

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS

CONSTITUTIONAL PETITION NO. E012 OF 2025

IN THE MATTER OF ARTICLES 2, 3, 10, 22, 23, 27, 41, 47, 73, 165 AND 232 OF THE
CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 12 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT
ACT. NO. 20 OF 2011

AND

IN THE MATTER OF SECTION 12 & 18 OF THE COUNTY GOVERNMENTS ACT, NO. 17 OF
2012

AND

IN THE MATTER OF THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT, NO. IA OF 2015

AND

IN THE MATTER OF THE RECRUITMENT OF THE DEPUTY CLERK OF THE COUNTY
ASSEMBLY OF MACHAKO

-BETWEEN-

PETER MULI KIOKO.....1ST PETITIONER

FELIX MUTUA.....2ND PETITIONER

-VERSUS-

MACHAKOS COUNTY ASSEMBLY SERVICE BOARD.....1ST RESPONDENT

THE CHAIRPERSON, MACHAKOS COUNTY

ASSEMBLY SERVICE BOARD.....2ND RESPONDENT

THE COUNTY ASSEMBLY CLERK,

MACHAKOS COUNTY ASSEMBLY.....3RD RESPONDENT

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

Introduction

1. The Petitioner commenced this suit vide a Petition dated 12th August 2025 seeking the following orders:-
 - a) *A declaration that the recruitment process for the position of Deputy Clerk, Machakos County Assembly, initiated on or about 6th August 2025 by the Chairman of the Machakos County Service Board, is unconstitutional, unlawful, null and void.*
 - b) *An order of prohibition restraining the Respondents from proceeding with or concluding the current internal recruitment process for the position of Deputy Clerk.*
 - c) *An order compelling the Respondents to conduct the recruitment process afresh through an open, competitive, and transparent process accessible to all qualified Kenyans.*
 - d) *Costs of the Petition.*
 - c) *Any other relief that this Honourable Court may deem just and fit to grant.*
2. The Petition was filed alongside the Supporting Affidavit of the 1st Petitioner sworn on 12th August 2025 with the Authority of the 2nd Petitioner, and annexures thereto.

3. In response to the said Petition, the Respondents filed a Replying Affidavit sworn by the 3rd Respondent, with the Authority and the 1st and 2nd Respondents, on 28th August 2025.
4. To counter the Respondents' reply, the Petitioners filed a Further Affidavit sworn by the 1st Petitioner on 4th September 2025.

The Petitioners' case in summary

5. The Petitioners' case is that or about 6th August 2025, the 1st Respondent, through the 2nd Respondent, issued an internal advertisement inviting applications for the position of Deputy Clerk, Machakos County Assembly. The advertisement was circulated only internally within the Machakos County Assembly staff and not published in the mass media or public platforms, thereby excluding qualified members of the public from applying, and restricting the position to internal applicants only.
6. It is the Petitioners' case that the exclusion of qualified members of the public from applying for the position of Deputy Clerk of the County Assembly violated the principles of fair competition, transparency, equality, and merit-based recruitment. It contravened Article 10 of the Constitution which binds all State organs to uphold national values and principles of governance, including transparency, accountability, and public participation; Article 27 on equality and freedom from discrimination; Article 73 which requires State officers to exercise their authority in a manner that is consistent with the purposes and objects of the Constitution, demonstrates respect for the people, and brings honour to the nation; Article 232 which establishes the values and principles of public

service, including fair competition and merit as the basis of appointments; and Sections 12 and 18 of the County Governments Act which require the County Assembly Service Board to conduct recruitment in accordance with the Constitution and applicable laws, as well as Sections 10 and 13 of the Public Service (Values and Principles) Act which require transparency and fair competition in appointments.

7. In response to the Respondent's claim that internal recruitment was necessitated by the Commission on Revenue Allocation (CRA) staff ceiling of 115 members, the Petitioner states that the said ceiling pertains only to total staffing levels and does not exempt the Respondents from their constitutional obligation to conduct open, transparent, and competitive recruitment for public offices under Articles 10, 27, and 232 of the Constitution. Their view is that internal recruitment, while potentially addressing headcount issues, still constitutes filling a public office, and therefore must be subjected to advertisement to the general public to ensure equal opportunity, merit-based selection, and avoidance of favouritism.

8. The Petitioners take the position that the CRA circular does not amend, suspend, or override the Constitution or statutory provisions on public service recruitment. Reliance on budgetary ceilings cannot lawfully displace the constitutional imperatives of fairness, competitiveness, and non-discrimination in public appointments. If indeed the Assembly had exceeded the approved staffing ceiling, the lawful approach would have been to rationalize or regularize the workforce in compliance with the law, not to unlawfully restrict recruitment to a closed internal process. No lawful exemption permitting them to conduct an internal-only recruitment for the position of

Deputy Clerk, a senior public office with significant constitutional and statutory responsibilities, has been demonstrated by the Respondents.

9. The Petitioners point out that the advertisement for the position of Deputy Clerk was signed by the Speaker of the County Assembly in his capacity as Chairperson of the County Assembly Service Board, which they take to be a reason for legitimate transparency and governance concerns as the line between political and administrative functions was blurred, calling into question the propriety and independence of the recruitment exercise. The Speaker is primarily a political leader, while the Clerk is the administrative head of the Assembly and ordinarily responsible for administrative processes such as executing recruitment documents.
10. The Petitioner's state that the Respondents have failed to address the Petitioners' core complaint that the internal advertisement discriminated against qualified members of the public. They are adamant that budgetary or operational considerations cannot override fundamental rights and principles entrenched in the Constitution, and public interest in lawful and transparent recruitment.
11. According to the Petitioners, the fact that the position of Deputy Clerk has been held by an acting officer since 2022 and the Assembly has functioned under him, demonstrates that there was no immediate or compelling operational urgency requiring deviation from the constitutional recruitment process. They also state that the speed with which the Respondents conducted the recruitment process after being served with the Notice of Motion - from interviews to appointment within four (4) days - is indicative of bad faith and malice, and strongly suggests an intention to defeat the substratum of this Petition by rushing the appointment before this Honorable Court

could pronounce itself on the legality of the process. It is further questionable, and indicative of ulterior motives, that immediately upon appointment to the office of Deputy Clerk, the same officer, one PETER MUEMA MBATHA, was gazetted by the 2nd Respondent through Gazette Notice No. 12553 dated 1st September 2025, appointing him as Acting Clerk to the County Assembly, thereby revoking the appointment of the 3rd Respondent, who was also serving in an acting capacity. They question whether due process was followed prior to the gazettelement, including by lawfully passing a formal resolution by the County Assembly Service Board and approval by the County Assembly Plenary. The Petitioners state that this sequence of events underscores their contention that the recruitment exercise was neither genuine nor aimed at filling the Deputy Clerk's position on merit, but rather designed to advance predetermined personal interests.

Respondents' case in brief

12. The Respondents' case is that the Assembly has a ceiling of One Hundred and Fifteen (115) members of staff as per the Commission of Revenue Allocation (CRA) circular Ref. CRA/FA/01VOL II (22) dated 28th June 2018 on staff ceilings. The current Assembly workforce as at 20th August 2025 stands at One Hundred and Twenty-Three (123), 105 on permanent basis and 18 on contract.

13. They state that the County Assembly Service Board (the 1st Respondent herein) resolved that it would be prudent to advertise the subject position of the Deputy Clerk of the County Assembly internally for the reasons that: The CRA Circular Ref. CRA/FA/01VOL II (22) dated 28th June 2018 capped the number of assembly staff at 115; the current work force is at 123 comprised of I

05 staff on permanent and pensionable terms and 18 staff on contract, and so the Assembly was doing its best to comply with the 115 staff cap; the county assembly revenue ceiling is pegged on the approved staff establishment of 115 with any additional staff beyond that approved ceiling leading to budgetary constraints in respect of personal emoluments, gratuity, pensions, medical cover and other operational expenses. Further, it states that there are enough officers with capacity and the institutional memory required of such a position; and internal recruitment would boost staff morale and create growth opportunities.

