

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS

PETITION NO. E009 OF 2025

IN THE MATTER OF ARTICLES 1,2,3,6,10,20,21,22,23,27,73,179,183, 185 & 196 OF THE  
CONSTITUTION

-AND-

IN THE MATTER OF SECTION 4 & 5 OF THE OFFICE OF COUNTY ATTORNEY ACT

-AND-

CONTRAVENTION OF ARTICLE 35 OF THE CONSTITUTION

IN THE MATTER OF CONTRAVENTION OF SECTIONS  
30,31,58,59,63,64,65,66,67,85,87,96 &97 OF THE COUNTY GOVERNMENT ACT

-BETWEEN-

FRANCIS MUSILI KAUTA .....PETITIONER

AND

AGNES KAWILA MULEWA .....1ST RESPONDENT

TIMOTHY KYALO MUANGE.....2ND RESPONDENT

CHRISTOPHER OKUMU OMBUNYA. ....3RD RESPONDENT

COUNTY GOVERNMENT OF KITUI PUBLIC SERVICE BOARD.....4<sup>TH</sup> RESPONDENT

PUBLIC SERVICE BOARD .....5<sup>TH</sup> RESPONDENT

THE GOVERNOR, KITUI COUNTY .....6TH RESPONDENT

CORAM

Before Lady Justice Jemimah Keli

C/A Otieno

## RULING

1. The petitioner filed a petition dated 8<sup>th</sup> August 2025 seeking for the following orders
  - 1) A DECLARATION that the 5th Respondent acted in contravention of the Constitution Specifically Article 10 and as such the entire process was unfair and irregular.
  - 2) A DECLARATION that the selection Process was in contravenes Article 27 of the Constitution of Kenya as majority of other suitable candidates were locked out in a systematic planned discrimination.
  - 3) CONSERVATORY ORDERS restraining the 1ST ,2ND & 3RD Respondents from acting as and/or discharging the duties and functions of County Secretary, County Attorney and County Public Service Board Respectively and/or holding such position in manner whatsoever.
  - 4) A PERMANENT INJUNCTION barring the 6th Respondent from forwarding the names of the 1st 2nd and 3rd Respondents for Vetting by the 4TH Respondent.
  - 5) A MANDATORY INJUNCTION directing repeat of the entire process in a fair, transparent and open manner.
  - 6) Cost of this suit and interests thereon.
  - 7) Any other order that this Honourable court deems fit and just in the circumstances.
  
2. The petitioner in addition to the petition filed a Notice of Motion dated 8<sup>th</sup> August 2025 seeking for the following orders-

a. Spent

- b. THAT pending the hearing and determination of this Application inter-partes or until further orders of this Honourable Court, the Honourable Court be and is hereby pleased to issue an appropriate temporary Conservatory order staying, restraining, and injunction the recruitment of a County Secretary, County Attorney and Secretary Public Service Board and all consequential actions thereon.
  - c. THAT pending the hearing and determination of the Constitutional Petition, or until further orders of this Honourable Court, the Honourable Court be and is hereby pleased to issue an appropriate temporary Conservatory order staying, restraining and injunction the recruitment of County Secretary, County Attorney and Secretary Public Service Board.
  - d. THAT an urgent date, and such further orders be set for the expeditious interpartes hearing of the Petition.
  - e. THAT this Honourable Court be pleased to grant such other appropriate relief as it may deem fit.
3. In response the respondent Notice of Preliminary Objection dated 28th August 2025 seeking for the suit to be struck with costs, in limine, on the following grounds;- (i) The Honourable Court is bereft of Jurisdiction to entertain the Petition since there exists no employment or labour relationship between the Petitioner and the Respondents capable of adjudication within the meaning of Article 162(2) of the Constitution and Section 12 of the Employment and Labour Relations Court Act. (ii) The Petition is misconceived as it does not raise any question of interpretation and application of Article 41 of the Constitution to necessitate the invocation of the Honourable Court's jurisdiction. 1 (iii) The Petition herein

contravenes the cardinal and prudential twin doctrines of ripeness and constitutional avoidance and as there is since an established adequate statutory mechanism to address the Petitioner's alleged grievance under the provisions of Sections 6 & 7 of the Public Appointments (County Assemblies Approval) Act. (iv) The Petition is utterly ambiguous and speculative as it does not disclose with specificity the alleged constitutional contraventions and the precise manner of the alleged violations.

4. The petitioner filed Grounds of Opposition to the Preliminary Objection on the following grounds:
  - a. This Honourable Court has jurisdiction under Article 162(2)(a) of the Constitution and Section 12(1)(a), (b), (c) & (f) of the Employment and Labour Relations Court Act to hear and determine all disputes relating to employment, labour relations, public service appointments, and matters incidental thereto.
  - b. The Petition raises questions of public service appointments, recruitment processes, and adherence to constitutional principles, which fall squarely within the Court's mandate. Jurisdiction of this Court is not confined to employer-employee disputes but extends to all disputes concerning recruitment, appointment, promotion, and removal from public office. See *USIU v Attorney General* [2012] eKLR and *Judicial Service Commission v Gladys Boss Shollei* [2014] eKLR, where the Court held that the ELRC has jurisdiction to determine constitutional petitions on appointments in public service.
  - c. The Petition invokes Articles 10, 27, 73, 232 of the Constitution, which concern values and principles of public service, leadership, equality, non-discrimination, integrity, accountability, and fair competition in appointments. These provisions are enforceable

under Articles 22 and 258 of the Constitution, which permit any person to institute proceedings to protect and enforce the Constitution, including in the public interest.

- d. The Petition is not limited to Article 41 (labour rights) but extends to broader constitutional violations in public service recruitment. The Respondents' contention that absence of Article 41 issues denies jurisdiction is misconceived.
  - e. The Petition concerns completed appointments in public office, not pending approvals under the Public Appointments (County Assemblies Approval) Act. Once appointments are concluded, oversight rests with the courts to enforce constitutional compliance. Statutory mechanisms cannot oust the Court's constitutional jurisdiction.
  - f. The Petition clearly pleads specific provisions of the Constitution and statutes alleged to have been contravened, and the factual basis for the grievances. The requirement of precision in constitutional pleadings has evolved, and courts have held that substantial justice should not be defeated by undue technicality.
  - g. The Preliminary Objection raises contested factual issues, such as whether the Petition discloses violations of the Constitution, which cannot be determined purely as points of law. Accordingly, the Preliminary Objection is incompetent and an abuse of court process.
5. The Notice of Preliminary Objection was canvassed first by way of written submissions. Both parties complied.

### Decision

#### Whether the court has jurisdiction in the first instance to determine the petition

6. The cause of action is the recruitment of the county secretary, the county attorney and the secretary of the Public Service Board for Machakos County. The preliminary objection is to effect that the jurisdiction to determine the dispute lies with the Public Service Commission under section 77 of the County Governments Act To Wit-*‘Appeals to the Public Service Commission*

*(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;’*

7. The Petitioner was of the position that once appointments are concluded, oversight rests with the courts to enforce constitutional compliance. That Statutory mechanisms cannot oust the Court's constitutional jurisdiction. The court found the position by the petitioner mistaken as the jurisdiction of the Public Service Commission to determine disputes on recruitment is hinged under the Constitution. Section 85 of the Public Service Commission states- *‘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;’* The ingredients of a Constitutional Petition was clearly formulated in the case of *Anarita Karimi Njeru v Republic (1979) eKLR* where it was partly stated 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.’’ The lack of Pleading with precision is not a technical issue for cure by Article 159 of the Constitution. The precision would justify the non-exhaustion of remedy under section 77 of the County Governments Act. For the lack of precision in pleadings as to the constitutional violations, the court holds that the dispute is one of constitutional avoidance and ought to be heard and determined under section 77 of the County Governments Act. The dispute is on the recruitment of officers under the Machakos County government, of which Article 234 of the Constitution states is to be handled by the Public Service Commission. Article 234 provides - ‘234. *Functions and powers of the Public Service Commission*

*(1)The functions and powers of the Commission are as set out in this Article.(2)The Commission shall—(i)hear and determine appeals in respect of county governments’ public service; ’*

8. The court upheld the position in the case of National Assembly vs James Njenga Karume Civil Application No.92 of 1992 the court held as follows; “In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of parliament, the procedure should be strictly followed...” and respected the constitutional mandate of PSC to handle any dispute related to recruitment at the county governments. The court invokes the provisions of Rule 56(5)(c) of its rules that –‘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.’ and orders the petitioner to first exhaust the process under section 77 of the County Government Act as the cause of action is recruitment which

falls under jurisdiction of the Public Service Commission. The petition is stayed pending the outcome of the alternative dispute resolution process before the Commission.

9. It is so Ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS THIS 8<sup>TH</sup> DAY OF MAY, 2026.

JEMIMAH KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Applicant : -absent

Respondent: Muasya h/b Musyoki