Barasa v Director of Public Prosecutions & 2 others (Petition E033 of 2026) [2026] KEELRC 974 (KLR) (20 April 2026) (Ruling)

Neutral citation: [2026] KEELRC 974 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E033 OF 2026

JK GAKERI, J

APRIL 20, 2026

BETWEEN

MARK NABUYUMBU BARASA, 'NDC' (K) ..... PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 1ST RESPONDENT

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS .... 2ND RESPONDENT

THE PUBLIC SERVICE COMMISSION ..... 3RD RESPONDENT

RULING

1. Alongside his Petition, the Petitioner filed an Application dated 28th January 2026, premised on Articles 22(1), 23(1 & 3), 41, 47, 50(1), 157(11), 232, and 162(2)(a) of *the Constitution*, and sections 12(1) (a & b) of the *Employment and Labour Relations Court Act*, seeking Orders that:

    i. Spent.

    ii. That a conservatory order be and is hereby issued staying the recruitment process, specifically the interviews scheduled to commence on 2nd February 2026 for the position of Senior Deputy Director of Public Prosecutions (DPP2) and Deputy Director of Public Prosecutions (DPP3), pending the inter-parties hearing and determination of the Application.

    iii. That the Conservatory Order be and is hereby issued restraining the Respondents from filling the vacancies in the said advertised positions (V/NO.17/2025 and 18/2025) pending the hearing and determination of the Petition herein.

    iv. That pending the hearing and determination of this Application, this Honourable Court be pleased to order the Respondents to forthwith produce and file before Court:

a. The approved shortlisting and selection criteria, including the scoring matrix, weightings, benchmarks, and evaluation parameters applied for the recruitment of Senior Deputy Director of Public Prosecutions (DPP2) and Deputy Director of Public Prosecutions (DPP3);

b. The individual score sheets and evaluation records for all the shortlisted candidates and the Petitioner, if any, showing marks awarded under each criterion; a comparative matrix showing for each of the candidates:

i. Post admission legal practice experience;

ii. Years served at the level of Senior Assistant Director of Public Prosecutions (SADPP);

iii. Current substantive posting or ministry;

iv. Whether the candidate is on secondment, and if so, the approving authority and duration thereof.

v. That such further orders be made as this Honourable Court shall deem fit in the interests of justice, transparency and accountability.

vi. That the costs of the Application be in the cause.

2. The Application is supported by the Applicant's supporting affidavit sworn on 28th January 2026 and based on the grounds categorized under: violation of human resource policies, meritocracy and equality principles; unconstitutional exclusion; failure to give reasons, arbitrariness and mala fides; admission of flawed process; prima facie case of procedural unfairness; irreparable harm; institutional integrity, sustainable development and public interest harm; and jurisdiction.

3. The Applicant's case is that the recruitment process violated applicable human resource policies and the Public Service Guidelines governing merit-based promotion, fair competition and eligibility. He added that shortlisting candidates on secondment from other ministries while excluding him was contrary to applicable HR policies. He equated the same to amount to an abuse of administrative discretion that undermines equal opportunity in public service and entrenches patronage at the expense of professionalism and institutional competence. He asserts that he was unconstitutionally excluded despite meeting the requisite experience, professional standing and academic qualification. He states that he possesses an L.L.B, higher diploma certificates, a Masters Degree, and specialized National Defence College training.

4. He further alleges that when he sought for written reasons for his non-shortlisting, the 1st Respondent issued a verbal and direct threat of war. Subsequently, that, he received an irregular invitation for an interview scheduled for 5th February 2026 vide letter dated 27th January 2026; outside the official shortlist and interview schedule. He averred that the conduct demonstrated arbitrariness, bad faith and procedural impropriety in the recruitment process. He avers that he has established a prima facie case that the process is in violation of the constitutional principles of equality, meritocracy, transparency, and fair administrative action. He avers that there is a real and imminent risk that the Respondents will complete the recruitment process before the Petition is heard, rendering it an academic exercise and ineffective; causing irreparable harm to his career, reputation and professional standing.

5. He avers that the process risks entrenching incompetence and compromised leadership within the prosecutorial hierarchy thereby weakening the institution and undermining public confidence and exposing the criminal justice system to grave and irreversible harm. He states the Court's duty is

not merely to protect him but also to safeguard the integrity, independence and effectiveness of the ODPP. He stated that the integrity and effectiveness of the ODPP is indispensable to peace, justice and strong institutions; as reflected in the Constitutional values, and international commitments, more so Sustainable Development Goal 16 urging that the Court had the jurisdiction to handle the matter as it arises from violation of fair labour practices and fair administrative action.

6. The Application was opposed by the 1st and 2nd Respondents vide their Grounds of Opposition dated 3rd March 2026 on premises that:

   a. That the Application is defective and bad in law as it seeks the enforcement of a right of access to information, through a procedure in violation of Rule 4 and 10 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, (hereinafter the Mutunga Rules) which specifically require that such applications for enforcement of rights be by way of a constitutional petition.

   b. That the Application is non-justiciable being trapped by the doctrine of ripeness, as the Petitioner had not applied to the 1st and 2nd Respondents for the access to any of the information sought vide the instant application, as per the requirements of section 8 of the *Access to Information Act*, No. 31 of 2016 (hereinafter the *Access to information Act*.)

   c. That the Application is an attempt by the Petitioner to have the Respondents assist him in his case against the Respondents thereby shifting the burden of proof of his allegations contrary to settled principles of law.

   d. That the Application amounts to a fishing expedition, is speculative, overly broad and to an extent also seeks some information which is already in the possession of the Petitioner such as the shortlist, and is also irrelevant to the extent that it asks for information that is not necessary for the determination of the Petitioner.

   e. That a disclosure of the material sought by the Petitioner, in the manner sought, would involve an unwarranted invasion of privacy of the other applicants for the positions the basis of the impugned interviews, other than the Petitioner.

   f. That it is in the interest of justice that the orders sought in the Application be declined.

7. The Petitioner in his submissions and supplementary submissions raised the following issue for determination: whether the Respondents as public bodies, have an obligation to produce the record of an impugned administrative decision; whether the lack of a formal Notice to Produce under the Civil Procedure Rules precludes the Court from granting the orders sought; whether Counsel for the Respondent is improperly on record due to a conflict of interest arising from shared professional history and direct involvement in the administrative functions that are the subject of this Petition.

8. He submitted that the state is bound by the duty of candour, requiring it to place all relevant information before the Court to ensure justice is done. In support, reliance was placed on the cases of R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Eorld Development Movement Ltd [1995] 1 WLR 386 and Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR where the Courts established the need to provide full factual context. He submitted that his right to information is guaranteed by Article 35(1)(a) of *the Constitution*, which right is self-executing and serves as an accountability tool. He urged that where the same is threatened, the Court has the jurisdiction even without a formal notice, for it to intervene and provide remedies. In support, he relied on the case of Trust for Indigenous Culture and Health & 5 others v Cabinet Secretary for Health & 3 others [2019] eKLR.

9. On procedural technicality, he submitted that the Respondent's argument that the failure to file a formal notice to produce is an affront to Article 159 (2) (d) of *the Constitution*. He added that Rule 4 of the Mutunga Rules mandates the Court to prioritize substantive justice and informality. He submitted further that Rule 21 of the said Rules grants the Court wide ranging powers to issue direction for the production of any document. He relied on the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR where he urged that the Court in the case warned against procedural idolatry. He submitted that he did not ambush the Respondents with the request as a formal request for reasons was made, yielding a threat from the 1st Respondent. He urged that the Court has the inherent jurisdiction and constitutional mandate to pierce the veil of administrative secrecy. He further urged that the documents sought are specific, relevant and necessary for the determination of whether his is a victim of unfair labour and administrative actions leading to constitutional violations.

10. While tackling the third issue in the supplementary submissions, the Petitioner submitted that the advocate-witness rule prohibits an advocate from acting in a matter where they are likely to be called as a witness on contested factual issues, as envisaged in the case of Delphis Bank Ltd v Channan Singh Chatthe & 6 others [2005] eKLR. He further relied on Rule 9 of the Law Society of Kenya (Code of Standards of Professional Practice and Ethical Conduct) 2017. He submitted that Mr. Owiti is not merely a representative but also a contemporary and the Petitioner's colleague who has witnessed the very administrative shifts the Petitioner challenges as victimization. He accused Mr. Owiti of being incapable of maintaining an objective distance required of counsel as they were both admitted to the ODPP in 2013 and inducted together.

11. He argued that they have since maintained professional proximity within their employment and have jointly handled several high profile and sensitive cases including: the baby Pendo case, the Arshad Sharif (Javeria Saddique) matter, habeas corpus proceedings, a successor conflict; where the said counsel now holds the Petitioner's position of Deputy Head Conventional and Related Crimes Department following his posting to desk role at the Prosecution Training Institute (PTI). He names the counsel as a material actor in the transition the Petitioner impugns. He contended that he intends on calling Mr. Owiti to testify on the contrast between the high-profile duties they handled together and the current state of the Petitioner's deployment. He argued that an advocate cannot cross examine himself nor can he be expected to challenge his own professional observations from the bar. He added that the conflict of interest is not merely perceived but substantive and structural. He urged that Mr. Owiti must recuse himself in order to preserve the integrity of the judicial process and ensure a fair hearing.

Analysis

12. Having considered the Application and the grounds of opposition by the Respondents, the issues that arise for determination are: whether the Petition meets the requirement of Constitutional Petitions; whether the Applicant has made a case to warrant the issuance of the orders sought; whether counsel for the Respondents should recuse himself; and whether the Respondents' objection to the Application is merited.

a. Whether the Petition meets the requirement of Constitutional Petitions

13. The Respondents' contention is that the Application contravenes the provisions of Rules 4 & 10 of the Mutunga Rules which requires that Applications for enforcement of rights to be made through constitutional petitions. The Petitioner in his defence argues that the defect in his application by failure to serve notice to disclose, is curable under Article 159(2)(d) of *the Constitution*.

14. The said Rule 4 of the Mutunga Rules provides as follows:

> 4. Contravention of rights or fundamental freedoms
>
> (1) Where any right or fundamental freedom provided for in *the Constitution* is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.
>
> (2) In addition to a person acting in their own interest, court proceedings under sub rule (1) may be instituted by—
>
> (i) a person acting on behalf of another person who cannot act in their own name;
>
> (ii) a person acting as a member of, or in the interest of, a group or class of persons;
>
> (iii) a person acting in the public interest; or
>
> (iv) an association acting in the interest of one or more of its members.

15. Rule 10 of the said Rules states thus:

> **10. Form of petition**
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> (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.
>
> (2) The petition shall disclose the following—
>
> (a) the petitioner's name and address;
>
> (b) the facts relied upon;
>
> (c) the constitutional provision violated;
>
> (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
>
> (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
>
> (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
>
> (g) the relief sought by the petitioner.
>
> (3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
>
> (4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.

16. The Threshold of a constitutional petition was laid down in Anarita Karimi Njeru v Republic [1979] eKLR as follows: -

> " 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 a 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."

17. Having perused the Petition herein the court is satisfied that it meets the required threshold as set out in the Rules and the above case. This reasoning is further fortified by the holding in Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); Kenya Human Rights Commission & another (Amicus Curiae) [2012] KEHC 2480 (KLR) where the court state:

    45. We must point out that Anarita Karimi Njeru was decided under the old Constitution. The decision in that case must now be reconciled and be brought into consonance with the New Constitution. In our view, the present position with regard to the admissibility of petitions seeking to enforce *the Constitution* must begin with the provisions of article 159 on the exercise of judicial authority. Among other things, this article stipulates that:(d)justice shall be administered without undue regard to procedural technicalities; and(e)the purpose and principles of this Constitution shall be protected and promoted.

    46. We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a petition as stated raises issues which are so insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against respondents in a constitutional petition are fashioned in a way that gives proper notice to the respondents about the nature of the claims being made so that they can adequately prepare their case.

    47. While the present petition might not be the epitome of precise, comprehensive, or elegant drafting, our view is that the complaints raised by the petitioner are concrete enough to warrant substantive consideration by the court: The petitioner complains against the appointment of the Interested Party to the Commission; and thinks that the appointment, at a minimum, violates article 73 of *the Constitution* as far as integrity and suitability of the interested party for the appointment to the position is concerned. That much seems not to be in doubt. Indeed, both the respondents and the Interested Party have proceeded from this understanding. They have sought to explain at length the contours of article 73 and chapter six of *the Constitution* in response to the petitioner's allegations. If one needed evidence that these parties understood the claim facing them, it is to be found in their various papers filed in court and the oral submissions made in court. This being a constitutional issue of immense public importance and interest, we refuse to worship at the altar of formal fetishism on this issue and hold that the controversy at issue has been defined with reasonable precision to warrant a proper judicial determination on merits.

b. Whether the Applicant has made a case to warrant the issuance of the orders sought.

18. The Application herein seeks conservatory orders and order of production of documents in the Respondents' custody, which the Petitioner believes are important for his case.

On conservatory orders, I resonate with the reasoning of the Court in Feisal Hassan & 2 others v Public Service Board of Marsabit County & another [2016] KEHC 3640 (KLR), where it held that:

(11) The principles for consideration of application for conservatory orders in constitutional litigation are as follows:

a. Arguability of the applicant's case. Sometimes a prima facie with 'probability' or 'likelihood of success' case is sought but in my view it is an arguable case that is relevant because at the interlocutory stage, the court does not attempt a final determination of the dispute and the arguable case does not mean a case that must succeed.

b. Prejudice of the applicant.

c. Public Interest.

(12) In Nairobi Constitutional Petition No. 206 of 2016 Satinderjit Singh Matharu v. Armajit Singh Gahir & 5 Others this court said that:

"Despite varied nomenclatural expressions, the principles upon which the High Court considers application for conservatory orders in constitutional litigation are now settled by several decisions on the point, and may be condensed as follows:-

1. The applicant must demonstrate prima facie case, or an arguable case, for the grant of the relief sought.

2. The applicant must stand to suffer an irreparable harm, injury or loss not remediable by any other relief; and

3. As a remedy in constitutional litigation, the conservatory order calls for consideration of the public interest in the matter, and the balance of convenience between the petitioner's and the respondent's case must favour the grant of the conservatory order."

...

(23) There can be no proprietary interest in being selected for appointment to an advertised position of employment as there can be no guarantee that the candidate would be the successful applicant. Indeed, there is no proprietary interest in a public position; all there can be is the legitimate expectation that once a person applies for an advertised position there shall be due process in the consideration of the application and subsequent interview for the job for the qualified applicants.

...

Balance of convenience

(38) Public interest would require that the process of appointment of the officers of the 2nd Respondent be done in accordance with the law. As citizens enforcing that public interest, the petitioners despite their personal interest, have the every person's right and interest in the Rule of Law. There is, therefore, really, no divergence and need for any balancing of public interest versus the petitioners' personal interest.

(39) As pointed out by counsel for the petitioners, there is no guarantee that the recruitment body will stop the exercise if it finds the process to have been faulty. By the time the respondents discover the error of their ways, if any, and cancel the recruitment exercise the same costs sought to be avoided by opposing the stopping of the exercise

would then have escalated in the resultant commencement of the recruitment exercise from the start. There is merit in halting the exercise at this stage before more costs, both monetary and emotional, that will be incurred by both the recruiting body and the expectant candidates attending the interviewees.

[40] In the interest of efficient disposal of government business that may be affected by delayed recruitment of officers of the 2nd respondent by the 1s respondent, the court must direct that the petition be heard on priority basis on a date to be fixed in consultation with counsel for the parties.

(41) In the meantime, in the public interest for the promotion of the rule of law as regards the selection of candidates for appointment into public service of the County Government of Marsabit, a conservatory order will issue to hold the status quo in the matter of the process of appointment of the applicants to the advertised jobs in the County.

19. From the foregoing and the material placed before this Court, the court is satisfied that the Petitioner has demonstrated a prima facie case, that he stands to suffer prejudice and the subject matter being appointment to public office. The court is convinced that the matter the aspect of public interest warranting the examination of this Court. Consequently, the court is satisfied that the prayer for conservatory order is merited.

20. On production of documents, the Respondents' argument is that the Petitioner failed to act in compliance with section 8 of the *Access to Information Act*, by failing to tender a written request for information he seeks and using the Court to unfairly disadvantage them. Section 8 provides that:

8. Application for access

(1) 1) An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.

(2) Where an applicant is unable to make a written request for access to information in accordance with subsection (1) because of illiteracy or disability, the information officer shall take the necessary steps to ensure that the applicant makes a request in manner that meets their needs.

(3) The information officer shall reduce to writing, in a prescribed form the request made under subsection (2) and the information officer shall then furnish the applicant with a copy of the written request.

(4) A public entity may prescribe a form for making an application to access information, but any such form shall not be such as to unreasonably delay requests or place an undue burden upon applicants and no application may be rejected on the ground only that the applicant has not used the prescribed form.

