**Benjamin v General & 55 others (Civil Appeal E722 of 2023)**
**[2024] KECA 1672 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1672 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL E722 OF 2023**

**DK MUSINGA, MSA MAKHANDIA & S OLE KANTAI, JJA**

**NOVEMBER 22, 2024**

**BETWEEN**

**DR. MAGARE GIKENYI J. BENJAMIN ..... APPELLANT**

**AND**

**HON. ATTORNEY GENERAL ..... 1ST RESPONDENT**

**PUBLIC SERVICE COMMISSION ..... 2ND RESPONDENT**

**NATIONAL ASSEMBLY ..... 3RD RESPONDENT**

**TERESIA MBAIKA MALOKWE ..... 4TH RESPONDENT**

**JULIUS KIPLANGAT KORIR ..... 5TH RESPONDENT**

**SALOME MUHIA-BEACCO ..... 6TH RESPONDENT**

**AURELIA CHEPKIRUI RONO ..... 7TH RESPONDENT**

**RAYMOND VICKY OJWANG' OMOLLO ..... 8TH RESPONDENT**

**MARY MUTHONI MURIUKI ..... 9TH RESPONDENT**

**PROF. JULIUS KIBET BITOK ..... 10TH RESPONDENT**

**DR. CHRIS K. KIPTOO ..... 11TH RESPONDENT**

**JAMES MUHATI BUYEKANE ..... 12TH RESPONDENT**

**PATRICK MARIRU ..... 13TH RESPONDENT**

**DR. ABRAHAM KORIR SING'OEI ..... 14TH RESPONDENT**

**ROSELINE KATHURE NJOGU ..... 15TH RESPONDENT**

**AMOS NJOROGE GATHECHA ..... 16TH RESPONDENT**

**VERONICA MUENI NDUVA ..... 17TH RESPONDENT**

**ENG. JOSEPH MUNGAI MBUGUA ..... 18TH RESPONDENT**

**MOHAMED ABDULKARIM DAGHAR ..... 19TH RESPONDENT**

**KIPROTICH KORIR NIXON ..... 20TH RESPONDENT**

**CHARLES HINGA MWAURA ..... 21ST RESPONDENT**

**JOEL PSIMATWA LOREMOI ARUMONYANG ..... 22ND RESPONDENT**

**PROF. EDWARD NAMISIKO WASWA KISIANGANI ..... 23RD RESPONDENT**

**ENG. JOHN KIPCHUMBA TANUI ..... 24TH RESPONDENT**

**ENG. PETER KIPLAGAT TUM ..... 25TH RESPONDENT**

**ANN NJOKI WANG'OMBE ..... 26TH RESPONDENT**

**DR. RICHARD BELIO KIPSANG ..... 27TH RESPONDENT**

**DR. ESTHER THAARA MUORIA ..... 28TH RESPONDENT**

**BEATRICE MUGANDA INYANGALA ..... 29TH RESPONDENT**

**PHILLIP KELLO HARSAMA ..... 30TH RESPONDENT**

**HARRY KIMTAI KACHUWAI ..... 31ST RESPONDENT**

**ALFRED OMBUDO K'OMBUNDO ..... 32ND RESPONDENT**

**ABUBAKAR HASSAN ABUBAKAR ..... 33RD RESPONDENT**

**DR. EUSEBIUS JUMA MUKHWANA ..... 34TH RESPONDENT**

**PATRICK KIBURI KILEMI ..... 35TH RESPONDENT**

**SUSAN AUMA MANGENI ..... 36TH RESPONDENT**

**ISMAIL MAALIM MADEY ..... 37TH RESPONDENT**

**JONATHAN MWANGANGI MUEKE ..... 38TH RESPONDENT**

**ENG.FESTUS KIPKOECH NGENO ..... 39TH RESPONDENT**

**EPHANTUS KIMOTHO KIMANI ..... 40TH RESPONDENT**

**JOHN LEKAKENY OLOLTUAA ..... 41ST RESPONDENT**

**MUSEIYA SILVIA KIHORO ..... 42ND RESPONDENT**

**UMMI MOHAMED BASHIR ..... 43RD RESPONDENT**

**DR. PAUL KIPRONOH RONOH ..... 44TH RESPONDENT**

**GITONGA MUKETHA MUGAMBI ..... 45TH RESPONDENT**

**ALEX KAMAU WACHIRA ..... 46TH RESPONDENT**

**MOHAMED LIBAN ..... 47TH RESPONDENT**

**GEOFFREY EYANAE KAITUKO ..... 48TH RESPONDENT**

**MOGOSI JOSEPH MOTARI ..... 49TH RESPONDENT**

**ABDI DUBAT FIDHOW ..... 50TH RESPONDENT**

**IDRIS SALIM DOGOTA ..... 51ST RESPONDENT**

**ELIJAH GITHUMBU MWANGI ..... 52ND RESPONDENT**

**BETSY MUTHONI NJAGI ..... 53RD RESPONDENT**

**SHADRACK MWANGOLO MWADIME ..... 54TH RESPONDENT**

**LAW SOCIETY OF KENYA ..... 55TH RESPONDENT**

**FREDRICK BIKERI ..... 56TH RESPONDENT**

***(Being an appeal arising from the Ruling and order of the Employment and Labour Relations Court of Kenya at Nairobi (Byram Ongaya, J.) dated 27th April 2023 in ELRC PET E207 of 2022)***

## JUDGMENT

1. By a Petition dated 5th December 2022 filed in the Employment and Labour Relations Court (ELRC), the appellant challenged the appointment of 1st to 51st respondents by the President of the Republic of Kenya as Principal Secretaries in various ministries, and the 52nd respondent to the position of Principal Administrative Secretary/Accounting Officer, National Police Service. The appointments were made on 1st December 2022. The appellant argued that the appointments were unconstitutional in that more than two thirds of the appointees were of one gender; people with disabilities were not included; the appointments did not reflect ethnic, cultural and regional diversity contrary to Articles 10, 73, 75 and 232 of *the Constitution*, among others.

2. Prior to their appointment, the President had nominated the said persons and on 2nd November 2022 forwarded their names to the National Assembly for its approval as required under Article 155(3) of *the Constitution*, and they were approved. With regard to the appointment of the 52nd respondent, the appellant argued that *the Constitution* does not provide for the position of Principal Administrative Secretary.

3. On the 17th January 2023 the 3rd respondent filed a preliminary objection to the petition on grounds that:

    a. The appellant had failed, refused and or ignored the statutory mechanism for challenging constitutional nominations under section 6(9) and (7) of the Public Appointments (Parliamentary Approval) Act, 2011, and therefore lacks locus standi to institute the petition.

    b. The appellant had instituted a similar petition, Nairobi ELRC No. W189 of 2022, that was struck out for want of exhaustion of the aforesaid statutory mechanism.

    c. The ELRC lacks jurisdiction to determine the petition because the appointment and removal from the position of Principal Secretaries is not a labour and employment issue; and the court's jurisdiction on constitutional issues is limited to issues that arise in the context of disputes on employment and labour relations.

4. The 2nd respondent raised more or less the same preliminary objection as the 3rd respondent. The 3rd respondent also filed an application seeking stay of further proceedings of the petition pending hearing and determination of an intended appeal from the ruling of the court in Nairobi ELRC Constitutional

Petition No. E186 of 2022 as consolidated with Nairobi ELRC Constitutional Petitions Nos. E189 of 2022 and E192 of 2022 that was delivered on 29th November 2022.

5. The application and the preliminary objections were heard and determined together. The trial court dismissed the application for stay of proceedings, but upheld the first limb of the preliminary objection to the effect that the appellant failed to invoke and exhaust the procedure under the Public Appointments (Parliamentary Approval) *Act No. 33 of 2011*, and on that account struck out the petition, except as related to the 52nd respondent, whose appointment the court found was not amenable to challenge under the alternative dispute resolution procedure as that of the nominees to the office of the Principal Secretary.

6. Being aggrieved by that decision, the appellant preferred this appeal.

   The memorandum of appeal raises 15 grounds. In summary and in the main, the appellant faulted the trial judge for; failing to consider the applicable law; and holding that the appellant could not challenge the constitutionality of the appointments vide the petition, having failed to present his objections before Parliament during the vetting of the nominees as required under the *Public Appointments (Parliamentary Approval) Act* 33 of 2011. He urged us to allow the appeal and make various declarations as sought in the memorandum of appeal.

7. The appellant also urged this Court to pronounce itself on the question: "Between the High Court and the ELRC, which court has jurisdiction to determine the constitutionality or otherwise of executive appointments of Principal Secretary"?

8. When the appeal came up for hearing, the appellant represented himself; Mr. Odukenya appeared for the 1st respondent; Mr. Ogosso for the 2nd respondent; and Mr. Atingo held brief for Ms. Khadambi for the 3rd respondent. All the other respondents were not represented but a hearing notice had been served upon each of them on 25th April 2024.

9. The appellant highlighted his written submissions dated 10th January 2024. Regarding the striking out of the petition for the appellant's failure to challenge the nominations by filing a memorandum before the National Assembly, the appellant submitted that the invocation of non-justiciability principle was not proper. This is because the petition was filed after the appointments had been made; the issues that were raised for determination were purely constitutional in nature; and there was no other forum for determining them apart from the court. Therefore, the petition should have been heard and determined on its merits, the appellant submitted.

10. The appellant added that the trial court was not being called upon to decide on an issue involving exercise of discretionary power by the Executive or the Legislature, in which case the doctrine of non-justiciability would have arisen, as was held in Anthony Miano & others v Attorney General & Others [2021] eKLR. Similarly, the doctrine of constitutional avoidance as pronounced by the Supreme Court in Communications Commission of Kenya & 5 Others v Royal Media Services Ltd. & 5 Others [2014] eKLR, was not applicable because what was being raised were purely constitutional issues, the appellant argued.

11. The appellant further submitted that a person can lawfully challenge the outcome of constitutional appointments in court even if he did not challenge the process that led to the appointments. He argued that Article 3 of *the Constitution* stipulates that every person has an obligation to respect, uphold and defend *the Constitution*; that Articles 22 and 258 of *the Constitution* grants any person liberty to challenge the constitutionality of public appointments at any time; and that there are no mandatory pre-conditions that bar any person from filing a petition to challenge any unconstitutional appointment. He urged us to interpret *the Constitution* in a manner that promotes its purposes, values

and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, and that contributes to good governance as required under Article 259 of *the Constitution*. He cited the Institute of Social Accountability & another v National Assembly & 4 Others [2015] eKLR, to buttress that submission.

12. Related to the above submission, the appellant further submitted that even if the 4th to 54th respondents had taken up their positions, nothing prevented anyone from challenging the constitutionality of their appointment.

13. Mr. Odukenya the 1st respondent's learned counsel, in his written submissions addressed two main issues: whether the appellant exhausted the dispute resolution mechanism provided for in the *Public Appointments (Parliamentary Approval) Act*, 2011; and whether the trial court applied the doctrine of justiciability correctly.

14. In respect of the first issue, counsel submitted that the appellant did not comply with the provisions of section 6(9) of the *Public Appointments (Parliamentary Approval) Act*, 2011 before he moved to court and, therefore, he violated the doctrine of exhaustion. This Court's decision in Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 others [2015] eKLR was cited in support of that submission.

15. Regarding the doctrines of justiciability and separation of powers, Mr. Odukenya argued that appointment of Principal Secretaries falls within the mandate of the Executive and the National Assembly and, therefore, the learned judge was right in exercising restraint not to interfere with the mandate of other arms of the government. He referred us to the Court's decision in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR. He urged the Court to dismiss the appeal.

16. Mr. Ogosso, learned counsel for the 2nd respondent, equally opposed the appeal and drew our attention to other matters that are pending before the ELRC regarding the appointment of Principal Secretaries, which, according to him, can be used to address any other relevant constitutional issue regarding their appointment.

17. Mr. Atingo reiterated that the appellant did not exhaust the available alternative dispute resolution avenues as prescribed in Article 119 of *the Constitution*, as well as Section 6(9) of the *Public Appointments (Parliamentary Approval) Act*, 2011. Failure to do so, counsel argued, divested the court of jurisdiction to hear and determine his grievances, because a determination of the dispute would have amounted to the court usurping the constitutional and statutory mandate of the 3rd respondent to vet presidential nominees.

18. Counsel cited, inter alia, the Supreme Court decision in Sammy Ndung'u Waity v Independent Electoral & Boundaries Commission & 3 Others [2019] eKLR, where the Court held:

> "63. Where *the Constitution* or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing a complainant the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice. We are fortified in this regard, by the persuasive

authority by the Court of Appeal, in Geoffrey Muthinja Kabiru & 2 others; [2015] eKLR; wherein the Appellate Court observed:

> "It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts."

Counsel urged us to dismiss the appeal.

19. In a brief rejoinder, the appellant told us that since the Principal Secretaries had already been sworn in and assumed their respective positions, the only option available to challenge their appointment was by way of filing the constitutional petition. He submitted that there is no law that prohibits any one from challenging an unconstitutional process or act at any time.

20. We have considered the submissions made by all the parties. In our view, the two main issues for our determination in this appeal are whether the ELRC erred in law in dismissing the petition because the appellant failed to invoke and exhaust the dispute resolution mechanism provided for in the *Public Appointments (Parliamentary Approval) Act*, 2011; and whether the ELRC applied the doctrine of justiciability correctly.

21. In determining the first issue, the starting point is the preamble to the *Public Appointments (Parliamentary Approval) Act*, 2011. Its objective is 'to provide for procedures for parliamentary approval of constitutional and statutory appointments and for connected purposes'. The Act sets out an elaborate procedure that has to be adhered to before Parliament can approve the appointment of any person who has been proposed or nominated for appointment to a public office.

22. Section 6(9) of the Acts stipulates as follows:

> "6. Approval hearing
>
> .....
>
> (9) Any person may, prior to the approval hearing, and by written statement on oath, provide the Clerk with evidence contesting the suitability of a candidate to hold the office to which the candidate has been nominated."

23. Among the issues that Parliament is required to take into consideration are: the procedure used to arrive at the nominee; any constitutional or statutory requirements relating to the office in question; and the suitability of the nominee for the proposed appointment.

24. It is not in dispute that the appellant did not comply with the statutory procedure of contesting the suitability of the proposed persons.

25. In its impugned ruling, the trial court, having analysed various relevant authorities on the issue, delivered itself as follows: -

> "10. The Court therefore returns that the preliminary objection would succeed on account of want of exhaustion of the prescribed statutory procedure under the *Public Appointments (Parliamentary Approval) Act* No. 33 of 2011. By that finding alone, the petition would collapse as augmented with the

cited doctrine of justiciability. While making that finding the Court has considered the mixed constitutional, statutory, and legitimate political, social, or economic considerations surrounding the challenged appointment of the Principal Secretaries, the interested parties herein together with the guiding values and principles in Articles 10, 232, and Chapter 6 of *the Constitution*. The Court considers that the failure to invoke and follow the procedure prescribed in the Act was such a serious bar precluding the petitioner from challenging the appointments as made and already implemented. The Court considers that the provisions in the Act are such that a challenge to the appointments must be prompt and flow as anticipated in the Act. The Court further holds that it enjoys jurisdiction for judicial review on merits of the decisions made by the respondents in that regard such as on account of the doctrine of unreasonableness such as is envisaged in Article 47 of *the Constitution*, on account of the principle of illegality, on account of constitutionality and, on account of established manifest injustice. However, looking at the grievances urged by the petitioner, they all squarely fall within the purposes for which the dispute and challenge procedure under the *Public Appointments (Parliamentary Approval) Act* No. 33 of 2011 was enacted. Failure to promptly invoke that procedure amounts to a bar especially that the interested parties have moved to take up the appointments in circumstances that their recruitment procedure and subsequent appointment appear not to have been challenged at all (looking at the facts and material before the Court) and as per the prescribed statutory provisions. The Court further observes that the findings to not apply to the petition as far as it relates to the 52nd interested party and whose recruitment procedures and subsequent appointment was not said and shown to be subject to the provisions of the Act."

26. Challenging that holding, the appellant argued that "the Court delved into non-applicable technicalities contrary to the tenets of the rule of law and constitutionalism ..." We do not agree. The learned judge rightly interpreted the law, and faithfully adhered to binding decisions of this Court and the Supreme Court, among them, Sammy Ndung'u Waity v Independent Electoral & Boundaries Commission & 3 Others (Supra).

27. In Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others [2019] eKLR, the Supreme Court held as follows:

"[115] In our considered view, the purpose of the RBA Act as a whole would be best served by reading the words as imperative terms that require, in the absence of any contrary laws, a strict interpretation of its provisions and that the administrative resolution mechanisms and the appellate processes by the Retirement Benefits Appeal Tribunal is exhausted in the first instance before recourse can be taken to the superior courts. This position was well set out in the case of Tom Kusienya (supra), in which the High Court expressly recognized the dispute resolution mechanism under the RBA Act in stating the following.

"..... the purpose of the Act as a whole and the specific dispute resolution provisions would be best served by reading the word "may" as an imperative term that requires that the appeal mechanism of the Tribunal is exhausted before recourse can be had to the High Court."

It went on to state:

> " the Court must exercise restraint in exercising its jurisdiction under Article 165. Where there exist alternative methods of dispute resolution, the Court must exercise deference to the bodies statutorily mandated to deal with specific disputes in the first instance."

(116) The foregoing verdict also finds support in an adage principle in administrative law of "Exhaustion of Administrative Remedies" and from the jurisprudence emanating from this Court and the lower Courts, which has been restated with notoriety to the effect that, where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their jurisdiction conferred by *the Constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance. See Alphonse Mwangemi Munga & 10 Others v African Safari Club Ltd [2008] eKLR Narok County Council case v Trans Mara County Council [2000] 1 EA 161 Kones vs Republic & Another ex parte Kimani wa Nyoike & 4 Others (2008)3 KLR (EP); Speaker of the National Assembly vs Njenga Karume (2008)1 KLR (EP) 425, Francis Mutuku vs Wiper Democratic Movement - Kenya & Others [2015] eKLR David Ochieng Babu v Lorna Achieng Ochieng & 2 others [2017] eKLR among other cases not referred to. The Court of Appeal in Geoffrey Muthinja & Another Vs Emanuel Muguna Henry & 1756 Others [2015] eKLR held that:

> "We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanism in place for resolution outside of courts. This accords with Article 159 of *the constitution* which commands Courts to encourage alternative means of dispute resolution."

28. We uphold the learned judge's holding and dismiss this ground of appeal.

29. Turning to the second ground, that is, whether the learned judge applied the doctrine of justiciability correctly, a close reading of the impugned ruling reveals that the main reason for striking out the appellant's petition was the failure to comply with the provisions of section 6(9) of the *Public Appointments (Parliamentary Approval) Act*, and not because the matter was not justiciable. See paragraph 10 of the impugned ruling that we have reproduced hereabove.

30. However, at paragraph *13*, the trial court held:

> "13. The Court has found that the preliminary objection will succeed on account of want of invoking and exhausting the statutory provisions as buttressed with the doctrine of justiciability that the Parliamentary forum was designed to deal with the kind of disputes raised in the instant petition. In that regard the petition is amenable to being struck out. The Court has considered the parties' respective margins of success as well as the public interest involved and returns that each party to bear own costs of the petition. In that regard the petition is amenable to being struck out."

31. We agree with the appellant that the concept of non-justiciability is comprised of three doctrines – political question doctrine, the constitutional avoidance doctrine and the ripeness doctrine. See Anthony Miano & Others v Attorney General & Others (Supra).

However, none of these doctrines would bar a court from interrogating whether the Executive or the Legislature violated *the Constitution* in the nomination and approval of the persons concerned. But the Court must be moved in accordance with the prescribed statutory procedure. The learned judge was alive to that fact, and that is why he stated that: "The Court further holds that it enjoys jurisdiction for judicial review on merits of the decisions made by the respondents in that regard such as on account of the doctrine of unreasonableness such as envisaged in Article 47 of the constitution, on account of the principles of illegality, on account of constitutionality, and on account of established manifest justice." (Emphasis supplied).

32. Mr. Ogosso, learned counsel for the 2nd respondent, told us that there are live matters before the ELRC relating to constitutionality of appointment of Principal Secretaries, one of them being Petition No. E513 of 2022. That was not disputed by any of the other counsel. We must therefore exercise restraint in our determination of this appeal, which arose from a ruling on a preliminary issue, so that we do not prejudice any of the parties in the pending matters.

33. Lastly, although the appellant urged us to determine whether it is the High Court or the ELRC that has jurisdiction to determine cases regarding constitutionality of appointments of Principal Secretaries, we shall not do so because the learned judge in his impugned ruling stated:

> "On the jurisdiction question, the Court as well finds for the petitioners (now appellant) that it was adequately addressed by Nduma, J. in the ruling delivered in the consolidated petitions and now said to be subject of appeal as preferred by the applicant herein against the ruling."

In the circumstances, it would be improper for us to pronounce ourselves on the issue as that may embarrass the bench that is seized of the appeal.

34. All in all, save what we have stated herein regarding the concept of justiciability, we find this appeal unmeritorious and proceed to dismiss it. Each party shall bear its own costs of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2024.**

**D. K. MUSINGA, (P.)**

**.....**

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

**.....**

**JUDGE OF APPEAL**

**S. ole KANTAI**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**