



REPUBLIC OF KENYA



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Consumers Federation of Kenya (COFEK) (Suing Through Ephraim Kanake, Stephen Mutoro and Henry Ochieng) v Cabinet Secretary Ministry of Agriculture & Livestock Development & 3 others; Ethics and Anti-Corruption Commission & 9 others (Interested Parties) (Petition E126 of 2024) [2025] KEELRC 208 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 208 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E126 OF 2024

HS WASILWA, J

JANUARY 30, 2025

**IN THE MATTER OF: ARTICLES 3(1), 2(4), 10, 27(4), 35,46,
73,232 & 258(1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: CONTRAVENTION OF ARTICLE
232(1)G OF THE CONSTITUTION OF KENYA ,2010**

AND

**IN THE MATTER OF: CONTRAVENTION OF
ARTICLE 73 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: SECTIONS 4,5,6,9 & 10 OF THE
AGRICULTURE AND FOOD AUTHORITY ACT, CHAPTER 317 LAWS OF KENYA**

AND

**IN THE MATTER OF: CONTRAVENTION AND VIOLATION
OF SECTION 5(5)A OF THE AGRICULTURE AND FOOD
AUTHORITY ACT, CHAPTER 317 LAWS OF KENYA**

AND

**IN THE MATTER OF: THE LEADERSHIP AND INTEGRITY
ACT, CA 185 LAWS OF KENYA**

AND

**IN THE MATTER OF: THE CONSUMER PROTECTION ACT
,2012**



AND
IN THE MATTER OF: THE EMPLOYMENT AND LABOUR
RELATIONS COURT ACT
AND
IN THE MATTER OF: IMPUGNED GAZETTE NOTICE
NO. 3665 OF 22ND
MARCH 2023
AND
IN THE MATTER OF: IMPUGNED GAZETTE NOTICE
NO. 3667 OF 16TH MARCH 2023
AND
IN THE MATTER OF: APPOINTMENT OF THE
UNLAWFUL AND UNPROCEDURAL APPOINTMENT OF THE CHAIRPERSON
AND DIRECTORS OF THE AGRICULTURE & FOOD AUTHORITY
AND
IN THE MATTER OF: FAILURE BY THE DIRECTORS OF
THE AGRICULTURE AND FOOD AUTHORITY TO COMPLY WITH
CHAPTER SIX OF THE CONSTITUTION IN THEIR ACTIONS

BETWEEN

CONSUMERS FEDERATION OF KENYA (COFEK) (SUING
THROUGH EPHRAIM KANAKE, STEPHEN MUTORO AND HENRY
OCHIENG) APPLICANT

AND

CABINET SECRETARY MINISTRY OF AGRICULTURE & LIVESTOCK
DEVELOPMENT 1ST RESPONDENT
AGRICULTURE AND FOOD AUTHORITY 2ND RESPONDENT
THE HON. ATTORNEY GENERAL 3RD RESPONDENT
PUBLIC SERVICE COMMISSION 4TH RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY
KATIBA INSTITUTE INTERESTED PARTY
CORNELLY SEREM INTERESTED PARTY
DANIEL SILA KITIVO INTERESTED PARTY
LUCY NJINE MAINA INTERESTED PARTY



PETERSON K. MUTHATHAI INTERESTED PARTY
WACHIRA KAGUONGO INTERESTED PARTY
SAMUEL ONYANGO ONG'OW INTERESTED PARTY
ROSEBELLA JEPCHIRCHIR LANGAT (DR) INTERESTED PARTY
CHRISTOPHER KINOTI NKANGI INTERESTED PARTY

JUDGMENT

1. The matter before the court arises from a Chamber Summons application dated 12th August 2024, sworn by Tali Israel Tali and Stephen Mutoro. The Applicant seeks the matter to be certified as urgent and heard during the Court's August recess, citing serious violations of Constitutional and Statutory provisions.
2. The application challenges the appointment of the 3rd to 10th Interested Parties as chairperson and directors of the Agriculture and Food Authority (AFA) through Gazette Notices No. 3665 of 22nd March 2023 and Gazette Notice No. 3667 of 16th March 2023. The Applicant contends that these appointments were made in contravention of Article 232(1)(g) of *the Constitution*, which requires fair, transparent, and competitive recruitment processes. The appointments also violate Sections 5(4)(b) and 5(5)(a) of the *Agriculture and Food Authority Act*, which similarly mandate competitive and merit-based appointments.
3. The Applicants contended that no public advertisements, interviews, or consultations were conducted before the appointments, contrary to constitutional and statutory requirements. They further alleged that the 3rd to 10th Interested Parties had unlawfully assumed office and continued to execute critical functions, draw remuneration, and make decisions detrimental to public interest and the agriculture sector, in violation of Chapter Six of *the Constitution* on leadership and integrity.
4. The Applicants relied on *Katiba Institute & Another vs Attorney General & Another* (2020) and *Katiba Institute & Another vs Attorney General & Another & Julius Waweru Karangi & 128 Others* (2016) to support their position that appointments made without a fair competitive process are unconstitutional. They further argued that the AFA Board is improperly constituted due to the lack of consumer representation, contrary to Section 94 of the *Consumer Protection Act*, which mandates consumer representation on regulatory bodies.
5. The Applicants submitted that unless urgent orders were issued, the actions of the 3rd to 10th Interested Parties would continue to harm public interest, undermine the rule of law, and jeopardize food security and the agriculture sector. They emphasized the risk of irreparable damage to the interests of farmers, consumers, and the Republic of Kenya if the matter was not heard expeditiously. The Application was supported by the affidavit of Stephen Mutoro and the annexed documents, with additional grounds to be adduced at the hearing.

Applicant's Written Submissions

6. The Applicant challenges the appointments of the Chairperson and Directors of the Agriculture and Food Authority (AFA) made through Gazette Notices No. 3665 of 22nd March 2023 and No. 3667 of 16th March 2023. The Applicant alleges the process was opaque, lacked public participation, and did not meet constitutional and statutory thresholds of fairness, transparency, and competitiveness.



Issues for Determination

1. Whether the nomination period was unreasonably short, violating the principles of good governance and accountability.
2. Whether the failure to publish a list of organizations that submitted nominations and to invite public comments offended the principles of transparency and accountability.
3. Whether the failure to share shortlisted candidates with the public and invite comments violated constitutional and statutory provisions.
4. Whether the AFA Board's composition violates Section 94 of the *Consumer Protection Act* by lacking consumer representation.

Analysis

Unreasonably Short Nomination Period

7. The Respondents issued a call for nominations on 10th January 2023, requiring submissions by 24th January 2023, giving only 13 days for member organizations to respond. This period, the Applicant argues, was insufficient for member organizations to conduct internal consultations or elections.
8. Article 10 of *the Constitution* emphasizes public participation, good governance, and accountability as national values. Article 232(1)(g) reiterates the need for transparency and provision of adequate time in public recruitment processes.
9. The recruitment's unique nature, described as "member-based nominations recruitment," requires collective decision-making by membership organizations. This is comparable to the nomination processes in the Judicial Service Commission (JSC), where organizations like the Law Society of Kenya and judges hold internal elections or consultations to nominate representatives. The 13-day period failed to accommodate this requirement, violating principles of good governance and accountability under Article 10 of *the Constitution*.
10. Lack of Transparency in Publishing Submissions
The Respondents did not publish the list of organizations that submitted nominations or the composition of the Multi-Agency Board Selection Committee. Such omissions contravene Article 232(1) (g), which mandates transparency and accountability in public service recruitment.
11. Section 5(5) of the *Agriculture and Food Authority Act* also requires adherence to fair and competitive recruitment processes. The absence of transparency in the selection process denied the public the opportunity to scrutinize the eligibility of the submitting organizations or raise concerns about potential conflicts of interest.
12. In *Chama Cha Mawakili v Chairperson Independent Electoral and Boundaries Commission & 2 Others* [2020] eKLR, the court emphasized that failure to notify the public of significant recruitment decisions undermines the process's integrity. Similarly, the Respondents' actions in this case breached constitutional and statutory requirements for transparency.
13. Public Participation in Shortlisting
The Respondents failed to publish the names of shortlisted candidates or invite public comments. This omission contravenes Article 10 and Article 232 of *the Constitution*, which require public participation in public service appointments.



14. The importance of public participation in recruitment processes was articulated in *Consumer Federation of Kenya v Attorney General & 2 Others* [2012] eKLR, where the court held that public participation entails sharing the shortlisted names and inviting comments from the public. The judgment stated:

“The public participates by being able to send any reports or objections on any of the persons who have been selected. Those who have not been shortlisted are given an opportunity to make inquiries as to why they have not been shortlisted. Finally, even the persons selected are still advertised giving an opportunity to participate in the process.”

Similarly, in *Benson Riitho Mureithi v J.W. Wakhungu & 2 Others* [2014] eKLR, the court emphasized that appointments must meet constitutional criteria, including public participation and transparency. The Respondents' failure to invite public comments on shortlisted candidates renders the recruitment invalid.

Lack of Consumer Representation

15. Section 94 of the *Consumer Protection Act* mandates consumer representation on all regulatory bodies. The section further requires appointing authorities to consider accredited consumer organizations when making such appointments. Despite this clear statutory requirement, the AFA Board lacks consumer representation, making it improperly constituted. Failure to comply with Section 94 contravenes the *Consumer Protection Act* and undermines the inclusivity envisioned by *the Constitution*.

Conclusion

16. The recruitment of the Chairperson and Directors of the Agriculture and Food Authority violated constitutional principles under Articles 10 and 232, as well as statutory provisions under Section 5(5) of the *Agriculture and Food Authority Act* and Section 94 of the *Consumer Protection Act*. The failure to ensure adequate time for nominations, transparency in submissions, public participation in shortlisting, and consumer representation renders the appointments null and void.

Orders Sought

17. The Applicant prays that the court:
1. Declares the appointments made under Gazette Notices No. 3665 of 22nd March 2023 and No. 3667 of 16th March 2023 null and void.
 2. Directs the Respondents to undertake a fresh recruitment process that adheres to constitutional and statutory requirements.

1st Interested Party's Case

18. The 1st Interested Party through a ground of opposition dated 3rd December 2024, opposes the Petition and Notice of Motion Application dated 12th August 2024, citing its constitutional and statutory mandate under Article 79 of *the Constitution* of Kenya 2010, the *Anti-Corruption and Economic Crimes Act*, 2003, and the *Ethics and Anti-Corruption Commission Act*, 2011, to investigate corruption, economic crimes, and unethical conduct. The Petitioner has not demonstrated that they raised the complaint with the 1st Interested Party prior to filing the application or that the 1st Interested Party failed or refused to investigate the allegations without justification.