21. The Petitioner's argument is that he wrote to the Respondents seeking reasons for his non-shortlisting but in vain. Having perused the annexures produced in support of the Petitioner's case, the court is satisfied that there exists a letter addressed to the Secretary Prosecution Services, ODPP dated 26th January 2026. Although there is no proof of service of the letter upon the Respondents, the letter it is not contested by the Respondents. However, it is important to examine whether the request fell within the ambit of section 8 and the prayers sought by this Application.

22. In answer, the court is guided by the holding in Nathwani & another v Cabinet Secretary, Ministry of Transport Infrastructure Housing & Urban Development & 4 others [2025] KEELC 7971 (KLR), where the court stated as follows:

> " 25. It is the applicant's case that the court needs to have the two documents to confirm that all the steps regarding the alienation of the suit land were followed before the title was registered in the names of the vendors from whom they acquired the land. Likewise, the applicants request the court to consider that these documents will help verify the authenticity of their claim concerning ownership of the suit property. The applicants are confident that the answer lies within these documents. These two reasons, evidently fall within the realm of evidence gathering by a party in order to proof its case.
>
> 26. The law is now settled that he who alleges must prove. In civil cases, the onus of proof rests with the claimant to prove his case on a balance of probabilities. Section 107(1) of the *Evidence Act* has codified this principle as follows:-
>
> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."
>
> 23. In this case, the responsibility to prove their claim before the court lies with the applicants. The court remains an independent umpire to adjudicate the matter between the two parties. It cannot accept the invitation to enter the arena of litigation, lest it be accused of aiding one party to the disadvantage of another in obtaining evidence, and to quote Lord Denning, liable to have its vision clouded by the dust of conflict. Additionally, the adversarial nature of our system does not require the court or respondents to assist the applicants in proving their case. Allowing the application in my view, invariably shifts the burden of proof from the applicants to the respondents, without any justifiable reason."

23. In averring that the letter produced by the Petitioner did not suffice as proper application for information and denial of the same to warrant the intervention of this Court, the court borrows from the holding in Coast Legal Aid & Resource Foundation (CLARF) v Coast Water Board Services & 2 others [2021] KEHC 7581 (KLR), where the court stated thus:

> 19. For purposes of actualizing Article 35 of *the Constitution*, the *Access to Information Act* 2016 (the Act) was enacted. Under Section 4 thereof, a right to access information held by a public body for purposes of exercising or protecting any right or fundamental freedom is secured. Further, Section 4(3) of the Act is categorical that access to information held by a public entity or a private body must be provided expeditiously at a reasonable cost.
>
> 20. Section 8 of the Act provides for procedure of accessing information in the following terms:
>
> (1) An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.
>
> (2) Where an applicant is unable to make a written request for access to information in accordance with subsection (1) because of illiteracy or disability, the information

officer shall take the necessary steps to ensure that the applicant makes a request in a manner that meets their needs.

(3) The information officer shall reduce to writing, in a prescribed form the request made under subsection (2) and the information officer shall then furnish the applicant with a copy of the written request."

21. In order to discharge his burden of proof, it was incumbent upon the Petitioner to produce the letter written on 21/7/2017 for the Court's perusal and consideration, to ascertain whether the said letter amounted to a proper request for information under Section 8 (1) of the Act. The 1st Respondent denies all the allegations made by the Petitioner including the one +requesting for documents.

24. The court is also alive to the Respondents' contention that disclosure of the information sought by the Petitioner would cause an unwarranted invasion into the privacy of other Applicants. The court foresees a denial of the information, it would be imprudent and in the absence of any evidence showing what constitutes private information and how privacy shall be invaded, the Respondents should not withhold any information sought in accordance with law. The court is guided by the limitations set out under section 6(1) of the *Access to Information Act*, which provides that:

6. Limitation of right of access to information

(1) Pursuant to Article 24 of *the Constitution*, the right of access to information under Article 35 of *the Constitution* shall be limited in respect of information whose disclosure is likely to—

(a) undermine the national security of Kenya;

(b) impede the due process of law;

(c) endanger the safety, health or life of any person;

(d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;

(e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;

(f) cause substantial harm to the ability of the Government to manage the economy of Kenya;

(g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;

(h) damage a public entity's position in any actual or contemplated legal proceedings; or

(i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.

c. Whether counsel for the Respondents should recuse himself.

25. The issue of counsel recusing himself was introduced by the Petitioner through his Supplementary Submissions without any formal application being placed before this Court.

It is trite law that submissions do not form part of pleadings or evidence and parties cannot sneak in new issues without granting their opponent an opportunity to respond. In Hunkar Trading Company Limited & another v Samuel Waweru Kiigi & another [2016] KEHC 8304 (KLR), the Court noted that:

> The source of the 'defamatory statements' written to the 2nd Plaintiff is as a result of the 'falling out' of the parties in their commercial engagement. The Plaint in my view does not disclose whether the said text messages were published to a third party. From reading the plaint, it seems the 2nd Defendant was only complaining to the 2nd Plaintiff and doesn't appear to have been broadcasting to the world at large but to the 2nd Plaintiff only. In the Plaintiffs' submissions it is asserted that the text messages were sent to a Mr. Aggrey Omondi. Submissions do not form part of pleadings and this should have come out clearly in the Plaint.

26. This position has been upheld in other cases such as Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, cited in East Africa Portland Cement, CFC Stanbic Limited & another v Peter Ividah Muliro [2019] eKLR as follows:

> "As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallize the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

27. Relatedly, the duty of a trial court, more so that of doing justice, is brought out under section 1B of the *Civil Procedure Act* as follows:

1B. Duty of Court

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology. Emphasis mine.

28. Rules of procedure were in order to assist the Courts in the performance of their mandate. That being the case, no court can abrogate the same on whatever basis as such conduct would lead to miscarriage of justice.

29. The guidelines under Order 18 Rule 2 of the Civil Procedure Rules provide that submissions are discretionary, by use of the word 'may'; which implies that a party may choose to file the submissions or not and consequently, failure would not be fatal to its case.

In this case, a failure by the Respondents to file submissions would not unfairly undermine their right to be heard.

Order 18 Rule 2 states;

"[Order 18, rule 2.] Statement and production of evidence.

2. Unless the court otherwise orders—

(1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence, and may then address the court generally on the case. The party beginning may then reply." (emphasis added)

30. Noting that this issue was raised by the submissions without any substantive application, there is no need to delve into its merits record.

On expunging submissions filed without leave, the position is fortified by the decision of the court in Kuria & 27 others v Moti & 12 others [2023] KEELC 20871 (KLR) are worth setting;

24. The Application was disposed of by way of written submissions. The Plaintiff's filed theirs dated 22/03/2023 on the same date. They filed another set of submissions dated 14/08/2023 on 15/08/2023. The Plaintiffs filed the latter submissions titled "Plaintiff's supplementary Submissions" without leave of the Court. This Courts therefore expunges them from the record.

31. In addition, in Pius Gitau v EWN (A minor through her mother and next friend MWK) [2021] KEHC 8318 (KLR) the court held that:

11. A perusal of the court record shows that the respondent filed a set of supplementary submissions on 23rd September 2020 after the appellant had filed his submissions on 21st September 2020. Besides apparently attempting to steal a march on the appellant, the respondent filed the supplementary submissions without leave of the court. It is my finding that the submissions were irregularly filed and were wrongly admitted into the court record. They are thus expunged from the court record.

Be that as it may, on 23rd March, 2026, the court directed all parties to file and exchange submissions in respect of the Preliminary Objection and the Application within 2 days and 4 days respectively and although the Petitioner styled its submissions as Supplementary, they are properly before the court.

d. Whether the Respondents' objection to the Application is merited

32. From the foregoing, it is discernible that the Application and the objection by the Respondents are partially successful.

33. As a consequence, the following orders commend themselves:

i. The Application succeeds to the extent that a conservatory order is hereby issued staying the recruitment process and restraining the Respondents jointly and severally from filling the vacancies in the said advertised positions of Senior Deputy Director of Public Prosecutions (DPP2) and Deputy Director of Public Prosecutions (DPP3), (V/NO.17/2025 and 18/2025) pending the hearing and determination of the Petition.

ii. The Preliminary objection succeeds in so far as the issue on discovery is concerned.

iii. The Petitioner is at liberty to apply for access to information in the Respondents' custody and the Respondents shall not unduly withhold information from the Petitioner.

iv. Parties are hereby directed to move expeditiously file their submissions in the matter and each party shall have seven (7) days to so do, from the date of this ruling.

v. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI

ON THIS 20TH DAY OF APRIL, 2026

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE