



Wafula v Kenya National Commission for Unesco & another; Cabinet Secretary, Ministry of Education & 4 others (Interested Parties) (Petition E167 of 2022) [2023] KEELRC 1100 (KLR) (2 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1100 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E167 OF 2022**

K OCHARO, J

MAY 2, 2023

BETWEEN

AGGREY WAFULA PETITIONER

AND

KENYA NATIONAL COMMISSION FOR UNESCO 1ST RESPONDENT

**SECRETARY GENERAL/CEO KENYA NATIONAL COMMISSION FOR
UNESCO 2ND RESPONDENT**

AND

CABINET SECRETARY, MINISTRY OF EDUCATION INTERESTED PARTY

THE HON ATTORNEY GENERAL INTERESTED PARTY

THE ETHICS AND ANTI-CORRUPTION COMMISSION . INTERESTED PARTY

INSPECTORATE OF STATE CORPORATIONS INTERESTED PARTY

PUBLIC SERVICE COMMISSION INTERESTED PARTY

JUDGMENT

1. Through his Petition herein dated 18th September 2022, the Petitioner seeks the following reliefs:
 - a) A declaration be and is hereby issued that in conducting the recruitment to fill 22 vacant positions as advertised on 13th September, 2022 without the investigation and resolution of the chairperson’s complaint and grievances as contained in the letters dated 1st and 18th of August 2022 and a letter by the Ethics & Anti-corruption Commission dated 20th September 2022 that the 1st and 2nd Respondents have violated the National Values of Transparency, Accountability, and Integrity under Articles 10[2] and 232 [1] of *the Constitution*.



- b) A Judicial Review order of Mandamus be and is hereby issued directed at the Ethics and Anti-Corruption Commission, to investigate the complaint touching on malpractices in the recruitment of the 17 members of staff as commenced by the 1st and 2nd Respondents on 1st March 2022 and establish whether it was marred by illegalities, irregularities and fraud as communicated by the 1st Respondent's Chairperson of the Board of Directors/Management vide letters dated 1st and 18th August, 2022.
 - c) A Judicial Review order of Certiorari do issue quashing the 1st and 2nd Respondents' decision to conduct a recruitment to fill up 22 vacant positions as contained in the newspaper advertisement of 13th September, 2022.
 - d) A declaration that is failing to obtain the approval and concurrence of the Public service Commission, the state and Corporation Advisory Committee and the National Treasury prior to commencing recruitment to fill up 22 positions as advertised on 13th September 2022, the 1st and 2nd Respondents have violated Articles 10 and 232 of *the Constitution*.
 - e) A declaration that the Secretary General of the 1st Respondent, Dr. Evangerina Njoka has violated the National Values and Principles of Integrity, accountability, transparency and high Standards of Professional Ethics under Articles 10 [2] and 232 [2] of *the Constitution* and is unfit to hold any public office.
 - f) The costs of the petition be accorded to the Petitioner and met by the 1st and 2nd Respondents.
2. The 1st and 2nd Respondents opposed the petition upon premise of the grounds obtaining on the affidavit sworn by Dr. Evangerina Njoka, its Secretary General and Chief Executive Officer, sworn on 5th October 2022.
 3. The 3rd Respondent filed an affidavit sworn by Dr. Julius O. Jwan, the Principal Secretary, State Department for Early Learning and Basic Education in the Ministry of Education.
 4. The 1st, 2nd and 3rd Interested Parties did not file any affidavits in support of or against the petition herein.
 5. The 4th Interested Party filed a replying affidavit sworn by Rosemary N. Mulati, MBS, its Deputy Commission Secretary, Corporate Services, sworn on 2nd February, 2023.
 6. The 5th Interested Party filed a replying affidavit that he swore on the 16th January 2023, the affidavit clearly, is in support of the petition.
 7. The 6th Interested Party filed a replying affidavit sown on the 26th March 2023. The affidavit, just like the 5th Respondent's appears to be in support of the petition.
 8. In response to the 5 Replying affidavit by the 5th Interested Party, Dr. Musigo Amatisumbi, the 1st and 2nd Respondents filed further affidavits sworn by Dr. Evangerina Njoka, sworn on the 13TH March 2023, an affidavit by Mary Rotich sworn on the 20th March 2023, and Patricia Aloo, sworn on the 15th March 2023.
 9. On the 17th January 2013, by consent of Counsel for the parties, this court gave the following directions: -
 - a) That the applications outstanding are hereby deemed abandoned in favour of the hearing of the substantive petition.



- b) The 1st and 2nd Respondents have leave of 7 days to file and serve a response to the affidavit by the 5th Interested Party.
 - c) The petition shall be canvassed via-voce.
 - d) The 4th Interested Party is given 7 days to file a response to the petition.
 - e) Hearing 28th March 2023.
10. On the above stated date, 28th March 2023, the Petitioner testified, adopted the contents of the petition and of the affidavit dated 16th September 2022 as his evidence in chief, before he was cross-examined on same and giving evidence in re-examination.
11. DR. EVAGERINA NJOKA, testified on her behalf as the 2nd Respondent and that of the 1st Respondent as its Chief Executive Officer. The Court adopted the contents of her two affidavits hereinabove referred to as her evidence in chief and the documents annexed to the affidavits as her documentary evidence. She was cross-examined on them.
12. The 1st two Respondents also presented as witnesses, one PATRICIA AWOUR ALOO [RW2] to testify in support of their case.
13. At the close of the Petitioner's and Respondent's first two witnesses' testimony, the parties recorded the following consent: -
- a) The Respondent's witness's [MARY ROTICH] affidavit sworn on the 20th March 2023, be admitted as the 1st & 2nd Respondent's evidence in this petition.
 - b) The affidavit filed by the 3rd Respondent sworn by the Permanent Secretary – Dr Julius Swang on 21st October 2022 is hereby admitted as evidence presented by the 3rd Respondent, 1st and 3rd Interested Parties.
 - c) The affidavit by Rosemary M. Mulatisworn on the 2nd February 2023 for the 4th Interested Party is admitted as the party's evidence in the petition.
 - d) The replying affidavit sown by the 6th Interested Party on the 26th March 2023 is admitted as her evidence in this petition.
 - e) The affidavit filed by the 5th Interested Party sworn on 16th January 2023 is hereby admitted as his evidence in the petition.
 - f) To this extent, the parties have waived their rights to cross-examine on the contents of the affidavits and the order of 17th January 2023, is reviewed accordingly.
 - g) The respective cases of the Respondents and the Interested Parties are closed.
14. The Court then gave directions to the parties on filing of written submissions. Only the 1st and 2nd Respondents complied and filed their submissions. The judgment herein is therefore without the benefit of the other parties' submissions.

The Petitioner's case.

15. The Petitioner stated that through an advertisement that appeared in the Daily Nation Newspaper of 13th September, 2022, the 1st and 2nd Respondents advertised for several vacant positions and invited applications from qualified candidates to express interest.



16. The Petitioner alleged that prior to the aforesaid advertisement, the 1st and 2nd Respondents had in March 2022, advertised 17 vacancies to be filled and subsequently conducted an irregular recruitment which was concluded in July 2017. The recruitment was unlawful.
17. He further stated that through letters dated 1st and 8th August, 2022, the immediate former Chairperson[the 5th Interested Party] of the 1st Respondent's Board of Directors wrote to a number of Government departments including the Cabinet Secretary, Ministry of Education, the Ethics and Anti-corruption Commission, the State Corporations Advisory Committee and the Public Service Commission, detailing the illegalities, irregularities as and criminal activities that characterised the recruitment of 17 persons that was concluded in July, 2022. The illegalities included;
 - a) Misrepresentation of material facts by the 2nd Respondent to the Board of Directors in relation to the long list and short list which were doctored and skewed in favour of certain candidates.
 - b) Falsification of documents of the 2nd Respondent in favour of her preferred candidates.
 - c) Tribalism and nepotism in the recruitment process.
 - d) Canvassing through threats and obtaining questions and answers prior to the interviews by the 2nd Respondent to ensure that preferred candidates were successful.
18. That through its letter dated 29th August, 2022 addressed to the Cabinet Secretary, Ministry of Education, the 1st Respondent's Board denied the alleged illegalities that its immediate former Chairperson had raised and invited the Inspectorate of State Corporations and Government Agencies to audit the recruitment.
19. Before investigations into the illegalities, fraud and the 2nd Respondent's conduct which bordered criminality could be concluded by the Inspectorate of State Corporations and the Ethics and Anti-corruption Commission, the 1st and 2nd Respondents initiated another recruitment pursuant to the advertisement of 13th September, 2022.
20. The intended recruitment, without conclusion of investigations into the serious recruitment malpractices regarding the earlier recruitment, ran afoul the National Values and Principles of Good Governance, Rule of Law, Integrity, Transparency and Accountability contemplated in Article 10 [2] of *the Constitution*.
21. The Petitioner alleged that on 6th March, 2022, the 1st Respondent's Board of Directors passed resolutions that future recruitments be undertaken by the Public Service Commission, to avert recruitment flaws as happened in the earlier recruitment. Therefore, the intended recruitment is contrary to the resolutions and without involvement of the Public Service Commission.
22. The 1st and 2nd Respondents have adopted and are Implementing Human Resource approaches in the recruitment, renewal of contracts, and promotion, of employees that contravene the Constitutional Principals of equal treatment and non-discrimination on the ground of tribe and nepotism. For instance, the renewal of the contracts for the Director Culture, and that of the Human Resource Manager were advertised upon expiry. However, in 2021, when the Director Education's [Mary Kangethe's] contract expired, it was renewed without any advertisement. This is testament of discrimination, abuse of office and corruption by the 2nd Respondent.
23. The 2nd Respondent's contract of employment is scheduled for expiry without option of renewal in June 2023. She is hurriedly trying to undertake and conclude the recruitment process that is marred by corruption, nepotism, abuse of office and discrimination contrary to the stipulations of Articles 10, 27 and 232 of *the Constitution*.



24. Cross examined by Mr. Ojiambocounsel for the 1st and 2nd Respondents on the affidavit and the petition, the Petitioner stated that there has never been any relationship between him and the 1st Respondent. Further that the information he had given in the documents he has filled herein actually relate to the 1st Respondent's Board meetings. He picked the information from the various letters by the 1st Respondent, letters which he has exhibited in this matter.
25. The letters are not copied to him. They were given to him by the former Chairperson of the Board, 5th Interested Party for purposes of the petition herein.
26. The Petitioner admitted that though he has attacked the recruitment that was concluded in July 2022, inter alia on the grounds of nepotism, in the petition he has not sought any sanction against the recruitment.
27. Further that though he alleged that the 1st Respondent ceded its authority to recruit in favour of the Public Service Commission, he placed no minutes before the court to demonstrate that.
28. The petition is further anchored on the fear that the 2nd Respondent may again carry out "a flawed" recruitment exercise. The defaults in the 1st recruitment exercise must be addressed first before the recruitment the subject matter of this petition is carried out. However, he admitted that if the recruitment were to be allowed to proceed, and flaws emerge in the process, he would still have a chance to challenge the process.
29. The Petitioner further admitted that the positions that the 1st Respondent intends to fill are vital for its proper operations.
30. Cross examined by counsel Kioko for the 3rd Respondent, 1st Interested Party and 3rd Interested Parties, the Petitioner admitted that he had no knowledge of the organizational structure of the 1st Respondent.
31. The petition does not seek any relief against the 3rd Respondent and 4th Interested parties.
32. Cross examined by Ms. WANGECI for the Public service Commission, the Petitioner stated that contrary to what he asserted in the certificate of urgency accompanying his application herein, no letter was addressed to the Commission.
33. In his evidence in re-examination the Petitioner stated that he did not seek any reliefs in respect of the earlier recruitment as it is a matter pending before other Government Agencies.

The 1st and 2nd Respondent's case

34. The 1st witness for the 1st and 2nd Respondents, was DR. EVAGERINA NJOKA, the 2nd Respondent. The witness contended that, it appears from the Petitioner's pleadings that the petition has been brought at the instigation of DR. MISIGO AMATSIMBI, who served as Board Chairman for the 1st Respondent for a period of three [3] years up to 23rd June 2022.
35. The 2nd Respondent asserted that during his tenure as Chairman, the 5th Interested Party respectively commended her for working well and professionally. He did not inform her of any shortcoming in her performance, and the Board which he chaired rated her highly for her performance. Consequently, the 5th Interested Party's letters of 1/8/2022 and 30/8/2022 came as a surprise to her.
36. The witness argues that if indeed there were any infractions on her part as alleged in the letters, nothing would have been easier than for the 5th Respondent to table the matter before the Board he was chairing for deliberations and action.



37. The Petitioner and the 5th Interested Party have not explained why they did not place the issues raised in the petition, before the current Board, for deliberations and action, instead of engaging the court process.
38. The petition is anchored on hypothetical or abstract ground that the recruitment exercise may flout Articles 10 and 232 of *the Constitution* of Kenya. The petition is an abuse of the court process.
39. The witness further asserts that the petition is founded on the false allegation that there was a meeting held on 6th March 2022 where the Board discussed and passed a resolution abandoning its right and ceded that authority to recruit, to the Public Service Commission. There was no meeting on the said date where such a motion could be tabled, discussed, and or passed, by the Board.
40. The witness stated that the petition is anchored on the false premise that the approval and concurrence of the Public Service Commission, and the then State Corporations Advisory Committee was required before 1st Respondent could embark on the recruitment to fill up the 22 vacant positions as advertised on 13th September 2022. The only approval that was required, was from the National Treasury, which approval was sought and obtained.
41. The witness stated that the 1st Respondent was previously a department in the ministry of Education until 2013 when it was elevated to a State Corporation through the *Kenya National Commission for UNESCO Act* 2013 [revised in 2014] in line with the UNESCO Constitution and the UNESCO Charter on National Commission for UNESCO.
42. The witness further stated that by a circular Ref. No. OP/SCA.9/21/1/1 of 15th May 2017, the State Advisory Committee in the exercise of Powers donated under Section 5[3] and 27 of the *State Corporations Act* Cap 446, required all State Corporations to review and align their Human Resource instruments to the Human Resource [HR] Policy Guidelines issued by the Public Service Commission.
43. The witness stated further, that pending compliance with the directions issued in the above stated circular, the Head of Public Service issued another circular Re. OP/CAB.34/4A of 28/7/2017 freezing the recruitment of any new staff in all State Corporations save in exceptional circumstances where approval for recruitment was obtained from his office. The freeze applied to the 1st Respondent too.
44. It was further stated that the 1st Respondent embarked on the review of its Human Resource Instruments and the final instruments were approved by the State Corporations Advisory Committee for Implementation in October 2019. The approval was expressed in its letter dated 9th October 2019 to the 1st Respondent's parent Ministry.
45. The Head of Public Service by his circular Re. OP/CAB-9/1A of 7/2/2022 lifted the freeze on recruitment as against the 1st Respondent and other State Corporations whose Human Resource Instruments had been approved by SCAC, through Circular Ref. OP/CAB.39/4IX of 28/7/2017. The circular allowed the 1st Respondent to recruit staff to fill vacant positions provided in the approved Human Resource Instruments on condition that;
 - a) The Board of the 1st Respondent had passed resolutions approving the recruitment and;
 - b) The 1st Respondent had sought and obtained the written approval of the National Treasury.
46. The witness stated that under the approved Human Resource Instrument, the staff establishment of the 1st Respondent ought to be 94 members. At the time, the 1st Respondent had only 35 members of staff.



47. On the 29th September 2021, the 1st Respondent's Board of Directors received the report of the 2nd session of the Human Resource and Establishment [HRE] Committee, considered the same, and duly approved the recruitment to fill up 19 vacant positions in its workforce.
48. The witness asserted that consequently the Board required her to write to the National Treasury through the 1st Respondent's parent Ministry seeking approval for the recruitment to fill up 19 vacant posts, that the 1st Respondent's budget could accommodate. Through her letter dated 10th December 2021, she sought for the approval.
49. She went ahead to state that by a letter dated 10th February 2022, the parent Ministry wrote to her, indicating the National Treasury's approval of the recruitment to fill up the 19 vacant positions in the 1st Respondent. Following the approval, an advertisement for filling of the 19 positions was done on 1st March 2022 in line with the 1st Respondent's Human Resource Policy.
50. The witness stated that on the 6th May 2022, the Chairperson of the Human Resources and Establishment Committee presented a detailed report outlining the recruitment process, criteria used in shortlisting candidates and presented the numbers of shortlisted candidates in each job category, to the Board. The Board considered the report and approved the shortlisted candidates for interview. The committee got enjoined to present the final list of successful candidates to the Board after the interviews.
51. The witness stated further that on the 9th May 2022, she prepared and sent minutes of the meeting held on 6th May 2022 for his reading and approval. The Chairman made comments and corrections to the minutes and sent them to her via his email of 10th May 2022. She immediately made the corrections suggested, and sent the minutes to him. He approved the same.
52. It makes no sense therefore for the former Chairman of the Board, to turn around and allege, and the Petitioner repeat that minutes of the Board meeting held on 6th May 2022 and signed by the chairman are replete with deliberate errors, mistakes, or misleading omissions. The minutes are a true record of the deliberations of the Board and there is neither mistake nor error as alleged.
53. The witness further stated that on the 11th May 2022 the Chairperson of the shortlisting Committee informed her that during verification of documents of shortlisted applicants, it was discovered that there were candidates who had higher academic qualifications but applied for positions KNC 4, 5, and 6, who were regrettably disqualified on account of over qualification. It was recommended that the shortlisting for the grades KNC 4, 5 and 6 be set aside and the process repeated to include those earlier disqualified on account of overqualification.
54. The witness got prompted to write to the Board Chairman bringing the anomaly to his attention and invited him to consider the request from the Chairperson of the Shortlisting Committee, carried in the memo dated 11th May 2022. The 1st Respondent's Chairperson agreed to the request and scheduled a special meeting of the Board to receive the report of the Committee.
55. In its meeting held on 23rd May 2022, after receiving the report from the chairperson of the Committee, the Board resolved that the shortlist approved on 6th May 2022 in respect of positions KNC 4, 5 and 6, be set aside. The Committee with the concurrence of the then Chairman repeated the shortlisting, taking into consideration higher academic qualifications over and above the requirements in their respective indents and came up with shortlisted candidates who met the minimum criteria as per the indents. The Board approved the revised shortlisted candidates and authorised the HRE Committee to proceed with interviews and report to the Board with successful candidates.



56. At that meeting held on 23rd June 2022, the full Board of the 1st Respondent received the interview report for the 19 advertised posts from the Human Resource Establishment [HRE] Committee. Upon discussion, the Board approved the 19 successful candidates for employment.
57. On the 2nd recruitment, the witness testified that at a meeting held on 23rd June 2022, the Board approved a recruitment process to fill up 22 vacant positions subject to concurrence of the National Treasury.
58. On the 24th June 2022, the witness prepared and sent to the Chairman the draft minutes of the meeting held on the 23rd June 2022 for his reading and approval. On the same day the Chairman approved the minutes.
59. On the 1st August 2022 she wrote to the National Treasury through the parent Ministry seeking approval to recruit and fill up the 22 vacant positions. By his letter dated 25th August 2022, the Cabinet Secretary in charge of National Treasury granted the approval.
60. Upon the approval for the recruitment by both the Board and the National Treasury, the 1st Respondent advertised the recruitment on 13th September 2022 inviting applications. There is nothing illegal with the said recruitment.
61. The staff ethnicity chart of the 1st Respondent disabuses the Petitioner's allegation that tribalism motivates staffing at the 1st Respondent. The 1st Respondent's staff represents the face of Kenya.
62. The 1st Respondent is presently impaired by understaffing. The Petitioner will not be prejudiced in any way if the recruitment were to proceed.

5th Interested Party's Case

63. The 5th Interested Party stated that he is the immediate former Chair of the Board, 1st Respondent's - Kenya National Council for the UNESCO, appointed on 24th June 2019 for a term of 3 years, term which lapsed on 23rd June 2022.
64. The Party asserted that he was shocked to learn that it is purported that he signed the Board minutes on the 26th August 2022, yet he left the Commission on 23rd June 2022. He alleged that Dr. Njoka forged and used his signature on the minutes without his authority. Following this, he laid complaints with the National Police Service, the Ethics and Anticorruption Commission, and the Data Protection Commissioner for investigations on the forgery. He further asserted that contrary to what Dr. Njoka contends, her working relationship with most of the Board Members of the 1st Respondent, was not cordial. They had major differences with her. The poor relationship flowed from her persistent misadvice and misrepresentations to the Board and the Ministry.
65. The 5th Interested Party stated that his attitude towards the 2nd Respondent changed as she on more than two occasions, called members of staff in her office and asked them if they were engaging sexually with him, a thing he found very unprofessional of her. That further, she spread rumour, that he had employed his girlfriends.
66. He asserted that contrary to the 2nd Respondent's contention that she was a performer with a straight record on leadership, the Board had numerous issues against her ranging from falsification of documents to mismanagement of the Commission, her leadership was infested with nepotism and tribalism.
67. That Dr Njoka has been vindictive against Commission staff like Catherine Nyaboke Nyang'au' and David Otiato who she had unfairly disciplined. Recently, on 26th September 2022 the EACC's



Investigating Officer exonerated Catherine Nyaboke of the accusations by Dr. Njoka about use forged documents to secure employment at the Commission. Dr Njoka had had Catherine disciplined based on these false accusations.

68. That the on 6th March 2020 the Board formed an ad hoc Investigation Committee to query illegalities in recruiting the Chief Accountant. In its report, the committee found that;

“The SG/CEO canvassed or conflicted based e-mail correspondence submitted by David Looremata...There was prior communication between the SG and Jacqueline Njeru’s father at the time of recruitment. There was no registered conflict of interest. There was evidence of canvassing, collusion, and conflict of interest.”

The Board recommended disciplinary action against all officers involved including Dr Njoka.

69. The Committee also recommended a review and standardization of the recruitment process to curb the persistent challenges in recruitment. The Commission was directed to develop an online application system; consider having external agencies to assist in recruiting top management offices; and that future communication during recruitment process should be done procedurally. This has not been implemented thus the recruitment challenges raised in this case.
70. To cure the falsification and change of Board Minutes, the committee recommended that there was a need to establish a clear communication of the Board’s resolutions and that the Board to implement e-Board for ease of reference to past discussions and resolutions. This has not been implemented. Dr. Njoka is lying by stating that the procurement of e-board tablets has been on since 2019.
71. He alleged further that on irregular employment in the Commission, it was recommended that management obtains Board approval of all staff appointments in the Commission. Indeed, KNATCOM Act gives the responsibility of employing all staff of the Commission to the Board. This was never done.
72. The Party alleged that during the recent recruitment in the Commission, Dr. Njoka changed the shortlisting format approved by the Board for her narrow and selfish gains without the Board’s input.
73. For instance, in a document that was authored by the 2nd Respondent it was claimed that Naomi Mwhaki Muiruri, who was appointed Finance Manager, had worked for the Commission for over 15 years as the Acting Manager of Finance and Accounts, yet she is 34 years old. This implies that Ms. Naomi was appointed to a senior position in the Finance Department at 18, a misrepresentation of facts by Dr. Njoka.
74. Section 2.1.5 of the KNATCOM Human Resource Policy and Procedures Manual, 2019, stipulates that all appointments must be made with the approval of the Board. Subsection 2.7.2 states that the Secretary-General/ CEO, upon approval by the Board may grant extension of an employee’s tenure for not more than three months to allow completion of assignment. The Board did not give any approval for either the appointment on short- term basis or renewal of appointment for James Gitahi and Denis Mwiti Gitari.
75. He further stated that the 2nd Respondent misused the 1st Respondent’s internship program for her personal gain. She could engage interns without the approval of the Board and advertisement as required by the 1st Respondent’s Human Resource Policy and Procedures Manual. She engaged interns and more especially those from her area to serve for more than the required period.



76. He further asserted that in the 1st recruitment, Dr. Njoka did not avail the lists of all applicants as was required by the 1st Respondent's Human Resource Policy and Procedures Manual, 2019. She didn't allow the Human Resource and Establishment Committee (HRE) to oversee the list of all applicants, to check on competence and diversity. Some applicants were not shortlisted despite having the requisite qualification. This is testament that the 2nd Respondent is a dishonest person.
77. Concerning the 2nd Respondent's assertion that the anomaly of some candidates not being shortlisted was brought to her attention by employees of the 1st Respondent, the 5th Interested party termed it a lie and contended that it is him who wrote to the CEO on 10/5/2022 inquiring why no Ph.D. holder was shortlisted for the Deputy Director of Research position. The 1st Respondent's Human Resource Policy and Procedures Manual does not provide for over-qualification. The alleged over qualification was a creation of the CEO, that was aimed at impeding candidates from a particular ethnicity from making it to the shortlist.
78. The 2nd Respondent deliberately excluded suitable and competent officers from the shortlisting Committee, notably the Program Directors and the Legal Officer, yet most of the vacancies that were being filled were in the Programs field. This was informed by the fact that she feared an objective shortlisting process.
79. Before the interviews, a shortlisting committee member gave applicants known to Dr Njoka interview questions and answers. Dr Njoka forced Program Directors to provide interview questions and answers a day before the interviews. The interview questions and answers were then sent to some candidates. Program Directors who were not involved in this scheme protested this infraction, but she did nothing about it. The same officer, who had leaked the questions and answers, was allowed to sit in the interview panels, and scored applicants despite the conflict of interest. The ranking of the Applicants was therefore not on merit.
80. It was unethical for Dr. Njoka and the Chair of the shortlisting committee to ask for interview questions and answers and leak them to candidates. The 5th Interested Party alleged that some applicants bribed their way to be offered appointment by the Commission.
81. He contended that a few days after his tenure as the Chairman of the Board, members of staff of the 1st Respondent visited his office, complaining about the CEO's unethical conduct during recruitment process. He immediately wrote a WhatsApp message to her asking her to investigate the allegations. He further wrote to the Chairman of HRE Committee, asking her to convey his concerns over the recruitment process, to the CEO.
82. The CEO having exhibited her unethical conduct in the management of the Commission and the recruitment process, should not be allowed to oversee any other recruitment in the Commission. The court should direct the EACC to investigate the unethical conduct by Dr. Njoka.

2nd Respondent's Rejoinder.

83. The 2nd Respondent filed a further affidavit sworn on 13th March 2023. In it she averred that it was not true that she had forged or misused the e-signature of the 5th Interested Party on the Minutes confirmed on 26th August 2022. The circumstances leading to the signing of the said Minutes were well explained in the affidavit of Patricia Aloo who had the custody of the e-signature.
84. It is averred that the 5th Interested Party chaired the special Session of the Board Meeting held on 23rd May 2022 and approved the said minutes vide his email to her on 24th May 2022 where he stated that the said Minutes represented the true copy of their deliberation. It is her position that the 5th Interested



- Party is trying to distance himself from the decisions reached by the Board and even alleges forgery against her. The 5th Interested Party is bound by the resolutions reached by the Board where he was the Chairperson.
85. The affiant contended that the 5th Interested Party was not available to sign the said Minutes and authorised his e-signature be used whereupon she told her secretary to append his e-signature. The Minutes were subsequently confirmed by the Board Meeting held on 26th and duly signed by her and the session Chairperson, Professor. Grace Bunyi.
 86. It is contended that the Minutes approved by the 5th Interested Party on 24th May 2022 for circulation and those confirmed by the Board on 26th August 2022 were the same and there was no material difference that would justify the allegations of forgery. The complaints made by the 5th Interested Party to the EACC and the Data Protection Commissioner are made in bad faith to tarnish her name and advance ulterior motives.
 87. The 2nd Respondent stated that she had a good working relationship with the Board and was highly rated by the Board members including the 5th Interested Party and nothing in her rating suggests that she was unable to perform the functions of her office or that she did not get along with the members of the Board as alleged by the 5th Interested Party.
 88. It is averred that the allegations that the 5th Interested Party had sexual relationships with the members of the staff were brought to her attention at an investigation called by the Inspectorate of the State Corporations where she was required to respond to the accusations made by the former staff. After meeting with the Inspectorate of Corporations officers she disclosed those disturbing allegations against the 5th Interested Party in confidence but surprisingly, she is now being accused of being the author of the said allegations. She did not call any member of the staff to accuse the 5th Interested Party or investigate his sexual relationship with any member of the staff.
 89. It is contended that the 2nd Respondent sent draft Minutes of the 58th Session of the Board Meeting held on Friday, 6th May 2022 to the 5th Interested Party via email of 9th May 2022 for concurrence. He asked her to proceed with the next action which was the signing and the circulation of the same among the Board members. He approved the draft Minutes where his e-signature had been appended. The said Minutes were subsequently confirmed without amendment at the subsequent meeting held on 26th August 2022.
 90. The 2nd Respondent stated further that the 5th Interested Party raised the allegations of falsification and mismanagement of documents after he left office. Such allegations are serious and if at all he had any confidence in them, he would have brought a charge against her. No explanation was proffered why he never took any action against her for the entire period between 24/6/2019 to 23/6/2022.
 91. It is the 2nd Respondent's position that the Board on 18th September 2019 held its 43rd special sitting under the chairmanship of the 5th Interested Party which resolved that three of its officers, among them Catherine be sent on compulsory leave to allow investigations and the same marked the beginning of Catherine's disciplinary action. The 5th Interested Party was the one who invited the EACC to investigate Catherine by the letter dated 3rd February 2020. She was directed to undertake the disciplinary action against her. It is further averred that Catherine Nyaboke was terminated through the disciplinary process approved by the Board where the 5th Interested Party was the chair on 19th May 2020. Catherine took out several cases challenging her termination but unfortunately the said cases were either withdrawn or struck out for being an abuse of the Court process.



92. The 2nd Respondent denies the allegations made against her by the 5th Interested Party in paragraphs 21-55 of his affidavit and instead avers that the 5th Interested Party knows or ought to have known that the staff recruitment is undertaken by the Human Resource and Establishment Committee of the Board and not her. The HRE Committee tabled its report to the Board chaired by the 5th Interested Party which was adopted by the Board.
93. It is averred that Naomi Muiruri had worked in the office of the Prime Minister from 2009 to 2010 as the Clerical Officer in Finance and Accounts and joined the 1st Respondent when it was a Department in the Ministry of Education in August 2010 as Clerical officer assisting in matters of finance. She was promoted to the position of Ag. Finance Manager since 2020 and had working experience exceeding 12 years when the minimum period was ten years.
94. The 2nd Respondent contends that Winnie Wambui was an intern for a year in the Culture program thereafter secured a job with Equity Bank for a period of two and half years. The position of Culture Programme Officer was an entry-level position that required basic knowledge and a degree. She earned her place competitively and the allegation she was given interview questions and answers in advance, is untrue.
95. The affiant asserted that the position of Research and consultancy Officer was an entry-level job that required a basic degree and knowledge. Mercy Chelimo Komen had worked for two years at Uasin Gishu County and Public Space Technologies which experience sufficed.
96. The 2nd Respondent further averred that James Gitahi had worked for the 1st Respondent for three years from December 2015 to November 2018, worked for St Mary's Hospital as its acting ICT Manager and back to the 1st Respondent and had a short-term contract of nine months, as he was only stepping in the only ICT officer who was proceeding on maternity leave. He was retained to install the ICT infrastructure. He had the requisite skill and experience of six years and earned his place competitively.
97. It is stated that Mr. Mwititi was first engaged as an intern between September 2018 and 31st August 2019 in the Account Department and later engaged in a short –term contract of six months reasons being that there was only one employee in the department and prior to this he had worked as a teacher for two years. The short-term contracts were legal and provided for in the KNATCOM HR Policy and Procedure Manual. She had no vested interest in the recruitment so as to influence the appointment or front any, candidate in the 1st Respondent.
98. She averred further that the 5th Interested Party cannot speak for the Human Resource and Establishment Committee where he was not a member. She sat in the Committee as its secretary and confirms that it undertook its tasks seriously and competently and tabled the reports to the full Board which were discussed by the Board under the Chairmanship of 5th Interested Party and approved.
99. Lastly the affiant contends that on 23/6/2022 the 8th Special Session of the Board approved the appointment of the 18 candidates, and she proceeded to issue relevant letters of appointment. The 1st Respondent was understaffed and new hands were urgently needed in service and there was no reason to wait confirmation of the Minutes. The 5th Interested Party in his own wisdom endorsed the Minutes on every page. She only implemented them. It is not true that the background checks or due diligence had not been undertaken prior to the appointments.

The affidavit by Mary Rotich

100. The 1st Respondent filed an affidavit sworn by Mary Rotich on 20th March 2023. In it she averred that at all the material times she was an employee of the Teachers Service Commission whom she had



- represented in the Board of the 1st Respondent for the period February 2020 to 30th June 2022. She also chaired the Human Resource Establishment Committee of the Board of the 1st Respondent which was in charge of the recruitment of the staff.
101. She averred that at the material time, the 5th Respondent was the Chairperson of the 1st Respondent, it is surprising that in his replying affidavit sworn on 16/1/2023, he chose to make false and alarming accusations against the recruitment undertaken by the HRE Committee which she chaired.
 102. It is contended that the instruments of recruitment were formulated and approved by the Board including the online Applications and his allegations the 2nd Respondent altered or changed the shortlisting format is false. The 5th Interested required that a Board member chair every session of the recruitment process, the instructions by the Board were duly complied with. The recruitment was approved by the Board, and one wonders why he raised the complaints only after his retirement.
 103. The allegations that the Board members had acrimonious relationship with the 2nd Respondent or that she was accused of falsification and mismanagement of documents or that she engaged in tribalism and nepotism were untrue as there were no such accusations brought to the attention of the Board for discussion. Having worked with the 2nd Respondent she kept proper record of the proceedings and there was nothing in her service that would imply the impropriety now alleged against her.
 104. It is averred that the 2nd Respondent having been the secretary to the HRE Committee could not hire or recruit staff as insinuated by the 5th Interested Party and the allegations that candidates were given questions or answers prior to the interview are untrue. Furthermore, no member sitting on the Committee was related to Winnie or in any way conflicted. The Ad Hoc Investigation Commission's report was rejected by the 5th Interested Party for overreach and making false accusations.
 105. It is contended that her Committee had access to the online Applications for the various positions and had them shortlisted based on set criteria. To allege that the Committee was conflicted or unaware of who applied and how the candidates were shortlisted is scornful and contemptuous of their ability and work undertaken.
 106. Lastly it is contended that the jobs advertised were low-cadre positions and the yardstick of over qualification was corrected prior to the shortlisting where the Board was involved as already explained by the 2nd Respondent. Moreover, there was no harm suffered by the Applicants in effecting the corrections.

Evidence by Patricia Aloo [RW2]

107. As indicated hereinabove the witness testified in court, whereby she adopted the contents of her affidavit sworn on 15th March 2023. It was her evidence that was aware that the 5th Interested Party was accusing the 2nd Respondent of forgery and misuse of his e-signature. Contrary to the accusation, she [RW2] is the one who appended the e-signature of the Interested Party on the minutes of the 7th Special Session of the Board meeting of the 1st Respondent held on Monday ,23rd May 2022. At the material time was working for the 1st Respondent as its secretary to the 2nd Respondent and a Principal Office Administrator in which roles she was tasked to typeset, circulate, file and keep the Minutes of the Board Meetings.
108. On the 26th August 2021, the 5th Interested Party sent her a handwritten signature on her WhatsApp number with a request that she assists him to convert it into an e-signature for official use. She enlisted the assistance of James Gitahi an Officer in their ICT Division who formatted it into both word and image format and shared the same to him as requested.



109. She averred that she was the custodian of the e-signatures of the 5th Interested Party who gave her for the purposes of appending it to documents on his behalf whenever required.
110. The draft Minutes of the 7th Special Session of the Board Meeting of the 1st Respondent were sent to her for purposes of appending the e-signature of the then Board Chairman [5th Interested Party] and the request came in form of an email from the 2nd Respondent. She was also shown an email from the 5th Interested party approving them for necessary action. Furthermore, the 5th Interested Party had signed and endorsed every page of the Minutes of the 8th Special Session of the Board Meeting of the 1st Respondent held on 23rd June 2022.
111. It is averred that the Minutes of the 7th and 8th Special Sessions of the Board Meeting of the 1st Respondent were subsequently confirmed at the meeting held on 26th August 2022 without any change and she personally appended the e-signature of the 5th Interested Party under the mistaken belief that his earlier approval of those same Minutes applied. She highly regrets the error and unnecessary acrimony caused to the parties by her inadvertent failure to seek prior guidance specifically on the signature of the session Chairperson namely Professor Grace Bunyi when the said minutes were confirmed.

The Public Service Commission's Case

112. The 4th Interested Party filed its replying affidavit sworn on 2nd February 2023 by Remmy N. Mulati its Deputy Commission Secretary. In it she avers that subsequent to being served with the petition and having understood its contents, the Commission wrote a letter dated 17th October 2022 to the 1st Respondent to inquire into the allegations regarding the recruitment of the various public officers within the Organization.
113. It is averred that upon receipt of the Commission's letter aforementioned, the 1st Respondent vide a letter dated 25th October 2022. The Commission did not receive the letters dated 1st and 18th August 2022 by the immediate former Chairperson of the 1st Respondent's Board. They were not even addressed to it.
114. The legal framework for recruitment and appointments for the 1st Respondent is governed by Section 22 of the *Kenya National Commission for UNESCO Act, 2013*. This section lead together with section 14 leaves no doubt that the 1st Respondent's Board has the mandate to recruit its staff and that where the Board has delegated the Power to make appointments, the recruitment process should be approved at all levels by the Board. From the records provided by the 1st Respondent and the Minutes of the Board Meeting held on 6th May 2022, it is evident that the Board was only provided with a list of shortlisted candidates and was never provided with a long list or list of the Applicants indicating their qualifications and other requirements by them to consider.
115. The affiant contended that the list of the Applicants forwarded to the Public Service Commission indicated the names of the Applicants with no other details and therefore the Commission could not establish whether qualified candidates who had met the qualifications as per the advertisement were left out in the recruitment process. It is averred that the Board was in charge of the recruitment of staff in the Organization and therefore, the HRE Committee delegated to shortlist the candidates had no power to change the requirement that only 5 Applicants would be shortlisted for each advertised position with the approval of the Board.



116. The affiant contended that the advertisements for vacant positions advertised in March 2022 and September, 2022 were not advertised on the Public Service Commission's website and therefore the advertisements failed to meet the dictates of the law.
117. It is averred that from the documents provided, the Public Service Commission could not with finality discharge its constitutional and statutory mandate of audit of the Human Resource Instruments and Investigation of the Organization, administration and the personnel practices of the 1st Respondent.

The 6th Interested Party's Replying Affidavit.

118. The 6th Interested Party filed her replying affidavit sworn on 26th March 2023. In it she averred that she was employed by the 1st Respondent as the Chief Accountant vide a letter of appointment dated 31st July 2018 and the said appointment confirmed on 18th February 2019. She carried her duties diligently until 23rd September 2019 when with the aid of the 2nd Respondent she was sent on a compulsory leave on false allegations that she had been involved in a fraud at the time of her employment.
119. It is her position that prior to being issued with the letter placing her on compulsory leave and the show cause letter, she wrote to the 2nd Respondent herein via a letter dated the 16th September 2019 informing her that the allegations tabled against her were false and that her estranged husband had been sponsoring social media bloggers to run malicious and defamatory stories against her. Despite this, the 2nd Respondent established the Ad Hoc Committee which invited her to a hearing to consider the allegations which meeting she truly attended and gave her oral submissions.
120. She further stated that the Ad Hoc committee compiled its report which recommended her unconditional recall from the compulsory leave awaiting the conclusion of proper investigations by the EACC since the media reports had implicated the 2nd Respondent. The Ad hoc committee approved the report but the 2nd Respondent without any justification unfairly refused to recall her to work and subjected her to an indefinite compulsory leave even after the conclusion of the intended internal disciplinary proceedings.
121. The affiant contends that while the 2nd Interested party was actively investigating the allegations, the 2nd Respondent proceeded to make a complaint at the DCI Kasarani against her leading to her arrest and malicious prosecution on trumped up charges and as a result of the 2nd Respondent's animosity and vindictive acts, she has been subjected to great mistreatment and unwarranted litigation on unsubstantiated allegations.
122. It is contended that the actions of the 2nd Respondent towards her were malicious, unfair, irregular and unlawfully aimed at ensuring that she was subjected to embarrassments, mistreatments and remain out of the office indefinitely without any legal basis.
123. The affiant avers that she did a letter on the 11th May 2020 requesting for minutes, statements, testimonies and the report by the ad hoc committee and those of the Board but the same was not given to her.
124. It is averred that in light of the illegalities against her and the violation of her rights, she filed an employment Petition at the Nairobi Employment Court under ELRC Petition No. 82 of 2020 Catherine Nyakobo Nyangau v Dr. Evangeline Njoka & Others which matter has since proceeded to the Court of Appeal pending hearing and determination.
125. It is averred that despite the ongoing court cases and the plight of her employment hanging by the Court, the 1st Respondent proceeded to advertise her position among those advertised and their



respective recruitment processes and it only shows that the intended recruitment as advertised by the 1st and 2nd Respondents was done before the conclusion of the investigation into the serious recruitment malpractice perpetrated by the 2nd Respondent. The recruitment approach adopted was indeed flawed and in contravention of the national values and principles of good governance.

Analysis and Determination

126. From the material placed before me by the parties, the following issues emerge for determination, thus;
- a) Whether this Court is seized with the jurisdiction to grant orders of judicial review.
 - b) Whether there was violation or threatened violation of the constitutional provisions placed forth by the Petitioner in the petition herein.
 - c) Whether the doctrine of Constitutional avoidance comes into play in this matter.
 - d) Whether the reliefs sought or any of them can be availed to the Petitioners.

Whether this Court is Seized with the Jurisdiction to Grant Judicial Review Orders.

127. No doubt, the Petitioner's petition herein seeks for inter alia judicial review orders. Counsel for the 1st and 2nd Respondents submits that this Court being an Employment and Labour Relations court, lacks jurisdiction to grant orders of mandamus and certiorari, as sought. Counsel argues that Article 165 of [the Constitution](#) that the Petitioner has cited in the petition vests the High Court with the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied or violated, infringed or threatened.
128. Counsel further submitted that this court is not the High Court established under Article 165 of [the Constitution](#). That Article 165 read together with Article 23[3], Section 9[1] of the [Fair Administrative Action Act](#) and Order 53[3][1] of the Civil Procedure Rules, leads to an unavoidable conclusion that the jurisdiction to grant the orders, is the preserve of the High Court only.
129. I am not persuaded by these submissions. In my view, and with great respect, the submissions are a product of a constrained, and selective interpretation of the law, and ignorance of relevant stipulations of the law and precedent. Article 162 of [the Constitution](#) establishes the Employment and Labour Relations Court. The powers of the Court aren't stipulated specifically in the Article, but they were contemplated to come forth in a statute that the drafters of [the Constitution](#) intended to be pursuant to the dictates of Article 162[3]. A narrow interpretation of Article 162 of [the Constitution](#) can lead to an unfortunate conclusion that the jurisdiction of the court, is only confined to what section 12 of the [Employment and Labour Relations Court Act](#), provides.
130. Article 165 [5] of [the Constitution](#), is clear, and clearly Counsel for the 1st and 2nd Respondents ignored the provision deliberately or otherwise. The Article provides;

“The High Court shall not have jurisdiction in respect of matters-

- a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
- b. falling within the jurisdiction of the courts contemplated in Article 162[2].

It is anchored on this, that there is now firm jurisprudence that this Court has jurisdiction to entertain and determine claims of violation of fundamental rights under Articles 22 and 23 of [the Constitution](#)



as pertains to employment and labour relations matters. 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 Articles 22 and 23 or enforcement of *the Constitution* under Article 258 of *the Constitution* as pertains to the employment and labour relations matters. The Court of Appeal has resolved the issue in the case of prof. Daniel W. Mugendi v Kenyatta University & 3 others Civil Appeal No. 6 of 2012. The Court stated thus;

“The question now is whether the Appellant should go back and ‘sever’ the composite portion alleging violation of his fundamental rights and breach of contract of employment. Much as severance would entail time and resources 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 Industrial Court on the two claims i.e violation 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 [u.s.i.u] versus the Attorney General & Others.”

131. Article 23 of *the Constitution* provides for reliefs that a Court entertaining a petition instituted under Article 22 or 258 can grant. One of the reliefs being judicial review orders. Having stated as I have hereinabove, my conclusion is that the reliefs under Article 23, are grantable by the High Court and Courts of equal status.
132. Rule 28 of this Courts procedure and practice Rules provides for modes through which litigants can approach this Court, inter alia, through a judicial review application. It automatically follows that the Court has jurisdiction to grant orders of judicial review on such brought applications.

Whether there was a violation or threat to the Constitutional provisions put forth in the petition.

133. No doubt, *the Constitution* of Kenya, 2010, brought in a new and liberal was of approaching the principle of locus standi, but it must be stated that it did not diminish the legal requirement that he who asserts must prove, in any manner or at all. The Petitioner in this matter was under an obligation to demonstrate on a balance of probabilities that the Constitutional provisions under Article 10, 47, 73, 77, and 232 were violated or threatened to be violated.
134. The Petitioner sought that the decision for the recruitment, for filling of the 22 vacancies in the 1st Respondent be quashed, on basis that the Respondents violated the constitutional principles set out in the petition. I have carefully considered the provisions of *the Constitution* against, the basis for the decision to recruit- the 1st Respondent’s Human Resource structure and the need flowing therefrom, the decision to initiate the recruitment for filling of the 22 vacancies, the fact that approval was sought from, and granted by the National treasury for the recruitment, that the vacancies were advertised in a newspaper with a nationwide circulation signifying transparency , accountability and the Respondent’s desire for a competitive recruitment and come to a conclusion that the Respondents didn’t breach or threaten to violate the Constitutional principles espoused in the Articles cited by the Petitioner.
135. The detailed evidence by the 2nd Respondent on the foregoing matters regarding the recruitment for filling of the 22 vacancies, which I hold was reasonable, was not rebutted or sufficiently challenged



- either by evidence by the Petitioner or, that of the interested parties that tended to support the petition, or under cross examination.
136. Cross examined; the Petitioner stated that the only reason he didn't want the recruitment process to proceed was because he feared that the recruitment would be flawed like the first one was. The court cannot allow petition[s] based on fears and speculations. Where a party asserts a threat to a violation of *the Constitution*, it must be an actual threat not one anchored on speculation and mere fear. The Petitioner correctly stated that if the recruitment were to be allowed to proceed and flaws emerge, he could still have a chance to challenge the process.
137. The Petitioner further asserted that the other reason informing his challenge against the recruitment was the fact that the Respondent's did not obtain concurrence from the Public Service Commission to recruit the 22. That through a resolution by its Board, the 1st Respondent ceded its authority to do further recruitments of its staff, in favour of the Public Service Commission. The Petitioner was not able to place before Court, minutes, or a document to demonstrate this. The assertion remained a bald assertion. In any event, the Court is of the view that the 1st Respondent's Board could not have the authority to delegate the 1st Respondent's discretion to recruit its staff to the Public Service Commission, and that the latter would find it within its mandate to undertake any such delegated power.
138. The Court cannot be said to be off mark for gaining the impression that the facts forming basis of the Petition are those that relate to the 1st recruitment which the Petitioner termed and considers flawed. Imperative to state that no relief has been sought from this court against the said recruitment, making the facts in my view, not very important for the petition which was aimed at assailing and assails the 2nd recruitment process.
139. The Court observed the Petitioner testify under cross examination, and to it, he appeared a party not very sure about his case, making this Court form an impression that he herein was a surrogate Petitioner. No wonder under cross examination, he stated that he was given the various letters, and information concerning the matters he has put forth in this matter, by the 5th Interested Party, the immediate former Chairperson of the 1st Respondent.
140. The affidavit placed forth for the 4th Interested Party heavily dwelt on the 1st recruitment [read recruitment for the 19]. The petition herein has not sought any orders against the said recruitment. It is not the subject matter herein. The subject matter in this petition is the recruitment process that had been initiated for filling of the 22 vacancies. I am unable to see how those details and attacks regarding the 1st recruitment are in regard to the 2nd recruitment.
141. It is at this point that it becomes imperative to state that Courts should be careful not to intervene too readily with the exercise of management's discretion.
142. I am satisfied from the material placed before me by the parties and the submissions made by the Respondents' Counsel that no legal or evidential basis whatsoever has been established which would serve to discharge the onus, unquestionably borne by the Petitioner to establish the alleged violation and how it is connected to the 2nd recruitment.

Whether the principle of Constitutional avoidance comes into play in this matter.

143. I now turn to discuss to the principle of constitutional avoidance, how it relates to, and its import on, the petition herein.



144. In *KKB v SCM & 5 others* [Constitutional Petition 014 of 2020] [2022] KEHC 289 [KLR] on the Principle, Justice Mativo, stated and I agree, thus:

“Constitutional avoidance has been defined as a preference of deciding a case on any other basis than one which involves a constitutional issue being resolved. As a principle, constitutional avoidance has been linked to the doctrine of justiciability. In broad terms, justiciability governs the limitations on the Constitutional arguments that the courts will entertain

The doctrine of avoidance was fortified in *Sports and Recreation Commission v Sagittarius Wrestling Club and another* 2001 [2] ZLR 501 [J] in which Ebrahim J.A. said the following:

“..... Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it, if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights.”

145. The Constitutional Court of Zimbabwe in *Chawira & others v Minister of Justice Legal and Parliamentary Affairs & others* held:

“As we have already seen, in the normal run of things courts are generally loathe to determine a constitutional issue in the face of alternative remedies. In that event they would rather skirt and avoid the constitutional issue and resort to the available alternative remedies.”

146. The Supreme Court of Kenya in the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR stated on the principle:

“[256]. The Appellants in this are seeking to invoke the “Principle of avoidance.” Also known as “Constitutional avoidance”: The Principle of avoidance entails that a court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S. v Mhlunou*, [1905] [3] S.A. 867 [CC] the Constitutional Court Kentridge A.J articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, Civil or Criminal, without reaching a constitutional issue, that is the course which should be followed.”

[257]. Similarly, the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of [*Ashwander v Tennessee Valley Authority*, 297 U.S. 288, 347 [1936].”

147. In the case of *COD & another v Nairobi City Water & Sewerage Company Limited* [2015] eKLR, the Court stated:

“ 11. Similarly, in *Papinder Kaur Atwal v Manjit Singh Amrit Nairobi* Petition No. 236 of 2011 where after considering several authorities on the issue, Justice Lenaola remarked as follows:

“All the authorities above would point to the fact *the constitution* is a solemn document, and should not be a substitute for remedying emotional



personal questions or mere control of excesses within the Administrative Processes I must add the following; our Bill of Rights is robust. It has been hailed as one of the best in any constitution in the world. Our courts must interpret it [with] all the liberalism they can Marshall. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.”

12. the Supreme Court of India also has held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner as provided under statute. For instance, see Re Application by Bahadur [1986] LRC [Const]. the Court expressed itself as follows at page 307:

“The Courts have said time and again that where infringement of rights is alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not *the constitution*. This case highlights the un-wisdom of ignoring that advice

The Constitution sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and actions of man. While an infringement of *the Constitution* might in certain cases give rise to the redress provided for at Section 14, yet, as has been proclaimed by the highest Court in the land, it is not “a general substitute for the normal procedures for invoking Judicial Control of Administrative Action.” [see Harrikison v A.G. [1979] 3 WKR 62].

148. There is ample evidence that the matter regarding the 1st recruitment, the alleged illegalities and irregularities thereof, and the conduct of the 2nd Respondent were reported to various Government Agencies for investigations by the 5th Interested Party, Agencies inclusive the Anti -Corruption Commission. On this there is common cause. The Petitioner asserts not that the investigations are complete or that the Agencies have failed to discharge their mandate on the matters referred to them for investigations. Yet the Petitioner brings those same matters for interrogation by this Court.
149. The Court has not lost sight of the fact that the Petitioner in limb [b] of the petition seeks for orders of mandamus to compel the Anti-Corruption Commission to investigate matters, the 1st recruitment, and in limb[e], that the 2nd Respondent be found unfit to hold any public office, on basis of the alleged infractions committed by her during the 1st recruitment of the 19 employees, yet the facts forming basis of these prayers, are same facts forming basis for the investigations by the Commission.
150. The common thread across all the decisions cited above is that the constitutional litigation path is one that is narrow, only to be travelled in exceptional and very necessary situations. Not every grievance or dispute shall be litigated under *the Constitution*. Where a matter can be handled through other processes, the best course is to allow them be under those processes. It matters not that alternatively, they can be dealt with under a constitutional litigation.
151. Further I have carefully considered the Affidavit by the 5th Interested Party, to this Court, it is surprising that it raises serious allegations and matters which allegedly took place when he was the Chairperson of the 1st Respondent’s Board. He had the authority to raise the same then, and have the Board deliberate them for appropriate action. There is no explanation given why he didn’t do it. This, coupled with the general contents of the affidavit, leave no doubt in my mind that all the allegations are an afterthought and ill prompted.
152. The affidavit is clear, most of the alleged flaws concerning the 1st recruitment were deliberated on by the Board, and mechanisms to avoid a repeat of the same put in place. It is inconceivable how then they can



be a ground[s] for the action sought by the Petitioner or desired by the 5th Interested Party. If the Board felt that they were serious grounds, they would have made the same subject matter of a disciplinary process against the 2nd Respondent. This Court cannot allow itself to be hijacked to perform functions of the Board.

153. It is not surprising that the Interested Party has made those damning allegations against the 2nd Respondent. He alleges that she made hurting and unprofessional statements against him, in the rumours she was spreading. At this point, it is important to state as the Court did in *Papinda Kaur Atwal* case [Supra], that emotional personal questions or mere control of excesses within the administrative processes are not for constitutional litigation.
154. The 6th Interested Party herein filed a lengthy detailed affidavit, in the affidavit she stresses how the process leading to her dismissal from the service of the 1st Respondent was ill- initiated, malicious, without valid justification and premature. However, she discloses that she challenged the same through a constitutional ELRC Petition No. 82 of 2020 – *Catherine Nyakoboke Nyanga’u v Dr. Evangeline Njoka &Others* . Though she was careful not to exhibit the Judgment in the petition, to aid this Court ascertain the outcome of the petition and on what basis, she averred that there is an appeal pending in the Court of Appeal over the judgment. Clearly, she is the Appellant in the appeal, leaving no doubt that she was not successful in the petition.
155. The affidavit is fashioned in a manner suggesting that this Court is invited to re-look the facts and find them helpful to the petitioner’s petition herein. This invitation, this Court declines. It shall be imprudent to discuss facts of a matter pending in a Court of Appeal, particularly taking into account the jurisdiction of the first Appellate Court, which inter alia, is to interrogate the facts as though it is the trial court and come up with its own independent conclusion on the facts.

Whether the Reliefs Sought or any of them can Be Availed to the Petitioner.

156. Without difficult, by reason of the premises foregoing, I find that none of the reliefs sought by the Petitioner can be availed to him. In the upshot, the petition herein is dismissed. The recruitment to continue.

READ, SIGNED AND DELIVERED THIS 2ND DAY OF MAY 2023.

.....

OCHARO KEBIRA

JUDGE

In Presence of

Mr. Nyboma holding brief for Ojiambo for the 1st and 2nd Respondents.

Mr. Dudley Ochieng for 5th Interested Party.

Mr. Manwa for the 1st Interested Party.

No appearance for the petitioner.

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 15th March 2020 and subsequent directions of 21st 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.

.....

Ocharo Kebira

Judge

