Havi v Judicial Service Commission & another (Petition E039 of 2024) [2024] KEELRC 798 (KLR) (8 April 2024) (Ruling)

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REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E039 OF 2024

B ONGAYA, J

APRIL 8, 2024

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 1, 2, 10, 19, 21, 27, 38, 41, 73, 131, 171 AND 232 OF CONSTITUTION OF KENYA

BETWEEN

NELSON HAVI ..... PETITIONER

AND

JUDICIAL SERVICE COMMISSION ..... 1ST RESPONDENT

MACHARIA NJERU ..... 2ND RESPONDENT

RULING

1. The petitioner filed an application by the Notice of Motion dated 20.03.2024 through Havi & Company Advocates. It was under Articles 22 and 23 of the *Constitution* of Kenya 2010 and Rule 32(3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms), Practice and Procedures Rules, 2013, Section 66 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya and the inherent powers of the Court. The petitioner is praying for the following orders:

    i. That the application be and is hereby certified as urgent and heard *ex parte* in the first instance.

    ii. That pending the hearing and determination of the application, a conservatory order be and is hereby issued suspending the implementation of the decision of the 1st respondent communicated on 7th March, 2024, notifying the public of shortlisted candidates for

interviews for the public office of Judge of the High Court of Kenya from 3rd to 30th April, 2024.

iii. That pending the hearing and determination of the petition, a conservatory order be and is hereby issued suspending the implementation of the decision of the 1st respondent communicated on 7th March, 2024, notifying the public of shortlisted candidates for interviews for the public office of Judge of the High Court of Kenya from 3rd to 30th April, 2024.

iv. That the costs of this application be provided for.

2. The application was based upon the grounds set out in the application as well as the supporting affidavit of the applicant filed together with the application and sworn on 20.03.2024. The applicants' case is as follows:

a. That on 29th February, 2024, Samson Omwanza Ombati was elected by members of the Law Society of Kenya as their male representative to the 1st respondent with which the mandate of the 2nd respondent to the 1st respondent ceased.

b. That in any event, the 2nd respondent being a holder of public office or state office was obliged to proceed on terminal leave 30 days before the 5th anniversary of his swearing in being on 14.04.2024 pursuant to the requirements of HR policies and procedures manual of the Public Service, 2016.

c. That following an advertisement for 20 vacancies for the public office of Judge of the High Court of Kenya published on 13.10.2023, the 1st respondent on 07.03.2024 notified the public of the shortlisted candidates and dates of interviews being from 3rd to 30th April, 2024.

d. That the first candidate shortlisted for interview on 3rd April, 2024 is the 2nd respondent's partner at Macharia-Mwangi & Njeru Advocates.

e. That majority of the shortlisted candidates are above 15 years' experience whilst a majority of rejected applicants are between 10 – 14 years' experience.

f. That on 08.03.2024 the petitioner requested the 1st respondent to cancel the interviews until the assumption of office of Samson Omwanza Ombati on 14.05.2024 in which the 1st respondent on 15.03.2024 notified the petitioner that it will proceed with the interviews with the 2nd respondent as the male representative to the 1st respondent and in so doing contravening the provisions of Article 10 (2) (a), (b) and (c) of the *Constitution* of Kenya.

g. That the actions of the 2nd respondent on the recruitment of the Chief Registrar of the Judiciary contained in the communication made to members of the 1st respondent on 19.03.2024 demonstrates a determination on the part of the 2nd respondent to pursue personal interests within the transition period.

h. That the affidavit is sworn in support of the application herein and prayed that the orders sought be granted.

i. He annexed a collective bundle containing the documents relied upon in the affidavit as exhibits.

a. The 1st respondent filed the replying affidavit of Winfridah B. Mokaya, the Chief Registrar of the Judiciary and Secretary to the 1st respondent filed through Martin Machira, Advocate and sworn on 02.04.2024. It was urged as follows:

b. That the Notice of Motion fails to specify with reasonable precision, the provisions of the Constitution of Kenya, 2010, statute and or any regulation that the respondents are alleged to have infringed.

