is demonstration that the public body has failed or neglected to carry out the legal obligation thereby causing prejudice to any person or the public.

51. It is clear the intervention of this Court is being sought in a matter which specifically falls under the mandate of the Ethics and Anti-Corruption Commission yet the petitioner has not given EACC that opportunity to deal with the matter in the first instance but wants this Court to intrude and direct EACC on the matter. This a perfect case to invoke the doctrine of judicial abstention which allows this Court to refrain from overstepping its judicial authority so to allow the proper functioning of other government organs or bodies. The Petition is therefore struck out.”

35. The contention is this Petition is not any way different. The gravamen of this Petition is that the Respondent’s appointment to the said office violates Chapter 6 of *the Constitution* and that the Respondent is unfit to hold any other public office. In fact, among the main prayers sought under (f) provides as follows:

An Order of mandamus compelling the 3<sup>rd</sup> Interested Party to criminally investigate and if culpable, instruct the 4<sup>th</sup> Interested Party, to criminally prosecute the Respondent for his flagrant breach of the law.

36. I do not see how I can reach a different finding. The Petitioners should have raised complaint against the Respondent with the 3<sup>rd</sup> Interested Party prior to filing this this Petition. In this matter, the Court is enjoined to exercise restraint under the doctrine of judicial abstention. Assuming jurisdiction in this matter would be tantamount to taking over the role of EACC, the 3<sup>rd</sup> Interested Party thereby rendering effective the provisions of Article 79 as read with the provisions under the EACC. This Court must step-back and exercise self-restraint to enable EACC, the 3<sup>rd</sup> Interested Party discharge its constitutional and statutory mandate.

37. For this reason, it is my humble view that the Respondent’s Preliminary Objection is merited. The Petition is hereby struck out.

38. I make no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29<sup>TH</sup> JANUARY, 2026.**

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**L N MUGAMBI**

**JUDGE**