19. The 1st Interested Party argues that the investigative process would require time, and it may not be in the interest of justice to delay the matter. Furthermore, the Petitioner has not presented any substantial claim, controversy, or dispute necessitating adjudication, nor have they disclosed any acts or omissions by the 1st Interested Party that violate or threaten to violate *the Constitution*. The Petitioner has also failed to demonstrate how the joinder of the 1st Interested Party would assist the court in determining the issues effectively.
20. The 1st Interested Party asserts that no cause of action has been disclosed against it, and no specific remedies have been sought. Its inclusion in the suit is unnecessary, and its removal would prevent the escalation of costs, abuse of court process, and wastage of judicial time. The Petition is deemed premature, lacking in merit, and an abuse of the court process, with no prejudice likely to be suffered by the Petitioner if the 1st Interested Party is struck out from the proceedings.

1st Interested Party Written Submissions

21. The Ethics and Anti-Corruption Commission (EACC), as the 1st Interested Party, opposes the Petition dated 12th August 2024 and relies on its submissions, authorities cited, and Grounds of Opposition dated 3rd December 2024.

Key Arguments

22. Petitioner's Failure to Lodge a Complaint EACC contends that the Petitioner failed to lodge a complaint with the Commission regarding the alleged violations before filing the Petition. This omission violates established procedures and renders the Petition premature and an abuse of the court process. *Patrick Michuki v Independent Electoral and Boundaries Commission (IEBC) & 4 Others*, Petition No. 408 of 2014 [2016] eKLR: was cited. The court held that failing to demonstrate prior lodging of a complaint with the responsible authority invalidates a subsequent petition, as it would amount to usurping the authority's independence.

Role of EACC in Investigating Allegations

23. The EACC underscores that its statutory mandate includes investigating allegations of corruption, financial impropriety, and breaches of integrity. The Petitioner should have allowed the Commission to perform this role before seeking court intervention. Article 79 of *the Constitution* establishes EACC as the primary body to investigate breaches of leadership and integrity. Section 11 of the *Ethics and Anti-Corruption Commission Act* outlines EACC's investigative powers. *Francis Kuria v Peter Gatirau Munya & 2 Others* [2017] eKLR: was cited. The court emphasized that allegations of corruption must first be reported to EACC for investigation. The EACC is then mandated to recommend appropriate actions, including forwarding files to the Director of Public Prosecutions (DPP) under Article 157 of *the Constitution*.

Abuse of the Court Process

24. EACC submits that approaching the Court without first exhausting statutory mechanisms undermines the principle of judicial restraint. Courts should not interfere with the operations of independent commissions unless it is demonstrated that the commission has failed or refused to act.
25. EACC prays that the Petition be dismissed with costs, as the Petitioner did not follow the appropriate legal channels before seeking redress from the Court.



1st and 3rd Respondent's Case

26. Paul Kipronoh, Principal Secretary for Agriculture, swore an affidavit dated 14th October 2024 on behalf of the 1st and 3rd Respondents. The affidavit opposes the Petition and Notice of Motion dated 12th August 2024, denying all allegations except those expressly admitted. The Respondents assert that the claims are ill-conceived, lack merit, and amount to an abuse of the court process.
27. The affidavit outlines that the Agriculture and Food Authority (AFA) operates as a state corporation under Section 3 of the *State Corporations Act* (Cap 446) and the *Agriculture and Food Authority Act, 2013* (AFA Act). Section 5 of the AFA Act establishes the Board of the Authority and specifies its composition, including a Chairperson appointed by the President and members representing various stakeholders in the agricultural sector.
28. The Respondents detail the recruitment process for appointing the Chairperson and eight Board Members. On 10th January 2023, the Ministry of Agriculture and Livestock Development advertised these positions through public notices. The applications attracted 20 candidates for the Chairperson's position and 37 for the Board Membership, with nominees from 85 farmer organizations representing the eight major crop subsectors (coffee, sugar, food crops, horticulture, fiber crops, pyrethrum, nuts and oils, and miraa).
29. A Multi-Agency Selection Committee, appointed on 16th January 2023, oversaw the shortlisting and interviews. Shortlisting was conducted from 21st to 23rd February 2023, and interviews took place at the Kenya School of Government, Lower Kabete, from 28th February to 6th March 2023. The process adhered to the qualifications under Section 5 of the AFA Act and compliance with Chapter Six of *the Constitution*, including integrity and suitability tests.
30. The Respondents maintain that the appointments were conducted transparently and in compliance with statutory and constitutional provisions. They argue that the Petition and Notice of Motion lack any basis and fail to establish reasonable grounds for the orders sought. They urge the court to dismiss the Petition as frivolous, vexatious, and an abuse of the court process, with costs awarded to the Respondents.

2nd Respondent's and the 3rd to 10th Interested Parties Case

31. In a replying affidavit dated 28th August 2024, sworn by Kibwana Kombo Mataka, the deponent, the Human Resource Director of the 2nd Respondent, stated that he is authorized to respond to the Petition and the Notice of Motion dated 12th August 2024 on behalf of the 2nd Respondent and the 3rd to 10th Interested Parties. He confirmed familiarity with the Petition and its supporting documents.
32. The deponent outlined that Section 5 of the *Agriculture and Food Authority Act* provides for the establishment of the Board of the 2nd Respondent and details its composition. The Ministry of Agriculture and Livestock Development invited applications for the position of Board Chairperson and eight independent Board Members in January 2023 through public advertisements. These invitations were made in compliance with the law and open to all qualified persons without discrimination.
33. The Cabinet Secretary, in consultation with the Council of Governors, appointed a Multi-Agency Selection Committee to shortlist and interview candidates for the positions. This committee held meetings and retreats to evaluate and shortlist candidates based on their qualifications, experience, and compliance with statutory requirements. Various criteria were applied to ensure the selection



process was inclusive, transparent, and in compliance with the Mwongozo Code and constitutional requirements, including gender representation and regional balance.

34. The interviews were conducted between 28th February and 6th March 2023, using an evaluation tool covering thematic areas such as sector knowledge, governance, and leadership. Successful candidates were notified, and the appointments were formalized through Gazette Notices in March 2023. The deponent emphasized that these appointments complied with all relevant laws and constitutional provisions, including fair competition and merit-based selection.
35. The deponent argued that the Petition was filed after an inordinate delay of 17 months since the appointments were gazetted. He contended that the 3rd to 10th Interested Parties have acted within their statutory mandate, and decisions made by the Board are lawful until declared otherwise by a court. Nullifying these appointments or decisions would create a legal vacuum and disrupt the operations of the 2nd Respondent.
36. The affidavit further asserted that the Petitioner has failed to demonstrate a prima facie case or show how they would suffer prejudice if conservatory orders are not granted. The public interest favors maintaining the status quo to avoid governance gaps. The deponent argued that remuneration and allowances paid to the Interested Parties are lawful, and the court should not compel them to refund these payments as they have performed their duties in accordance with the law.
37. Lastly, the affidavit contended that the Petition lacks legal or factual basis, is frivolous, vexatious, and an abuse of the court process. The deponent urged the court to dismiss the Petition with costs.

The 2nd Respondent and the 3rd to 10th Interested Parties Written Submissions

38. In its submissions opposing the Notice of Motion dated 12th August 2024, the 2nd Respondent and the 3rd to 10th Interested Parties argue that the application lacks merit and fails to meet the threshold for the grant of conservatory orders. The Petitioner, through the said application, seeks various orders, including interim conservatory orders prohibiting the 3rd to 10th Interested Parties from exercising their duties as members of the Board of the Food and Agriculture Authority, drawing remuneration, or occupying their offices pending the determination of the Petition. However, these parties contend that the application is unfounded and premature.
39. The guiding principles for granting conservatory orders were outlined in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, which require the applicant to demonstrate an arguable prima facie case with a likelihood of success, show that denial of the order would render the petition nugatory, and establish that granting the order would serve public interest. Additionally, the Supreme Court has defined conservatory orders as measures meant to preserve the substratum of the matter to prevent the proceedings from being rendered academic. This principle was reiterated in *Judicial Service Commission v Speaker of the National Assembly & Another* [2013] eKLR.
40. The 2nd Respondent and the 3rd to 10th Interested Parties argue that the orders sought do not maintain the status quo but rather disrupt it, as the 3rd to 10th Interested Parties are already in office performing their statutory duties. They cite the principle laid out in *Muslims for Human Rights (Milimani) & 2 Others v Attorney General & 2 Others* [2011] eKLR, where Ibrahim J. emphasized that courts must avoid making final findings at the interlocutory stage.
41. Further, the 2nd Respondent asserts that the appointments of the 3rd to 10th Interested Parties were conducted through a transparent, fair, and competitive process, as stated in the Replying Affidavit sworn by Mr. Kibwana Kombe Mataka on 28th August 2024. They argue that the legality of these appointments remains a justiciable issue to be determined at the hearing of the Petition, not at the



- interlocutory stage. In support of this, they rely on *Nelson Andayi Havi v Law Society of Kenya & 3 Others* [2018] eKLR, where the Court of Appeal held that delays in the realization of certain ambitions can be mitigated by expediting the hearing of the main matter.
42. The Respondents further contend that the Applicant has not demonstrated any prejudice that would be suffered if the orders are not granted. The claim that the 3rd to 10th Interested Parties' remuneration is detrimental to public interest is dismissed as speculative, with the Respondents asserting that it is contrary to public interest to deny individuals compensation for services rendered.
 43. Regarding public interest, the 2nd Respondent submits that its statutory mandate would be adversely affected without the participation of the 3rd to 10th Interested Parties, thereby creating a regulatory vacuum. They argue that maintaining the current status quo does not prejudice the Applicant and is in the greater public interest.
 44. In conclusion, the 2nd Respondent and the 3rd to 10th Interested Parties urge the Court to dismiss the Notice of Motion dated 12th August 2024 with costs, asserting that the Applicant has not satisfied the legal threshold for the grant of conservatory orders and that the Petition can proceed to full hearing without interim reliefs
 45. In their written submissions filed on 21st January 2025, the 2nd Respondent and the 3rd to 10th Interested Parties contend that the Petition filed by the Petitioner, Consumers Federation of Kenya (COFEK), lacks merit and should be dismissed with costs.⁴⁵ The 2nd Respondent and the 3rd to 10th Interested Parties submit that the allegations by the Petitioner are unsubstantiated and lack evidentiary support. The Petition primarily asserts that the recruitment process was opaque, lacked stakeholder engagement, and was devoid of a call for applications or interviews. The Petitioner further alleges that the 3rd to 10th Interested Parties have continued to execute the functions of the Board while unlawfully receiving remuneration. However, the Petitioner fails to provide specific details of the alleged breaches or demonstrate how the cited constitutional and statutory provisions were violated. The affidavits filed by the Petitioner merely restate the claims in the Petition without introducing new evidence beyond the impugned Gazette Notices No. 3665 and 3667.
 46. The 2nd Respondent and the 3rd to 10th Interested Parties oppose the Petition in totality, as set out in their Response to the Petition dated 27th August 2024, supported by the Replying Affidavit of Kibwana Kombo Mataka, the Human Resource Director of the 2nd Respondent, sworn on 28th August 2024. The Respondents argue that the Further Affidavit filed by the Petitioner on 1st November 2024 improperly attempts to introduce new grounds not pleaded in the Petition, including claims about the reasonableness of the 13-day period allegedly given for nominations and the failure to disclose the membership of the Multi-Agency Board Selection Committee. These new issues do not form part of the original Petition and should not be entertained. The Respondents submit that the only claim in the Petition was the alleged absence of a call for applications or interviews. However, the Petitioner contradicts itself in the Further Affidavit by arguing that the time given for nominations was unreasonable, thereby conceding that a call was indeed made.
 47. The Respondents further argue that the subject of legal challenge under the Petition is limited to the two Gazette Notices and not the recruitment process leading to the appointments. Since there is no specific prayer for nullification of the process itself, the Court cannot grant orders not sought by the Petitioner. The legal threshold for constitutional petitions requires specificity and clarity, as was emphasized in *Anarita Karimi Njeru v Republic (No.1)* (1979) KLR 154, where the court held that a party alleging a constitutional violation must set out the provisions breached and the manner in which they were contravened. The Petitioner has failed to do so. The Petition does not meet the required constitutional threshold, and the pleadings are vague and imprecise.



48. The Respondents rely on *IEBC v Stephen Mutinda Mule & 3 Others* [2014] eKLR, which establishes that parties are bound by their pleadings and cannot introduce new arguments outside their original case. Similarly, in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR, the Court of Appeal reiterated that courts cannot grant reliefs not pleaded. The Respondents also cite *Ogando v Watu Credit Limited & another (Civil Suit E098 of 2022)* [2024] KEHC 3074 (KLR) (14 March 2024), where Hon. Justice Magare Kizito held that submissions cannot replace pleadings and that a party cannot introduce new claims through submissions.
49. The Respondents argue that public participation was conducted adequately. In *Independent Policing Oversight Authority & Another v Attorney General & 660 Others* [2014] eKLR, Hon. Justice Isaac Lenaola (as he then was) held that public participation is sufficient where members of the public are given a reasonable opportunity to make their contributions. Further, in *Law Society of Kenya v Attorney General & 2 Others* [2013] eKLR, the court held that the burden of proving the absence of public participation rests on the Petitioner. The Respondents maintain that the Petitioner has failed to discharge this burden.
50. The 2nd Respondent and the 3rd to the 10th Interested Parties further submit that Gazette Notices No. 3665 of 22nd March 2023 and No. 3667 of 16th March 2023 cannot be declared null and void as sought by the Petitioner. A Gazette Notice merely communicates to the public a decision already made by a state organ and is not the decision itself. It follows that invalidating a Gazette Notice without an order nullifying the underlying decision would be an exercise in futility. The said Gazette Notices have been in existence since March 2023, and the Petitioner's delay in filing this Petition—over seventeen months later—renders the challenge unsustainable.
51. The Petitioner not only seeks the nullification of the Gazette Notices but also prays for a declaration that all decisions made by the 2nd Respondent's Board since its appointment are null and void. The 2nd Respondent and the 3rd to 10th Interested Parties submit that granting these prayers would result in significant injustice to the public and the agricultural sector. The 2nd Respondent has undertaken numerous statutory and regulatory decisions that affect both individuals and legal entities not party to these proceedings. Nullifying such decisions without affording those affected an opportunity to be heard would violate the principles of fair administrative action. This Court has consistently held that public bodies should not be subjected to legal uncertainty where no demonstrable harm has been suffered by the Petitioners.
52. The Respondents further argue that the inordinate delay in filing this Petition renders it an abuse of court process. The Gazette Notices in question have been in existence for more than a year and a half, and the Petitioner has failed to provide any explanation for the delay. The principle of laches dictates that courts should not aid those who sleep on their rights. The Supreme Court in *Hon. Mr. Justice Martin Mati v The Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya* (2020) eKLR emphasized that delay in seeking judicial intervention must be justified with plausible reasons, and that prolonged delay without explanation prejudices the interests of justice.
53. The 2nd Respondent and the 3rd to the 10th Interested Parties further submit that even if the Gazette Notices were found to be flawed, the Court must consider the consequences of nullification on public interest. In *Okiya Omtatah Okoiti v President of Kenya & 4 others* [2019] eKLR, the Court held that the principle of proportionality must be considered when assessing the legality of appointments. The Court found that nullifying appointments already made to boards of state corporations would have counteractive effects, including disrupting public administration and causing regulatory uncertainty. Similarly, in this case, nullifying the Gazette Notices would paralyze the 2nd Respondent's operations



- and disrupt service delivery in the agricultural sector. The Petitioner has not demonstrated how it would suffer any prejudice should the 3rd to 10th Interested Parties complete their term in office.
54. The 2nd Respondent and the 3rd to the 10th Interested Parties further submit that the Gazette Notices referred to in the Petition do not exist. The Petitioner has cited Gazette Notices No. 3665 of 22nd March 2023 and No. 3667 of 16th March 2023; however, the actual Gazette Notices in issue are No. 3665 and 3667 of 24th March 2023. The Court cannot issue orders in respect of non-existent legal instruments. The Petitioner has failed to provide any evidence to support the claim that these Gazette Notices were unlawfully issued.
55. The 2nd Respondent and the 3rd to the 10th Interested Parties further submit that Section 94 of the *Consumer Protection Act* does not override or amend Section 5 of the *Agriculture and Food Authority Act*. The Petitioner contends that the 2nd Respondent's Board is improperly constituted due to the lack of consumer representation, relying on Section 94 of the *Consumer Protection Act*, which states that there shall be consumer representation on all regulatory bodies and that appointing authorities should have due regard to accredited consumer organizations. However, Section 5 of the *Agriculture and Food Authority Act* explicitly sets out the qualifications and composition of the 2nd Respondent's Board, and there is no requirement that a representative from an accredited consumer organization must be included. The Petitioner's interpretation of Section 94 is flawed, as the provision does not mandate direct appointment of consumer representatives but merely requires appointing authorities to consider consumer organizations when making appointments. The Petitioner has not demonstrated that any accredited consumer organization made an application for nomination and was denied participation in the process.
56. The Respondents further submit that there is no legal conflict between the *Consumer Protection Act* and the *Agriculture and Food Authority Act*. Where Parliament has intended for consumer representation to be mandatory, it has expressly stated so. In the absence of such express language, the argument that Section 94 of the *Consumer Protection Act* supersedes Section 5 of the *Agriculture and Food Authority Act* is without basis. The Petitioner has failed to prove that the 2nd Respondent's Board is improperly constituted.
57. The 2nd Respondent and the 3rd to the 10th Interested Parties further submit that the Petitioner has not discharged its burden of proof in this matter. Section 108 of the *Evidence Act* places the burden of proof on the party asserting a fact, while Section 109 states that the burden of proving a particular fact lies with the person who wishes the Court to believe in its existence. The Petitioner has presented no evidence beyond the two Gazette Notices to support its allegations of unconstitutionality and illegality. In *Republic v National Employment Authority & 3 others Ex-parte Middle East Consultancy Services Ltd* [2018] eKLR, Justice John Mativo (as he then was) held that a petitioner must provide concrete evidence to demonstrate the unconstitutionality of official actions. The mere fact that an appointment was made does not, in itself, constitute proof of illegality.
58. The Petitioner further seeks an order compelling the 3rd to 10th Interested Parties to refund all remuneration and allowances received while in office. The Respondents submit that this prayer is untenable, as remuneration for work performed is a constitutional right under Article 41 of *the Constitution*. Denying individuals remuneration for services lawfully rendered would be contrary to public policy and labour rights. The Court should not issue an order compelling the 3rd to 10th Interested Parties to refund monies legally earned in the discharge of their official duties.
59. The Petitioner also seeks a declaration that all decisions and actions taken by the 2nd Respondent's Board as constituted with the 3rd to 10th Interested Parties are null and void. The Respondents submit that such an order would have far-reaching implications, including invalidating statutory and



contractual decisions that have affected numerous third parties who are not before the Court. The Court must exercise caution in issuing blanket declarations that would create legal uncertainty and regulatory chaos. In *Okiya Omtatah Okioti v President of Kenya & 4 others* [2019] eKLR, the Court declined to invalidate past appointments to state corporations on grounds that doing so would disrupt governance and cause economic instability. The same reasoning applies in the present case.

60. The Respondents further submit that judicial review orders such as certiorari and mandamus are discretionary in nature. The Court must weigh the balance of convenience and the delay in filing the Petition as factors against granting such orders. The principle that discretionary remedies must be exercised judiciously was reaffirmed in *Republic v National Employment Authority & 3 Others Ex-parte Middle East Consultancy Services Ltd* [2018] eKLR, where the Court held that judicial review reliefs must be based on demonstrable illegality and not mere allegations.
61. The 2nd Respondent and the 3rd to 10th Interested Parties submit that the Petition lacks merit, is speculative and unsubstantiated, and has failed to meet the constitutional threshold for a valid claim. The recruitment process was lawful, and the appointments were validly made. The Court is therefore urged to dismiss the Petition in its entirety.
62. On the issue of costs, the 2nd Respondent and the 3rd to the 10th Interested Parties submit that costs follow the event. The Petitioner has instituted a baseless claim that has necessitated legal expenses on the part of the Respondents. The Court is urged to award costs in favour of the 2nd Respondent and the 3rd to the 10th Interested Parties

Petitioner's Further Affidavit

63. In a further affidavit dated 1st November 2024, the Petitioner stated that the Respondents' call for nominations for the positions of Board Members and Chairperson of the Agriculture and Food Authority on 10th January 2023 was unreasonable and violated Article 10 of *the Constitution* by providing only 13 days for membership organizations to submit nominees. This timeframe was inadequate for organizations to conduct fair and transparent internal processes.
64. The Petitioner further asserted that the Respondents failed to publish the list of nominating organizations and the composition of the Multi-Agency Board Selection Committee, undermining transparency, accountability, and public scrutiny. The recruitment process did not make public the names of shortlisted candidates or invite public participation, thereby breaching constitutional principles of fairness, competitiveness, and public involvement.
65. The affidavit concluded that the recruitment process was unconstitutional and failed to meet the requirements of good governance and integrity as enshrined in *the Constitution* of Kenya, 2010. The statements were deponed to the best of the Petitioner's knowledge, with sources disclosed where applicable.
66. I have examined all the averments and submissions of the parties herein. The issues for this court's determination are as follows:
 1. Whether the recruitment process of the chairperson and Director of the Agriculture and Food Authority was procedurally done.
 2. Whether failure to share shortlisted candidates with public and invite comments violated constitutional and statutory provisions.
 3. Whether failure to publish and list of organizations that submitted nominations and invite public comments violated principles of transparency and accountability.



4. Whether the AFA Board's composition violated section 94.

Issue No 1

67. The petitioner has considered that the appointment made for the 3rd to 10th interested parties herein was made unprocedurally without regard to the Constitution and the law.
68. The petitioner alleges that the 3rd to 10th interested parties assumed office unlawfully and continues to execute crucial functions to the detriment of the public.
69. The petitioners aver that the appointments were made without a fair and constitutional process. They have averred that the nomination period was short as the respondents called for nomination on 10th January 2023 requiring submissions by 24th January giving only 13 days for members organizations to respond.
70. They also aver that this is against the article 10 of the Constitution which emphasizes public participation and good governance and accountability as national values.
71. Under the Agriculture and Food Authority Act Cap 317 Section 5(1) the management of the authority shall vest on a board which consists of the following:
 - a. Non executive chairperson appointed by the president
 - b. The Principal Secretary in the ministry responsible for Agriculture.
 - c. The principal secretary in the ministry responsible for Finance
 - d. ...deleted
 - e. The principal secretary in the ministry responsible for lands
 - f. ...deleted
 - g. ...deleted
 - h. ...deleted.
 - i. Eight persons being farmers representing farmer organization in the major crop subsection in Kenya appointed by the cabinet secretary in consultation with the council of governance.
 - j. The Director General who shall be the Secretary of the Board and CEO of the authority date.....
 - k. The same section provides for qualifications assigned to a person to be appointed a member of the board under section 5(1)(a)
72. Section 5 of the Agriculture and Food Authority Act further provides for appointment of the board members as follows:

A person appointed as a member of the Board under subsection (1)(a) shall—

 - (a) be a person who—
 - (i) holds a degree from a university recognized in Kenya; and
 - (ii) has knowledge and experience in agriculture, finance, law, administration, human resource management or such other expertise as the appointing authority may consider relevant;



- (b) be appointed through a competitive recruitment process;
 - (c) serve for a term of five years and shall be eligible for re-appointment once for a further term of five years.
73. The operative provision of this provision is that a member of the board must be competitively appointed. The petitioner contends that the appointments made were not competitively made.
74. The respondents on their part deny this contention. The respondents have averred that the recruitment process was above board. The 1st and 3rd respondents have averred that on 10/1/2023 the Ministry advertised for these positions through public notices. The notice was attached to their response and marked as App PK-1. The advertisement required nominations/applicants to have been submitted by 24/1/2023.
75. The respondents further submitted their report of 14/2/2023 which dealt with shortlisting of the candidate for position of chairman. The report shows that there were 20 applicants for the position of chairperson. The report further indicates at page 4ff that a selection panel was established to consider the applications made on 28th February 2023 to 6th March 2023. Interviews were conducted for Chairman's position.
76. As concerns nominations for farmers organization 85 nominations were received. The 2nd respondent and the 10 interested parties also filed their RAS and reiterated the averments of the 1st and 3rd respondents. They provided a list of the applicants for members of the board who were 85 in number out of the applicants 37 were shortlisted. Interviews were then conducted and appointments made. They aver that the entire process was transparent.
77. The 1st interested party also avers that the process was overboard and that they received no complaint about the recruitment process.
- The 1st interested submitted that they opposed the petition as their role is investigating allegations on complaints of corruption, financial impropriety and breaching integrity. No report was ever made to the EACC and they aver that their inclusion in the petition was also an abuse of the court process and sought to be struck out of the proceedings
78. The petitioner had averred lack of a competitive process for the reason that the time allowed for the recruitment process was short and that the list of nominees was not published to allow any public participation.
79. A look at the AFA Act just indicates that there shall be competitive recruitment. The requirement to publish names of applications and shortlists has not been provided.
80. Article 232(1) (g) of *the Constitution* on the other hand provides as follows:
- “subject to paragraph (h) and (i) fair competition and merit are the basis of appointments and promotions”... as one of the values and principles of Public Service.
81. Indeed the issue of involvement of the people in the process of policy making is also a key principle which the petitioner aver was never adhered to. The petition avers that the list of applicants and even short list was never published to allow for public comments and participation.
82. There is however evidence that there was an advert set out for applicants to be submitted. The advert was in the public domain. There is evidence that indeed applications were made and short listing and interviews done.



83. The petitioner and those who may have felt aggrieved did not write any complaint in relation to the time given for the applicants nor seek extension of time.
84. As to the issues of publishing names of applicants and shortlisted ones, the petitioner has not indicated that they were interested in the list as applicants. They have not demonstrated how they were prejudiced by the list not being published.
85. The 1st respondent is a public body. The requirement that all public bodies must show their list of applicants and nominees in an interview process would in my view be cumbersome and expensive and it would suffice to have adverts in the public domain and for any applicant who feels prejudiced to seek for information on the interview scores where possible.
86. I do find in the circumstances that the recruitment process of the chairman and directors of the AFA was procedurally done.

Issue No 2

87. Issue no 2 has been discussed above with my finding that failure to share shortlisted candidates with the public inviting comments did not violate *the Constitution* and statutory provisions.

Issue No 3

88. This issue is also answered in my analysis on issue No 1 above with the finding that failure to publish a list of organization that submitted nominations and invited public comments did not violate the principal of transparency and accountability.

Issue No 4

89. The petitioner aver that the AFA board's composition violated section 94 of the Consumer Federation Act. I have in this judgment listed out the provision of the law on the membership of the Board of AFA. Section 94 of the *Consumer Protection Act* provides as follows:

There shall be consumer representation on all regulatory bodies and the respective appointing authorities shall have due regard to accredited consumer organizations and the Advisory Committee in making such appointments.

90. Section 5 of the AFA Act on the other hand provides membership of its board as listed herein.

“A person appointed as a member of the Board under subsection (1)(a) shall—

- (a) be a person who—
 - (i) holds a degree from a university recognized in Kenya; and
 - (ii) has knowledge and experience in agriculture, finance, law, administration, human resource management or such other expertise as the appointing authority may consider relevant;
- (b) be appointed through a competitive recruitment process;
- (c) serve for a term of five years and shall be eligible for re-appointment once for a further term of five years.”

91. The *Consumer Protection Act* was enacted by parliament and came into force on the 14th December 2012. The Agriculture Food and Authority Act on the other hand was enacted by parliament in 2013.



In interpreting which law takes precedence over the other, I am guided by rules of construction which state that the later act would normally repeal the former.

92. This principal was applied in High Court Misc Civil Application 375”B” Simon Kariithi and Anor Versus Cleti Kembio eKLR (2015) where the honorable Judge Aburili J made the following findings:

“ Even if that were not to be the case, this court would employ the principles applicable in statutory construction among them, the rule of precedence that the statute that was enacted latter would have the effect of amending the earlier statute.

In this case, the *Civil Procedure Act* was enacted on 31st January 1924 whereas the Magistrates Courts Act was enacted on 1st August 1967.

In both cases, the dates given are the actual commencement dates. It therefore follows that in as much as Section 15 of the *Civil Procedure Act* commands the spirit that appears to be in the conflict with Section 3(2) of the Magistrates Courts Act, the Magistrate’s Courts Act having been enacted later than the *Civil procedure Act*, is deemed to have amended the *Civil Procedure Act*. I am also persuaded by the holding by Ringera J (as he then was) in Mohamed Sitaban V George Mwangi Karoki in HCCA 13/2002 where the Learned Judge in considering the perceived conflict between the above two provisions in the two statutes stated:

“ Section 3(2) of the Magistrates Courts Act provided that a court of the Resident Magistrate(which is defined to include a Senior Principal Magistrate’s court has jurisdiction throughout Kenya. Such a court is not the subject of the local jurisdiction contemplated by Section 15 of the *Civil Procedure Act*. In my opinion, Section 15 of the *Civil Procedure Act* applied only to courts lower than a Resident Magistrates Court. I am fortified in that view by the fact that the Magistrate’s Court Act Cap 10 of the Laws of Kenya, was enacted in 1967 long after the *Civil Procedure Act*.

The legislative was therefore aware of the provisions of Section 15 of the *Civil procedure Act* and the hallowed rule of statutory construction that where two provisions in different statutes conflict, the provisions in the latter statute is deemed to amend the earlier provision. Accordingly, I find that the Bungoma Court had jurisdiction to entertain the suit and the rule that suit filed in a court without geographical jurisdiction is a nullity and cannot be transferred is inapplicable in the circumstances of this case. There may be sound administrative reasons for filing suits in administrative districts in which the defendant resides as the cause of action but those reasons cannot outs the statutory jurisdiction.”

A similar situation had arisen in Doshi Enterprises Ltd vs Oriental Steel Fabrications & Builders Nairobi HCC 627/2001 and Mwera J, with approval by Odunga J in Justus Kyalo Mutunga V Labb Singh Harnam [2012] e KLR agreed that the filing of a case outside the geographical jurisdiction of both parties contrary to the mandatory provisions of Section 15 of the *Civil Procedure Act* does not make it a nullity because Section 15(b) of the *Civil procedure Act* adds that a court may give leave for the filing away from the local limits or the defendant may acquiesce in such situation.

A similar situation arose in John Wekesa Maraka V Patrick Wafula Otunga (Sergon J). This court in Ruth Gathigia Kamunya & Another V George Kimani [2015] eKLR cited with approval all the above decisions and also agreed with Honourable Sergon J that Section 15 of the *Civil Procedure Act* was not meant to apply to Resident Magistrate’s Court. The learned Judge stated:



“I do not think Section 15 of the Civil Procedure Act was meant to apply to Resident Magistrate’s Court. Most probably it was intended to apply to District Magistrate’s Courts defined under Section 6 of the Magistrate’s Court, the position in my view will not change because the law is well settled that where there is a conflict between two statutes, the provision in the latter statute would be deemed to have amended the earlier provision. The Magistrate’s Courts Act was enacted later than the Civil Procedure Act. It therefore evidently clear that the Webuye Court had jurisdiction to entertain the suit. The Learned Senior Resident Magistrate therefore misapprehended the point when she held that she had no jurisdiction to hear the matter. For the above reasons the appeal must succeed.”

94. This same principal was restated by J Mativo (as he then was) in R versus Kenya School of law ex parte Daniel Mwaura Marai (2017) eKLR where he stated as follows

“the applicant having not obtained a minimum grade B (plain) in English Language or Kiswahili and a mean grade of C+ (plus) in the Kenya Certificate of Secondary Education or its equivalent would be locked out from admission to the ATP. I also agree with the learned judge when he stated that if the provisions of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 are in conflict with the provisions of section 16 of the Kenya School of Law Act as read with the Second Schedule to the said Act, the former cannot override the latter. “

95. Indeed the law is clear as stated above and the AFA Act having been enacted later in time overrides any principal in the Consumer Protection Act and the submission that the two acts are in conflict does not arise.

96. Having considered the facts as above, it is therefore my finding that the petition lacks merit and is thereby dismissed. Each party shall meet its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF JANUARY, 2025.

HELLEN WASILWA

JUDGE