c. That the whole process of advertising up and until the shortlisting of the candidates to be interviewed for the position for the office of the Judge of the High Court of Kenya were well within all required parameters and in accordance with all provisions of the relevant statutory and constitutional provisions.

d. That the 2nd respondent was sworn to office on 13th May, 2019 and his tenure expires on 12th May, 2019 hence there is no vacancy at the Commission with regard to the position of male representative.

e. That the request by the applicant that interviews for the office of the Judge of the High Court be cancelled until Mr. Ombati assumes office lacks any basis whatsoever in law.

f. That Commissioners at the 1st respondent are not employees of the 1st respondent and work on a part time basis and having no employer-employee relationship. Therefore, they are not entitled to leave as contemplated under Section 28 of the *Employment Act*.

g. That the decisions of the Commission are not made by one person or the 2nd respondent in particular as alleged by the petitioner.

h. That it is common knowledge that there is a huge backlog in Kenya and recruitment of Judges is one of the ways to address the challenge, hence, granting prayer 2 & 3 of the application would deny Kenyans access to speedy resolution of their disputes.

i. That granting of any conservatory orders or any order as prayed would amount to great injustice.

3. The 2nd respondent also filed his replying affidavit through Martin Machira, Advocate. The 2nd respondent essentially repeated the position taken for the 1st respondent.

4. The respondents also filed a preliminary objection dated 02.04.2024 in which they dispute the jurisdiction of this Honourable court to hear the matter.

5. The preliminary objection is based upon the following grounds:

a. That the Honourable Court lacks jurisdiction to adjudicate the dispute, if any, and determine the issues presenting in the petition and application as the same do not fall under any of the categories of jurisdiction conferred to it under section 12(1) and (2) of the *Employment and Labour Relations Court Act,* 2011 pursuant to Article 162(2) of the *Constitution* of Kenya.

b. That the petition on the first part relates to the question as to whether the 1st respondent complied with the constitutional and statutory edicts in shortlisting applicants for the position of Judge of the High Court and presents pure constitutional issues which are a preserve of the High Court by dint of Article 165 (3) (d) of the *Constitution*.

c. There is no employer-employee relationship between the petitioner, the applicants for the position of High Court Judge and the Respondents and the jurisdiction of the Court has wrongly been invoked by the petitioner on the assumption that the recruitment and selection process constitute matters within the jurisdiction of this Honorable Court.

d. That the Court lacks jurisdiction to hear and determine the question presenting in the petition as to the term or tenure of office, the continued holding of office by the 2nd respondent and whether the 2nd respondent should cease holding office as the issues raised are purely constitutional and within the remit of the High Court as the constitutional court pursuant to Article 165 (3) (d) of the *Constitution*.

e. That this Honorable Court lacks jurisdiction to entertain the petition and the application as the orders and reliefs sought therein will culminate to the unlawful, unconstitutional and unprocedural removal of the 2nd respondent from office contrary to the established procedure under Article 251 of the *Constitution*.

6. The respondents herein pray that the preliminary objection be allowed, and that the application and the petition be dismissed with costs.

7. Parties filed their respective final submissions. The court has considered all material on record and returns as follows.

8. To answer the 1st issue, the Court returns that the preliminary objection must collapse as misconceived. It is urged for the petitioner, and not in so clear constitutional or statutory basis, that where an office is established under the Constitution and terms and conditions attached to the office with respect to any human resource function such as recruitment, selection, appointment, acting appointment, promotion, removal from office or disciplinary control are provided for in the Constitution, then the Employment and Labour Relations Court of Kenya would not have jurisdiction to adjudicate an emerging dispute. The Court holds that in absence of an express statutory or constitutional provision impairing the Court's jurisdiction, the Court's jurisdiction spreads to all disputes about formulation, interpretation, and implementation of human resource functions and powers whether the formal situ of the attached terms, conditions and procedures are in the Constitution, statute, subsidiary legislation, lawful policy, a contract of service or a collective bargaining agreement or even oral or verbal arrangements. In the instant case, the respondents have not demonstrated a constitutional or statutory provision that removes the instant dispute from the Court's jurisdiction and as conferred in section 12 of the *Employment and Labour Relations Act,* Articles 22, 162(2) (a) and 165 (5) (b) of the *Constitution*, the Court enjoys the exclusive original jurisdiction to hear and determine the petition.