14. It is averred by the Respondents that the position of Deputy Clerk Administration has been vacant since January 2022 and there was need to fill the position substantively, with a view to halting the acting allowances that were being paid to the officer who had been appointed to the position in an acting capacity.

15. The Respondents confirm that the 1st Respondent interviewed applicants and appointed one officer to the subject position on 26th August 2025 hence the orders sought have been overtaken by events.

DETERMINATION

16. Following directions by the court that parties should file written submissions, both parties complied.

Issues for determination

17. In their submissions dated 2nd October 2025, the Petitioners submitted generally on the Petition.

18. On their part, the Respondents identified the following issues for determination in their submissions dated 10th September 2025.

- i. Whether this Court has jurisdiction over the matter.
- ii. Whether the recruitment exercises done by the respondents were lawful.
- iii. Whether the petitioner should be granted the reliefs sought.

19. Having considered the parties' pleadings, evidence presented before this Court and the written submissions, it is my considered view that the two issues for determination are as follows:

- a) Whether Court has jurisdiction over this matter; and
- b) Whether the Petitioners should be granted the reliefs sought.

ISSUE 1: Whether Court has jurisdiction over this matter

20. It is trite law that when a litigant raises a challenge to jurisdiction, the same must be dealt with in the first instance. This position was eloquently expressed in the celebrated case of *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1* where it was held that: - *Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...*'

21. The Respondents herein have mounted an assault on the Court's jurisdiction on the premise that this suit contravenes the doctrine of exhaustion of local remedies as the Public Service Commission has jurisdiction to hear this dispute in the first instance. The Respondents cite Section 86 of the Public Service Commission Act and Section 77 of the County Governments Act to support this position.

22. I have reviewed the provisions of the law relied on and note that Section 85 of the Public Service Commission Act Cap 185 of the Laws of Kenya provides as follows:

“The Commission shall, in order to discharge its mandate under Article 234(2)(i) of the Constitution, hear and determine appeals in respect of any decision relating to engagement of any person in a County Government, including a decision in respect of—

(a) recruitment, selection, appointment and qualifications attached to any office;

(b) remuneration and terms and conditions of service;

(c) disciplinary control;

(d) national values and principles of governance, under Article 10 and values and principles of public service under Article 232 of the Constitution;

(e) retirement and other forms of removal from the public service;

(f) pension benefits, gratuity and any other terminal benefits; or

(g) any other decision the Commission considers to fall within its constitutional competence to hear and determine an appeal in that regard.”

23. Section 86 of the same Act provides that:—*“any person who is dissatisfied or affected by a decision of any authority or person in respect of a County Government Public Service may appeal to the Commission against the decision.”*

24. Section 77 (1) and (2) of the County Governments Act Cap 265 of the Laws of Kenya provides that:—

“(1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer

may appeal to the Public Service Commission (in this Part referred to as the "Commission") against the decision.

(2)The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—

- (a) recruitment, selection, appointment and qualifications attached to any office;
- (b) remuneration and terms and conditions of service;
- (b) disciplinary control;
- (d) national values and principles of governance, under Article 10, and, values and principles of public service under Article 232 of the Constitution;
- (e) retirement and other removal from service;
- (f) pension benefits, gratuity and any other terminal benefits; or
- (g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.”

25. The present petition relates to the recruitment of the Deputy Clerk of Machakos County Assembly. As such, the body in charge of his recruitment/appointment is the County Assembly Service Board, rather than the County Public Service Board. The mandate and operations of the County Assembly Service Board are set out and governed by the County Assembly Services Act Cap 265D of the Laws of Kenya which is described in the Preamble to the Act as:-

“An Act of Parliament to make further provisions on the County Assembly Service Board and the County Assembly Service as established under the County Governments Act in relation to each county; and for connected purposes.”

26. In Section 2 of the Act, "*office*", in relation to the Service, is defined as a paid office as an employee of the Service, not being the office of a member of the Board, or a part-time office, or an office the emoluments of which are payable at an hourly or daily rate. "*officer*" or "employee" means any person who holds or acts in any office of the Service otherwise than as a part time officer or employee.

27. The Deputy Clerk of the County Assembly is recognised as an officer within the Service in Sections 21 and 28 of the County Assembly Services Act. Sections 24-27 thereof provides that the County Assembly Service Board shall establish offices within the service; formulate and disseminate schemes of service for officers in the service providing for their appointment, promotions resignations and terminations of appointment; secondment of staff and transfers; scales of salaries and allowances, and the designations and grades of officers and other staff; establish contributory pension schemes for employees; and exercise disciplinary control over officers of the Service. *Before the court was a constitutional petition.* Rule 56 (5) on alternative dispute resolution (ADR) of the ELRC (Procedure) Rules provides as follows:-(5) Where the Constitution, a written law, collective bargaining agreement, contract of service, policy, or other instrument provides for alternative dispute resolution mechanisms—

(a) a person being party to a dispute may file a suit and seek appropriate interlocutory relief pending exhaustion of such alternative dispute resolution mechanisms or pending determination of the suit;

(b) want of exhaustion of such alternative dispute resolution mechanisms shall not operate as a bar to a suit for application for interim orders or alleging unconstitutionality or unlawfulness of the action, omission, decision or other matter in dispute pending such exhaustion; and,

(c) a suit filed prior to exhaustion of such alternative dispute resolution mechanisms may be stayed and not struck out on account of such exhaustion." Justice Byram Ongaya (as he then was) interpreted the above Rule to mean that the existence of an appellate statutory procedure did not operate as a bar to the petitioner seeking an interim order in terms of the pending application or even as a bar to the petition pegged on violation of his Constitutional rights, in the case of *Wamukoto v Kenya Electricity Transmission Company Limited & 2 others* (Petition E185 of 2025) [2025] KEELRC 3174 (KLR) (13 November 2025) (Ruling).

28. A five judge bench of the High Court set out exceptions to the doctrine of exhaustion of remedies in the case of *Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (Constitutional Petition 159 of 2018 & 201 of 2019 (Consolidated))* [2020] KEHC 10266 (KLR) (6 November 2020) (Judgment) as follows: "*However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus: What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly*

delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case* (*supra*), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.*) As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by *Matavo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.*

62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed

constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.

63. Article 165(1) of the Constitution vests in the High Court vast powers including the power to ‘determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened’ and the jurisdiction ‘to hear any question respecting the interpretation of the Constitution.’” The court upheld the decision of the 5judge Bench of the High Court and held that the instant petition raises constitutional issues hence not barred by non-exhaustion of alternative remedies. The court has jurisdiction.

Whether the recruitment process was unconstitutional

29. The petitioner submitted on the law as follows- Representation, Standing and Constitutional Mandate -The Petitioners are self-represented and bring this petition in the public interest. Their objective is not merely personal redress, but to vindicate constitutional norms crucial to public confidence in the machinery of governance. The Constitution of Kenya 2010 expressly provides for public interest litigation: e Article 22 (Enforcement of the Bill of Rights) permits proceedings by any person "acting in the public interest" for violations of rights in the Bill of Rights. Article 258 similarly allows any person to institute proceedings asserting that the Constitution has been contravened, inclusive of those acting in public interest. These constitutional provisions relax the usual constraints of standing and require the Court to interpret procedural rules so as to facilitate access to justice, especially for matters of public law where constitutional values are at stake.

Central Constitutional Violations at Issue - Violation of Article 232 – Values and Principles of

Public Service This Article mandates that public appointments be founded on fair competition, merit, transparency, objectivity, and non-discrimination. The respondents' decision to confine recruitment for a senior public office (Deputy Clerk) to internal candidates breaches these precepts in substance and form. Breach of Article 10 - National Values and Principles of Governance Among the fundamental values under Article 10 are transparency, accountability, public participation, inclusivity, and integrity. An internal-only advertisement, excluding external candidates and shunning public notice, is antithetical to those values. Infringement of Article 27- Equality and Non-Discrimination Every Kenyan enjoys equal treatment before the law and protection against discrimination. Excluding qualified external candidates solely on the basis of their not being internal staff is discriminatory, unless a constitutionally valid justification is shown -which is absent. Violation of Article 47 - Right to Fair Administrative Action Decisions affecting individuals must be lawful, reasonable, and procedurally fair. Here, the process lacked essential elements of fair procedure: open competition, clarity of evaluation criteria, notice to all who might qualify, and reasons for excluding external applicants. Supremacy of the Constitution No authority, internal policy, administrative convenience, or external constraint (such as staffing ceilings) may override constitutional imperatives. The constitutional supremacy doctrine demands that all public conduct, including recruitment, be consistent with constitutional norms.

30. Application of the Law to the Facts - On 6 August 2025, the first respondent advertised the post of Deputy Clerk, but restricted applications to internal staff only - effectively closing off public competition. No statutory provision or regulation permits this restriction for that office. The respondents reliance on a staffing ceiling (CRA) does not lawfully grant exemption from the constitutional requirement of openness and fairness. The advertisement was signed by the Speaker in

his capacity as Chairperson of the Service Board, raising questions about the mixing of political and administrative roles, which must be conducted with scrupulous integrity under constitutional law. After court papers were served, the respondents expedited the process (from interviews to appointment in four days) - a conduct suggestive of intent to pre-empt judicial oversight and circumvent constitutional review. Supplementary evidence (Annex PMK-1, PMK-2) demonstrates that the process was neither transparent nor fair, thereby violating Articles 10, 27, 47, and 232 in multiple respects. Authorities and Precedents 4.1 Gladys Boss Shollei v Judicial Service Commission & another [2014] eKLR - the court reaffirmed that public appointments must be made on merit, with transparency and competitive procedure. County-assembly recruitment jurisprudence (e.g., Republic v County Assembly of Kisumu & another) consistently holds that constitutional public service norms cannot be circumvented by internal rules or practices. Cases affirming public interest standing under Articles 22 and 258, where courts have recognized that constitutional values demand that procedural rules not impede challenges to violations that affect the public trust.

31. Reliefs Sought - A declaration that the recruitment process for the Deputy Clerk, initiated on or about 6 August 2025, is unconstitutional, unlawful, and null and void ab initio. A mandatory order compelling the Respondents to conduct a fresh recruitment process that adheres strictly to constitutional values: open advertisement, fair competition, merit, nondiscrimination, transparency, and accountability. Structural or supervisory orders if necessary- for example, requiring publication of criteria and evaluation matrices; ensuring independent oversight or reporting; and separation of political from administrative roles in recruitment. Costs to the Petitioners.

Decision

32. Annexure PMK1 was an internal advertisement dated August 6, 2025, issued by the County Assembly Service Board of Machakos for the position of Deputy Clerk. It was signed by Hon. Anne Kiusya, the Speaker of the Assembly and the Chairman of the Machakos County Assembly Service Board. The advertisement called for qualified candidates to apply for shortlisting. The court determined that the intention was to conduct a competitive recruitment process from among staff already in service. The petitioner argued that this was unconstitutional and illegal, as previously stated. Having found that the doctrine of exhaustion of remedies, especially concerning Section 77 of the Public Service Act, does not serve as a barrier to lawsuits regarding violations of constitutional provisions, the court, in assessing whether the internal recruitment for the Deputy Clerk position was unlawful, may consider the case of *Okoti v Ethics and Anti-Corruption Commission & another* (Petition E040 of 2020) [2021] KEELRC 2302 (KLR) (15 January 2021) (Judgment). In that case, your sister, Justice Maureen Onyango, held that:- "55. *The 1st Respondent on its part maintained that its actions were well within the law and that the decision to internally advertise for the positions was done following a resolution reached at the commission's 76th Special Meeting held on 11th June, 2020, and a directive by the Government as communicated via Treasury Circular Number 7/2019 that froze new appointments for, among others, Constitutional Commissions like the 1st Respondent.* 56. *I have perused the said circular dated 28th June, 2019 and marked EB – 3 in the 1st Respondent's Replying Affidavit sworn on 1st September, 2020 and note that indeed at clause 23 the Government through the National Treasury and Planning did freeze new appointments except for security agencies, health workers and education sector.* 57. *The 1st Respondent further maintained that its decision to advertise the positions internally was supported by its Corporate Services Policies and Procedures*

Manual also attached to its Replying Affidavit and marked as EB – 1 that provides at Clause 2.4.5 as follows:

Clause 2.4.5 All vacancies in the Commission will be filled competitively based on merit and will be advertised either internally or externally where applicable as the Commission may determine from time to time.

Clause 2.4.6 eligibility for appointment or promotion will be in accordance with the existing Career Guidelines...”

58. From the foregoing, it is clear the commission acted within its mandate and the confines of the law when it elected to fill the positions internally as opposed to externally.

59. Further the internal advertisement is supported by the 1st Respondent’s Corporate Services Policies and Procedures Manual, dated July 2017 which provides at Clause 2.4.8 as follows:

2. 4.8 The Commission may, where need be, advertise vacant posts in at least two local dailies of wide national circulation, the Commission’s website or any other method as the commission may decide from time to time.”

60. I therefore find that there was no illegality or unconstitutionality in the filling of the vacant positions within the Commission by way of internal advertisement as decided by the 1st Respondent herein.

61. Whether the impugned internal recruitment process adopted violates the Petitioner's fundamental rights and freedoms under Articles 27, 41(1) and 47 of the Constitution of Kenya as read with Sections 37 of the Public Service Commission Act and Section 5 of the Employment Act.

62. Having found that the internal recruitment process was lawful, I find that the Petitioner has not established that the 1st Respondent violated any of the provisions of the Constitution or statute as the 1st respondent's actions are well founded in law."

35. In this case, the Respondents argue that they chose to fill the Deputy Clerk position within the County Assembly internally because the Commission for Revenue Allocation had capped the Assembly's staff at 115. They acknowledged that they had already employed 123 staff members, exceeding the limit of 115, and thus decided, in an effort to comply with the Commission's directives, to recruit internally for the Deputy Clerk position. The respondent also stated that they had existing staff capable of filling the role. Notably, there has been an acting Deputy Clerk since 2022. Upon reviewing the documents provided by the Respondents, I found no policy, regulation, or statute explicitly permitting internal appointments or internal recruitment. Therefore, the court will determine whether the circular from the Commission for Revenue Allocation justifies such internal recruitment. The respondent further justified the internal hiring as necessary for promoting existing staff and argued there was no evidence of discrimination, citing the decision in *Okindi –vs- Kenya Maritime Authority* [2025], which states that discrimination involves “unjust or prejudicial treatment of different groups in similar circumstances” and “unfair treatment or denial of normal privileges to individuals, or a failure to

treat everyone equally without a justifiable reason for distinction.” The court recognizes that restricting vacancies to internal candidates is not inherently unconstitutional or illegal unless proven otherwise. There is no evidence before the court to support such a claim. The principle that ‘he who alleges must prove’ applies here. Article 10 of the Constitution requires a fair and competitive process for recruitment. The positions were advertised, and existing staff were invited to apply. The court found no reason to question the legality of the advertisement, which was signed by the Speaker in his capacity as Chairperson of the Service Board. The County Assembly Service Board is the employer, of which the Speaker is the chairman.

36. In addition, the Court was informed that the recruitment had already taken place and that Peter Mbaka was appointed as deputy clerk. Mbaka was not the acting clerk. A competitive recruitment process was thus conducted. In the case of Senate & 2 others –vs- Council of County Governors & 8 others [2022] KESC 7 (KLR) (Constitutional and Human Rights) (17 February 2022) (Judgment), the court observed, “*Conversely, other organs of the national government had to keep to their lanes as drawn by the Constitution and utilize the structures and channels in the Constitution to carry out their legislative and oversight duties and to trust the competence of the county governments’ structures and organs to discharge theirs functions.*” There was no evidence before the court that the respondent was not competent to carry out its mandate or that the process was unlawful. The court finds no basis to interfere with the recruitment.

37. The petition is dismissed. The petition was brought under public interest. Each party is to bear its own costs in the petition.

38. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13th DAY OF
MARCH, 2026.

J.W. KELI,
JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Petitioners:

Respondent: