



**Sang v Governor Kericho County & 2 others (Petition E001 of 2023)
[2024] KEELRC 1631 (KLR) (24 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1631 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
PETITION E001 OF 2023**

**HS WASILWA, J
JUNE 24, 2024**

BETWEEN

COLLINS KIPNGETICH SANG PETITIONER

AND

THE GOVERNOR KERICHO COUNTY 1ST RESPONDENT

THE COUNTY ASSEMBLY OF KERICHO 2ND RESPONDENT

KERICHO COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

JUDGMENT

1. The petitioner instituted this suit by a Petition dated 9th February, 2023, seeking for the following reliefs; -
 - a. A declaration that the nomination of Alice Chepngetich Bett to the position of County Attorney Kericho County is illegal and unconstitutional.
 - b. An order of certiorari to be issued quashing the nomination, appointment and/or purported appointment of one Alice Chepngetich Bett to the office of County Attorney Kericho County.
 - c. A declaration that the 1st Respondent violated *the Constitution* by nominating and purporting to appoint Alice Chepngetich Bett to the office of County Attorney Kericho County.
 - d. A declaration be issued that persons performing functions of County Attorney as at 13th July 2020 are deemed as the County Attorney, under the office of the County Attorney Act by operation of the law.
 - e. A declaration that Gideon Kipkoech Mutai is legally and legitimately occupying the office of County Attorney as per gazette notice No. 10187 dated the 27th November 2020.



- f. An injunction do issue restraining the 1st Respondent from removing the serving County Attorney unless under section 13 of the office of the County Attorney Act.
 - g. A declaration that by dint of Article 73 of *the Constitution* the 1st and 2nd Respondents are bound to exercise public authority in a manner that is consistent with the purposes and objects of *the Constitution*, and which promotes public confidence.
 - h. A declaration that the 1st Respondent's actions are glaringly illegal and unconstitutional and thus not fit to continue holding public office.
 - i. A declaration that the 1st and 2nd Respondents acted ultra vires and breached the provisions of Articles 10, 73, 174 and 232 of *the Constitution*.
 - j. There be an order as to costs.
2. The petition herein is expressed under Article 1(1), Article 1(3), Article 2(1), Article 3(1), Article 10 (1), Article 27, Article 73, Article 174, Article 175, Article 232, Article 258(2) and Article 259(1) of *the Constitution*.
 3. The basis upon which the Application is made is that the 1st Respondent, in reliance of section 5 of the Office of the County Attorney Act, nominated Alice Chepngetich Bett for the position of the County Attorney.
 4. Prior to the said appointment, the said position was not advertised nor was there any competitive sourcing as demanded by the law. But that the said name was merely forwarded to the County Assembly for vetting and thereafter appointment.
 5. It is averred that the 1st Respondent nominated Alice Chepngetich Bett to the office of County Attorney even though Gideon Kipkoech Mutai was gazetted as the County Attorney to serve up to 2026, and that his appointment was not yet been revoked.
 6. It is contended that the nomination of Alice Chepngetich Bett by the 1st Respondent was not open and is shrouded in secrecy thus tainting the entire process with irregularities. In spite of that, the 2nd respondent intends to proceed with the vetting exercise despite the glaring irregularities.
 7. The Petitioner states that the 3rd Respondent has failed to take any corrective action on the uncompetitive nomination as demanded by section 75 of the *County Governments Act*.
 8. He avers that the actions of the Respondents fly in the face of the mandatory Principles under Articles 10, 27, 54, 73, 174, and 232 of *the Constitution* and other mandatory legal and constitutional provisions relevant to public appointments.
 9. He states that the 2nd Respondent is hell-bent on proceeding with the vetting exercise which in itself is illegal and unconstitutional, when the import and the spirit of sections 4 and 5 of the *Office of the County Attorney Act, 2020* is that the recruitment of the County Attorney would entail advertising for the position, filtering applications, interviewing the qualified applicants then presenting the name of the most qualified and suitable candidate to the County Assembly for vetting.
 10. He maintained that the Respondents acted in contravention of the law by purporting to intentionally and unlawfully hand-pick a candidate instead of adhering to the clearly laid down process of filling the position of a County Attorney.



11. He stated that the 1st Respondent acted contrary to the law by failing to initiate or undertake a process that would guarantee competitiveness and safeguard the rule of law. Additionally, that the purported recruitment exercise generally violated the Constitution and the law.
12. He avers that the actions by the respondents are an affront to the democratic gains and advancements made under the new Constitutional order.
13. On violation of the constitution, he stated that to the extent that the 1st respondent failed to competitively source the nominee for the County Attorney before submitting the name to the 2nd Respondent, the provisions of Articles 10, 73, 174 and 232 of the Constitution and section 5 of the Office of the County Attorney Act as read with section 7 of the Public Appointments Approval Act, have been violated.
14. Further that to the extent that the respondents deliberately and maliciously disregarded the laid down procedure provided for in the law without any compelling reasons the provisions of Articles 10,73, 174 and 232 of the Constitution to wit democracy, rule of law, participation of the people, good governance, integrity, transparency, accountability and public participation in public affairs, have been violated.
15. The Petition is opposed by the Respondents who filed a replying affidavit sworn by Dr. Wesley Kipkorir Bor, the County Secretary and Head of County Public Service Board, on 19th July, 2023.
16. In the affidavit, the affiant state that the said Alice Chepngetich Bett is a qualified member for the appointed to the office of the County attorney pursuant to section 5(2) of the County Attorney Act, 2020. This is because, she is an Advocate of the High Court of Kenya with an experience of over 30 years of post-admission to the bar and an active member of the Law Society of Kenya.
17. He states that as much at the petitioner laments on lack of competitive sourcing of the said Alice Bett, section 5(1) of the County Attorney Act does not require the nominee for appointment in the position of the county attorney to be competitively sourced. Thus the petitioner's case is misconceived, in bad faith and tainted by ulterior motives.
18. He stated that by the letter dated 18.01.2023 Alice Chepngetich Bett was nominated by the Governor Kericho County for appointment as the County Attorney, County Government of Kericho, subject to approval of the County Assembly, Kericho.
19. That the Office of the County Attorney Act, 2020, establishes the Office of the County Attorney that provide for the functions and powers of the County Attorney to; discharge of duties and the exercise of powers of the County Attorney; and for connected purposes. Section 4, of this Act establishes in each, the Office of the County Attorney as an office in the county public service, consisting of; the County Attorney; the County Solicitor; and such other number of County Legal Counsel as the County Attorney may, in consultation with the county public service board, consider necessary.
20. He avers that unlike the county solicitor and county legal counsel, section 5(1) does not provide for competitive recruitment exercise for the position of the county attorney, but only for their appointment by the Governor with the approval of the county assembly.
21. He stated that Section 31 of the Office of the County Attorney Act, 2020 provides for, transition clause that, upon the coming into effect of the Act, members of staff employed by the county executive to perform the functions of the Office of the County Attorney under the Act shall, be deemed to be members of staff of the Office in their respective capacities; retain any rights accrued or accruing to them as such staff or contributors; be at liberty to continue to contribute to any superannuation scheme to which they were contributors; be entitled to receive any deferred or extended leave as if they have



- continued to be such staff of the Office during their service with the county executive; be entitled to receive any payment, pension, or gratuity as if they have continued to be such staff of the Office during their service with the county executive and be deemed to be employees of the Office for purposes of any law under which those rights accrued or were accruing, under which they continue to contribute or by which that entitlement is conferred.
22. However, that section 31(2) of the County Attorney Act, states that despite the provisions of subsection (1) of the Act, a person employed by the county public service board to perform the functions of the County Attorney, County Solicitor or County Legal Counsel at the commencement of this Act shall continue to hold their respective positions in the Office after the coming into effect of the Act only if they meet the qualifications specified in the Act. Moreover, that, there is no provision in the county Attorney act that expressly impedes the Governor from nominating a substantive holder for the position of the county Attorney when the same was held by a person in transient capacity.
 23. It is averred that, prior to the enactment of this Act, on 1st September 2014, Mr. Gideon K. Mutai was competitively recruited as the County legal officer and chief legal advisor to the County Government of Kericho on permanent and pensionable terms. Upon enactment of the Act, Mr. Gideon Mutai was gazetted as a county attorney vide gazette notice of 4th December 2020 VOL CXXI No. 215 in a transitory capacity and in compliance with section 31 of the County Attorney Act.
 24. That section 31(3) of the County Attorney Act provides that the county public service board shall, where a person employed by the county executive to perform the functions of the County Attorney, County Solicitor or County Legal Counsel does not meet the qualifications specified in the Act, redeploy such a person to the highest position that is vacant and to which such person qualifies for appointment. Pursuant to the new law, Alice Chepngetich, was appointed as a county Attorney, having meet all the qualifications listed under the Act.
 25. He avers that by dint of section 17 of the [Office of the County Attorney Act, 2020](#) only the County Solicitor ought to be competitively recruited and appointed by the 3rd respondent and by dint of section 18 of the Act, County Legal Counsel, but with the consultation with the County Attorney. As such the office of the County Attorney is not an office that is statutorily required to be filled with substantive input from the 3rd respondent.
 26. He maintains that the appointment of the County Attorney is not amongst the functions vested on the 3rd respondent but that the County Attorney is only appointment by the Governor in line with section 5(1) of the [Office of the County Attorney Act, 2020](#).
 27. The Affiant questioned the locus standi of the Petitioner and stated that, the Petitioner does not have the requisite locus standi to institute the present petition on behalf of Mr. Gideon Mutai the erstwhile county Attorney, having not declared being his proxy. Moreover, the petitioner has been disowned by Mr. Gideon Mutai himself in the replying affidavit dated 20/02/2023. In any case that, the Petition revolve around the renewal of contract of Mr. Gideon Mutai employment contract, which the petitioner is not privy to and thus cannot legally be of any effect to him. On that basis, the affiant stated that the proceedings herein are fatally defective and an abuse of the court process.
 28. He avers that Gideon Mutai in his affidavit dated 20/02/2023 and annexed to the affidavit dated 18/02/2023 categorically states that he temporarily transitioned to the position of county attorney in line with the office of the Attorney General legal advisory and thus the terms of his employment however did not change from permanent and pensionable terms to contractual terms. In any event that the Gideon Mutai cannot be employed under permanent and pensionable terms while at the same time on contract for two jobs as it will result to a conflict of interest under Article 75(1) of [the Constitution](#).



29. Furthermore, that the permanence and stability associated with the former, juxtaposed against the transitory nature of the latter, create an incongruity that undermines the principles of equitable and sustainable employment practices.
30. He stated that the constitutional issues if at all, are improperly preferred before this forum and the issues therein ought to have been preferred in the normal manner as a claim before the Employment Court by Gideon Mutai.
31. He stated that Gideon Mutai is the one that proffered a written advisory to the County Secretary vide his letter dated 3/02/2023 regarding the provisions of the County Attorney Act in relation to the transitional arrangements under the Office of the County Attorney Act. Moreover, Mr. Gideon explicitly conveyed his complete lack of opposition towards the appointment of a substantive County Attorney.
32. The affiant avers that the Petition is fatally defective and incurably bad for misjoinder of causes of action in the sense that the issues are mixed up and especially regarding the employment of the County Attorney and the alleged dismissal of Gideon Mutai by the 1st Respondent and the reliefs sought, therefore, cannot be adjudicated upon at once and/or by this Court alone.
33. He stated that the office of the County Attorney is critical in the government's achievements in service delivery hence the impugned provisions grant autonomy to the Governor and his County Assembly to select persons who will best deliver the objectives and targets of the county. For that reason, the selection of the persons to appoint requires considerations such as, the ability to attract strategic partnerships for the entities and to deal with political issues and players therefore, getting suitable persons may entail head-hunting.
34. He avers that the Petition does not meet the threshold contemplated and reserved for constitutional petitions considering the Petitioner has failed to illustrate the constitutional contraventions of public interest and has only demonstrated an individualistic concern with regards to the legal replacement of the former County Attorney.
35. He stated that the alleged violations have not been specifically set out and Particulars provided as in the case *Anarita_Karimi Njeri -vs-The Republic* [1976-1980] KLR 1272. Further that there exists no discernible relief that flows from the Respondents to the Petitioner and therefore the Petitioner has not demonstrated how and in what manner he was affected by the purported constitutional contraventions.
36. He stated that the petition offends the principle of Constitutional Avoidance which demands that where a dispute is one which can be determined under another area of law other than under *the Constitution*, then it is best that it be so determined and pure constitutional issues left to be determined as such.
37. It is also stated that the Petition offends the doctrine of exhaustion which requires a party to exhaust all available internal dispute resolution mechanisms provided by the law before filing a dispute in court. On that basis, he stated that the Petitioner should have exhausted the appellate process envisaged under Article 234(2)(i) of *the Constitution* of Kenya 2010 as read with section 77 of the *County Governments Act* and sections 85 and 87 of the *Public Service Commission Act, 2017*.
38. He states that the principle of proportionality militates against the grant of the drastic orders sought in so far as proportionality is a principle relating to public policy consideration and requiring the court or an administrative authority, in exercising its discretion to maintain a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and purpose



which it pursues based on firstly, the balancing test requires a balancing of the ends that an official decision attempts to achieve against the means applied to achieve them. This requires an identification of the ends and purposes sought by the official decisions. In addition, it requires an identification of the means employed to achieve those ends, a task which frequently involves an assessment of the decision upon affected persons.

39. Secondly, the necessity test requires that where a particular objective can be achieved by more than one available means, the least harmful of these means should be adopted to achieve a particular objective. This aspect of proportionality requires public bodies to adopt those regulatory measures which cause minimum injury to an individual or community and Thirdly, the suitability test requires authorities to employ means which are appropriate to the accomplishment of a given law, and which are not in themselves incapable of implementation or unlawful.
40. The Affiant also stated that the supporting affidavit dated 9th February 2023 bears the signature and stamp of the commissioner of oaths, H.K Rutto whose full name is Rutto marrirmoi Hillary Kiprof of personal Registration No. is P. 105/9021/12, who is inactive. He stated that the said Advocate is barred by section 31 of the Advocates Act from acting as an Advocate and by extension a commissioner of oaths. He does not hold a practicing certificate hence not qualified to act as an Advocate under section 9 of the Advocates Act. In addition, that he is barred by Section 34 of the Advocates Act from taking instructions, drawing and filing pleadings hence the pleadings drawn and filed by the said firm are defective and urged this Court to strike out the said pleadings.
41. In conclusion, he stated that the scope contemplated by Articles 22 and Article 258 of the Constitution have not been clearly illustrated by the Petitioner in the Petition and therefore the present petition fails the test determinant to lay it down for adjudication before the Constitutional Court. Therefore, that the instant petition is vexatious, and abuse of court process and therefore ought to be dismissed with costs.
42. The Application herein was canvassed by written submissions.

Petitioner's Submissions

43. The petitioner submitted from the onset that he is challenging the nomination of Alice Bett as the County Attorney of Kericho County Government and not her qualification. He argued that Alice Bett's nomination was made without any competitive process, which violates both statutory and constitutional provisions regarding appointments in the county public service. He argued that the crux of this matter lies in the importance of ensuring a fair and transparent selection process in the county public service that aligns with the tenets of our constitutional system because lack of a competitive process undermines the integrity of the Constitution and the rule of law.
44. The Petitioner then submitted on four issues; whether the appointment of one Alice Chepngetich Bett as the County Attorney complied with the constitution and the law, whether the 1st Respondents' actions amounted to gross violation of the law, what order should issue and who should pay costs.
45. On the first issue, it was submitted that it has not been contested that the nomination of Alice Chepngetich Bett as the County Attorney of Kericho County was carried out in a manner that did not involve adequate evaluation of other potential candidates, advertising the vacancy or conducting interviews. Additionally, that it is clear and indisputable fact that Section 4 of the County Attorney Act categorizes the position of County Attorney as an office within the county public service. Furthermore, that Article 260 of the Constitution is instructive that "public service" means the collectivity of all individuals, other than State officers, performing a function within a State organ.



46. Section 2 of the [County Governments Act](#), 2012 on the other hand defines “County Public Service” as the collectivity of all individuals performing functions within any department of the county government or its agency, but does not include the governor, deputy governor, members of the county executive committee and the members of the county assembly.
47. It was submitted that failing to advertise the position of County Attorney violates the principles of fairness and merit, as outlined in Article 232(1)(f) of [the Constitution](#) and the County Government Act. He added that the Respondents had a mandatory legal obligation to advertise the position of County Attorney to ensure that the appointment process is transparent, fair, and open to all qualified candidates.
48. It was argued that the allegations that the County Public Service Board, has no role in recruiting a County Attorney is misplaced as the appointment of a County Attorney must comply with the County Government Act. Veritably, section 66 of the [County Governments Act](#) is instructive that; -
- “If a public office is to be filled, the County Public Service Board shall invite applications through advertisement and other modes of communication so as to reach as wide a population of potential applicants as possible and especially persons who for any reason have been or may be disadvantaged.”
49. To further support this, the Petitioner relied on the case of *Evans Muswahili Ladtema Vs Governor, County of Vihiga; County Assembly of Vihiga & others(Interested Parties)* [2021] eKLR where Radido J held that;
- “Consequently, under section 5(1) of the [Public Appointments \(County Assemblies Approval\) Act](#), 2017, the Governor was under a statutory duty to publish an advertisement inviting applications for nomination to the office of the County Attorney. The advertisement contemplated by section 5(1) of the Public Appointments (County Assemblies) Act, 2017 has its antecedents in the supreme law which requires appointments to be made on merit and competitiveness with attendant public participation. The 3rd Interested Party did not disclose which advertisement prompted him to apply for the office of the County Attorney. The Governor also did not disclose when an advertisement was made. The nomination of the 3rd Interested Party did not, therefore, meet the statutory threshold of competitiveness and merit. The fact that the 3rd Interested Party is a person living with a disability would not excuse the unilateral and arbitrary decision by the Governor. The nomination and appointment were invalid.”
50. This position was reiterated in the case of *Commission for Human Rights and Justice v Michelle Bibi Fondo & 2 others* [2021] eKLR determined thus;
- “.....To answer the 3rd issue for determination the Court returns that under the design of section 5(1), the 3rd respondent is not involved in the recruitment, approval and appointment of the County Attorney. The Court further considers that by section 5(1) providing that the County Attorney shall be appointed by the Governor with approval of the county assembly, the constitutional ethos of transparency, accountability, competitiveness, suitability and merit are not thereby defeated. It is the Court’s considered view that in undertaking the nomination of the County Attorney for appointment with approval of the county assembly, the Governor must exercise the discretion in accordance with the constitutional values and principles of public and state appointments. The Court further considers that towards achieving such constitutional values and principles, the



Governor may invoke his or her own procedures or delegate to appropriate authority such as the 3rd respondent or act in accordance with such applicable legislation (by the National or County Government) or such lawful policies and practices, for the time being in place.”

51. Similarly, it was argued that Article 10 of *the Constitution* on the national values and principles of governance include the rule of law and participation of the people. Therefore, that when it comes to public appointments one of the ways in which the values of public participation is observed is through ensuring vacancies are advertised and potential Kenyan citizens offered an opportunity to offer themselves. Without such participation then any appointments to offices in the public service bereft of competition will be incongruent with the tenets of article 10 of *the Constitution*.

52. On justification for constitutional threshold, the petitioner relied on the case of Okiya Omtatah Okoiti & 3 Others Vs. Nairobi City County & 5 others [2014] eKLR in which the High Court cited, approvingly, the case of Benson Riitho Mureithi Vs J.W Wakhungu and 2 Others Pet No. 19 of 2014, where it was stated that:

“It may seem that *the Constitution* has imposed an irksome and onerous burden on those responsible for making public appointments by requiring that they make the appointments on the basis of clear constitutional criteria; that they allow for public participation; and that those they appoint meet certain integrity and competence standards. This burden, however, is justified by our history and experience, which led the people of Kenya to include an entire chapter on leadership and integrity in *the Constitution*.”

53. The Petitioner also relied on the case of Benson Riitho Mureithi Vs J. W. Wakhungu & 2 others [2014] eKLR which cited with approval the case of David Kariuki Muigua vs. Attorney General & Another [2012] eKLR, which held that:-

“There is no evidence that there was a competitive process that would enable public participation in the process and show the transparency and accountability required under *the Constitution*, thereby giving legitimacy to the appointment of the petitioner. Like his successor, the petitioner was appointed on the basis of a Gazette Notice; the basis of the appointment, the criteria followed in appointing him and the other members of the Tribunal was, from all appearances and regrettably so, more in keeping with the old order that preceded and indeed gave impetus to the clamour for the new Constitution when public officers were appointed at the whim of the Minister or President. To uphold the appointment of the petitioner would be to give a seal of approval to the old order. It is imperative that all public appointments are made in accordance with constitutional values and principles.”

54. On whether the 1st Respondents’ actions amounted to gross violation of the law, it was submitted that the nomination of Alice Chepngetich Bett as the County Attorney of Kericho County was carried out in a manner that did not comply with the relevant statutes and constitutional provisions. In particular, the failure to advertise the position, conduct interviews, and consider other qualified candidates violates the principles of fairness, transparency, and merit enshrined in Article 232(1)(f) of *the Constitution* and the *County Governments Act*. In light of these violations, it was submitted that the 1st Respondent acted in gross violation of the law. Further that the 1st Respondent failed to make good public considerations the public good by illegal and hastily nomination of a County Attorney without proper consideration of all qualified candidates.



55. He argued that it is undisputed that Gideon Mutai has been duly gazetted as County Attorney for Kericho. However, there is a contention regarding the nature of his appointment, whether it is transitional or substantive in character. Nevertheless, that the position of county attorney was not available for filling since the county does not lack a principal legal advisor as long as Mr. Mutai continues to occupy the office of County Attorney. Hence the potential appointment of Alice Chepngetich Bett without fair consideration of other competent candidates raises serious concerns and set a risky precedent by disregarding the fundamental values of fairness and merit, which form the basis of appointments in the county public service. Furthermore, it would jeopardize the integrity of the county public service and undermine public confidence in the inclusiveness of Kericho county government institutions.
56. It was submitted that the appointment of Ms. Bett without due process and fair consideration of other qualified candidates would contravene the principles of equity and good governance and violated the law and *the constitution*.
57. He submitted that the gist of the Petition rests on the actions 1st and 2nd Respondents to deliberately and unashamedly violate the values principles of public service as enshrined in Article 232 of *the Constitution*. In particular on the principal Article 232(1)(g) which enjoins state organs to regard fair competition and merit as the basis of appointments and promotions. Also that the Governor's actions were so blatant as to deny other eligible Kenyans an opportunity to serve the people of Kericho in the office of County Attorney. A move that circumvented *the Constitution* and rule of law from the 1st Respondent action to forgo competitive recruitment yet the same is clearly provided for in the law.
58. In conclusion, it was submitted that this Court has the jurisdiction to grant the orders sought herein and issue further orders deemed fit, having submitted that the 1st and 2nd Respondents wilfully acted contrary to the law. He added that under the law, the Governor is required to make the nomination after competitively recruiting his nominees. In support of this, he relied on the case of Republic v Nairobi City County Government & 6 others Ex Parte Mike Sonko Mbuvi [2017] eKLR which cited with approval the case of Rensley vs. The City Council of Nairobi [2006] 2 EA 311 where the Court stated that:
- “In this case there is an apparent disregard of statutory provisions by the respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid...The purpose of the court is to ensure that the decision-making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followedPublic Bodies and Ministers must be compelled to observe the law: and it is essential that bureaucracy should be kept in its place.”
59. Accordingly, that the petition is merited as the appointment of the County Attorney ought to be nullified and the 1st Respondent commence the recruitment of a County Attorney afresh in strict compliance with the law.
60. On costs, it was argued that the Respondents decision to act in open defiance to the law in the appointment of one Alice Chepngetich Bett as the County Attorney was done intentionally and knowingly. There is no fathomable reason why the Respondents chose to take a course contrary to the law other than their embrace of impunity towards the rule of law and constitutionalism that is



worryingly becoming a common attitude in our devolved units especially in the County of Kericho. Therefore, that an order of costs will encourage more public-spirited Kenyans to move to court in defence of the constitution particularly in matters involving glaring and blatant violations of the constitution.

Respondents Submissions

61. The Respondent submitted on four issues; whether there exists a requirement for a competitive recruitment process for the nomination of County Attorney, whether the court should grant the Orders sought, whether the Petition is procedurally and substantially regular and proper and who should bear costs of the suit.
62. On the first issue, it was submitted that section 5 of the County Attorney Act provide for nomination of the County Attorney with approval of the County Assembly, while section 17 provides for competitive recruitment of the County Solicitor and section 18 provides for competitive recruitment of the legal counsel. As such the Act does not provide for competitive recruitment of the County Attorney. Only that section 6(1) of the Office of the County Attorney provides that the County Attorney shall have the status and rank of a member of the County Executive Committee. Hence the modus operandi for recruitment of the CECs is akin to the one of the County Attorney that does not require competitive recruitment. In support of this, he relied on the case of John Lewis Ndombi Vs County Government of TransNzoia & 2 Others [2016] eKLR, where the court affirmed and ratified the absence of mandate for competitive recruitment in selection process of County Executive Committee members.
63. He argued that the County Attorney Act conspicuously omits any explicit provisions requiring competitive recruitment of the County Attorney and delineates such requirement to other positions such as the County Solicitor and the County Legal counsel. Therefore, that the Act is clear that the County Attorney does not require to be competitively recruited. To buttress this position, the Respondent relied on the case of Commission of Human Rights and Justice V Michelle Bibi Fondo & 2 Others [2021] eKLR where the Court held that;-

“The Court further considers that by section 5(1) providing that County Attorney shall be appointed by the Governor with approval of the county assembly, the constitutional ethos of transparency, accountability, competitiveness, suitability and merit are not thereby defeated. It is the Court’s considered view that in undertaking the nomination of the County Attorney for appointment with approval of the county assembly, the Governor must exercise the discretion in accordance with the constitutional values and principles of public and state appointments. The Court further considers that towards achieving such constitutional values and principles, the Governor may invoke his or her own procedures or delegate to appropriate authority such as the 3rd respondent or act in accordance with such applicable legislation (by the National or County Government) or such lawful policies and practices, for the time being in place. Thus the Court finds that it was misconceived for the petitioner to urge that for an appointment under section 5(1) of the Office of the County Attorney Act, 2020, the 3rd respondent had to be necessarily involved within the mandate as vested in the 3rd respondent under the County Governments Act, 2012 to create offices; declare and publicly advertise vacancies; and, to undertake competitive recruitment (interviews) and selection of the successful candidate. In any event the Court hold that the County Attorney’s office is already expressly established by the Act and nothing more was needed to create the office or position.”



64. On whether the Petition is premature, it was submitted that the petition as framed offends the principle of justiciability on account of want of ripeness. He argued that the petitioner has not exhausted all the available remedies under the *Public Appointments (County Assemblies Approval) Act*, which provides for individuals to present any objections of nomination of a candidate to the committee of the County assembly, charged with overseeing the approval hearing under section 7 of the Act. That in this case, the Petitioner had not demonstrated any objections presented to the committee and thus did not exhaust all the remedies before instituting this case in court.
65. It was argued that the County Assembly is mandated under the law to exercise due care and diligence during approval and vetting process, however that they were unable to fulfil that mandate due to stay Orders granted in this case. He added that section 7(8) of the Public Appointment (County Assemblies Approval) Act, 2017 mandates the County Assembly during approval hearing to focus on among other things; a candidates academic credentials and professional training . Further that section 8 of the same Act obligates the committee to consider the procedure used in arriving at the nominee including the criteria for shortlisting of the nominee, any constitutional or statutory obligations relating to the office in question and the suitability of the nominee for the appointment having regard to the nominee’s credentials, abilities, experience and qualities to make sure they meet the needs of the positions to which the nomination is being made. Hence any objection would have been made to the County assembly for consideration in the vetting process. To support the requirement for exhausting alternative dispute resolution mechanisms, the Respondent relied on the case of William Odhiambo Ramogi & 2 Others V s Attorney General & 6 Others, [2018] eKLR and the case of Dr. Magare Gakenyi Benjamin Vs Honourable Attorney General and 2 others; Teresia Mbaika Malokwe and 53 Other interested parties Elrc Petition No. E207 of 2022. Where the court held that :-

“the court therefore returns that the preliminary objection would succeed on account of want of exhaustion of the prescribed statutory procedure under the public appointments parliamentary Approval Act. By that finding alone, the petition would collapse as augmented with the cited doctrine of justiciability. While making the finding that the court has considered the mixed constitutional, statutory and legitimate political, social or economic considerations surrounding the challenged appointment of the principal secretaries , the interested parties herein together with the guiding values and principles in Articles 10, 232 and Chapter 6 of *the Constitution*, the Court considers that the failure to invoke and follow the procedure prescribed in the Act was such a serious bar precluding the petitioner from challenging the appointment as made and already implemented. The Court considers that the provisions in the Act are such that a challenge to the appointments must be prompt and flow as anticipated in the Act. The Court further holds that it enjoys jurisdiction for judicial review on merit of the decision made by the Respondents in that regards such as on account of the doctrine of unreasonableness such as is envisaged in Articles 47 of *the Constitution* on account of the principle of illegality, on account of constitutionality and, on account of established manifest injustice, However, looking at the grievances urged by the petitioner, they all squarely fall within the purposes for which the dispute and challenge procedure under the Public Appointments (Parliamentary Approval} Act No, 33 of 2011 was enacted. Failure to promptly invoke that procedure amounts to a bar especially that the interested parties have moved to take up the appointments in circumstances that their recruitment procedure and subsequent appointment appear not to have been challenged at all (looking at the facts and material before the Court) and as per the prescribed statutory provisions.”



66. It was submitted that Mr. Gideon Mutai was appointed as County on permanent basis before the enactment of the County Attorney Act and his gazettelement was done in the transition capacity in compliance with the County Attorney Act. Therefore, that the said Mr. Mutai was only appointed as a County Attorney in transition period until a substantive county Attorney is appointed then he reverts back to be the County Legal Counsel in line with section 31(3) of the County Attorney Act. In any event that an employee on permanent basis cannot be given another role on contractual terms, neither can he be allowed to serve in two position earning two salaries as this will be in conflict with Article 75(1) of *the Constitution*.
67. On whether the reliefs sought should be granted, it was submitted that the petition herein has been instituted as a thinly veiled public interest claim, when public interest suit are required to address general welfare of the public that warrant recognition and protection. That in determining a public interest matter, the Court has to take into consideration the following principles; principle of proportionality, the balancing test, necessity test and suitability test.
68. He submitted on these principles and with regard to proportionality, the Respondent argued that the Court or administrative body in exercising its discretion has the to maintain a proper balance between any adverse effect which its decision may have on the rights, liberties or interest of persons and purpose which it pursued and in this case the right of Alice Bett and Gideon Mutai who are not parties to these proceedings will be adversely affected by the Orders herein when they were not heard. In this, they relied on the case of Oliver Mukhebi & 28 Others V County Public Service Board of Bungoma & Another [2022] eKLR, where the Court held that;-
- “the 236 village administrators have vested employment rights which cannot be taken away without them being heard, a cardinal principle of justice. None of the said appointees have been sued in this case. They hold rights exclusive of the Respondents”
69. On balancing test, it was argued that, this is the required assessment of the decision upon affected person. Necessity test on the other hand requires that where a particular objective can be achieved by a more than one available means, then the least harmful means should be adopted. Suitability test requires authorities to employ means which are appropriate to the accomplishment of a given law and which are not in themselves incapable of implementation or unlawful.
70. Accordingly, it was submitted that the Petition herein fails on all the principles as such it is not in public interest for the Orders herein to be issued. In any case that public resources have been spent in the recruitment process which was altered. In support of this, he relied in the of Hussein & Another V Governor, County Government of Mandera & 2 Others; Somo (Interested Party) Petition E143 of 2023 [2023] KEELRC 2656 (KLR) where Ongaya J Held that;-
- “it will not serve public interests for the declarations and the order of certiorari to issue in circumstances that the respondent would anyway be entitled to recommence the nomination, approval and appointment proceedings only to reappoint the interested party and all at the expense of the Public resources and the petitioners having failed to avail themselves the prompt intervention opportunity accorded under the Public Appointment (County Assemblies Approvals) Act, 2020.”
71. The Respondent submitted also that the petition is improper for the reason that the supporting affidavit sworn on 9th February, 2023 and the further Affidavit of 21st March, 2023 have different signatures, showing that it was not signed by the same person contrary to sections 70 and 76 of the *Evidence Act*, therefore that the affidavits are defective affecting the petition herein.



72. It was also argued that the affidavits were omission by an in active Advocate and thus the documents are not admissible under section 24 and 30 of the *Advocates Act* and hence the Affidavits are invalid. In support of this, they relied on the case of *Omusotsi V Returning Office Mumias East Constituency, Independent Electoral and Boundaries Commission and Benjamin Washiali Jomo, Election Petition No. 9 of 2017*, where the Court held that;-

“ An affidavit can only be commissioned by a commissioner for oaths and officials of the court allowed to do so under the Act.....the petition as filed is not supported by the affidavit of the petitioner as required by rule 12 (1) (b), of the Elections Rules... The petition does not comply with the mandatory provisions of the law. The petition filed without the said documents is not a competent petition. The petition is a still birth that should not be allowed to see the light of day. The petition is accordingly struck out with costs.”

73. The Respondent also relied on the case of Hosea Mundi Kiplagat V Sammy Komen Mwaita & 2 Others [2013] eKLR and the case of Pius Njogu Kathuri V Joseph Kiragu Muthura & 3 Others [2018] eKLR where the court held that;-

“ Court to admit the affidavit it must be an affidavit. It must have been sworn. The affidavits cannot be said to have been sworn. It is sworn when it is commissioned by a person authorized to administer oaths, The defect is not an form nor is it a technicality... It is clear that the affidavit of the petitioner and his witnesses were ‘commissioned’ by an advocate who was not authorized to practice law. He was operating illegally and in contravention of the provisions of the Advocates’ Act and *Oaths and Statutory Declarations Act*. The affidavits allegedly commissioned by Robinson N. Mugo are not affidavits but mere Statements. There was no legal basis for the trial magistrate to hold that the application to strike out the petition had no merits.”

74. On costs, it was submitted that petition is advanced in the spirit of promoting public interest, thereby serving the collective welfare. Furthermore, that it is within the evolutionary trajectory of jurisprudence, as enshrined in *the Constitution*, hence it is equitable that each party bears its own costs.

75. 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 nomination of one Alice Bett to the position of the office of the County Attorney Kericho County was done procedurally and can stand.
- (2) What remedies this court can grant in the circumstances of this case.

ISSUE NO. 1

76. From the evidence on record the petitioner herein was employed by the Respondents as County Legal Officer vide a letter dated 1/9/2014 exhibit WKB.

77. The Petitioner served the Respondents in that capacity until his appointment to the position of County Attorney on 27/11/2020 vide gazette Notice No. 10187 which gazette Notice does not give an expiry date to this position.

78. The Office of the County Attorney Act 2020 on the other hand came into force on 27th July, 2020. Under Section 6 of this Act, the County Attorney shall hold office for a term of six years and shall have the status and rank of a member of the County Executive Committee.



79. For one to qualify as a County Attorney Section 5 of the County Attorney Act provides as follows:-
5. “Appointment and qualifications for appointment of County Attorney:-
- (1) The County Attorney shall be appointed by the Governor with the approval of the county assembly.
 - (2) A person qualifies for appointment as County Attorney if such person— 5 CAP. 265E Office of the County Attorney [Rev. 2022]
 - (a) is an Advocate of the High Court of Kenya of at least five years standing; and
 - (b) meets the requirements of Chapter Six of *the Constitution*.
 - (3) The County Attorney shall take and subscribe to the oath or affirmation as set out in the First Schedule to this Act before assuming office.”
80. The legal threshold for application to this office is for an advocate of the High Court of Kenya having at least five years standing and meeting the requirements of chapter 6 of *the Constitution*.
81. Section 31 of this Act also provides as follows:-
31. “Transition
- (1) Upon the coming into effect of this Act, members of staff employed by the county executive to perform the functions of the Office under this Act shall—
 - (a) be deemed to be members of staff of the Office in their respective capacities;
 - (b) retain any rights accrued or accruing to them as such staff or contributors;
 - (c) be at liberty to continue to contribute to any superannuation scheme to which they were contributors;
 - (d) be entitled to receive any deferred or extended leave as if they have continued to be such staff of the Office during their service with the county executive;
 - (e) be entitled to receive any payment, pension or gratuity as if they have continued to be such staff of the Office during their service with the county executive; and
 - (f) be deemed to be employees of the Office for the purposes of any law under which those rights accrued or were accruing, under which they continue to contribute or by which that entitlement is conferred.
 - (2) Despite the provisions of subsection (1), a person employed by the county public service board to perform the functions of the County Attorney, County Solicitor or County Legal Counsel at the commencement of this Act shall continue to hold their respective positions in the Office after the coming into effect of this Act only if they meet the qualifications specified in this Act.
 - (3) The county public service board shall, where a person employed by the county executive to perform the functions of the County Attorney, County Solicitor or County Legal Counsel does not meet the qualifications specified in this Act, redeploy such person to the highest position that is vacant and to which such person qualifies for appointment.”
82. The gist of this provision is that members of staff employed to perform the functions of the office under the Act were deemed to transit and perform duties under the Act upon the coming into effect of the said Act.



83. The provision under Section 31 (3) above were for those staff not qualified and in such a case, the CPSB was duty bound to redeploy the said staff to another highest position available.
84. In the case of the Petitioner, there is no indication that he didn't meet the said qualifications as he qualifies as an advocate of the High Court of Kenya with over 5 years standing.
85. There is also no indication and the Respondents have not raised any shortcomings in terms of Chapter 6 of *the Constitution*. The Petitioner was also formerly appointed to the position of County Attorney after the coming in force of the County Attorney Act and the gazette notice does not indicate that his appointment was on a transitional basis.
86. Having set out the position of the Petitioner, the question then is whether the Petitioner being a substantive holder of an office of the County Attorney another, in this case Alice Chepngetich Bett could be nominated to fill the same position.
87. First and foremost there is no vacancy in the office of the County Attorney. Secondly even if the Respondents wished to replace the incumbent Petitioner, there are mechanisms for removal as set in the Act under section 13 which states as follows.
13. Removal from office The Governor may, with the approval of the County Assembly, remove the County Attorney from office only for—
- (a) serious violation of *the Constitution* or any other law;
 - (b) gross misconduct, whether in the performance of functions of the Office or otherwise;
 - (c) physical or mental incapacity to perform the functions of the Office;
 - (d) incompetence; or
 - (e) bankruptcy.
88. The Respondents never invoked this provision to remove the Petitioner and the act of nominating another was null and void ab initio and an abuse of power and an abuse of the rule of law.
89. It is my finding therefore that the nomination of one Alice Bett to the position of County Attorney of Kericho County was unprocedurally, null and void and cannot hold.

Issue No. 2

90. Having made the above finding, it is also clear that the Respondents acted unlawfully and I make a declaration that Gideon Kipkoech Mutai is legally and legitimately occupying the Office of County Attorney as per gazette Notice No. 10187 of 27th November 2020.
91. I also do issue an injunction restraining the 1st Respondent from removing the Petitioner from office of the County Attorney unless acting lawfully under Section 13 of the Office of the County Attorney Act 2020.
92. Indeed the action of the 1st Respondent is glaringly illegal and unconstitutional and is in breach of Article 73 which states as follows:-
- “(1) Authority assigned to a State officer—
- (a) is a public trust to be exercised in a manner that--
 - (i) is consistent with the purposes and objects of this Constitution;



- (ii) demonstrates respect for the people;
 - (iii) brings honour to the nation and dignity to the office; and
 - (iv) promotes public confidence in the integrity of the office; and
- (b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.
- (2) The guiding principles of leadership and integrity include--
- (a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;
 - (b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;
 - (c) selfless service based solely on the public interest, demonstrated by--
 - (i) honesty in the execution of public duties; and
 - (ii) the declaration of any personal interest that may conflict with public duties;
 - (d) accountability to the public for decisions and actions; and
 - (e) discipline and commitment in service to the people.”

93. And Article 232 of *the Constitution* which states as follows:-

- “(1) The values and principles of public service include--
- (a) high standards of professional ethics;
 - (b) efficient, effective and economic use of resources; responsive, prompt, effective, impartial and equitable
 - (c) provision of services;
 - (d) involvement of the people in the process of policy making;
 - (e) accountability for administrative acts;
 - (f) transparency and provision to the public of timely, accurate information;
 - (g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;
 - (h) representation of Kenya’s diverse communities; and
 - (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of--
 - (i) men and women;



- (ii) the members of all ethnic groups; and
 - (iii) persons with disabilities.
- (2) The values and principles of public service apply to public service in--
- (a) all State organs in both levels of government; and
 - (b) all State corporations.
- (3) Parliament shall enact legislation to give full effect to this Article.”

94. The 1st Respondent having acted illegally, I find the Petitioner is entitled to damages for the said breach and I order he be paid damages to the tune of 2 million by the 1st Respondent.

95. The 1st Respondent will pay costs of this petition.

JUDGMENT DELIVERED VIRTUALLY THIS 24TH DAY OF JUNE, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Lorot for 1st and 3rd Respondents – present

Petitioner – Absent

Court Assistant - Fred