9. The Court considers that the instant petition and application is not for the removal of the 2nd respondent from the office of member of the Judicial Service Commission as contemplated in a removal under Article 251 of the *Constitution*. Nevertheless, as already found by the Court, a dispute about the exercise of the removal or disciplinary powers under the Article would fall within the Court's jurisdiction as an exercise of human resource disciplinary or removal function, which is essentially a procedure for terminating a service or employment of a state or public officer. In the instant petition and application, the petitioner seeks to suspend exercise of duty as a commissioner or member of the 1st respondent with respect to the 2nd respondent. In the opinion of the Court, such would not amount to removal from office of the 2nd respondent. Whether such suspension would be available is the subject of the instant proceedings.

10. While making the finding, the Court has considered that in *Narok County Government and Another v Richard Bwogo Birir and Another* (2015) 5JELR 104466 (CA) the Court of Appeal has found that state and public officers are all servants of the people when the Court upheld the trial Court's findings thus,

"39. It is upon consideration of those and other provisions that the trial court reached the following compelling conclusion:

> "...all persons holding public or state office in Kenya in the executive, the legislature, the judiciary or any other public body and in national or county government are servants of the people of Kenya. The court holds that despite the level of rank of state or public office as may be held, no public or state officer is a servant of the other but all are servants of the people. Thus, the court holds that the idea of servants of the crown is substituted with the doctrine of servants of the people under the new Republic as nurtured in the *Constitution* of Kenya, 2010. The hierarchy of state and public officers can be complex, detailed and conceivably very long vertically and horizontally but despite the rank or position held, the court holds that they are each a servant of the people and not of each other as state or public officers. They are all servants of the people. The court holds that there are no masters and servants within the hierarchies of the ranks of state and public officers in our new Republic. The court further finds that the string that flows through the constitutional provisions is that removal from public or state office is constitutionally chained with due process of law. In the opinion of the court, at the heart of due process are the rules of natural justice. Thus, the court finds that the pleasure doctrine for removal from a state or public office has been replaced with the doctrine of due process of law. Article 236 is particularly clear on the demise of the pleasure doctrine in Kenya's public or state service... In the new Republic, the court holds that public service by public and state officers is guided by the doctrine of servants of the people and the doctrine of due process and not by the doctrines of the servants of the crown and the pleasure doctrine. In the opinion of the court, the demise of the pleasure doctrine and the demise of the doctrine of servants of the crown in the new Republic's constitutional framework constitute the very foundation of the Republic, namely, Kenya is a sovereign Republic and all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution."

11. The Court has also considered its opinion and holding in *Okiya Omtatah Okoiti v The National Executive of the Republic and 6 Others* [2019]eKLR, thus, "The Court has also held that in the public service under the *Constitution* of Kenya 2010, there are no masters and servants so that in public service in the new Republic, the test of master – servant does not obtain towards establishing existence of employment. In *Paul Nyadewo Onyango v Parliamentary Service Commission and Another* [2018]eKLR the Court stated, "In the present case, the Court will not therefore place emphasis on the relationships between individual public or state officers. None was a servant or master of the other. What is paramount, in the opinion of the Court, is that the officers interrelate and work together within the lawful prescription of the standards of a good public service delivery. They have no private treaties binding one officer to the other but only the constitutional, statutory and lawful policies or practices that are applicable to the public service and incorporated in the individual officer's contract of service."

12. The Court holds that within universal approaches to access to justice, public and state officers are all servants of the people, employed by the people or working for the people within prevailing provisions of the constitution, statute, lawful public service policies and practices, and, the individual public officer or state officer contracts of service. The designations of the public officers and their nomenclature in establishment are diverse as the complexity of the state and public service such as judge, president, cabinet secretary, secretary, managing director, director, director general, clerk, commissioner, member, tutor, lecturer, counsel, magistrate, and many others in their numeracy, species or cadres, and numbers. The Court holds that the nomenclature and designation or cadre does not

impair the fact of their working for the people as servants of the people as envisaged in Articles 10, 232 and chapter 6 of the *Constitution*.

13. While finding that the Court has jurisdiction, the Court has considered and been guided by the judgment of the Supreme Court in *Kenya Tea Growers Association and 2 others v The National Social Security Fund Board of Trustees and 7 others* Petition E004 of 2023 as consolidated with Petition No. E002 of 2023 (Koome CJ & P; Mwilu DCJ & V-P; Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ) delivered on 21.02.2023. At paragraph 75 of the Judgment, the Supreme Court with reference to section 12(2) of the *Employment and Labour Relations Court Act* concluded thus, "From the above provisions of the Constitution and the Act, it is clear that the jurisdiction of the ELRC is limited in terms of the types of disputes and the parties." Further, "[83] Can it be said that the parties herein are not among the disputants contemplated under Section 12(2) of the *ELRC Act*? Even where the Act stipulates that a complaint, application or suit may be lodged against the Cabinet Secretary for Labour or any office established by law for that purpose? Or that the nature of the dispute is not one that falls within the jurisdiction of the ELRC, even where, as in this case, both employers and employees, trade unions, and workers associations are decrying what they consider to be the adverse effect of a new law on their working conditions? We are in agreement with the Court of Appeal to the effect that this dispute did not arise strictly from an employer-employee relationship. But what about the other aspects of the dispute? What meaning is to be ascribed to the phrase "labour relations"?" Further, "[79] In our view, there is nothing in the *Constitution*, the ELRC Act, or indeed in our decision in the Karisa Chengo Case to suggest that in exercising its jurisdiction over disputes emanating from employment and labour relations, the ELRC Court is precluded from determining the constitutional validity of a statute. This is especially so if the statute in question lies at the centre of the dispute. What it cannot do, is to sit as if it were the High Court under Article 165 of the *Constitution*, and declare a statute unconstitutional in circumstances where the dispute in question has nothing or little to do with employment and labour relations within the context of the ELRC Act. But, if at the commencement or during the determination of a dispute falling within its jurisdiction, as reserved to it by Article 162 (2) (a) of the *Constitution*, a question arises regarding the constitutional validity of a statute or a provision thereof, there can be no reason to prevent the ELRC from disposing of that particular issue. Otherwise, how else would it comprehensively and with finality determine such a dispute? Stripping the Court of such authority would leave it jurisdictionally hum-strung; a consequence that could hardly have been envisaged by the framers of the Constitution, even as they precluded the High Court from exercising jurisdiction over matters employment and labour pursuant to Article 165 (5) (b). We are therefore in agreement with the appellants' submissions regarding this issue as encapsulated in paragraph 69 of this Judgment."

14. Thus, while finding that the Court has jurisdiction, the Court finds that the subject matter of the dispute is recruitment of Judges and whether the 2nd respondent can validly or lawfully sit as a member of the Commission during the recruitment. The 1st respondent and 2nd respondent are performing in that regard, the employer's prerogative or function to recruit. The petitioner is therefore entitled to move the Court per section 12 (2) of the *Employment and Labour Relations Court Act* and per the binding wisdom of the Supreme Court in *Kenya Tea Growers Association and 2 others v The National Social Security Fund Board of Trustees and 7 others Petition* E004 of 2023 as consolidated with Petition No. E002 of 2023 (Koome CJ & P; Mwilu DCJ & V-P; Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ) delivered on 21.02.2023.

15. The Court considers that it should be obvious that the jurisdiction of the Court extents to disputes relating to employment and labour relations. Article 41 as the constitutional anchoring provides for the right of every person to fair labour practices and the wording is about a worker and an employer. The Court has already found that it has jurisdiction in the subject matter of discharge of human resource

functions. That a given person performing work is not expressly put under the Employment Act or is expressly excluded from application of the Act does not by itself eliminate the Court's jurisdiction. The Court is alert that the world of work is replete with many diverse work arrangements. Thus, that the 2nd respondent holds a constitutional office as member of the Commission and that his appointment and exercise of removal or disciplinary control is provided in the constitution does not by itself eliminate the Court's jurisdiction in the ensuing service as a servant of the people contemplated in Chapter 6 of the Constitution. Employment relationships or work engagements can take diverse arrangements. It can be temporary and time bound like in fixed term contracts, casual service, or piece rate work arrangements. It can be part-time as alleged for the 2nd respondent. It may also be triangular where the owner of the work does not directly employ the worker as it happens in outsourcing. It can also be disguised employment where the owner of the work treats the worker not as one to escape the legal implications and protections of undisguised and regular employment. In Kenya's constitutional and statutory design, all public and state officers are servants of the people, the sovereign power of the people having been vested in the people per Article 1 of the *Constitution*. The Court is alert that some state officers or public officers may want to disguise themselves as not being servants of the people in an emergent strange scheme to escape the constitutional, statutory or regulatory exercise of the ultimate employer prerogatives vested in the people collectively, as groups or individuals in the exercise of the legitimate sovereign power over the state or public officers. The Court returns that arguments such as part timing, piece rate work, designation and naming of a public or state office held shall not disguise the true status of the officers, they are all servants of the people, employed by the people, to serve the people.

16. In that regard the Court has considered the International Labour Organization (ILO) Recommendation 198 (R198 - Employment Relationship Recommendation, 2006 (No. 198). The recommendation considers the difficulties of establishing whether or not an employment relationship exists in situations where the respective rights and obligations of the parties concerned are not clear, where there has been an attempt to disguise the employment relationship, or where inadequacies or limitations exist in the legal framework, or in its interpretation or application. The R198 notes that situations exist where contractual arrangements can have the effect of depriving workers of the protection they are due. R198 provides that national policy should at least include measures to:

    (a) provide guidance for the parties concerned, in particular employers and workers, on effectively establishing the existence of an employment relationship and on the distinction between employed and self-employed workers;

    (b) combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due;

    (c) ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties, so that employed workers have the protection they are due;

    (d) ensure that standards applicable to all forms of contractual arrangements establish who is responsible for the protection contained therein;

    (e) provide effective access of those concerned, in particular employers and workers, to appropriate, speedy, inexpensive, fair and efficient procedures and mechanisms for settling disputes regarding the existence and terms of an employment relationship;

(f) ensure compliance with, and effective application of, laws and regulations concerning the employment relationship; and

(g) provide for appropriate and adequate training in relevant international labour standards, comparative and case law for the judiciary, arbitrators, mediators, labour inspectors, and other persons responsible for dealing with the resolution of disputes and enforcement of national employment laws and standards.

17. R 198 further states that for the purpose of facilitating the determination of the existence of an employment relationship, members should, within the framework of the national policy referred to in the recommendation, consider the possibility of the following:

(a) allowing a broad range of means for determining the existence of an employment relationship;

(b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present; and

(c) determining, following prior consultations with the most representative organizations of employers and workers, that workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.

R198 further provides that members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include:

(a) the fact that the work is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;

(b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.

18. The Court has considered the provisions of ILO R198 and returns that the 2nd respondent as a member of the 1st respondent is not working for himself but for the benefit of the sovereign, the people. Further, in that capacity the 2nd respondent is integrated into the sovereign's systems and procedures through the various binding relevant provisions of the Constitution, applicable statutes and regulations. The irresistible finding is that state officers and public officers are employees of the sovereign, the people.

19. On the 2nd issue, the Court returns that the principles guiding the Court in interfering with the exercise of the employer's human resource prerogatives or human resource functions and powers are well established by case law. In *Geoffrey Mworia v Water Resources Management Authority and 2 Others* [2015]eKLR the Court held thus, "The principles are clear. The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement

between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."

20. As submitted for the petitioner, the power to grant a conservatory order like it is prayed for in the petition is given per Article 23(3) (c) of the *Constitution* of Kenya and Rule 23(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013. The purpose of a conservatory order is to preserve the substratum of the dispute pending the hearing and determination of the dispute with finality. The order arrests a given set or state of affairs, usually in the public interest.

21. To answer the 3rd issue, the Court returns that petitioner has not met the threshold for the grant of the conservatory order as prayed for. The Court's reasons for the finding are as follows:

    a. The facts are not in dispute. The 2nd respondent was sworn to office on 13th May, 2019 and his tenure expires on 12th May, 2019 hence there is no vacancy at the Commission with regard to the position of male representative. The 2nd respondent is properly in office as a member of the Judicial Service Commission as his five-year tenure per Article 171(4) of the *Constitution* has not lapsed. Mr. Samson Omwanza Ombati being the next duly elected Law Society representative and due to replace the 2nd respondent will assume office on 12.05.2024 or thereabouts.

    b. In urging that the 2nd respondent should proceed to terminal leave of 30 calendar days, the applicant relies on clause E.12 of the Public Service Commission Human Resource Policies and Procedures Manual for the Public Service, May 2016. The clause provides that an officer who is due for retirement will be entitled in addition to his annual leave, thirty (30) calendar days leave pending retirement and the leave must be taken a month preceding retirement or be forfeited because it cannot be commuted for cash nor will the officer qualify for additional leave allowance. As urged and submitted for the respondents, the provision applies to the public officers serving under the Public Service Commission and the 2nd respondent in the capacity of member of the Judicial Service Commission is not thereby a public officer subject to the provision. Article 234(1) states that the powers and functions of the Public Service Commission will not apply to state officers like the 2nd respondent in capacity of member of the Judicial Service Commission. The Court returns accordingly.

    c. The petitioner urged that the 2nd respondent should not sit and participate in the on-going recruitment of Judges of the High Court on account that the first candidate shortlisted for interview on 03.08.2024 is the 2nd respondent's partner at Macharia Mwangi & Njeru Advocates. The 2nd respondent has denied that fact and stated that the candidate in issue is employed as an associate and further that the 2nd respondent will make the requisite declaration of interest per Article 73(1), (2) (c) and (d). The Court has considered the parties' respective positions. Section 16 of the Leadership and Integrity Act, 2012 provides elaborately on guiding principles on conflict of interest for state officers. The 2nd respondent has admitted that the first listed candidate is his associate at the law firm and has undertaken to declare the same. Section 16 of the Act infers a conflict of interest with respect to a business associate or agent. The section further provides thus, "(7) Where a State officer or a public officer is present at a meeting, where an issue which is likely to result in a conflict of interest is to be discussed, the State officer or public officer shall declare the interest at the beginning of the meeting or before the issue is deliberated upon. (8) A declaration of a conflict of interest under subsection (7) shall be recorded in the minutes of that meeting." Further, section 41 of the Act on the

breach of the Leadership and Integrity Code provides thus, "(1) Subject to subsection (2), a breach of the Code amounts to misconduct for which the State officer may be subjected to disciplinary proceedings. (2) Where an allegation of breach of the Code has been made against a State officer in respect of whom the Constitution or any other law provides the procedure for removal or dismissal, the question of removal or dismissal shall be determined in accordance with the Constitution or that other law." In view of the provisions of the cited provisions of the law, it appears to the Court that the provisions provide for clear measures that may be taken with respect to shortlisting and recruitment for appointment of the first candidate and the measures that may be taken against the 2nd respondent as a state officer and with respect to the alleged conflict of interest. The Court finds that the existence of the alternative remedial measures and which appear not invoked by the applicant or shown to have been exhausted, or accrued, or even unavailable for implementation per the statutory design, militate against the Court interfering in the recruitment process. In any event, if the alleged conflict of interest were to be established as offensive at all, it would impair only the recruitment and selection of the first shortlisted candidate. Accordingly, it does not amount to an established good basis for granting the interim conservatory order which would adversely affect the entire on-going recruitment process.

d. The applicant has urged that the 1st respondent has discriminately shortlisted candidates whose experience is above 15 years as compared to those below fifteen and above the prescribed minimum ten years of experience. The Court finds that the applicant has not shown that the 1st respondent shortlisted the candidates upon the alleged discrimination on account of experience. The applicant appears not to have requested and obtained the 1st respondent's parameters or score sheet at the shortlisting and how the individual candidates performed. The replying affidavit of Winfredah B. Mokaya at paragraphs 10 to 17 has explained the 1st respondent's criteria and considerations in shortlisting the candidates. At paragraph, 15 of the replying affidavit it is stated thus, "15. That the Constitution provides that one must possess at least 10 years of experience for appointment as a Judge. This is the minimum threshold. It does not state that even if a candidate possesses 10 years of experience he or she must be shortlisted on this basis only as the Petitioner contends since there are other parameters provided by the Constitution such as those provided under Article 232 as read with the Judicial Service Act that are considered." In *Chama Cha Mawakili (CCM) v Chairperson Independent Electoral and Boundaries Commission & 2 Others* [2020] eKLR the Court held, "....The Court holds that an objective and predetermined score sheet taking into account the qualifications in section 10(2) of the IEBC Act was crucial and mandatory. Similarly, the Court holds that it was mandatory to have an objective and predetermined score sheet for the interview process or other method invoked to recruit and select the most suitable candidate on headings contemplated in Articles 232(1) (g), (h) and (i) and Article 73(2) (a) of the *Constitution* and section 10(2) of the *IEBC Act* so as to demonstrate fairness and transparency and other values and principles in Articles 10, 232, and 73 of the Constitution. The score sheet must be completed for the candidates who have the basic prescribed qualifications at the shortlisting stage and then for each candidate progressing to the subsequent steps such as oral or written interviews. The Court holds that the 2nd respondent enjoys the discretion on the weight of scoring under any such headings in the score sheet but must show it was predetermined and objectively applied to all applicants. It is that individual scores are held in confidence to be disclosed to the concerned individual as he or she may request – but the score sheets and the related documentation guiding the process must be available for ascertaining the compliance in the recruitment process. In absence of such documentation of scores upon predetermined and objective criteria, the Court returns that it is difficult to make a finding of

a recruitment, selection and appointment process that is consistent with the relevant statutory and constitutional provisions. The Court therefore returns that taking the material on record into account, it cannot be said that the recruitment, selection, and appointment process as challenged is continuing in accordance with the law." In the instant case, the Court returns for the 1st respondent that as urged, the 1st respondent is entitled to consider the minimum experience of 10 years and the other prescribed constitutional and statutory qualifications for the office of the Judge of the High Court and in its discretion determine the range of scoring or weighting on each factor for shortlisting and recruitment or selection to be applied objectively to all the candidates. The applicant has not shown that the consideration of the factor of experience of at least 10 years has been discriminately invoked by the 1st respondent or not applied objectively. The ground will collapse as a basis for granting the conservatory order.

e. It was submitted for the applicant that there is a precedent in the commonwealth that for good governance principle that upon election the outgoing officer is constituted a caretaker of the administrative affairs of the office leaving the making of major decisions in respect to the office to the incoming officer as was held in Khawaja Muhammad Asif v Federation of Pakistan & Others, Supreme Court of Pakistan (Constitutional Petition No. 30 of 2013). While the submission is persuasive, the Court returns that in Kenya's constitutional design, unless expressly limited by statute or by the Constitution, a person holding a state office or a public office continues to perform the functions of the office even during the transition with a standby next office holder. In the judgment delivered on 10.11.2023 in *Captain Paul Rukaria v Hon. Attorney General, and, Hussein Tene Debasso and Another (Interested Parties),* ELRC Petition 20 of 2023 at Machakos, the Court held "24. Second, the Court finds that there is no cross-appeal challenging the appointment of the petitioner as chairperson by the out-going President and only 4 days to the presidential elections at the voting held on 09.08.2022. To that extent the Court returns that it appears extraneous to seek to justify the revocation of the petitioner's appointment as chairman based on the likely manner the petitioner was appointed. The manner of appointment of the petitioner is undisputedly permissible within the express provisions of Article 134 of the Constitution. Article 259 provides that the *Constitution* shall be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and, contributes to good governance. By that constitutional guidance, it appears to the Court that the purported spirit of the Constitution in the manner the petitioner may have been appointed, and as submitted for the 1st interested party, cannot operate as to supersede the petitioner's entitlement to allege violation and then enforcement of his human rights and fundamental freedoms. That line of submission, in the opinion of the Court, must collapse as coming in the way and blocking the express constitutional provision that the Constitution is interpreted in a manner that advances the rule of law, and, the human rights and fundamental freedoms in the Bill of Rights. Article 259 (3) (a) provides that a function or power conferred by the Constitution on an office may be performed or exercised as occasion requires, by the person holding the office. In view of that provision, the Court considers that the out-going President Uhuru would appear, in absence of any other material, to have acted in accordance with that provision in appointing the petitioner at 4 days to the voting date. As to the submission on it being a sun-set appointment, it appears to the Court that Article 259(5), (6), (7) and (8) provide for strict principles on computation of time and none of the provisions has been shown to have been violated. Article 259(8) states that if a particular time is not prescribed by the Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises. The computation of time being expressly provided in the Constitution, the Court returns that time shall be

strictly reckoned in line with the strict constitutional provisions. Thus, invoking the spirit of the Constitution is found unjustified as it was suggested that the petitioner's appointment being outside the excluded time, nevertheless, it was trapped by that time as submitted because the impact of the appointment defeated the alleged or purported mischief (per submissions) of an out-going President's design of packing "the men of his heart" in public offices to undermine the in-coming President from appointing to the offices "the men of his heart" towards realization of the will of the people conferred at the voting for the in-coming President to achieve his policies and priorities. The Court considers that it will become difficult to set boundaries on how far the spirit of the constitution would fly based on the impact of the many decisions an out-going President may make outside the excluded period in Article 134, and yet, the decisions be defeated by being brought into same status as those made within the excluded period. Conceding to that proposition of the spirit of the Constitution in matters of the computation of time would spell absurd outcomes which the Court considers not to have been intended at all in construction of Article 134. The Court returns that the petitioner's appointment cannot be defeated and used to justify the revocation of the appointment upon the submissions challenging the time of the appointment. In reflection about the issue, on the material on record, it is not urged for the respondent or the 1st interested party that the reason the petitioner's appointment was revoked was because of the time or manner he was appointed - and failing which, the merits of the manner and time of the appointment does not fall for consideration in the instant petition." The Court considers that the opinion applies in the instant case and the 2nd respondent is not barred by the *Constitution* or statutory provision from performing the roles as member of the 1st respondent in the sunset days of his tenure as such member.

22. In view of the findings, the Court returns that the petitioner has failed to pass the threshold for the Court to interfere in the on-going recruitment, selection and interviewing of candidates for the position of Judge of High Court by way of a conservatory order as prayed for the applicant.

23. The notice of preliminary objection dated 02.04.2024 filed for 1st and 2nd respondents and the application for the petitioner by the notice of motion dated 20.03.2024 are both liable to dismissal. Considering the parties' margins of success and the nature of the instant petition and application each party to bear own costs of the application and the preliminary objection.

In conclusion, the notice of preliminary objection for the respondents and the application for the petitioner are each dismissed with each party bearing own costs and parties to fix a convenient mention date for directions on expeditious hearing and determination of the main petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 8TH APRIL 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE