

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**

**ELRC PETITION NO. E127 OF 2025**

**KITOVOTO MUTINDA.....PETITIONER**

**VERSUS**

**KITUI COUNTY ASSEMBLY SERVICE BOARD.....1<sup>ST</sup>  
RESPONDENT**

**THE CHAIRMAN,  
KITUI COUNTY ASSEMBLY SERVICE BOARD.....2<sup>ND</sup> RESPONDENT**

**THE AG. SECRETARY,  
KITUI COUNTY ASSEMBLY SERVICE BOARD.....3<sup>RD</sup>  
RESPONDENT**

**JUDGMENT**

The Petitioner describes himself as a public-spirited citizen of Kitui County and he sued the Kitui County Assembly Service Board and its Chairman and Ag. Secretary. The Petitioner challenges the actions done by the County Assembly as illegal null and void the same having been taken in the absence of a substantive secretary upon retirement of the Secretary who was also the clerk of the County Assembly on 1/7/2024 and the 3<sup>rd</sup> Respondent was appointed to take the position of Acting Secretary of the 1<sup>st</sup> Respondent on an acting capacity and has continued to serve in such acting capacity for well over the mandatory period of six months.

The actions taken during that intervening period, now impugned by the Petitioner comprise amendment to the County Assembly Scheme of Service done on or about in the month of April 2025 and approved on

30/4/2025 in which illegal positions were created and then advertised on 5/5/2025.

Particulars of the impugned amendments include:-

- a) Creating the position of an additional deputy clerk.
- b) Lowering the legally established/required qualification for the position of deputy clerk, from 12 years to 3 years.
- c) Lowering the required/established qualification for the position of Principal Legal Counsel, from 5 years to 2 years
- d) Lowering the required qualification of a Senior Hansard Editor from 5 years, 2 years of experience among other qualifications.
- e) Lowering the established qualifications of the procurement assistant, from 3-year experience to 10 years.

The Petitioner states that the amendment did not conform to the law and in particular section 24(4) of the County Assembly Services Act which mandates the Respondent to appoint a reputable Human Resource firm to advise on the effective new and efficiency of any intended review/amendment of the Scheme of Service. The impugned position include that of a second Deputy Clerk.

The Petitioner also challenges ( variatory?) terms and condition of service of Assistant/Store keeper which was now considered a promotional position not subject to competitive recruitment and lowering the established qualification for various professional position within the Assembly Service that affect the quality-of-service delivery.

The Petitioner posits that the only reasonable explanation for the measures taken was to create positions for cronies who do not meet the established criteria.

That the Board had not produced its Annual Retirement Plan as required under paragraph 3.2 of the approved Human Resource Kitui Assembly manual to guide the staffing requirement.

That these measures are illegal having been undertaken in the absence of a substantive secretary to the Board.

### **Violation**

The Petitioner states that the Respondents violated Article 230(4) of the Constitution by countering benefits to drivers and body guards of certain class of members of the Assembly without approval by SRC.

Violation of Article 231(1) (a) and (g) by lowering the required qualification of certain stated officers and by so doing unlawfully paving way for employment of unqualified cronies.

The Petitioner further cites violation of statutory provisions including section 10(1) of the Public Service (values and principles) Act which mandates the Respondent to ensure that Public Officers are appointed and promoted on the basis of fair competition and merit.

That other illegal measures taken include suspension, interdiction and.....of County Assembly Officers while improperly constituted in the

absence of a substantive secretary. The Petitioner seeks the following reliefs:=

1. A declaration that any decisions/resolutions of the 1<sup>st</sup> Respondent that were made without a substantive clerk were illegally made and as such they are null and void.
2. A declaration that the decisions of the Respondents to amend the Scheme of Service and advertise for positions without resource to a reputable Human Resource firm, without public participation of the current service members and without proof of budgetary allocation for the exercise offended the provisions of Article 201(d), 10(2)(c) and (d) of section 24(4) of the County Assemblies Service Act.
3. A declaration to amend the Schemes of Service to lower the established qualifications for the various positions offended the provisions of Article 232(1)(d) of the Constitution.
4. An order of certiorari to remove to this Honourable Court and quash the decisions/resolutions of the Respondents of 30<sup>th</sup> April 2025 approving the amended Scheme of Service.
5. A prohibitory order restraining the Respondents from advertising and/or inviting applications for the positions whose qualifications were amended and/or altered with the amendments of 30<sup>th</sup> April 2025.
6. Any other relief that this Honourable Court may deem appropriate to ensure law, order and constitutionalism.
7. Costs of this petition.

The Petitioner filed a supplementary affidavit with leave of court sworn on 9/10/2025 in which the Petitioner states that the Respondents have

continued to undertake more egregious acts which he wished to bring to the attention of the court including the file of ***ELRC Petitioner No. 190 of 2025, Hon. Mathew Ngori and another versus Kitui County Assembly Service Board and others*** which continuation of the violations that are established in this petition and which violations the Petitioner reiterates herein and associates himself with the Petitioner in Petition ELRC No. 190 of 2025.

The Respondents filed replying affidavit to the petition sworn to on 12/9/2025. The Respondents states that in early 2025, the 1<sup>st</sup> Respondent contrary to the averments by the Petitioner conducted an internal assessment which revealed critical staffing gaps affecting the effective performance of Assembly's Legislative oversight and administrative functions. Following the assessment, the Board amended the Scheme of Service to adjust the minimum qualification for certain.....positions. The measures to fill the vacant positions were fully budgeted for lawfully coordinated with the relevant internal departments and intended to strengthen institutional efficiency. That the allegation made in the petition lack merit and it be dismissed. That the supplementary affidavit filed by the Petitioner is incurably defective and ought to be expunged from the record for reason that it annexes and relies on proceedings emanating from another suit that is presently ongoing before a court of equal jurisdiction. The Petition offends the *sub judice* rule and it be expunged from the record.

## **DETERMINATION**

The parties filed written submissions which the court has carefully considered together with the depositions by the parties. The issues for determination are:

- (a) Whether the Petitioner's supplementary affidavit offends the sub judice rule and ought to be struck of.
- (b) Whether the Petitioner has proved the alleged contravention of the constitution
- (c) Whether the Petitioner is entitled to the reliefs sought.

In answer to issue (a) the Petitioner filed supplementary affidavit upon leave being granted to him on 22/9/2025. The affidavit does not contain direct depositions from the Petitioner from his personal knowledge but purports to attack entire pleadings by the Petitioner in constitutional Petition No. E190 of 2025 a matter which is before another ELRC court of equal jurisdiction and has yet to be determined. The pleadings include certificate of urgency dated 29/9/2025 notice of motion dated 24/9/2025 and petition 24/9/2025 together with all attachments there to.

This matter is not set for hearing before this court, it is subject to hearing and determination before another court of competent jurisdiction. The supplementary affidavit offends the ruling rule of sub judice whose key ingredients are as follows:

**Kuria v Wanjohi; Chief Land Registrar (Interested Party) (Environment & Land Case 068 of 2024) [2024] KEELC 1700 (KLR) (4 April 2024) (Ruling) where it was held that;**

**In this respect, I beg to adopt and reiterate the ratio of the Supreme Court of Kenya [the Apex Court] in the case of Kenya National Commission on Human Rights v Attorney**

**General, Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR, where the court held thus: The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives**

Section 6 of the Civil Procedure Act 2010 provides that;

**No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed**

The supplementary affidavit is accordingly struck out of the records for offending the rule of subjudice.

The second issue is whether the Petitioner has proved on a balance of probabilities that his constitutional rights and those of the members of the public he is seeking to protect have been violated by the Respondent.

Article 230 (4) of the Constitution of Kenya reads:-

***“(4) The powers and functions of the Salaries and Remuneration Commission shall be to:-***

***(a) Set and regularly review the remuneration and benefit of all state officers; and***

***(b) advise the national and county governments on the remuneration and benefits of all public officers.***

The Petitioner did not provide any evidence that it had written to SRC regarding any usurpation of its functions by the Respondent. The Petitioner did not enjoin SRC in this suit nor has it provided any evidence and or any tangible evidence in respect of measures taken by the Respondents in violation of Article 230(4). The Petitioner has made bare allegations in the petition which have no substance. The alleged violation of Article 230(4) by the Respondents lack merit and is dismissed.

The other allegations by the Petitioner is that the Respondent violated Article 232(1)(a) and (g) of the Constitution.

Article 232(1)(a) of the Constitution reads:-

***“The values and principles of public service includes:-***

***(e) high standards of professional ethics; where***

***(g) reads***

***“(g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions.”***

The petition lack nay evidence at all of any appointments and or promotions made by the Respondents during the material period referred to in the petition. The Petitioner has not satisfied the requirement of sections 107 and 108 of the Evidence Act Cap 80 laws of Kenya by proving on a balance of probabilities the serious but bare allegations made by the Petitioner in the petition and supporting documents. The allegation that the Petitioner's right protected under Article 232(1)(a) of the Constitution have been violated lack merit and same are dismissed.

There is no other provision of the constitution set out by the Petitioner under paragraph D of the petition titled

***“Denial, violations, infringement and loss threat to the constitution statutes.”***

This being the case, the Petitioner has failed to establish any basis of filing this petition and avoiding other statutory dispute resolution mechanism provided under the provision of County Government Act and/or the provision of the Employment Act, 2007.

The Petitioner is therefore guilty of violating the doctrine of constitutional avoidance which requires courts to resolve disputes on a constitutional basis only as a final resort after first exhausting all other methods. A constitutional issue is that which directly arises from courts interpretation of the constitution. See the case of *Nixon versus USA 506 US 224 (1993) per Justice Stevens*.

The court also defers to the words of the Court of Appeal *Anarita Karimi Njeru versus The Republic (1976-1980) KLR 1272 restated in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] Eklr* where the Court of Appeal held that;

*‘The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars. We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide*

***sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to.***

According, this petition lack merit in its entirety and it is dismissed with no order as to costs, it being a public interest Petition filed without any reasonable basis.

Dated at Nairobi this **2<sup>nd</sup> day of March 2026**



**Mathews Nduma**

**JUDGE**

Dated, signed and delivered in open court at Nairobi this **11<sup>th</sup> day of March 2026**

**J.W KELI**

**JUDGE**

**In presence of:**

Mr. Musyoki for Petitioner

Mr. Mwalimu for Respondents

Mr. Kemboi – Court Assistant

ORIGINAL