



Ladema v Vihiga County Public Service Board; Vihiga County Assembly & 8 others (Interested Parties) (Petition E009 of 2023) [2024] KEELRC 938 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 938 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
PETITION E009 OF 2023**

JW KELI, J

APRIL 25, 2024

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES
1,2,3, 10, 73, 226, 232, 235, 258 AND 259 OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE CONTRAVENTION
OF THE COUNTY GOVERNMENTS ACT,2012**

BETWEEN

EVANS MUSWAHILI LADEMA PETITIONER

AND

VIHIGA COUNTY PUBLIC SERVICE BOARD RESPONDENT

AND

VIHIGA COUNTY ASSEMBLY INTERESTED PARTY

GOVERNOR VIHIGA COUNTY INTERESTED PARTY

HEZEKIAH NGANYI INTERESTED PARTY

GEORGE OMUSULA OKHASO INTERESTED PARTY

JOSPHAT AMADI OGWERO INTERESTED PARTY

BIGOOD ASIENWA OPAPA INTERESTED PARTY

ANDREW MWENESI AHUGA INTERESTED PARTY

JOHN NAVIAVA SAUL INTERESTED PARTY

EDWARD ALUDA INTERESTED PARTY



JUDGMENT

1. The Petitioner was a resident of Vihiga County in the Republic of Kenya. He filed the instant Petition asserting the protection of public interest and the rule of law in the exercise of duties and functions of public institutions.
2. The Petitioner contends that the Respondent in total contempt of the law and contempt against the 1st interested party, re-advertised the position of Municipal Manager, when the 1st Interested party, was conducting investigations into the fate of the previous interviews that had been conducted by the Respondent on the 3rd to 9th Interested parties. The petitioner filed a Notice of Motion Application under Certificate of Urgency dated 27th December 2023 and filed in Court on an even date for orders that:-
 - a. Spent
 - b. Spent
 - c. Pending the hearing and determination of the application and petition herein, there be a temporary order of stay suspending the use of the advert by the Respondent to proceed to receive applications from innocent Kenyans.
 - d. Upon suspension of the new applications vide advertisement dated the 18th December 2023 the Respondent be ordered to proceed with the initial recruitment process as advertised on 28th June 2023 to conclusion in which the Applicant is one of the contestants and be informed of the outcome of the interview.
 - e. The costs of this Application be in the cause.
3. The motion was supported by the grounds on the face of the application and the Petitioner's supporting affidavit sworn on 27th December 2023 that:-
 - i. The Respondent had published an advert(EML-1) for the Position of Municipal Manager in June 2023 and had received applications until 11th July 2023; when it shortlisted eight candidates and proceeded to interview seven of them on 7th August 2023. The Respondent approved the recruitment report on 5th October 2023 but failed to pronounce and announce a successful candidate to date.
 - ii. The Petitioner noticing the Respondent's failure to name a successful candidate, which led to the delay in filling the office of the Municipal Manager, petitioned the 1st Interested party, the County Assembly, through a Petition of 9th November 2023(EML-4) to compel the Respondent to complete the recruitment process and appoint a substantive Municipal Manager.
 - iii. The Respondent out of malice and contempt to the 1st Interested party, readvertised through an Advert of 18th December 2023(EML-2), the post of the Municipal Manager, when the 1st Interested party was yet to complete its investigations into the 1st recruitment process, as evidenced by the invitation letter to the 7th Interested party before the 1st interested party of 11th December 2023(EML-3).



- iv. That the respondent's actions go against the principle of separation of powers and look down on the 1st Interested party's oversight powers.
 - v. The Respondent's actions seek to obscure a possible illegal and criminal activity in the previous recruitment and deny the 3rd, 4th, 5th, 6th, 7th, 8th, and 9th Interested parties' right to know the outcome of the recruitment process they participate in.
 - vi. The Respondent's actions deny the residents of Vihiga County an opportunity to know what happened in the previous recruitment process, and why they have to wait longer for a substantive Municipal Manager.
 - vii. The Respondent's actions will cause public resources to continue to be wasted by conducting a new recruitment process, when the previous recruitment was conducted, the respondent failed to provide results, only to readvertise again.
 - viii. That there is a threat of further violation of *the Constitution* and the law if the Court does not intervene and suspend the second advert for the post of Municipal manager, and give the necessary reliefs to aver any further prejudice of public interest.
4. Contemporaneously, the Petitioner filed the Petition dated 27th December 2023 seeking the following reliefs: -
- a. A Declaration that the 18th December 2023 advert for the post of municipal Manager is illegal, null and void.
 - b. An order of certiorari does issue quashing the advert.
 - c. Upon suspension of the 18th December 2023 advertisement, the Respondent be ordered to revert to the recruitment process as advertised on 28th June 2023 and conclude it by informing the petitioner herein and all the interested parties of the outcome.
 - d. If the respondent confirms conclusion of the recruitment process vide the 28th June 2023 advert, an order be directed at the respondent to release the results of the previous recruitment exercise for the post of municipal manager.
 - e. An order is made of who should be the Municipal Manager based on the recruitment report of the Respondent and the investigation report of the 1st Interested Party.
 - f. An order is made to punish the Respondent and any other parties in the matter who may have committed illegalities in the entire recruitment process.
 - g. Any other relief that the Court may deem fit and necessary is upholding *the Constitution* and the rule of law.
5. The Petition was supported by the supporting affidavit of the Petitioner sworn on 27th December 2023.
 6. The Petition was opposed. The Respondent and the 2nd Interested Party entered appearance on 18th January 2024 through the Office of the County Attorney, Tony Godiah, and filed a Replying affidavit sworn by Amb. Franklin Esipia on 18th January 2024.
 7. The 3rd Interested party through the firm of Obura -Obwatinya & Co. Advocates, entered appearance on 22nd January 2024 and on even date filed a Notice to Produce dated 19th January 2024.
 8. In support of the application, the 3rd Interested Party filed a Replying affidavit sworn on 19th January 2024 and received in Court on 23rd January 2024.



9. On 23rd February 2024, the Petitioner filed a Notice of Objection(later renamed Supplementary Affidavit) dated 1st February 2024, which was supported by a supporting affidavit of even date.
10. The 1st, 4th, 5th, 6th, 7th, 8th and 9th Interested parties did not enter appearance.

WRITTEN SUBMISSIONS

11. The Court directed that the application and Petition be canvassed together by way of written submissions. The Petitioner's written submissions drawn by the Petitioner were dated 14th February 2024 and received in Court on 16th February 2024. The 3rd Interested party's submissions dated 22nd February 2024 were filed by Obura -Obwatinya & Co. Advocates on 4th March 2024. The Respondent's and 2nd Interested Party's written submissions drawn by the County Legal Counsel, Tony Godia were dated 8th March 2024 and received in Court on an even date.

Petitioner's case in summary - (The case as per petition, Petitioner's supporting affidavit to Notice of Motion and Petition sworn on 27th December 2023, and the Petitioner's supporting affidavit/ Notice of Objection of 1st February 2024)

12. The petitioner states that the Respondent which is a public body, is established under Section 57 of the County Governments Act, to promote the values and principles under Articles 10 and 232 of the Constitution in the establishment of public offices in the county and under Section 60& 63 of the County Governments Act, to ensure vacant position are competitively and transparently filled.
13. It was the Petitioner's case that the Respondent had published an advert(EML-1) for the position of Municipal Manager in June 2023 and had received applications until 11th July 2023; when it shortlisted eight candidates and proceeded to interview seven of them on 7th August 2023. The Respondent approved the recruitment report on 5th October 2023 but failed to pronounce and announce a successful candidate to date.
14. The Petitioner noticing the Respondent's failure to name a successful candidate, which led to the delay in filing the office of the Municipal Manager, petitioned the 1st Interested party, the County Assembly, through a Petition of 9th November 2023(EML-4) to compel the Respondent to complete the recruitment process and appoint a substantive Municipal Manager.
15. That in disregard of Articles 1(1), 3(1), 10, 73(1)(1c)(2), 232, 235(1)(b), 259(1), 258, 226(5) of the Constitution, the Respondent out of malice and contempt for the 1st Interested Party, re-advertised through an Advert of 18th December 2023(EML-2), the post of the Municipal Manager, when the 1st Interested party was yet to complete its investigations into the 1st recruitment process, as evidenced by the invitation letter to the 7th Interested party before the 1st interested party, of 11th December 2023(EML-3).
16. The Petitioner contended that the respondent's actions go against the principle of separation of powers and look down on the 1st Interested party's oversight powers.
17. The Petitioner contended that the Respondent's actions aimed to obscure a possible illegal and criminal activity in the previous recruitment and deny the 3rd, 4th, 5th, 6th, 7th, 8th, and 9th Interested parties' right to know the outcome of the recruitment process they participated in. The Respondent's actions deny the residents of Vihiga County an opportunity to know what happened in the previous recruitment process, and why they have to wait longer for a substantive Municipal Manager. The Respondent's actions will cause public resources to continue to be wasted by conducting a new



- recruitment process, when the previous recruitment was conducted, the respondent failed to provide results, only to readvertise again.
18. The Petitioner argued that there was a threat of further violation of the Constitution and the law if the Court does not intervene and suspend the second advert for the post of Municipal Manager, and give the necessary reliefs to aver any further prejudice of public interest.
 19. The Petitioner argued that the public has been missing the service of a substantive Municipal manager for more than six months, which threatens the loss of potential donor funding that could have gone to the infrastructural development of the Municipality.
 20. The Petitioner argued that, the respondent's assertion that the legal advice from the county legal Advisor that a Municipal Manager must possess the qualification of a Certified Public Secretary should not be used to penalise the 3rd to 9th Interested parties who had applied for the position, without considering whether the said applicants possess the said qualification. The Petitioner states he is aware that the 8th Interested party possesses the said qualification.
 21. The petitioner argued that the county attorney is an ex-official member of the County Executive Committee and the Respondent must have received the legal advice of the County Attorney before the advertisement of the position of the Municipal Manager, and even if the advice was not given, the Respondent ought to have raised an objection and referred to the law.
 22. The Petitioner confirms that "a secretary to a board of a city or an urban area must be a Certified Public Secretary" under Section 59(2) of the County Governments Act and the Respondent was aware of the same but ignored it. The Petitioner states that, though Section 14(2) e of the Urban Areas and Cities Act provides that a Municipal Manager shall be a Secretary to the Municipal Board and an ex-official member of the Board, the qualification as a Certified Secretary is not there(EML-2).
 23. The petitioner however contends that under the Urban Areas and Cities Act as amended in 2019, under Sections 13A, 14, and 28 to 30 the Qualifications of a Municipal Manager (EML-1) are provided and the qualification as a Certified Public Secretary is not there.
 24. The petitioner argues that the Respondent gave a different reason for failing to appoint a municipal manager before the County Assembly being that the 1st ranked interviewee could not produce his Master's certificate and a disclaimer report had been received on account of the second-ranked interviewed (EML-3), contrary to their assertion in Court of the qualification factor as a Certified Public Secretary.
 25. The petitioner asserts that the Respondent's assertion that only the 3rd to 9th Interested parties can raise a complaint against the Respondent is misconstrued as under Article 3(1), and 258, every person has an obligation to uphold and defend the Constitution and the right to institute proceedings claiming the constitution has been contravened or is threatened to be contravened.
 26. The petitioner argues that the Governor, the 2nd Interested party is the CEO of the County responsible for ensuring service delivery and stands prejudiced if the respondent continues to play games in the recruitment of a substantive office holder of the Municipal Manager, and the risk of cancellation of grants by the World Bank to the Municipality for lack of a substantive office holder.
 27. The Petitioner argues that the petition raises constitutional issues apart from employment ones, and an appeal to the Public Service Commission cannot address them as the jurisdiction is with the Court.
 28. The Petitioner asserts that the 1st interested party under the doctrine of separation of powers has oversight powers over the conduct of the Respondent, and indeed the Respondent appeared before the



1st Interested party after the Petitioner's petition was committed to the County Assembly's Committee and that the Court exercises supervisory powers over constitutional bodies.

3rd Interested Party's Case- Replying affidavit of 19th January 2024)

29. The 3rd Interested Party stated that he is the Acting Municipal Manager appointed as so on 4th April 2023 awaiting the appointment of the substantive holder (HON-1).
30. The 3rd Interested Party contended that he was one of the interviewees for the substantive position and once the process was completed, due to selfish reasons the successful candidate was never announced, which he states is prejudicial to him having been highly ranked in the interview as evidenced by the letter to EACC for clearance for appointment (HON-2).
31. He stated that some people are on a fishing expedition to deny him the chance to be appointed and he demanded for production of the recruitment Report presented to the Governor, the merit list, and the individual scores of all candidates.
32. He stated that he was appointed as the Acting Municipal Manager because he possessed all the qualifications and petitioned that the prayer in the application be granted in the public interest.

Respondent's & 2nd Interested Party's case in summary- (The case as per the Replying affidavit of Am. Franklin Esipila- Chairperson of the Respondent, sworn on 18th January 2024)

33. The Respondent and the 2nd Interested Party state that they indeed received an intent from the County Chief Officer responsible for Urban Areas, to advertise for the position of municipal manager. They duly advertised the position and interviewed candidates for the same position.
34. That before they announced the successful candidate, their attention was drawn to the provision of Section 59 of the County Governments Act, requiring that a holder of the position of secretary to a County Board must be a Certified Public Secretary. They had relied on sections 14(2)(e), 28, 29, and 30 of the Urban Areas Act, in the initial advertisement which did not require the qualification of a Certified Public Secretary. On the advice of the Legal advisor, they were advised to comply with the provisions of both legislations as the same did not contradict but only had an additional requirement.
35. That the Respondent resolved to avert the danger of future challenges, considering that the previous candidates had not given proof that they qualified as Certified Public Secretary they re-advertised the position with the new qualification.
36. They contend that the 3rd to 9th Interested parties did not raise any concerns after the advertisement and the Respondent cannot be faulted for complying with what it believed was the law, as contemplated under Article 184 to be the Urban Areas and Cities Act on the governance of urban areas and cities, which position was later clarified by the County attorney to be the County Governments Act.
37. They state that the role of recruiting is solely the Respondent's function and the 2nd Interested party has no role.
38. They contend that any issue relating to the qualification, manner of recruitment, or an appointment can only be brought by appeal to the Public Service Commission.
39. They aver that the petitioner has no standing in law to ask the 1st Interested party to inquire into the appointment of the Municipal Manager, as the oversight role does not apply thereto.
40. They state that the petition and application before the Court are meant to ask the Court to act as an enabling agent to the 1st Interested party to act outside the jurisdictional mandate of the Court and the



Petitioner lacks the locus to file the petition which is outside the jurisdiction of the Court, and seeks that the application and petition be dismissed or struck out with costs.

Determination

Issues for determination.

41. The Petitioner did not specify any issues for determination and submitted that the Respondent was mandated to inform the interviewees of the results of the interview as they had a legitimate expectation and a right to information and that a re-advertisement must be justified.
42. The 3rd interested party in his submissions addressed the following issues:-
 - a. Whether the respondents' decision to re-advertise the position with new terms and requirements is illegal and therefore null and void
 - b. Whether the respondent contravened *the constitution* and rule of law by failing to conclude the first recruitment exercise.
 - c. Whether the 1st interested party has the legal authority to investigate the impropriety, if any, of the 3rd interested party or any other interested party.
43. The Respondent and 2nd Interested Party in their submissions addressed the following issues: -
 - a. Whether the Court had jurisdiction to entertain the instant petition
 - b. Whether the 2nd interested party is rightly enjoined in the instant petition.
 - c. Whether the petition satisfies the reasonable specificity test threshold required of constitutional petitions.
 - d. Whether the 3rd Interested party's written submissions amount to a pleading capable of eliciting reliefs.
 - e. Whether the petitioner's document called "Notice of Objection" has any legal implication.
44. The Court having perused the pleadings by the parties and their submissions was of the considered opinion that the issue placed before the Court by the parties for determination are: -
 - a. Whether the Court has jurisdiction to entertain the petition
If answer to (a) in the affirmative proceed with the following issues:-
 - b. Whether the Petitioner has locus standi to institute the petition
 - c. Whether the petition meets the Constitutional threshold.
 - d. Whether the Petitioner is entitled to the reliefs sought.

Issue a. Whether the Court has jurisdiction to entertain the petition

45. The Respondent and the 2nd interested party have challenged the jurisdiction of the Court to handle and determine the petition. It is trite that whenever the jurisdiction of the Court is challenged, the Court must satisfy itself first that it has jurisdiction as guided by the Court of Appeal decision by Nyarangi JA in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR where he observed:- "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more



- step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
46. The cause of action in the petition is the recruitment of a Municipal Manager by the Respondent. The Petitioner challenges the decision of the Respondent to re-advertise the position after the Respondent had advertised, shortlisted, and interviewed candidates from 3rd to 9th interested parties but failed to release the results.
 47. The Respondent contends that any issue arising from the qualifications, manner of recruitment and appointment can only be raised by way of appeal to the Public Service Commission. That the point of law is invoked at paragraph 14(b) of the Respondent’s replying affidavit dated 18th January 2024 and sworn by Amb. Franklin Esipila.
 48. The Respondent contends that the 2nd advertisement which is the cause of action in the instant petition was a decision of County Public Service Board on recruitment of the municipal manager which is its statutory mandate.
 49. The Respondent submits that the Court lacks the requisite jurisdiction to hear the petition by dint of section 77 of the County Governments Act to wit:- “(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;”
 50. The Respondent submits that the decision to re-advertise was in pursuit of recruitment and falls under section 77(2)(a) of the County Governments Act hence recourse for any grievance fell with the Public Service Commission.
 51. The Respondent submits that the Petitioner’s prayers (a-g) reveal all the petitioner is challenging is the recruitment which grievance falls directly under the purview of the Public Service Commission.
 52. The Respondent to buttress the foregoing further relied on the provisions of section 85 of the Public Service Commission Act providing for the mandate to hear appeals from its decisions and section 87(2) of the Act which prohibits challenge of its decisions in Court at the first instance as follows:- “ 87(2) A person shall not file any legal proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government public service unless the procedure provided for under this Part has been exhausted. “
 53. To buttress the foregoing submissions the Respondent relied on the decision in Independent Electoral and Boundaries Commission & 2 Others Ex parte Shaileshkumarnata Verbal Patel (2013)e KLR where Hon. G.V Odunga upheld the provisions of Article 159 of the Constitution to promote alternative forms of dispute resolution methods including other legal forums. The Judge held:- “According I agree that where there is an alternative remedy and procedure available for the resolution of the dispute that remedy ought to be pursued and procedure adhered to.”
 54. The Respondent further relied on the definition of the doctrine of exhaustion is defined in Black’s Law Dictionary 10th Edition as follows:- “ exhaustion of remedies. The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine’s purpose isto maintain comity between the courts and



administrative agencies and to ensure that courts will not be burdened by cases in which judicial relief is unnecessary.”

The Petitioner’s position

55. The Petitioner argues that the petition raises constitutional issues apart from employment ones, and an appeal to the Public Service Commission cannot address them as the jurisdiction is with the Court.
56. The Petitioner objected to the Replying affidavit of Amb. Franklin Esapila on basis that he was served on 22nd January 2024 which he says was a delay tactic to allow the Respondent to proceed with the impugned advert and also took issue with the belated reliance on the County Attorney’s legal advice. The Court on the 22nd January 2024 was informed by Counsel for the Respondent, that they filed the replying affidavit on 18th January 2024. The petitioner was absent. The record does not indicate that the Court did not have the affidavit. The said document in the Court file is stamped 18th January 2024. I find no prejudice suffered even if the same was served on 22nd January 2024 as the Petitioner could have sought leave to file a response. The notice of objection filed by the Petitioner is unknown in law.
57. The petitioner did not submit on the issue of jurisdiction. The petitioner relied on a decision of the Court by Justice Wasilwa who pronounced herself on the challenge to re-advertisement in *Abdi Mohammed Abdullahi v the Board Chairman, National Water Harvesting & Storage Authority & 3 others (2020)e KLR* where the Judge found the re-advertisement unconstitutional.
58. The instant Petition was against a County Public Service Board which unlike the case against the National Water Harvesting & Storage Authority has an alternative form of dispute resolution under section 77 of the County Government Act. The decision cited is thus not relevant to the instant case. The Court considered the prayers sought in the Petition namely:-
 - a. A Declaration that the 18th December 2023 advert for the post of municipal Manager is illegal, null and void.
 - b. An order of certiorari does issue quashing the advert.
 - c. Upon suspension of the 18th December 2023 advertisement, the Respondent be ordered to revert to the recruitment process as advertised on 28th June 2023 and conclude it by informing the petitioner herein and all the interested parties of the outcome.
 - d. If the respondent confirms conclusion of the recruitment process vide the 28th June 2023 advert, an order be directed at the respondent to release the results of the previous recruitment exercise for the post of municipal manager.
 - e. An order is made of who should be the Municipal Manager based on the recruitment report of the Respondent and the investigation report of the 1st Interested Party.
 - f. An order is made to punish the Respondent and any other parties in the matter who may have committed illegalities in the entire recruitment process.
 - g. Any other relief that the Court may deem fit and necessary is upholding *the Constitution* and the rule of law.
59. The Court finds that this was a pure grievance on the recruitment process of the municipal manager by the respondent . The dispute falls squarely under the appeal jurisdiction of the Public Service Commission pursuant to the provisions of section 77 of the County Governmnet Act to wit:- ‘77(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;”(emphasis given). Section 85 of the *Public Service Commission Act* the Enabling Act reads:- “85. 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 Court holds that there is a clear procedure for resolution of a dispute on the recruitment process by the Respondent under the cited laws. The Court is bound to respect the alternative process as guided by the Court of Appeal in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR where the Court observed:- “In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”

60. The Petitioner submitted that the petition raises constitutional issues apart from employment ones, and an appeal to the Public Service Commission cannot address them as the jurisdiction is with the Court. I have considered the prayers sought and the pleadings. It is my opinion that all the prayers were focused on recruitment and there was no nexus between the cited constitutional provisions and how they have been violated in relation to the interested parties. (See *Anarita Karimi Njeru v Republic* 1979 e KLR to effect that in constitutional petition the petitioner must set out with reasonable precision, the alleged violation, the provisions of *the Constitution* said to be infringed, and the manner in which they are alleged to be infringed.) There was no compliance in the instant petition.
61. The Court takes the view the dispute or grievance was within the statutory mechanism under section 77 of the County Government Act and there was no basis to elevate it to a constitutional petition. The petition violated the doctrine of constitutional avoidance as there exists a clear statutory procedure for dealing with grievances arising from the recruitment process of the Respondent under section 77 of the *County Governments Act*.
62. The doctrine of constitutional avoidance was enunciated in *Commission of Kenya & Others v Royal Media Services* [2014] eKLR (cited by the Court of Appeal in *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] Eklr) where the Supreme Court of Kenya considered the question whether where a legislation has provided a remedy and prescribed a clear procedure for address of a particular grievance, a litigant can invoke the provisions of *the Constitution* for redress of such grievance. The Supreme Court said at paragraph [256]: “The appellants in this case are seeking to invoke ‘the principle of avoidance’; also known as ‘constitutional avoidance’. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.” Further the Supreme Court at paragraph [258] applying the principle of constitutional avoidance observed : “From the foundation of principle well laid in the comparative practice, we hold that – 1st, 2nd and 3rd respondents’ claim in the High Court, regarding infringement of intellectual property rights was a plain copyright – infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.”(emphasis given.) I uphold the foregoing decision of the Supreme Court and invoke the principle of constitutional avoidance to hold that there was no constitutional issue disclosed in the instant petition and hence the Court will not determine the petition, when the matter may properly be decided on another basis being vide appeal to the Public Service Commission under section 77 of the *County Governments Act*.



63. In the upshot the Court finds that the the petition is premature for failure to exhaust the statutory mechanisms under section 77 of the [County Governments Act](#) and the Petition falls under the principle of Constitutional avoidance. The Court also notes that the Petitioner is before the 1st Interested Party hence not short of alternative forums for dispute resolution.
65. The petition dated 27th December 2023 and the application thereunder of even date is struck off for want of jurisdiction at first instance. The Court proceeds to down its tools.
66. This being public interest litigation each party is to bear own costs.
67. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 25TH DAY OF APRIL 2024

J.W. KELI

JUDGE

In The Presence of:

C/A: Lucy Macheso

For Petitioner: In person

For Respondent/2nd Interested Party : absent

For 3rd Interested Party: absent

