



**Mwamanzi v Cabinet Secretary Ministry of ICT Innovation & Youth Affairs & 2 others  
(Petition E146 of 2022) [2023] KEELRC 1102 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1102 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E146 OF 2022**

**K OCHARO, J**

**APRIL 27, 2023**

**IN THE MATTER OF: ARTICLES 3[1], 10, 20, 22, 23, 27, 41, 47, 50[1], 159,  
165[3], 232, 236, 258 & 259 [9] OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF: ALLEGED VIOLATION OF ARTICLES 3[1] 10, 20, 22,  
23, 27, 41, 47, 50[1] 232 AND 236 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF SECTIONS 5, 9, 45,  
49 OF THE EMPLOYMENT ACT, SECTION 4 OF FAIR ADMINISTRATIVE  
ACTIONS ACT, SECTION 12 OF EMPLOYMENT AND LABOUR RELATIONS  
COURT, SECTION 5, 36, 60, 62 AND 63 OF PUBLIC SERVICE COMMISSION ACT**

**BETWEEN**

**JOHN NUSU MWAMANZI ..... PETITIONER**

**AND**

**CABINET SECRETARY MINISTRY OF ICT INNOVATION & YOUTH  
AFFAIRS ..... 1<sup>ST</sup> RESPONDENT**

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

**HONOURABLE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. Contending that, as a citizen of Kenya obligated under Article 3[1] of *the Constitution* to respect, uphold and defend *the Constitution*, he is aggrieved by the Respondents’ decision which according to him affronts *the Constitution*, his constitutional rights and the law, the Petitioner filed the instant Petition seeking for the following reliefs;



- a. A declaration that the Respondents have violated Articles 10, 20, 27, 41, 47, 232 and 236 of *the Constitution*.
  - b. A declaration that the Respondents have violated the Petitioner's rights under Articles 27, 41, 47, 232 and 236 of *the Constitution*.
  - c. A Judicial review order of mandamus directed to the Respondents to promote the Petitioner to the position of Director ICT, [CSG 5/JG "5"].
  - d. A declaration that the Petitioner is entitled to salary allowances, and attendant privileges enjoyed or earned for the position of Director ICT, [CSG 5/JG "5"] from 26<sup>th</sup> August 2020.
  - e. Costs of the Petition.
2. The 1<sup>st</sup> Respondent who the Petitioner has described as the Cabinet Secretary Ministry of ICT Innovation and Youth Affairs, a person and office responsible for appointment, promotion and or transfer of employees under the Ministry, through the 2<sup>nd</sup> Respondent opposed the Petition through an affidavit that was sworn by one James M. Gatere, Director, Human Resource Management and Development, in the state Department of ICT and Digital Economy in the Ministry.
  3. The 2<sup>nd</sup> Respondent is the Public Service Commission, a constitutional body established under Article 233 of *the Constitution* whose functions are inter alia to establish and abolish offices in Public Service; and to investigate monitor and evaluate organization, administration and personnel practices of public service. The Commission opposes the Petition upon premise of the grounds put forth in the affidavit of Simon K. Rotich, its secretary/Chief Executive Officer.
  4. The 3<sup>rd</sup> Respondent is the Chief Government legal Advisor. This Respondent did not file any response to the Petition.
  5. Imperative to state that the Petitioner did file herein an affidavit captioned "Petitioner's further affidavit" in response to matters raised in the Respondents' replying affidavits.

### **The Petition**

6. The Petitioner first came into the employment of the Respondents as System Analyst Programmer 2, Job Group J. Thereafter he rose through the ranks and in August 2019 he was promoted to the position of the Deputy Director ICT [CSG 6/JG "R"].
7. The Petitioner stated that on or about the 1<sup>st</sup> April 2022, following an appeal that had been made by the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent considered and approved promotion of various officers in various cadres within the 1<sup>st</sup> Respondent Ministry. The decision by the 2<sup>nd</sup> Respondent was communicated through a letter dated 1<sup>st</sup> April 2022.
8. The Petitioner further contended that the 2<sup>nd</sup> Respondent, however, did not allow the appeal for promotion in respect of Opiyo Andrew Nyawango and Mr. Mwanzi John Nusu both the Deputy Directors, ICT [CSG 6 Group R] to the grade of Director, ICT [CSG 5/Job Group 5], on account that the position had already been advertised and the selection process was on going.
9. The Petitioner stated that by a letter dated 22<sup>nd</sup> May 2022, he sought for a review of the stated decision by the 2<sup>nd</sup> Respondent. The said appeal never attracted any action by Respondents.
10. The Petitioner asserted that by the Respondents' action, he acquired a legitimate expectation that he was to be promoted to the grade of Director ICT, legitimate expectation which the Respondents through their acts of commission and omission did violate.



11. The Petitioner further asserted that his constitutional rights under the Bill of Rights were violated by the Respondents as:
  - (i) The failure to promote was anchored on a reason that was contrary to the Respondents established practice that the internal promotions are undertaken regardless of any advertisement.
  - (ii) Advertisement could not necessarily result to a recruitment.
  - (iii) On the 26<sup>th</sup> August 2020, the 2<sup>nd</sup> Respondent promoted all ICT officers by one Job Group [one Grade] in the course of addressing challenges in the staff establishment and succession management that was facing the Information and Technology cadre in the Civil service. Among other officers, the Petitioner's name was omitted or not considered. The name was so omitted in bad faith and maliciously.
  - (iv) In what amounts to discrimination, by a letter of 1<sup>st</sup> April 2022, the 2<sup>nd</sup> Respondent promoted two ICT officers, who had not appealed or applied for the same, to wit Pius Muchai and Munyiri Simon.
  - (v) Owing to his agitation for his rights, he on the 13<sup>th</sup> July 2022, was unfairly and irregularly transferred from the Ministry of ICT, innovation and Youth Affairs to state Department of Public Works. An action that was calculated to frustrate his efforts and defeat the process of this Court.

#### **The 1st Respondent's Response**

12. The 1<sup>st</sup> Respondent stated that it is true that ICT officers were promoted with effect 26<sup>th</sup> August 2010 and that the Petitioner was not among those promoted.
13. That through its letter dated 6<sup>th</sup> October 2010, letter under reference number MICT/CON/2/2/2012, it appealed on behalf of the Petitioner and other officers, to the 2<sup>nd</sup> Respondent, urging the letter to promote them.
14. Subsequently, through its letter dated 1<sup>st</sup> April 2022, the 2<sup>nd</sup> Respondent expressed that it had disallowed the appeal regarding the Petitioner. It communicated the 2<sup>nd</sup> Respondent's decision to the Petitioner under a letter dated 17<sup>th</sup> May 2022.
15. The 1<sup>st</sup> Respondent stated that the 2<sup>nd</sup> Respondent had invited the Petitioner for an interview for the position of Director ICT and that at the time of filing the replying affidavit on or about 1<sup>st</sup> December 2022, the results of the interviews were yet to be declared.

#### **The 2nd Respondent's Response**

16. The 2<sup>nd</sup> Respondent stated that on or about the 26<sup>th</sup> August 2020, the 1<sup>st</sup> Respondent approved the organizational structure for the State Department of Information Communication and Technology. In the process the 1<sup>st</sup> Respondent promoted 312 officers to address succession gaps. The factors considered in promoting the officers to address the management gaps included, vacancies at each level, the period the staff had stagnated at a particular level and seniority of the staff and gender.
17. The Petitioner was not promoted under the succession management because he was last promoted to the position of Deputy Director in August 2019. Therefore, he had not stagnated.



18. The Petitioner appealed against the decision, but by the time his appeal was being received the position of Director had already been advertised. This position was communicated to his lawyer through a letter dated 5<sup>th</sup> August 2022.
19. The Petitioner applied for the position and got shortlisted for an interview.
20. The Respondent contends that the Petitioner had an advantage over the other officers who were promoted much later as he now ranks in seniority over them. Contrary to the assertion by the Petitioner, it is not true that all internal promotions are effected without advertisements.
21. The 2<sup>nd</sup> Respondent asserted that, internal promotions are guided by the number of vacancies available and the criteria that it may have set as a guide for the promotion.
22. According to the 2<sup>nd</sup> Respondent, where vacancies are more than the eligible officers and all officers meet the set criteria then they will be promoted, however, where the vacancies are few and the eligible officers are more as was in the present case, then a competitive process has to be adopted.
23. In the instant case, there were only 2 vacancies and the officers who met the set criteria were 24 in number. All the 24 officers had to compete therefore.
24. In fact, Article 232 [g] of *the Constitution* provides for fair competition and merit as a basis for recruitment and promotions. In placing an advertisement for the position of director, it was in the 2<sup>nd</sup> Respondent's quest to oblige the constitutional imperative.
25. The allegation that the Petitioner has been discriminated against is unfounded as he had been promoted earlier than the rest.
26. The 2<sup>nd</sup> Respondent stated further that the requirements of the Fair Administrative Actions Act, 2015 were complied with. The Petitioner through his advocate was informed why his promotion was not effected.
27. The competition will establish who among the shortlisted candidates has the merit, aptitude and suitability to be promoted to the position of Director as required by section 36 of the *Public Service Commission Act* 2017.
28. The Petition lacks merit.

### **The Rejoinder**

29. The Petitioner in the further affidavit contended that on 14<sup>th</sup> February 2018 he was promoted to the position of Senior Assistant Director ICT under Job Group "Q".
30. During the evaluation and conversion exercise of various job Group tiers, the 2<sup>nd</sup> Respondent converted job Group "Q" and "Z". The petitioner was therefore promoted to Job Group "R" in 2018 and not 2019 as contended by the Respondents. In the exercise, Job Group "M" and "N" were converted into one Job Group "N".
31. The Petitioner contended that those ICT officers who in 2018 were moved from Job Group "M" to "N" were promoted in 2020 through the succession management exercise to Job Group "P".
32. The Petitioner contended that therefore he had a legitimate expectation in the year 2020 that through the succession management he would be promoted one Job Group up just like ICT officers were promoted.



33. The Petitioner contended further that indeed when he appealed to the 2<sup>nd</sup> Respondent regarding the promotion, the advertisement for the post of ICT Director was already in place but that should not have been reason enough to deny him the promotion.
34. The Petitioner stated that he had stayed in Job Group “Q”/ “R” for approximately three [3] years and had a legitimate expectation to be promoted to Job Group “S” on account of his seniority since seniority was a key consideration.
35. The 2<sup>nd</sup> Respondent on the 26<sup>th</sup> August 2020 promoted one Ms. Nyongesa to the post of Director ICT without engaging, a competitive recruitment process.
36. He contended further that it is only after she took the position that two vacancies remained for filling up.
37. He alleged that the 24 ICT officers that were shortlisted for interviews and shortlisted by the Respondents, were Assistant Directors ICT and others were in different cadres in the Government. Consequently, the officers were not eligible for promotion to the post of ICT under the succession management process as of 26<sup>th</sup> August 2020, yet he is now made to be interviewed alongside them for the post, while his colleague Ms. Nyongesa Lynne Ngina was given a direct promotion to Director ICT.

### **The Petitioner’s Submissions**

38. It was submitted for the Petitioner that in a bid to address “Staff Establishment and Succession Management Challenges facing information communication and Technology cadre in Civil Service” on the 26<sup>th</sup> August 2020, without conducting any interview or appraisals the Respondents made a decision to promote all its ICT officers to climb one grade up. In what amounts to discrimination and violation of the principle of legitimate expectation, the Respondents promoted one Lynne Ngina Nyongesa from Deputy Director ICT Job Group GSG 6/Job Group R to the next grade, to wit, Director ICT Job Group [ CGS 5/Job Group S] but failed to apply the said automatic promotion in respect of the Petitioner.
39. It was further submitted that at the time the decision was taken for the upward mobility of all ICT officers, there had been an advertisement for recruitment which was not considered as relevant in the circumstances because it had nothing to do with the escalation in the premises, the reason of advertisement and ongoing selection process was just an excuse not to promote him.
40. The constitutional rights encapsulated under Article 27 of *the Constitution* and Section 5[3] of the *Employment Act* were violated.
41. To support the submission that the Petitioner was discriminated against, reliance was placed upon the case of *Law Society of Kenya v Attorney General & COTU* Petition number 4 of 2019, where the Supreme Court defined discrimination as:

“A distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to members of society.”



42. And on the case of Barclays Bank of Kenya Limited & another vs. Gladys Muthoni & 2 others [2018] eKLR, where the Court of Appeal defined discrimination thus:

“Discrimination means affording different treatment to different persons attributed wholly to their description ..... whereby persons of such description are subjected to ..... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description .....

Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex ..... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

43. The Petitioner argued that he was not promoted at the time the other ICT officers were automatically promoted following a new Scheme of Service or dictates of succession management. The reason advanced of “advertisement and ongoing selection process” was not applied to the other officers hence he was discriminated against.

44. On the alleged breach of legitimate expectation, it was submitted that the Petitioner just like all other ICT officers who the 2<sup>nd</sup> Respondent promoted in a bid to address the stagnation challenge of all ICT officers in the civil service, ought to have promoted.

45. The Petitioner submitted that under Section 7 [2] [m] of the Fair Administrative Actions Act, this Court has jurisdiction to grant remedy for a proved breach of a person’s legitimate expectation.

46. As to what amounts to legitimate expectation, the Petitioner placed reliance on the elaboration by the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others.

47. The Petitioner further submitted that the principles to be considered when interrogating whether there existed a legitimate expectation and if so whether the same was breached, were put forth in the Communications Commission Case [supra], wherein the court did with approval cite the holding in the South African case of South African Veterinary Council v. Szymanski 2003 94] S.A. 42 [SCA], thus;

“[a] There must be an express, clear and unambiguous promise given by the public body.

[b] The expectation itself was reasonable.

[c] The representation must be one which it was competent and lawful for the decision maker to make; and

[d] There cannot be a legitimate expectation against clear provisions of the law or *the Constitution.*”

48. In interrogating a matter where legitimate expectation is alleged, the court is enjoined to give a two-step approach as elaborated in the case of Republic v Principal Secretary, Ministry of Transfer, Housing and Urban Development Exparte Soweto Residents Forum CBO [2019] eKLR.

49. The Petitioner contended that it was not reasonable and lawful for the 2<sup>nd</sup> Respondent to deny the Petitioner a promotion because there was an “advertisement and ongoing selection process.” He argues, that the issue of promotion, if anything, had nothing to do with the selection that was on going. The decision was in breach of the provisions of section 47 of *the Constitution.* Reliance was placed on the decision in Capital Markets Authority v. Jeremiah Gitua Kiereini & another [2014] eKLR.



## The 2nd Respondent's Submissions

50. The 2<sup>nd</sup> Respondent identified two issues for determination in this Petition.
- a) Whether the Respondents violated the Petitioner's rights.
  - b) Whether the Petitioner is entitled to the reliefs sought.
51. The 2<sup>nd</sup> Respondent states that the Petitioner's Petition is anchored on the fact that his rights under Article 27, 41, 47, 232 and 236 of *the Constitution* were violated. However, all he did was to list the rights without demonstrating how they were violated.
52. It was further submitted that the burden of prove violation of the right under Article 27 of *the Constitution* lies on the employee alleging the violation. This was elaborated in the case of Reuben Wamukota Sikulu v The Director of Human Resource management, Ministry of Devolution & Planning and 2 OTHERS, Civil Appeal No. 186 of 2018, thus: -
- “What the employee is required to do is to establish a prima facie case, through direct evidence or statistical proof that he or she was discriminated against on any of those grounds set out in Article 27 [4] of *the Constitution* which included: - race, sex, pregnancy marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. To establish a prima facie case the appellant had a duty to demonstrate he qualified for the position which he was denied, show he suffered an adverse employment action as a result of discrimination, must provide prima facie proof that other explanations by the employer are not contrived or without basis, that the real reason for denial of the promotion was unreasonable and the reasons must bear unreasonableness or other types of malpractices which must be linked to the suffering endured by the employee. Where the employee establishes a prima facie case, the burden shifts to the employer to show a legitimate explanation for refusing to grant the promotion. The employer must give articulate clear specific and non-discriminatory reason for the denying of the promotion.”
53. It was submitted that the Petitioner had just been promoted a year before, he had not stagnated at all when new vacancies arose, other officers who could not be promoted earlier for lack of vacancies were given a chance.
54. There were fewer vacancies at the Director position compared to eligible candidates and the only way of filling the positions available was through fair competition. The vacancies were advertised and all eligible candidates were free to apply. The Petitioner did submit an application and was shortlisted. Instead of waiting for the process to be completed the Petitioner wanted to short circuit it.
55. Submitting on the alleged violation of the provisions of Article 41 of *the Constitution*, the 2<sup>nd</sup> Respondent submitted that the Petitioner has not been specific in regard to how the right encapsulated in the Article was breached.
56. The 2<sup>nd</sup> Respondent complied with the requirements of Article 232 [g] of *the Constitution* by advertising the limited vacancies available at the Director level to give an equal chance to all eligible candidates.
57. Concerning the alleged violation of Article 236 of *the Constitution*, the 2<sup>nd</sup> Respondent submitted that the Petitioner has not demonstrated how he was victimized for performing his duty.
58. On the reliefs sought by the Petitioner, the 2<sup>nd</sup> Respondent submitted that the 2<sup>nd</sup> Respondent is responsible for making promotions on the Public Service and in the discharge of this function, section



14 of the Public Commission act, 2007, allows it to determine its work procedure. The 2<sup>nd</sup> Respondent, just like any decision-making body has the power to determine its own procedures. To buttress this submission, reliance was placed on the holding in the Court of Appeal decision in Civil Appeal No. 108 of 2009 – Kenya Revenue Authority v Mangiya Salim Murgani.

“There is ample authority that decision making bodies other than courts and bodies other than Courts and bodies where procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task, it is for them to determine how they will proceed.”

59. It was argued further that the 2<sup>nd</sup> Respondent determined that the only fair way the limited vacancies at the Director level could be filled, was through advertisement and competitive filing. Providing any other way would have been unfair to other eligible officers. The 2<sup>nd</sup> Respondent cannot therefore be faulted for doing that which *the Constitution* required it to do.
60. The 2<sup>nd</sup> Respondent argued further that employment being a contract of service, the court may not order promotion. To fortify this point, the case of E.D.K. v KU, cause No. 1715 of 2011 was cited. The court did hold therein: -

“I cannot interpose between the Claimant and the Respondent on a contract of service and cannot therefore order her promotion to the positions enumerated. Even if she was qualified, the court would be running afoul of the law if it were to order her appointment.

### **The 1st and 3rd Respondents' Submissions**

61. The 1<sup>st</sup> Respondent submits that the Petitioner has not demonstrated at all that he violated any Article of *the Constitution* or any other provision of the law. His duty ended at the point when his office appealed on behalf of the Petitioner to the 2<sup>nd</sup> Respondent.
62. It was argued that section 5[6] of the *Employment act* places upon the employer a burden of proving that the discrimination did not take place as alleged and that the discriminatory act or omission is not on any of the grounds specified in the section, in a dispute where an employee alleges discrimination. Considering the circumstances of this matter, the burden did not lie on it but the 2<sup>nd</sup> Respondent.

### **Analysis and Determination**

63. Before I delve into considering the issues that have presented themselves for determination in the instant Petition, it is imperative to point out that it is now settled law that this court has jurisdiction to entertain and determine claims of violation of fundamental rights, pertaining employment and Labour Relations matters. The jurisdiction flows from and or finds anchor on, the stipulations of Article 22, 23 and 258 of *the Constitution*. In the case of Geoffrey Mworira v Water Resources management Authority & 2 others [2015] eKLR, the Court stated: -

“The issue as stated in the Respondent’s submissions is whether the employment and Labour Relations Court has jurisdiction to entertain and determine claims of breach of fundamental rights under Article 22 and 23 and enforcement of *the Constitution* under Article 258 of *the Constitution* as pertains to Employment and Labour Relations matters. The Court of Appeal has resolved the issue in the case of Prof. Daniel Mugendi v Kenyatta University & 3 others, Civil appeal No. 6 of 2022. The Court stated thus;

“The question now is whether the Appellant should go back and “sever” the composite portions alleging violation of his fundamental rights and breach of contract of employment.



Much as severances would entail time and resource to effect the necessary amendments and make due motions, we are of the view that with necessary amendments, which appear imperative to make out a clear case of breach of rights being affected, the appellant can and should be heard by the Industrial Court on the two claims i.e. violations of rights and breach of contract of employment. The position that the Industrial Court can and should entertain the claim as laid by the Appellant is in line with the decision of Majanja J. in Petition No. 170 of 2012 – United States International University [USIU] v The Attorney General & others.”

64. Imperative to state that the 2<sup>nd</sup> Respondent has exhorted this Court to exercise greater caution when intervening as sought by the Petitioner and show a measure of deference to its decision. I am urged to employ a constrictive criteria therefore. In a bid to persuade me to buy the position, the 2<sup>nd</sup> Respondent cited the holding in E.D.K. v K.U. Cause No. 1715 of 2011 [supra] where Justice wa Makau held:

“I cannot interpose between the Claimant and the Respondent on a contract of service and cannot therefore order her promotion to the position enumerated. Even if she qualified, the Court would be running afoul of the law if it were to order her appointment.”

65. In my view any suggestion that the differential approved is rooted in the prescripts of the law is unsustainable. There is nothing in the Constitutional and statutory scheme that suggests that when interrogating the fairness, legality and constitutionality of an employer’s decision, the Court must approach the matter from the perspective of the employer.

66. Having stated as I have hereinabove on this Court’s jurisdiction and the approach this Petition has to be given, I now turn to identity the issues that have presented themselves for determination in the Petition herein; they are;

- a) Whether the Petition herein meets the threshold of a properly presented Petition;
- b) Whether there has been a breach of the constitutional provisions and or rights put forth in the Petition herein.
- c) Whether there was legitimate that was breached.

**Whether the Petition herein meets the threshold of a properly Presented Petition.**

67. Addressing a similar issue this court in Constitutional Petition E 026 of 2022 – Anthony Otiende Otiende v The Board of Trustees National Social Security Fund & another, stated: -

“It is now trite law that a party seeking reliefs through a constitutional Petition on basis of a violation of rights, constitutional freedoms or *the constitution*, has to plead with a high degree of precision; show the constitutional or fundamental freedoms violated, the manner of violation, the constitutional provisions in question and the jurisdictional basis. In the Court of Appeal Case of Mumu Matemu v Trusted society of Human Rights Alliance & 5 others [2013]eKLR, the Court stated: -

“44. We wish to confirm the principle holding in Anerita Karimi Njeru [supra]. In view of this we find the Petition before the High court did not meet the threshold established in that case. At the very best the Respondent should have seen the need to amend the Petition to provide sufficient particulars to which the Respondent could reply. Viewed thus, the Petition fell short of the very substantive test to which the High court made



reference. In view of the substantive nature of these short-comings, it was not enough for the superior Court below to lament that the Petition before it was not the epitome of precise comprehensive, or elegant drafting without requiring remedy by the 1<sup>st</sup> Respondent.”

68. This Court went further to state: -

“ 51. In my view, the principle expressed by the Court of Appeal in the forestated matter is underpinned by appreciation of the purpose and essence of pleadings in an adversarial system, as is ours. Sir Jack Jacob in his Article entitled “The present importance of pleadings,” cited with approval by the learned Judges of the Malawi Supreme Court in *Malawi Railways v Nyaluda* [1988] MWSC, aptly captures it, thus;

“As parties are adversaries, it is left to each one of them to formulate his own case, subject to the basic rules of pleadings ..... for the sake of certainty and finality, each party is bound by its own pleadings and cannot be allowed to raise a different or fresh case without amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is bound by the pleadings by the parties as they are themselves. It is no part of the duty of the court to enter, upon any inquiry into the case before it, other than to adjudicate upon specific matters in dispute which the parties themselves have raised by way of pleadings. To do so would be to enter upon the realm of speculation. Moreover, such event the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party, is equivalent not to hearing him at all and thus be a denial of justice ..... In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for trial by their pleadings and neither party can complain if the agenda is not strictly adhered to. In such an agenda there is no room for an item called “any other business.” In the sense that points other than those raised may be raised without notice.”

69. From the heading of the Petitioner’s Petition, it is not difficult for it to be discerned that the basis of same is an alleged violation of Articles 3 [1], 10, 20, 22, 23, 27, 41, 47, 50 [1] 232 and 236 of *the Constitution*, sections 5, 9, 45, 49 of the *Employment Act*, sections 4 of the Fair Administrative actions Act, section 12 of *employment and labour Relations Court Act*, and Section 5, 36, 60, 62 and 63 of the Public Service Act.

70. The Court notes that in the Petition there are no explanations on how the Constitutional provisions or the provisions of the law were violated or threatened to be violated by the Respondents.

71. The court has not lost sight of the fact that the Petitioner filed a further affidavit. The affidavit contains explanations that in my view ought to have been in the Petition to allow the Respondents an opportunity to respond to the same. The explanations were brought in a last document to be filed. It was improper therefore, for the Petitioner to bring matters that ought to have been pleaded in the first document filed, the Petition, in the affidavit.

72. In any event, as will come out shortly hereinafter, the replying affidavit does not make good the deficiency obtaining in the Petition, that of clearly demonstrating the manner of the alleged violations. By reason of the premises, and in answer to the issue hereinabove, this Court finds that the Petition herein does not meet the threshold for a properly drafted and presented Petition.



**Whether there has been a breach of the constitutional provisions and or rights and statutory provisions set out in the Petition.**

73. Assuming I am wrong on the foregoing finding, the Petition herein has to fail for as shall come out hereinunder shortly, the Petitioner did not demonstrate that the Respondents breached any of those constitutional rights, provisions, and statutory provisions he brought out in the Petition.
74. Despite putting forth a number of constitutional provisions, rights and statutory provisions as breached, the Petitioner's submissions were limited to very few of them, and it is them that I will consider at this point.
75. The Petitioner's counsel submitted that promotion discrimination occurred and anchored the submissions, on the provisions of Article 27 of *the Constitution* and section 5 of the *Employment Act*. In my view promotion discrimination is a type of workplace discrimination that occurs when an employee meriting promotion is passed over for a promotion for an unlawful reason. Employers have the right to decide who to promote but when the decision is based on an unlawful reason, it is illegal.
76. The *Employment Act*, 2007 prohibits discrimination as part of its broader purpose of promoting employment equity. The prohibition is one of the Public Policy norms governing an employment relationship, which cannot be out contracted.
77. Section 5 of the Act provides:
- “[i] It shall be the duty of the Minister, labour Officer and the Industrial Court –
    - [a] To promote equality of opportunity in employment in order to eliminate discrimination in employment; and
    - [b] To provide and guarantee equality of opportunity for a person who is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.
  - [2] An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.
  - [3] No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee -
    - [a] On grounds of race, colour, sex language, religion, political or other opinion, nationality ethnic or social origin, disability, pregnancy, marital status or HIV status.
    - [b] In respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of employment ....
  - [7] In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.”
78. No doubt the prohibition is restricted to conduct occurring within the scope of an “employment policy or practice.”



79. Article 27 [4] & [5] of *the Constitution* of Kenya, 2010, makes a provision on discrimination thus:

“[4]. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, labour, age, disability, conscience, belief, culture, dress, language or birth.

[5] A person shall not discriminate directly or indirectly against another person or any of the grounds specified or contemplated in Clause [4].”

80. Imperative to state that neither *the Constitution* nor the *Employment Act* defines discrimination. However, in a galaxy of judicial decisions, courts have defined the term. The ILO Convention 111, concerning Discrimination in respect of Employment and Occupation also provides a definition for the term.

81. Article 1 of the Convention defines it thus:

“[a] Any distinction, exclusion, or preference made on basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity in treatment in employment or occupation.

[b] Such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers’ and workers’ organization, where such exist, and with other appropriate bodies.”

82. In the case of *Law Society of Kenya v Attorney General & COTU*, Petition No. 4 of 2019, cited by counsel for the Petitioner, the Supreme court of Kenya defined discrimination, thus:

“A distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to members of society.”

83. The Court of Appeal in the case of *Barclays Bank of Kenya Limited & Another v Gladys Muthoni & 2 others* [2018] eKLR, defined discrimination in the following manner:

“Discrimination means affording different treatment to different persons attributed wholly or mainly to their description ..... where persons of such description are subjected to ..... restrictions to which persons of another description are not made subject to are accorded privileges or advantages which are not accorded to persons of another such description .....

Discrimination also meant unfair treatment or denial of normal privileges to persons because of their race, age, sex ..... a failure to treat all persons equally where no reasonable distinction can be found between the favoured and those not favoured.”

84. In the employment contract, I find the definition by the ILO Convention 111 [supra] and Court of Appeal in the *Barclays Bank of Kenya* case [supra], very apt.



85. The objective nature of the ILO definition makes it unnecessary to venture into the space of inquiring into the intention of the employer. In the South African case of Leonard Dinglar Employee representative Council V. Leonard Dinglar [pty] Limited [1997] 11 BLLR 1438 [LC], the Court held that intention or motive of the employer is not relevant to the finding of discrimination.
86. Having said as I have hereinabove, I now turn to consider the burden of proof in disputes regarding workplace discrimination, inclusive promotion discrimination. Section 5 [7] of the [Employment Act](#) provides for the burden of proof, thus:
- “In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.”
87. The provision explicitly places the burden of proof on the employer to prove that discrimination did not occur in the manner alleged [emphasis mine] and that the discriminatory act or omission is not based on any of the prohibited grounds or any of them. In my view, the provision presupposes that the employee alleging discrimination must first prima facie demonstrate that discrimination occurred, that it did on the prohibited grounds or grounds akin thereto before the burden shifts to the employer to prove as herein before stated.
88. I have carefully considered the material placed before me, and find no challenge in concluding that the Petitioner did not allege that, the alleged promotion discrimination occurred on basis of any of the prohibited grounds or ground[s] akin thereto. Therefore, he did not discharge his burden. A claim for workplace discrimination should not be based on bare allegations and speculations. The court should not be left to speculate the grounds, and the basis for the alleged discrimination.
89. Assuming that the Petitioner did establish prima facie that discrimination occurred, a conclusion that the Respondents proved that the alleged discrimination did not occur, cannot be said to be off mark.
90. Considering the evidence of the Respondents brought out in detail hereinbefore, concerning the reason why the promotion of the Petitioner from Deputy Director to Director was not possible without a competitive process, I come to an inescapable conclusion that the reason was not unreasonable, arbitrary or capricious. It was not as a result of any of the prohibited grounds. The Respondents were able to discharge their burden of proof.
91. Lastly, I am under considerable difficulty to understand how the Petition herein was really informed, and its necessity. Where a person in the position of the Petitioner is aware that his or her employer is seeking to fill positions which to him or her constitute promotional posts by inviting applicant's from outside – or those to whom the post is not one of promotion and people like the Petitioner apply for such posts, and participate in the process with regard to selection by consciously competing with the outsiders without raising any protest, can he or she then mid-stream or on completion of the process and not being awarded the post, claim that the process and/or failure by the employer to offer him or her the post amounts to unfair discrimination relating to his or her promotions? I believe not.
92. There is no contestation that the Petitioner happily applied for the post of Director ICT, got shortlisted, and interviews are pending. The Petitioner is abandoning the process that he subjected himself to, mid-stream, alleging that he ought to have been promoted to the next level automatically under a different system/ arrangement. If such a move is accepted, then I fail to see why the Petitioner bothered to take the trouble of applying for the post and participate in the process at all. Had the Petitioner honestly believed, from the onset, that he was entitled to the position as promotional post, he has instead of applying for the position, seek to stop the Respondents from proceeding to seek



applicants for whom the vacant position would not be a promotional one within the 1<sup>st</sup> Respondent's Ministry.

93. The Petitioner contended that the Respondents breached the provisions of Article 47 of *the Constitution*. Counsel for the Petitioner has made extensive submissions on this provision. However, with great respect, I fail to see how the submissions and the authorities cited align to the circumstances of the instant Petition.

**Whether legitimate expectation was aroused, and whether there was any breach.**

94. The Petitioner anchored his Petition further on the fact that owing to the conduct of the Respondents he had a legitimate expectation that he was to be promoted. The Respondents on the other hand asserted that, they did not by their conduct or in any manner arouse the expectation and that they were in breach of none.

95. In the case of Communications Commission of Kenya and 5 others v Royal Media Services Limited & 5 others [2014] eKLR the Supreme Court of Kenya elaborated when legitimate expectation occurs, thus;

“Legitimate expectation would arise when a body, by representation or practice, has aroused an expectation that is within its power to fulfil .....”.

96. In the circumstances of the matter at hand, this Court finds that there was no clear representation or promise that the Petitioner was to automatically promoted. Considering that the Respondents had made an advertisement for the post of Director to be filled, there is no doubt that the invitation for application was extended to even outsiders. The process in respect of the post was not promotional, it was for a vacancy to be filled.

97. Having found that the position of Director ICT, in the circumstances explained by the Respondents and which the Court considers reasonable, was no longer available to be filled through a promotional process but through a competitive process, it could not be lawful for the Respondents to promote the Petitioner to a position already advertised. The Respondents could not have the competence to so do. The provisions of Article 232 of *the constitution* that speaks to fair competition and merit as the basis of appointments and promotions could be violated. The Petitioner would not have a legitimate expectation against this clear provisions of *the Constitution*.

98. By reason of the premises, I find that the Respondents did not through their conduct or in any manner arouse any reasonable expectation and none was breached therefore.

99. In the upshot, this Court finds no merit in the Petitioner's Petition, it is hereby dismissed.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF APRIL, 2023.**

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**OCHARO KEBIRA**

**JUDGE**

**In the presence of**

**Ms. Mulwa for Muchiri for the Petitioner.**

**Mr. Iseme for the 2<sup>nd</sup> Respondent.**



**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

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**OCHARO KEBIRA**

**JUDGE**