



**Sang v Governor Kericho County & 2 others (Petition
001 of 2023) [2023] KEELRC 1291 (KLR) (23 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1291 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 001 OF 2023
HS WASILWA, J
MAY 23, 2023**

BETWEEN

COLLINS KIPNGETICH SANG PETITIONER

AND

THE GOVERNOR KERICHO COUNTY 1ST RESPONDENT

THE COUNTY ASSEMBLY OF KERICHO 2ND RESPONDENT

THE COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

RULING

1. Before me for determination is the Petitioner/Applicant's Notice of motion dated 9th February, 2023, filed under certificate of urgency pursuant to Articles; 1, 2, 3, 10, 174, 200, 232 and 259 of the Constitution, Section 5 of the Office of the County Attorney Act, Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of law seeking for the following Orders;
 1. Spent.
 2. Spent.
 3. That pending the hearing and determination of this Petition, this Honourable Court be pleased to issue interim injunctive orders restraining the Respondents from proceedings with the vetting, appointment or issuing of letter of appointment to any candidate for the position of the County Attorney Kericho County.
 4. That the cost of this Application be provided for.
2. The application is supported by the grounds on the face of the application and the supporting affidavit of Collins Kipngetch Sang, the Petitioner herein, deposed upon on the 9th February, 2023.



3. The Affiant stated that the 1st Respondent pursuant to Section 5 of the County Attorney Act nominated one Alice Chepngetich Bett for the Position of the County Attorney.
4. He contends that the said nominee was not subjected to competitive recruitment in advertising, interviewing among others as provided for under the spirit of Section 5 of the [Office of the County Attorney Act](#). Rather that she was nominated and her name forwarded for vetting and eventual appointment without following the recruitment process.
5. The Applicant stated that the said office of the County Attorney has a substantive occupant, whose services have not been terminated as such there is no vacancy capable of being filled by the said nominee.
6. He blames the 3rd Respondent for abdicating its role of appointing the occupant of the office of the County Attorney. Further that the said appointment is marred with irregularities which should be quashed by this Court.
7. That the actions by the 1st Respondent to single handedly source a candidate to occupy the office of the County Attorney is in violation of Articles 10,27,54,73,174 and 232 of the [Constitution](#).
8. The Applicant states that he is interested in applying for the position of the County Attorney when its advertised and urged the Court to allow the Applications as prayed.
9. The Application is opposed by the Respondent who filed replying affidavit deposed upon by Dr. Wesley Kipkori Bor, the County Secretary and head of Public Service Board Kericho County, sworn on the 18th February, 2023.
10. In the affidavit, the Respondent stated that the nominee, Alice Chepngetich Bett, is qualified for the position of County Attorney, being an advocates of the High Court of Kenya, with 30 years of Experience and an active member of the Law Society of Kenya.
11. It is stated that the appointment of Alice into the office of County Attorney was in compliance with [Office of the County Attorney Act](#) as read with [County Governments Act](#) and the [Constitution of Kenya](#). He avers that by the letter dated 18.01.2023, Ms. Alice Chepngetich Bett was nominated by the Governor Kericho county for appointment as the County Attorney, County Government of Kericho, which nomination is subject to the approval of the County Assembly, Kericho.
12. It is stated that Section 5 (1) of the County Attorney Act 2020 provides that the County Attorney shall be appointed by the Governor with the approval of the county assembly. Section 5(2) of the aforesaid Act further provides that a person qualifies for appointment as County Attorney if such person is an Advocate of the High Court of Kenya of at least five years standing and, meets the requirements of Chapter Six of the [Constitution](#).
13. He avers that Section 31(2) of the County Attorney Act, thereof 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.
14. Based on that law, the previous County Attorney, Mr. Gideon K Mutai, was appointed on permanent and pensionable terms with effect from 1st September 2014, under the old dispensation, prior to the enactment of the [Office of the County Attorney Act](#). Thereafter in compliance with the new law, Mr. Gideon K 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.



15. He stated 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 person to the highest position that is vacant and to which such person qualifies for appointment.
16. Based on that the provisions of Section 31(3) of the County Attorney Act, the said Ms. Alice, being qualified for the said position was appointed by the Governor in line with the law.
17. Contrary to the averments by the Petitioner, the Affiant stated that the appointment of the County Attorney is not amongst the functions vested on the 3rd respondent and that function of appointing the County Attorney is among the powers granted to the Governor, by section 5(1) of the [Office of the County Attorney Act, 2020](#).
18. He avers that section 17 of the [Office of the County Attorney Act, 2020](#) provides that only the County Solicitor is 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.
19. The Respondents also questioned the locus standi of the Petition in instituting this Petition and stated that 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.
20. Also that the scope contemplated by Articles 22 and Article 258 of the [Constitution of Kenya](#) have not been clearly illustrated by the Petitioner in the Petition and therefore the present petition and interlocutory application fail the test determinant to lay it down for adjudication before the Constitutional Court.
21. The affiant further stated that the Petitioner does not have any authority to act on behalf of the said Mutai, neither is he privy to the contract between Mr. Mutai and the County Government of Kericho. Also that the constitutional issues if at all, are improperly preferred before this forum (Employment Court) and the issues therein ought to have been preferred in the normal manner as a claim before the Employment Court by Mr. Gideon Mutai.
22. The affiant contends that the petitioner in his supporting affidavit dated 9/02/2023, avers that the application is for conservatory orders. However, the same is not evinced in the substantive prayers sought in the notice of motion dated 9/02/2023 as interim injunctive orders are distinctively different from conservatory orders.
23. It is contended 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 Mr. Gideon Mutai the 1st Respondent and the reliefs sought, therefore, cannot be adjudicated upon at once and/or by this Court alone. Thus, the petition is not maintainable for reasons that there are different causes of action to wit; an employer-employee relationship and appointment procedures of the county attorney which require different jurisdictional setups to fully adjudicate the issues.
24. He stated that 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.

25. It is stated that the Petition falls short of the three (3) precise principles to wit;
- (a) specifically set out the provisions in the Constitution that have been allegedly violated;
 - (b) Provide the Particulars of the alleged violations;
 - (c) Provide particulars in which the Respondent has purportedly infringed their rights in respect of the scope and breadth of constitutional petitions adjudged in the locus classicus case Anarita Karimi Njeri -vs-The Republic [1976-1980] KLR 1272.

Therefore that the petition/application offends the principle of Constitutional Avoidance considering the issues spread out in the Petition would have been easily determined in another forum and area of law other than the Constitution.

26. The Affiant maintained that the petition/application 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 the Constitution, then it is best that it be so determined and pure constitutional issues left to be determined as such.
27. The deponent avers that the Application and the suit is premature having been filed before exhaustion of Alternative Dispute Resolution Mechanism.
28. The Respondent also took issue with the advocate Rutto marrirmoi Hillary Kiprop of personal Registration No. is P. 105/9021/12 for commissioning the affidavits for the Petitioner when he is inactive and stated that the said advocate is barred under Section 31 of the Advocates Act from acting as an advocate and by extension a Commissioner for Oaths as such the pleading herein as incompetent and should be struck out.
29. He stated in conclusion that the interest of justice tilts towards disallowing the Application and to allow it will cause more disharmony at the County and disrupt the business of the County Government of Kericho.
30. In the further affidavit sworn by the Petitioner on the 21st March, 2023, the Applicant reiterated the contents of his Supporting Affidavit and stated that his contention is in the manner in which Ms. Alice was appointed and not on her qualification to occupy the said Office.
31. He clarified that he is filling this suit in his own individual capacity and not as a proxy of Mr. Mutai and also that the Application herein is for public interest to preserve and protect against abuse of the law and the Constitution in Public appointment.
32. It is his case that the Respondent are evading the gist of the Application which is their failure to follow recruitment process in appointing Ms. Alice into the office of the County Attorney.
33. The Application was heard by written submissions.

Applicants' Submissions

34. The Applicant submitted on whether the interlocutory injunction sought should be issued. On this he cited the celebrated case of Giella v Cassman Brown [1973] E.A 358, that set down the grounds for granting interlocutory relief to include;
- a) whether there is a *prima facie* case with a likelihood of success on the merits,



- b) the balance of convenience,
- c) the risk of irreparable harm, and the public interest.
35. On *prima facie* case, 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 involve adequate evaluation of other potential candidates, advertising the vacancy or conducting interviews, when the said office is categorized under section 4 of the of the County Attorney Act as an office within the county public service. He argued 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. Further, section 2 of the [County Governments Act, 2012](#) defines “county public service” means 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. Therefore, that the recruitment into the office of the County Attorney should have followed the proper recruitment process envisioned for all other public officers under Article 232 of the [Constitution](#) as read with section 10 of the [Public Service \(Values and Principles\) Act, 2015](#).
36. It was submitted also that the 3rd Respondent ought to have been the one in charge of appointing the said County Attorney as opposed to the Governor as instructively provided for under section 66 of the [County Governments Act](#) which provides 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 a wide population of potential applicants as possible and especially persons who for any reason have been or may be disadvantaged. He argued that since the Office of the County Attorney is a public office, the law provided for recruitment process to be adhered to as per section 66 of the [County Governments Act](#). To back up this argument, they relied on the decision by Justice Radido in [Evans Muswabili Ladtema v Governor, County of Vihiga; County Assembly of Vihiga & others \(Interested Parties\)](#) [2021] eKLR where the Court 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.”
37. The applicant also relied on the decision of Byram Ongaya J in [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.”

38. The Applicant submitted that one of the ways in which the values of public participation is observed is through ensuring vacancies are advertised and potential candidates offered an opportunity to offer themselves, so that without such participation, any appointments to offices in the public service bereft of competition will be incongruent with the tenets of article 10 of the Constitution. To support this he 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 v 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.”

39. On irreparable harm and balance of convenience, the Applicant 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. Particularly, 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, it was argued that granting interim orders in favor of the petitioner would serve the interests of justice and the public good because such orders would help to maintain the status quo and prevent the Respondents from making a potentially illegal and hasty nomination of a County Attorney without proper consideration of all qualified candidates. He added that there exist other prospective candidates, including the petitioner, who meet the eligibility criteria for the position of County Attorney for Kericho. However, due to the unlawful nomination, these potential applicants are currently barred from pursuing the said position. It is only by means of an interim order that our client’s rights and the public interest can be suitably protected and ensure a fair and just process in the selection of the County Attorney for Kericho.
40. From the foregoing, the Applicant submitted that it has met all the condition pre-requisite to granting interim injunctive Orders and urged this Court to allow the same as prayed.

Respondent’s Submissions.

41. The Respondent on the other hand submitted on the three issues condition to be satisfied before injunctive orders are issued. There elements are; Whether there is a *prima facie* case with a likelihood of success on merits, the balance of convenience, the risk of irreparable harm and the public interest and Whether the instant application is procedurally and substantially regular and proper.



42. On what amounts a *prima facie* case, the Respondent cited the Court of Appeal case in Moses C. Mubia Njoroge & 2 others v Jane W. Lesaloi and 5 others, [2014] eKLR which cited the case of Mrao Ltd v First American Bank of Kenya and 2 others where the Court defined a *prima facie* case that;-

“A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

43. He argued that when dealing with applications for temporary or interlocutory injunctions, Courts are generally called upon to exercise caution to avoid dealing with finality in the interim, on issues which are the preserve of the main petition. In this they relied on the decision by Ibrahim, J (as he then was) in Muslim for Human Rights (Milimani) & 2 Others v Attorney General & 2 Others [2011] eKLR. The Learned Judge, correctly so, stated as follows: -

“The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.”

44. It was submitted that if the Orders sought by the Petitioner are allowed at this stage, the Court would intimate that the applicant’s case is successful before granting audience to the respondents contrary to the law as held in East African Portland Cement Company Limited v Attorney General and Another NRB IC No. 9 of 2012 [2013] eKLR which held that

“Interim orders are granted where the Court, in exercising its discretion is satisfied that they are necessary due to the urgency and nature of the circumstances. They are mostly injunctive in nature, putting on hold an action, maintaining the status quo, until the substantive dispute can be investigated and resolved. The applicant must establish genuine urgency. Interim orders are not suitable if by their grant, they finally determine the substantive dispute. The Courts must be wary of prejudgment of the substantive merits.”

45. Accordingly, it was submitted that Madam Alice Chepngetich Bett was nominated by the Governor Kericho County for appointment as the County Attorney, County Government of Kericho. The nomination is subject to the approval of the County Assembly, Kericho. This is in accordance with Section 5 (1) of the County Attorney Act that provides that the County Attorney shall be appointed by the Governor with the approval of the county assembly. Furthermore, that the said section provides for qualification for appointment of County Attorney which they Said Ms. Alice has surpassed. Also that the Governor is the one empowered to appoint the County Attorney and not the 3rd Respondent as submitted by the Applicant.

46. He submitted that section 17 of the Office of the County Attorney Act, 2020 provides that 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.

47. On that basis, it was argued that there is no *prima facie* case established that would warrant the issuance of temporary injunctive orders pending the hearing of the main petition but that the status quo ante, which prevailed prior to filing of this petition and application, has to be preserved.
48. On irreparable damage, it was submitted that the Applicant is an advocate and there is no demonstration that he might otherwise suffer irreparable injury if an injunction does not issue. On the balance of convenience, the same tilts in favour of declining to interfere with the status quo as there would be a remedy by way of damages should the Applicant be ultimately successful. Moreover, that the grant of interim injunctive orders as against the respondents shall act to constrain and impede the activities of the county government in its provisions of essential services to the greater people of Kericho county thereby inconveniencing the respondents.
49. The Respondent also submitted that the Applicant did not demonstrate the prejudice they would personally suffer if the orders are not issued. Moreover, that no issue of prejudice was pleaded or that inconvenience caused to him will be greater than that which may be caused to the respondents. Thus that the scales of balance of convenience squarely tilts in the respondents' favour.
50. On whether the suit herein is a public interest litigation, it was submitted in the negative. In defining what amounts to public interest case, the Respondent relied on the case of *Kenya Anti-Corruption Commission v Deepak Chamanlal Kamani and 4 Others*, [2014] eKLR which held that:
- “...a matter of public interest must be a matter in which the whole society has a stake, anything affecting the legal rights or liability of the public at large”.
51. He argued that in determining public interest matter, the following principles has to be applied;
- i) The principle of proportionality
 - ii) The balancing test
 - iii) The necessity test and
 - iv) The suitability test. He argued that none of these principles have been demonstrated by the Applicant to classify this case as a public interest matter for the purposes of issuance of the Orders sought.
52. He went ahead and submitted on applicability of each of the above principle 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. On that basis, he argued that the rights of Alice Chepngetich Bett and Gideon Mutai who are not parties to the suit are to be adversely affected should the court grant the prayers sought in the application. In this he relied on the case of *Oliver Mukhebi & 28 others v County Public Service Board of Bungoma & another* [2022] eKLR which 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. “



53. On the balancing test, he argued that the same 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.
54. On the necessity test, he submitted that it 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. And on suitability test, he argued that it 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.
55. The Respondent took issue with the signatures appended by the petitioner in the supporting affidavit and the further affidavit and alleged that the same have a remarkable difference and therefore cannot have been authored by the same person. He urged this Court to make a finding that the application and the supporting affidavit attached therein is fatally defective for want of proper execution as required under the *Evidence Act*.
56. The Respondent also took issue with the Advocate that commissioned the Applicant supporting affidavit one Rutto marrirmoi Hillary Kiprop of personal Registration No. is P. 105/9021/12 and stated that since he is inactive, he is not allowed to practice law as per the dictates of section 24 and 30 of the *Advocates Act*. Therefore, that the commissioned affidavits are invalidated. To support this argument, they relied on the Supreme Court of Uganda case of *Prof Syed Hug v Islamic University of Uganda* C.A. No. 47 of 1995 where the Court considered the effect of an Advocate Commissioning Oaths without a practicing certificate and held that the actions were illegal as it was done while perpetrating an offence which cannot be considered by a court of law. Also cited a High Court of Kenya Decision in Election Petition No. 21 of 2017 *Omusotsi v the Returning Officer and Another* where the petition was struck out on the grounds that the affidavits were not commissioned by an advocate permitted to practice law.
57. To further reinforce its position, the Respondent relied on the case of *Hosea Mundui Kiplagat v Sammy Komen Mwaita & 2 Others* [2013] eKLR Court stated:
- “An affidavit commissioned by unqualified advocate is as good as an affidavit not commissioned at all.”
58. Also in *Pius Njogu Kathuri v Joseph Kiragu Muthura & 3 others* [2018] eKLR it was 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 on 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.
59. In conclusion, the Respondent urged this Court to dismiss the application herein for being incompetent and for failing to demonstrate all the principle required for granting of interim injunctive Orders.



60. I have examined the averments and submissions of the parties herein.
61. The applicant has taken issue with the manner one Alice Bett has been appointed as County Attorney and contends that she was not competitively appointed as envisaged.
62. The respondents on their part aver that there is no requirement for competition requirement as they referred court to the County Attorney Act 2020.
63. Section 5 of the County Attorney Act states as follows;
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—
 - (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.
 - (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—
 - (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.
64. Under the Act it is clear that the County Attorney shall be appointed by the Governor with the approval of the County Assembly.
65. However it is evident that there is no vacancy existing in the office of the County Attorney as there is an incumbent in office one Gideon Mutai who is holding office and his contract is due to expire in 2025. There is no explanation as to what has happened to the incumbent and why a new appointee was nominated.
66. In the circumstances, the applicant has established a *prima facie* case with a probability of success which necessitates the grant of orders sought.
67. I will extend the injunction orders restraining the respondents from proceeding with the vetting, appointment and issuing of letters of appointment to any candidate for the position of the County Attorney Kericho County pending the hearing and determination of this petition.
68. Costs in the petition.

RULING DELIVERED VIRTUALLY THIS 23RD DAY OF MAY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE



In the presence of:-

Lorot for 1st & 3rd Respondents – present

Petitioner – absent

Court Assistant – Fred

