



**Benjamin v Attorney General & 2 others; Malokwe & 53 others (Interested Parties)  
(Petition E207 of 2022) [2023] KEELRC 962 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 962 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**PETITION E207 OF 2022**  
**B ONGAYA, J**  
**APRIL 27, 2023**

**IN THE MATTER OF SKEWED AND IRREGULAR APPOINTMENT OF PRINCIPAL  
SECRETARIES (PS) AND PRINCIPAL ADMINISTRATIVE SECRETARY (PAS)**  
**AND**  
**IN THE MATTER OF ARTICLE 155 OF THE CONSTITUTION (2010)**  
**AND**  
**IN THE MATTER OF RULE 4, 10, 11, 13 OF THE CONSTITUTION OF KENYA  
(SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL  
FREEDOMS) – HIGH COURT PRACTICE AND PROCEDURE RULES, 2013**  
**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLE 3, 10, 27, 73, 75,  
159, 162, 179, 201, 232, 249, 258 AND 259 OF THE CONSTITUTION OF KENYA (2010)**  
**AND**  
**IN THE MATTER OF RIGHT TO INCLUSIVITY,  
2/3 GENDER RULE, NON-DISCRIMINATION**

**BETWEEN**

**DR. MAGARE GAKENYI BENJAMIN ..... PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL ASSEMBLY ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**TERESIA MBAIKA MALOKWE ..... INTERESTED PARTY**

**JULIUS KIPLANGAT KORIR ..... INTERESTED PARTY**



ESTHER MUMBI NGERO ..... INTERESTED PARTY  
AURELIA CHEPKIRUI RONO ..... INTERESTED PARTY  
RAYMOND VICKY OJWANG' OMOLLO ..... INTERESTED PARTY  
MARY MUTHONI MURIUKI ..... INTERESTED PARTY  
JULIUS KIBET BITOK ..... INTERESTED PARTY  
CHRIS K. KIPTOO ..... INTERESTED PARTY  
JAMES MUHATI BUYEKANE ..... INTERESTED PARTY  
PATRICK MARIRU ..... INTERESTED PARTY  
ABRAHAM KORIR SING'OEI ..... INTERESTED PARTY  
ROSELINE KATHURE NJOGU ..... INTERESTED PARTY  
AMOS NJOROGE GATHECHA ..... INTERESTED PARTY  
VERONICA MUENI NDUVA ..... INTERESTED PARTY  
JOSEPH MUNGAI MBUGUA ..... INTERESTED PARTY  
MOHAMED ABDULKARIM DAGHAR ..... INTERESTED PARTY  
KIPROTICH KORIR NIXON ..... INTERESTED PARTY  
CHARLES HINGA MWAURA ..... INTERESTED PARTY  
JOEL PSIMATWA LOREMOI ARUMONYANG ..... INTERESTED PARTY  
EDWARD NAMISIKO WASWA KISIANGANI ..... INTERESTED PARTY  
JOHN KIPCHUMBA TANUI ..... INTERESTED PARTY  
PETER KIPLAGAT TUM ..... INTERESTED PARTY  
JOSEPHINE NJERI MBURU ..... INTERESTED PARTY  
RICHARD BELIO KIPSANG ..... INTERESTED PARTY  
ESTHER THAARA MUORIA ..... INTERESTED PARTY  
BEATRICE MUGANDA INYANGALA ..... INTERESTED PARTY  
PHILLIP KELLO HARSAMA ..... INTERESTED PARTY  
HARRY KIMTAI KACHUWAI ..... INTERESTED PARTY  
ALFRED OMBUDO K'OMBUNDO ..... INTERESTED PARTY  
ABUBAKAR HASSAN ABUBAKAR ..... INTERESTED PARTY  
EUSEBIUS JUMA MUKHWANA ..... INTERESTED PARTY  
PATRICK KIBURI KILEMI ..... INTERESTED PARTY  
SUSAN AUMA MANGEA MANGENI ..... INTERESTED PARTY  
ISMAIL MAALIM MADEY ..... INTERESTED PARTY  
JONATHAN MWANGANGI MUEKE ..... INTERESTED PARTY  
FESTUS KIPKOECH NGENO ..... INTERESTED PARTY



<b>EPHANTUS KIMOTHO KIMANI .....</b>	<b>INTERESTED PARTY</b>
<b>JOHN LEKAKENY OLOLTUAA .....</b>	<b>INTERESTED PARTY</b>
<b>MUSEIYA SILVIA KIHORO .....</b>	<b>INTERESTED PARTY</b>
<b>UMMI MOHAMED BASHIR .....</b>	<b>INTERESTED PARTY</b>
<b>PAUL KIPRONOH RONO .....</b>	<b>INTERESTED PARTY</b>
<b>GITONGA MUKETHA MUGAMBI .....</b>	<b>INTERESTED PARTY</b>
<b>ALEX KAMAU WACHIRA .....</b>	<b>INTERESTED PARTY</b>
<b>MOHAMED LIBAN .....</b>	<b>INTERESTED PARTY</b>
<b>GEOFFREY EYANAE KAITUKO .....</b>	<b>INTERESTED PARTY</b>
<b>MOGOSI JOSEPH MOTARI .....</b>	<b>INTERESTED PARTY</b>
<b>ABDI DUBAT FIDHOW .....</b>	<b>INTERESTED PARTY</b>
<b>IDRIS SALIM DOGOTA .....</b>	<b>INTERESTED PARTY</b>
<b>ELIJAH GITHUMBU MWANGI .....</b>	<b>INTERESTED PARTY</b>
<b>BETSY MUTHONI NJAGI .....</b>	<b>INTERESTED PARTY</b>
<b>SHADRACK MWANGOLO MWADIME .....</b>	<b>INTERESTED PARTY</b>
<b>BERNICE SILAAL LEMEDEKET .....</b>	<b>INTERESTED PARTY</b>
<b>LAW SOCIETY OF KENYA .....</b>	<b>INTERESTED PARTY</b>
<b>FREDRICK BIKERI .....</b>	<b>INTERESTED PARTY</b>

## RULING

1. The 3<sup>rd</sup> respondent filed an application by way of the notice of motion dated 07.02.2023 drawn and filed by Suzanne L. M. Khadambi Advocate. The 3<sup>rd</sup> respondent prayed for orders:
  - a. .... (spent).
  - b. .... (spent).
  - c. The Honourable Court be pleased to stay further proceedings in this matter pending the hearing and determination of the intended appeal by the 3<sup>rd</sup> respondent (applicant) against the ruling of the Court in Nairobi ELRC Constitutional Petition No. E186 of 2022 (as consolidated with Nairobi ELRC Constitutional Petitions Nos. E189 of 2022 and E192 of 2022) delivered on 29.11.2022.
  - d. That costs of the application be provided for.
2. The application was supported by the annexed affidavit of Samuel Njoroge, the Clerk of the National Assembly, sworn on 07.02.2023 and upon the following grounds:
  - a. The present petition seeks to challenge the nomination and appointment process of the Principal Secretaries on account of failing to meet the two-thirds gender rule, failing to comply



with regional balance requirements and lack of transparency inter alia. The instant petition was scheduled for hearing on 21.02.2023.

- b. The issues raised in the present petition were raised in Nairobi ELRC Constitutional Petition No. E186 of 2022 (as consolidated with Nairobi ELRC Constitutional Petitions Nos. E189 of 2022 and E192 of 2022) where the National Assembly raised a preliminary objection challenging the jurisdiction of the Employment and Labour Relations Court and asserting that the Petitions contravene the doctrine of exhaustion.
  - c. On 29.11.2022 the Court made a determination that it was endowed with the requisite jurisdiction to hear and determine the petitions aforesaid but the Court proceeded to strike out the petitions only upon the grounds that the same had been filed prematurely.
  - d. The applicant the National Assembly was aggrieved by that by the ruling and filed a notice of appeal dated 30.11.2022 against the ruling of the Court in Nairobi ELRC Constitutional Petition No. E186 of 2022 (as consolidated with Nairobi ELRC Constitutional Petitions Nos. E189 of 2022 and E192 of 2022) and delivered on 29.11.2022. The proposed appeal is arguable such as whether the Court had jurisdiction to determine the dispute about procedure of nomination and appointment of Principal Secretaries being constitutional office holders and the procedure being provided for in the Constitution; and, whether the jurisdiction of the Court under Articles 162(2) of the Constitution and section 12 of the Employment and Labour Relations Court Act is limited to constitutional issues that arise in the context of disputes relating to employment and labour relations.
  - e. If the order of stay of proceedings sought in the application is not granted, the court will proceed to hear and determine the petition herein before the Court of Appeal makes a determination of the important question whether the Court is endowed with the requisite jurisdiction to determine matters relating to nomination and the process of appointment of Principal Secretaries.
  - f. If the order of stay as sought is not granted the intended appeal will be rendered nugatory. Further stay of proceedings should be granted so that there is no ensuing judicial embarrassment should the Court of Appeal allow the appeal. The Court has jurisdiction to grant an order of stay of proceedings pending the hearing and determination of the intended appeal. The application is made without undue delay.
3. The petitioner opposed the application by filing in person the replying affidavit sworn on 08.02.2023. The petitioner urged as follows:
- a. That he had read and understood the application dated 7<sup>th</sup> February, 2023 filed by 3<sup>rd</sup> respondent praying for stay of proceedings of the petition on the strength of notice of appeal.
  - b. That from the onset, the application was a classical example of abuse of court processes in that the respondent's advocate on record being aware or ought to be aware that a notice of appeal by itself is not an order of the court and it will be a sad day for the Kenyan courts to halt its proceedings merely on the basis of a Notice of Appeal without any substantive orders of the Court of Appeal.
  - c. That a Notice of Appeal only shows intention to appeal, and that there was no evidence placed before the Court to show first, that an appeal itself has been filed and even more importantly, the Court of Appeal has actually granted an order of stay of proceedings as per Rule 5(2)(b) of the Court of Appeal Rules. In fact, in any event, there is nothing to be stayed since the interested parties (51 Principal Secretaries and one (1) Principal Administrative Secretary) have already



been gazetted, appointed and are actually working in the offices. Courts of law don't give orders in vain.

- d. That in any event, he is not one of the respondents in the intended appeal. The appellants named only Law Society of Kenya of ELRC Petition No. E192 of 2022 yet this is ELRC Petition No. E207 of 2022.
- e. That even if the application or appeal were to be placed before the Court of Appeal as per Rule 5(2)(b) of the *Court of Appeal Rules*, there is zero probability of the application succeeding because of the following:
  - i. That the applicants will not be able to prove the 3 limbs of stay pending appeal as per Rule 5(2)(b) of the *Court of Appeal Rules* -which are arguability, nugatory and public interest limbs
  - (ii) That even if we presume that the applicant will succeed in the prima facie arguability limb, they will definitely fail in nugatory limb since the interested parties (51 Principal Secretaries and one (1) Principal Administrative Secretary) have already been gazetted, appointed and are actually working in the office. Nugatory limb is dead on arrival.
  - (iii) That there will be no public interest in a Court of law granting stay to the effect that the PS's and PAS start working and yet they are already working. It will bring mockery and embarrassment to the court of appeal.
  - (iv) That in any event, the court of appeal would not certify the matter as urgent since the interested parties are already working and that it means due to the high case-load at the Court of Appeal, the matter would be heard 2-3 years from now.
- f. That it will defeat the wheels of justice to stay proceeding for more than 3 years in that even if this Honourable court would find that the petition is merited, the same would be an academic exercise as the interested parties would have completed their terms.
- g. That it is also worth noting and the Court ought to take judicial notice that the 1<sup>st</sup> respondent (Attorney General) working in cahoots with this applicant (3<sup>rd</sup> Respondent) has filed another preliminary objection (P.O.) application on issue of jurisdiction of this Honourable court and they are aware that the same was ruled on 29<sup>th</sup> November, 2022 by Hon. Justice Nduma Nderi, hence *res judicata* and essentially the matter became *functus officio*.
- h. That one wonders why the respondents are fearing arguing the petition on merit. That the respondents are trying to avoid arguing the petition itself like plague. They rather knock out the petition on technicality than face it head on. They should wait the petition succeed, then they can then proceed to the Court of Appeal to appeal it. They urge the court not to accept the invite by the respondents.
- i. That it is a matter of fact when you see a party making multiple applications to be is a sign of fear. They have now realized that they don't have any points of law to oppose the petition and want to apply delay and technical tactics through filing of applications in efforts to avoid facing the petition which in all honesty have no chances of stopping the Court from considering the impugned appointments which *inter alia* have only 11 women (females) - 21% contrary to constitutional and statutory requirements of more than one third.
- j. That this Honourable Court should only stay proceedings when there is actual order from the Court of Appeal and not "hot air orders" in form of Notice of Appeal.



- k. That from the foregoing the petitioner prayed that the application for stay of proceeding filed by the 3<sup>rd</sup> respondent (applicant-the National Assembly) on 7<sup>th</sup> February, 2023 is vexatious, frivolous, and abuse of court processes and is meant to delay wheels of justice so as to continue illegalities and unconstitutionality in our country contrary to Article 1, 2, 3 of the Constitution. The same should be dismissed with costs to the Petitioner.
4. The 3<sup>rd</sup> Respondent also filed a notice of preliminary objection as amended and dated on 12<sup>th</sup> April, 2023. The 3<sup>rd</sup> Respondent raised preliminary objection upon the following grounds:
- a. Having deliberately failed, refused and or ignored, to attempt (leave alone to exhaust) the alternative statutory mechanism that existed to him under Section 6(9) and 7 of the Public Appointments (Parliamentary Approval) Act, 2011, the Petitioner herein lacks the locus standi to institute and sustain the present Petition.
- b. The rationale for the doctrine of exhaustion was explained by the Court of Appeal in the case of Geoffrey Muthinja Kabiru & 2 Others - vs - Samuel Munga Henry & 1756 Others [20151 eKLR as:
- “The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”
- c. The Petitioner herein instituted a similar Petition being Nairobi ELRC Constitutional Petition No. E189 of 2022 which was struck out for want of exhaustion of statutory mechanism that was available to him under the Public Appointments (Parliamentary Approval) Act even after being guided by the Court in this regard.
- d. This Honourable Court lacks jurisdiction to determine this matter because:
- i. Appointment and removal from the positions of the Principal Secretaries is not a labour and employment issue, but a special constitutional innovation, a sui generis devise to address challenging governance needs and gaps. Under Article 132 (2) and 152 of the Constitution, the final word rests not with His Excellency the President but with the house.
- ii. Appointment of the Principal Secretaries does not involve any of the parties or raise any employment and labour relation issues envisioned by sections 12 (1) and (2) of the Employment and Labour Relations Court Act.
- iii. The jurisdiction of this Court to interpret and apply the Constitution is not original or unlimited like the High Court. This Court's jurisdiction is limited to constitutional issues that arise in the context of disputes on Employment and Labour Relations.
5. The applicant filed the supplementary affidavit of Samuel Njoroge sworn on 01.03.2013. The affidavit stated that the notice of appeal against the ruling by Nduma J referred to in the application was dated 30.11.2022 and lodged on 07.12.2022; on 30.11.2022 the applicant's counsel wrote requesting for certified Court proceedings in the matter subject of the appeal; and, a memorandum of appeal dated 01.03.2023 had been filed. It was urged the orders for stay of proceedings should therefore be granted.
6. The Court directed that the application and the preliminary objection be heard and determined together. The petitioner filed submissions on the preliminary objection and as dated 08.02.2023. The



applicant filed the submissions dated 22.03.2023 to support the application and further submissions dated 23.03.2023 to support the preliminary objection. The other parties did not take part in the application and preliminary objection as no papers were filed in that regard. The Court has considered the positions taken by the applicant and the petitioner. The Court returns as follows.

7. To answer the 1<sup>st</sup> issue for determination, the Court returns that there is no established case for grant of an order of stay of proceedings herein as urged for the applicant, the National Assembly. In particular, the application will fail upon the following findings:
  - a. As urged for the petitioner, the initiated appeal by reason of the notice of appeal does not relate to a ruling or order made in the instant petition. The initiated appeal process is with respect to the ruling by Nduma J on 29.11.2022 in Nairobi ELRC Constitutional Petition No. E186 of 2022 (as consolidated with Nairobi ELRC Constitutional Petitions Nos. E189 of 2022 and E192 of 2022). The applicant has invoked order 42 rule 6 and by the applicant's own submissions that rule applies to stay of execution pending appeal and not stay of proceedings as is sought in the instant case. The applicant has cited *Port Florence Community Health Care –V- Crown Health Care Limited* [2022]eKLR for the observation that order 42 rule 6 of the Civil Procedure Rules applies only to stay of execution pending appeal and in exercising discretion to order a stay of proceedings pending appeal, it will be considered whether the appeal would be rendered nugatory. The appeal in issue being outside the instant proceedings, the court returns that the initiated appeal does not start to operate as a consideration for staying the instant proceedings as the issue of the appeal being rendered nugatory cannot arise.
  - b. The instant petition is new cause of action. It is that it may raise matters similar to the previous petitions in which Nduma J rendered the ruling subject of Court of Appeal Civil Appeal No. E117 of 2023 National Assembly –V- The Law Society of Kenya and 55 Others. It is the Court's opinion that the instant case being based upon a fresh cause of action though related to the one in the previous petitions and whose ruling is being appealed against, the legitimate path of justice is for the parties to urge their respective arguments for determination by the Court in the instant case.
  - c. If indeed a stay of proceedings was to be obtained on account of a pending appeal as is the circumstance in the initiated appeal, as urged by the petitioner, the legitimate thing to do would be to invoke Rule 5(2) (b) of the *Court of Appeal Rules* and such stay would spread to stay of proceedings in the trial Court from which such an appeal would be preferred and not a separate and fresh proceeding as the instant petition.
  - d. The application will therefore fail as misconceived and unfounded.
5. The 2<sup>nd</sup> issue for determination is whether the petition should collapse because the petitioner failed to exhaust the prescribed procedure for challenging the nomination and appointment of the interested parties to the position of Principal Secretaries. It is submitted for the applicant that under Article 119 (1) every person has a right to petition Parliament to consider any matter within its authority including to enact, amend or repeal any law. Further and pursuant to that Article, section 6(9) of the *Public Appointments (Parliamentary Approval) Act*, 2011 provides that any person may prior to the approval hearing, and by written statement on oath, provide the Clerk with evidence contesting the suitability of a candidate to hold the office to which the candidate has been nominated. It is urged that the petitioner being fully aware of that alternative procedure to resolve his concerns subject of this proceedings, decided to be indolent so as to ensure the lapse of the timeline within which the alternative dispute resolution mechanisms would be available to him. While the Court finds for the petitioner that it is not necessary for a litigant to petition Parliament under Article 119(1) prior to



moving a court of law, section 6(9) of the [Public Appointments \(Parliamentary Approval\) Act, 2011](#) indeed entitled the petitioner, prior to the approval hearing, and by written statement on oath, to provide the Clerk with evidence contesting the suitability of a candidate to hold the office to which the candidate has been nominated. The suitability of the interested parties to be appointed in the present petition is contested. However, the petitioner has not shown that he made presentations to Parliament as per section 6(9) of the [Public Appointments \(Parliamentary Approval\) Act, 2011](#). The Court has perused the petition and the petitioner's affidavit and nowhere does the petitioner allege or urge that he moved the Parliament as provided in the [Public Appointments \(Parliamentary Approval\) Act, 2011](#) or that he was denied such an opportunity. While the section uses "may" suggesting a discretionary provision to challenge the appointments before the Parliament, the Court considers that the provision must be followed except where the petitioner who fails to do so establishes a good reason why the provision was not followed or such bars to complying with that provision. In [Lucy Njoki Waitbaka v Tribunal appointed to investigate the conduct of Lucy Njoki Waitbaka & another; Kenya Magistrates and Judges Association \(Interested Party\)](#) [2019] eKLR the Court stated thus "The Court considers that justiciability is the concept in law that concerns itself with whether the Court is the most appropriate organ of the state or government (government in the wider sense including the three arms of government and other public agencies or bodies) to deal with the dispute. The [Black's Law Dictionary](#) 10th Edition at page 996 defines "justiciability" as the quality, state, or condition of being appropriate or suitable for adjudication by a court. The case may not be suitable for adjudication by the court due to a number of reasons such as under mootness doctrine where the real dispute has ceased to exist. The dictionary lists elements of the doctrine of justiciability such as advisory opinions, feigned and collusive cases; standing, ripeness, political questions and administrative questions. The Court considers that the application of the doctrine of justiciability is highly modified by the provisions of the [Constitution](#) of Kenya 2010 and which provisions have tended to admit than deny the forum in courts of law more readily and often so than not. The Court considers that a sound development and application of the doctrine of justiciability should lead to rules related to availability of alternative and more convenient remedies. Thus as was held in [Secretary, County Public Service Board & Another v Hulbbhai Gedi Abdille](#) [2017] eKLR by the Court of Appeal, an alternative and more convenient remedy in some other tribunal or forum should, in the Court's opinion be a good ground for the Court to decline to act. The Court considers that a sound application of the doctrine of justiciability should be one of the better mechanisms for keeping courts within what actually is or is perceived to be their proper constitutional sphere of activity." The Court considers that from the material before the Court, it is not a contested fact that the petitioner failed, for no established bar or good reason, to make his grievances to the National Assembly or its Committee. There is nothing on record to suggest the opportunity to have the grievances addressed by the National Assembly was denied or there was in existence such circumstances making it impossible for the petitioner to make the grievances before the Assembly or the designated committee of the House as provided in the cited Act.

6. Again in [Okiya Omtatah Okoiti -V- National Executive of the Republic of Kenya & 5 others; Katiba Institute \(KI\) & 3 Others\(Interested Parties\)](#) [2020] eKLR, the Court stated,

"However, in [Trade Union Congress of Kenya \(TUK-Ke\) -Versus - Dr. Joseph Kinyua, Head of Public Service and Another, and National Assembly and 2 Others](#) [2020] eKLR, the Court held that the [Public Appointments \(Parliamentary Approval\) Act](#) No. 33 of 2011 provided for such an elaborate statutory procedure which offered the petitioner the proper forum but it was never utilized or invoked by the petitioner. The Court further held that where there was such alternative avenue for resolving the petitioner's grievances with respect to the 3rd interested party's nomination, vetting and subsequent appointment, the Court found that the petitioner had failed to meet the threshold for the exercise of the



Court's rare jurisdiction to intervene in the performance of the human resource functions by the relevant person or authority as was held in *Geoffrey Mworira-Versus- Water Resources Management Authority and 2 others* [2015]eKLR thus,....” And Further, “In the instant petition, the Committee of the National Assembly that vetted the 6th respondent for approval as the Controller of Budget returned that it received no memorandum or statement on oath as prescribed in the relevant statute challenging the nomination and subsequent approval of the 6th respondent for appointment. The petitioner has not challenged the evidence that the Clerk of the National Assembly published in the daily newspapers notices inviting the members of the public to make any representations challenging the nomination and approval for appointment of the 6th respondent as Controller of Budget. The Court finds that the petitioner's concerns about the suitability of the persons who sat in the interview committee and whether the 6th respondent had all or any of the minimum requirements for appointment as Controller of Budget were all matters within consideration and determination by the Committee of the National Assembly that vetted the 6th respondent as provided for in the *Public Appointments (Parliamentary Approval) Act* No. 33 of 2011. The Court finds that the Committee was the proper forum and that forum not having been moved accordingly, the respondents have thereby established a bar to this Court's jurisdiction to intervene. Had the petitioner exhausted that forum, then he would have properly established the Court's jurisdiction as the proper forum to review the Committee's decisions on merits as appropriate.”

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



11. To answer the 3<sup>rd</sup> issue the Court returns that as submitted for the petitioner, in *Alfred Njau & 5 Others v City Council of Nairobi* [1983] eKLR that the Court of Appeal stated thus,

“The term *locus standi* means a right to appear in Court, and, conversely, as is stated in Jowitt’s Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.”

The Court returns that as submitted by the petitioner, he had the relevant standing to institute the petition as a citizen on account the matter was of public interest and pursuant to Articles 22 and 258. The standing is constitutionally granted and the applicant has established no justification to defeat the petitioner’s standing.

12. To answer the 4<sup>th</sup> issue the Court returns that it enjoys the relevant jurisdiction to hear and determine the petition but for the finding that the statutory alternative dispute procedure had not been invoked and exhausted. The applicant object to jurisdiction on account that there is no employer –employee relationship. However, the Court of appeal in *Narok County Government & Another v Richard Bwongo Birir & Another* [2015]eKLR (Waki JA, Nambuye JA and Kiage JA) upheld that all public servants and state officers serving in the Legislature, the Judiciary and the Executive or other public bodies are all servants of the people and their employment is governed by constitutional, statutory and lawful policy provisions and, practices. The Court is on its part guided by that holding of the Court of Appeal. In that regard the Court follows its previous holdings aligned with that holding of the Court of Appeal such as follows. In the ruling delivered on 12.04.2019 in *Okiya Omtatab 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.”

In *Okiya Omtatab Okoiti & Another v Cabinet Secretary for Information, Communications and Technology & 2 Others; Mohmoud Mohamed Noor and 9 Others* [2019]eKLR; and *Okiya Omtatab Okoiti v Attorney General & 2 Others, Francis Muthaura (AMB) & 5 Others* [2019]eKLR; were all decisions consistent with that Court of Appeal guidance. On the jurisdictional question, the Court as well finds for the petitioners that it was adequately addressed by Nduma J in the ruling delivered in the consolidated petitions and now said to be subject of appeal as preferred by the applicant herein against that ruling.

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



In conclusion the application and the notice of preliminary objection are hereby determined with orders:

1. The application is hereby dismissed.
2. The grounds in the notice of preliminary object fail save the ground that the petitioner failed to invoke and exhaust the procedure under the *Public Appointments (Parliamentary Approval) Act* No. 33 of 2011 and on that account, the petition is hereby struck out but except as relates to 52<sup>nd</sup> Interested Party who was appointed as Principal Administrative Secretary (PAS) and Accounting Officer, National Police Service Commission and under a recruitment procedure and subsequent appointment not alleged or said to be amenable to challenge under the alternative dispute resolution or challenge procedure provisions of the Act.
3. The petitioner at liberty to prosecute the residual petition in terms of the exception in terms of order (2) above.
4. Each party to bear own costs of proceedings.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 27<sup>TH</sup> APRIL, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

