



**Zakayo & 3 others v Kitui County Public Service Board & 2 others; Kitui County Assembly  
(Interested Party) (Petition E212 of 2022) [2023] KEELRC 1722 (KLR) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1722 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
PETITION E212 OF 2022**

**NJ ABUODHA, J  
JULY 14, 2023**

**BETWEEN**

**GODFREY KIMANZI ZAKAYO ..... 1<sup>ST</sup> PETITIONER  
GOEFFREY MULINGE CHANGANGU ..... 2<sup>ND</sup> PETITIONER  
ENOCK KIMANZI NGUTHU ..... 3<sup>RD</sup> PETITIONER  
JOSEPH KIMANGA MUTUA ..... 4<sup>TH</sup> PETITIONER**

**AND**

**KITUI COUNTY PUBLIC SERVICE BOARD ..... 1<sup>ST</sup> RESPONDENT  
COUNTY GOVERNMENT OF KITUI ..... 2<sup>ND</sup> RESPONDENT  
THE GOVERNOR OF THE COUNTY GOVERNMENT OF  
KITUI ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**THE KITUI COUNTY ASSEMBLY ..... INTERESTED PARTY**

**JUDGMENT**

1. Through a petition dated 7<sup>th</sup> December, 2022 the petitioners averred that;-
  - i. The Petitioners are employees of the 2<sup>nd</sup> Respondent having been employed as the County Chief Officer in charge of various departments within the Ministries of Kitui County Government on permanent and pensionable terms.
  - ii. The Petitioner have been faithfully carrying out duties with loyalty and dedication and in accordance with their mandate set out in the contract and the law.



- iii. The Petitioner avers that the 1<sup>st</sup> Respondent on 7<sup>th</sup> October 2022 did put up an undated advertisement that purported to declare vacancies in the Kitui Public Service and invited applications for positions for Chief Officers in 16 departments. Which departments were described as being the departments of: -
- a. Public Service and General Administration
  - b. Performance Contracting, Disaster & Emergency Services
  - c. Decentralized Units, SEKEB and Inter-governmental Relations
  - d. Governor's Service Delivery Unit & Public Communication
  - e. Tourism, Hospitality & Game Reserves.
  - f. Medical Services
  - g. Drugs and Medical Supplies Management
  - h. Public Health & Sanitation
  - i. Culture, Gender & Social services
  - j. Youth, Sports, ICT and Innovation
  - k. Roads & Public Works
  - l. Finance, Revenue Management and Accounting
  - m. Economic Planning & Budgeting
  - n. Trade, Industry, MSMEs & county ElZs
  - o. Transport and Bodaboda sector
  - p. Cooperatives and Citizen Group Economic Empowerment Initiatives
- iv. The 1<sup>st</sup> Respondent subsequently on 17<sup>th</sup> October 2022 did put up another undated advertisement that purported to declare vacancies in the Kitui Public Service and invited applications for positions for Chief Officers in 10 departments, which departments were described as being departments of:-
- a. Basic Education, ECDE & Childcare Facilities
  - b. Polytechnics, Vocational Centres and HomecraftCentres
  - c. Lands & Housing
  - d. Urban Development
  - e. Agriculture and Fisheries
  - f. Livestock Development and Apiculture
  - g. Water
  - h. Irrigation
  - i. Environment & Forestry



- j. Energy, Minerals & Natural Resources
- i. The Petitioners aver that the said advertisements required persons to apply for the said positions by Friday October 28, 2022.
- vi. The Petitioners aver that the 1st Respondent did subsequently indicate that it had shortlisted 208 candidates and invited them for interviews commencing on 23<sup>rd</sup> November 2022 to 6<sup>th</sup> December 2022.
- vii. The Petitioners aver that they have learnt that said the interviews are ongoing.
- viii. The Petitioners further aver that none of the currently serving Chief Officers were shortlisted by the 1st Respondent for interviews apart from one individual.
- ix. The Petitioners further aver that they and all the accounting and Chief Officers in the Kitui County Government were unprocedurally and unlawfully issued letters dated October 21, 2022 by the 2<sup>nd</sup> Respondent titled Notification of imminent constitution of new government and expiry of employment contract.
- x. The Petitioners aver that the said letter inter alia indicated as follows:
  - a. The 3rd Respondent was in the process of appointing a new County Government.
  - b. The 3rd Respondent had powers to appoint persons to the office of Chief Officers by virtue of section 45 of the County Government Act.
  - c. The 1st Respondent had advertised for the position of Chief officers.
  - d. The letter appointing the Petitioners was open ended and did not have an exit clause.
  - e. The Petitioners were notified that their contracts of employment would "expire" once a new officer was appointed,
- xi. The Petitioners avers that the letter dated October 21, 2022 by the 3<sup>rd</sup> respondent and the actions of the 1<sup>st</sup> Respondent declaring vacancies, shortlisting and interviewing persons to the position of chief officer are illegal and unlawful for the following reasons:
  - a. Chief Officers terms of office are by law not tied to formation of a new county government as they do not will executive authority.
  - b. The Petitioners and the other serving Chief Officers were employed on permanent and pensionable terms and not term contracts. The Respondents are unlawfully and un contractually attempting to convert the Petitioners' employment services to term contracts.
  - c. By declaring vacancies in the office of Chief Officers, and proceeding to advertise, interview and recruit persons into the office while there are competent persons in the said offices, the Respondents are not only violating the law but are also being wasteful in utilizing public resources, malicious and are acting in an ultra vires manner.
  - d. The actions of the Respondents are violating the provisions of the Kitui County Human Resource Policies and Regulations for Public Service 2018 in particular the following clauses Clause 3.2 requiring an authorized officer to report a vacancy to the County Service Board. Clause 3.4 requiring recruitment be done on basis of fair competition and merit. Clause 3.70 on categories of appointments to the county



public service, Clause 3.90 regarding issuance of letters that specify inter alia the terms and conditions of service, duration of employment and terms of separation. Clauses 3.16 & 3.17 regarding appointment to pensionable positions in the County Service board. Clause 3.19 on appointments to contract terms.

- xii. The Petitioner aver that there were no vacancies for chief officers as contemplated under section 45 (6) of the County Governments Act to enable the Respondents to declare vacancies, advertise for appointments, interview, recruit and attempt to proceed to appoint persons to the said positions.
- xiii. The Petitioners further aver that the Respondents have illegally advertised for vacancies in a number of units or department in the Kitui County Government which are yet to be established the County Executive Committee as envisioned under Section 46 of the County Governments Act. These illegal departments are
  - a. Performance Contracting, Disaster & Emergency Services
  - b. Decentralized Units, SEKEB and Inter-governmental Relations
  - c. Governor's Service Delivery Unit & Public Communication
  - d. Medical Services
  - e. Drugs and Medical Supplies Management
  - t) Public Health & Sanitation
  - g. Trade, Industry, MSMEs & County ElZs
  - h. Transport and Bodaboda sector
  - i. Cooperatives and Citizen Group Economic Empowerment Initiatives
  - j. Basic Education, ECDE & Childcare Facilities
  - k. Polytechnics, Vocational Centres and Homecraft Centres
  - l. Youth, Sports, ICT and Innovation
  - m. Tourism, Hospitality & Game Reserves.
  - n. Environment & Forestry
  - o. Energy, Minerals & Natural Resources
  - p. Agriculture and Fisheries
  - q. Livestock Development and Apiculture
  - r. Water
  - s. Irrigation
  - t. Roads & Public Works
  - u. Urban Development
- xiv. The Petitioner further aver that the Respondents have also pro tem renamed or redesignated several units and departments without following the process contemplated in section 46 of the County Government Act and proceeded to advertise for vacancies in the said departments.



- xv. The Petitioners further aver that as a result of the
- xvi. Respondents illegal actions the units or departments in the Kitui County Government have been unlawfully increased from 12 to 26 without the involvement of the County Executive Committee which under section 46 has the Responsibility of determining the organization of the County Government.
- xvii. The actions of the Respondents violate the express provisions of the County Government Act cited herein and substantially alters the terms of engagement of the Petitioners and other Chief Offices without re designating them contrary to the law and the terms of their contract.
- xviii. The Petitioners aver that the Respondents by so acting, have breached the following constitutional and legal provisions.
  - a) *The Constitution* at:
    - i) Article 10 that sets national values and principles of governance,
    - ii) Article 47 on fair administrative action,
    - iii) Article 73 (I) (a) which calls on public trust is be exercised in a manner that is consistent with the purposes and objects of *the constitution*.
    - iv) Article 75 (I) (c) that calls on State officers to behave in a manner that avoids demeaning the office the officer holds,
  - g. Article 226 (I) & (2) that provide for an Act of Parliament to be responsible for, inter alia, for the designation of an accounting officer in every public entity at the county level of government and that the said accounting officer of a county public entity is accountable to the county assembly,
  - vi) Article 232(1) that provides for the values and principles of public service;
  - b. The County Government Act, No. 17 of 2012
    - i. Section 8 (I) a), of the County Government Act, which provides that one of the roles of the county assembly is to vet and approve nominees for appointment to county public offices as may be provided for in the Act.
    - ii. Section 45 of the County Government Act, inter alia, with regard to Appointment of county chief officers, when vacancies in the office of Chief Officer can occur and be declared,
    - iii. Section 46 1 (a), which gives power to the County Executive Committee (and not the Governor nor County Service Board) to establish department while taking into account the guidelines set in section 46 (2).
    - iv. The *Public Finance Management Act* No. 18 of 2012
    - v. Violated Section 148, of The *Public Finance Management Act* which provides
      - “ that County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation”.



- b. The *Public Appointments (County Assemblies Approval) Act* Sections 5, which sets the requirements for an advertisement, requirement to appear before a committee of the relevant County Assembly Section 6 of the Act which provides for an appointing authority to, upon nominating a person for an appointment to notify the relevant County Assembly and also make a publication to the general public. Section 8 on vetting of nominees.
      - xix. The Petitioners submit that the Respondents have acted contrary to the principle of good governance where persons who are qualified and properly appointed to perform the tasks in the County Public Service are being un procedurally being removed from their positions by the incoming Governor and not by the County Service Board which has authority of their removal from office. The Governor only has powers to reassign a Chief Officer to an office or department established by the County Executive Committee but not remove them from office.
2. The petitioners therefore prayed for order among others
  - a. A declaration that, the Respondents conduct amounts to discrimination and to that extent, is discriminatory against the Petitioners under Article 27 of *the Constitution*.
  - b. A declaration that the process leading up to, including the decision, findings and recommendations Respondents to change the terms of service of the Petitioners and pro tem to terminate their contracts on the basis that their contracts would expire upon appointment of other persons to their office is unconstitutional, un procedural, substantively unconstitutional, illegal, high handed, biased, lacking in independence, in breach of the rules of Natural Justice, in breach of the principles of fairness, ultra-vires thus null and void ab initio.
  - c. An order compelling the Respondents not to take any adverse action against the Petitioners without following due process and directing the Respondents to retain, restore the Petitioners to their lawful position as Chief Officer without loss of status, salary, position or benefits.
  - d. An order that the Petitioners are entitled to compensation by way of damages for violations under Articles 23, Article 27.(l), Article 27. (2), Article 27 (4), Article 28, Article 29.(t), Article 41. (1), Article 41. (2) (a), (e), Article 47. (1), Article. 48 and Article 50 of *the constitution* taking into account damages for loss of use of office privileges and benefits, career stagnation, injury to reputation and potential loss of future income.
  - e. An order of certiorari calling up and forthwith quashing the 3<sup>rd</sup> Respondents letters dated October 21, 2022 to the Petitioners that purports to vary their terms of service without following due process.
  - f. Orders staying, restraining, suspending, halting and preventing the Respondents purported intended removal by the Respondents of the Petitioner herein and the other current Chief Officers in the Kitui County Government as indicated in the unlawful letters dated October 21, 2022 by the 3<sup>rd</sup> Respondent.
3. The respondent filed a replying affidavit through one Dr. Florence Makindi who deponed inter alia that;-
  - a. That I am the Chairperson- Kitui County Public Service Board, the 1<sup>st</sup> Respondent herein. I am fully conversant with the facts and matters in issue in this suit, and particularly the issues I raise in this affidavit. As such, I am competent to make this affidavit.



- b. That I have read and understood the contents intended 5<sup>th</sup> Petitioner's application dated 7<sup>th</sup> February, 2023.
  - c. That the instant application is in bad faith, frivolous, vexatious and constitutes or amounts to an abuse of the due process of court. The Applicant/Intended 5<sup>th</sup> Petitioner is only using the judicial system as a pawn to drag the Respondents through the corridors of justice in hopeless and unending legal battles.
  - d. That the Applicant does not merit to be enjoined in this suit as he has failed to disclose to this honourable court there are pending cases seeking similar orders over his employment status against the Respondents as particularised below:
    - a. Nairobi ELRC PET NO.E063 Of 2020: dement Mulyungi Munyithya -Vs- Kitui County Government, County Secretary, Kitui County & Governor, Kitui County — this suit is still pending in this honourable court.
    - b. Kitui High Court Petition 16 of2020: Antony Mukuia Mutua Vs The Governor Kitui County, Everiyne Kayoka Musembi & 7 others- this suit was stayed waiting the decision in Nairobi ELRC PET NO.E063 Of 2020.
  - e. That it would be unfair for this honourable court to allow the introduction of the Petitioner very late in the day when the parties have already taken directions on the disposal of the main Petition.
  - f. That the Intended Petitioner was recently reinstated as a Chief Officer- Office of the Governor. There are several Chief Officers in the Office of the Governor including the 1<sup>st</sup> Petitioner. Any claims of replacement are speculative and not based on any concrete evidence.
  - g. That the issues raised in the instant Petition do not substantially affect the intended Petitioner in the same way as the 1<sup>st</sup> to 4<sup>th</sup> Petitioners to warrant grant of orders enjoining him. In any event, the intended Petitioner ought to have been enjoined in the beginning of the suit since he is represented in Nairobi ELRC PET NO.E063 Of 2020 by the same advocates representing the Petitioners in this suit.
  - h. That the Applicant lacks goodwill and the instant application is deliberately filed to slow the determination of the instant suit as the other Petitioners continue to enjoy interim orders.
  - i. That I make this affidavit conscientiously, in the knowledge that it is true to the best of my knowledge and belief.
4. In the submissions in support of the petition, Counsel for the petitioner Mr. Waudo submitted among others that the petitioners had the right to continue holding office when there was change of government. In this regard Counsel relied on the case of Kisumu County Public Service Board -vs- Samuel Okuro & 7 others [2018] eklr and David Ogega Kebiro & another -vs- Kisii County Public Service Board & another.
  5. Counsel further submitted that the number of offices of County Chief Officers in the Kitui County Government established by County Public Service Board pursuant to Section 59(1)(a), 60 and 62(2) of the County Government Act, 2012 as read with article 235 of *the Constitution* are twelve and not twenty six. Consequently, the aforesaid advertised positions simply did not exist in law. According to Counsel there were no vacancies in the offices of Chief Officers of the Kitui County Government as at the dates of the advertisements as none of the then holders including the petitioners had left office in the manner envisaged under Section 45(6) of the County Government Act 2020.



6. Regarding term of office, Counsel submitted that the law did not prescribe the term of office of the County Chief Officers. The petitioners' contracts of service were indefinite and therefore could not terminate by effluxion of time as is the case with fixed term contracts. Counsel further submitted that Section 10(2)(e) of the *Employment Act*, 2007 provided that a written contract of service shall state the terms and duration of the contract and that under Section 9(2) of the *Employment Act*, an employer who was a party to a written contract of service was responsible for causing the contract to be drawn up stating the particulars of the employment. The employer therefore could not run away from a term of a contract it prepared. Further under Section 45(2) of the County Government Act, the office of a County Chief Officer was an office in the County Public Service hence protected under article 236(b) of *the constitution* from arbitrary removal.
7. Mr. Waudo further submitted that the petitioners were not subjected to any disciplinary process and procedure known to law. Further, the county Executive Committee member for the County Treasury was not the appointing authority for accounting officers which was a function reserved for the 3<sup>rd</sup> respondent under Section 31(c) of the County Government Act. Consequently, the County Executive Committee member for the County treasury lacked the legal capacity to revoke the appointments of the petitioners who were appointed by the governor as accounting officers in their respective ministries. Counsel further submitted that the powers of a County Executive Committee member for finance to designate accounting officers under Section 148(1) of the *Public Finance Management Act* is limited to the designation of Accounting Officers already appointed by the Governor pursuant to Section 31(c) of the County Government Act and approved by the County Assembly. The law did not provide for appointment of acting accounting officers hence the purported acting accounting officers were not appointed by the Governor hence could not be designated as such as they had not been appointed pursuant to Section 31(c) of the County Government Act.
8. Counsel for the respondent Mr. Isa, on the other hand submitted that the petitioners contracts that were for a period of three years lapsed by affluxion of time and had not been unlawfully terminated. The respondent therefore submitted that the petitioners no longer held valid positions of chief officers as their contract lapsed on 9<sup>th</sup> April, 2021. According to Counsel, clause 1 of each of the respective contracts stipulated that the employment contract would be specifically governed by *the Constitution*, all relevant laws and the Kitui County Government Human Resource Manual. Clause 319 of the Human Resource Manual provided that appointments on contractual terms shall be limited to maximum period of three years renewable subject to demonstrable performance. None of the petitioners produced a letter from 1<sup>st</sup> respondent extending their contracts. To this extent Counsel relied on the Supreme court decision in Kenfrieght (E.A) Limited -vs- Benson K. Nguti;
9. According to Mr. Isa, the claims by the petitioners that they were still employees of the 2<sup>nd</sup> respondent was therefore misleading and not supported by their contracts of Employment or Human Resource Manual.
10. Regarding extension of contract, Counsel submitted the extension and terms of employment for the petitioners could have been only done through the execution of an offer of extension of contract. The extension could neither be implied nor could it arise from the fact that the employee continues to undertake his duties despite the effluxion of the contract. In this regard counsel relied on the case of Registered Trustees of PCEA & another -vs- Ruth Gathoni Ngotho [2017] ekr. Counsel further submitted that the petitioners contracts automatically lapsed on 9<sup>th</sup> April, 2021 and the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> petitioners acknowledged this when they submitted their applications for consideration alongside other qualified applicants.



11. The thrust of this petition is premised on the question whether the petitioners were hired on fixed term contracts or permanent and pensionable terms. The court considers other issues and contention by petitioners as peripheral and not directly linked to the issues in dispute. Therefore, no much time will be spent on them.
12. The petitioners' contract was started to commence on 6<sup>th</sup> April, 2018 and was to be subject to performance. The contract further stated that it would be governed by *the Constitution*, relevant laws and applicable human resource guidelines.
13. Clause 3.9 of Kitui County Human Resource Policies and Procedures Manual for the County Public Service provides;-

Letter of appointment

- i. An officer appointed to a position in the County Public Service shall be issued with a letter of appointment specifying the terms and condition of service.
  - ii. A letter of appointment shall state particulars of employment which should include the name and address of the employee, job title, date of commencement of appointment, terms and duration of employment, place of work, remuneration, terms and condition of employment and terms of separation.
14. On fixed term contracts, the Manual provides at clause at 3.19 as follows:-

Appointment on Contract terms

- i. Appointment on contract terms will be made under the following circumstances;
    - a. Where persons to be appointed may not qualify for pension as per the respective pension scheme.
    - b. Where officers are appointed to serve on fixed term projects;
    - c. Appointments at senior levels as determined by the Public Service Board from time to time;
    - d. Where capacity in the public services lacking or specific skills are required; and
    - e. Personal staff of specified County Officers as determined by the Board from time to time. Such staff shall serve during the tenure of the County Officers.
15. The foregoing clause read together with the petitioners' letters of appointment establishes a discrepancy in the letters of appointment issued to the petitioners. Whereas clause 3.9 of the manual states that an officer appointed to County Public Service shall be issued with a letter specifying the terms and conditions of service and further clause 3.19 talks of appointment on contract terms, circumstances under which they are made and their renewal process, the petitioners letters of appointment simply stated that their appointment would be governed by *the constitution*, relevant laws and applicable human resource guidelines. The contracts did not specify their duration.
  16. Clause 3.15 of the Human Resource Manual provides as follows; concerning appointments on probation to pensionable establishment
    - a. Where vacancies exist in the pensionable establishment, candidates recruited to fill such vacancies shall be appointed on probation for a period of six (6) months.



- b. An officer appointed on probation to the pensionable establishment shall be regarded as being on assessment with a view to learning his work and being tested as to his suitability for it. It is the duty of the supervisor(s) to ensure that every officer on probation is given adequate opportunities to qualify for confirmation in appointment.
  - c. At least one (1) month before the expiry of the probationary period, the Authorized Officer shall consider in the light of the report(s) on the officer's performance, conduct and capabilities whether or not the officer is suitable for confirmation.
  - d. Where an officer's performance is unsatisfactory, they shall be informed in writing and the probation period may be extended for a maximum period of three (3) months.
  - e. Should the officer's performance fail to improve on expiry of the extended probation period, his probationary appointment shall be terminated in accordance with the Public Service Board regulations.
17. Clause 3.17 of the Manual further provides that an officer appointed to the service on a pensionable post will be confirmed in appointment and admitted into the permanent and pensionable establishment on completion of probationary period of six months of satisfactory service.
18. The court has had occasion to peruse the letters of appointment issued by the respondents to the petitioners and has not found any provision therein akin to the requirements stipulated under clauses 3.15 and 3.17 of the Human Resource Policy and Procedures Manual. For instance, there is no provision for probation and further no provision for confirmation of appointment and admission into the permanent and pensionable establishment on completion of probationary period of six months.
19. The petitioners' letters of appointment made reference to among others that the appointment was in accordance with Section 45 of the County Government Act. That section provides in material part as follows; -
- Section 45 Appointment of county chief officers
- (1) The governor shall—
    - (a) nominate qualified and experienced county chief officers from among persons competitively sourced and recommended by the County Public Service Board; and
    - (b) with the approval of the county assembly, appoint County Chief Officers.
  - (2) The office of a county chief officer shall be an office in the county public service.
  - (3) A county chief officer shall be responsible to the respective county executive committee member for the administration of a county department as provided under section 46.
  - (4) The county chief officer shall be the authorized officer in respect of exercise of delegated power.
  - (5) The governor may re-assign a county chief officer.
  - (6) A county chief officer may resign from office by giving notice, in writing, to the governor.
20. A reading of this Section yields the interpretation that the Governor nominates the chief officers from among persons competitively sourced and recommended by the County Public Service Board. The nominees are thereafter approved by the County Assembly and sent back to the Governor for appointment. The exercise is therefore majorly in the hands of the Governor and the County Assembly hence largely a political process. It is therefore less wonder that at the end of each election cycle, a



Governor whether re-elected or new in office and members of the County Assembly almost always reconstitute their government by appointing their own chief officers. It is in the above context that the letter dated 21<sup>st</sup> October, 2022 ought to be understood. The new Kitui Governor Dr. Jullius Malombe was categorical that following the August, 2022 General Election, he was in the process of constituting a new government and therefore the petitioners should stand advised that their contract of employment which the governor admitted had no exit clause, would expire once a new officer was appointed.

21. The petitioners, as observed earlier could not have been hired on permanent and pensionable terms as contended since the process required for hiring on permanent and pensionable terms as provided in the Human Resource Policy Manual was not complied with. Their appointment could only therefore be regarded as fixed term contracts coterminous with the term of the Governor who appointed them. There was no obligation on the part of the new Governor to retain them hence no illegality, unlawfulness or discrimination when the new Governor informed the petitioners of the intention to terminate their contracts to allow him constitute his government in line with his vision for the county. Further the petitioners applied for the positions advertised by the County Public Service unfortunately only one of them was shortlisted. This action by the petitioners to apply for the advertised positions may reasonably be construed to mean that they too in their minds knew or were not sure if their engagement with the respondent was on permanent and pensionable terms.
22. In conclusion to this issue of the petitioner's terms of service, it is useful to observe that this court since its inception in 2012 has had to contend with numerous cases of similar nature. Whenever there is an election of new Governors, the court must always brace itself to deal with petitions of similar nature. There is a problem with the law or policies concerning Chief Officers in the County Public Service. If as is the emerging practice that appointments as a chief officer is a pleasure appointment at the whim of the Governor, then let the law be clear on this. To appoint a chief officer with no clear terms of service as is the case here is to subject them to uncertainty in their employment which is not only demotivating but also disruptive and costly to both the Chief Officer and the County Government because more often than not the issue ends up in court.
23. As observed earlier, the thrust of this petition was premised on the question whether the petitioners were hired on fixed term contracts or permanent and pensionable terms. The court further observed that the other issues raised in the petition were peripheral and not directly linked to the main issues in dispute. They simply overdeveloped and stretched what in the view of the court was a very straight forward matter. The petitioners did not have to file a forty six paragraph petition seeking eighteen prayers from the court, most of which were repetitive. The court wonders what became of the cardinal rules of pleadings which requires them to be concise and to the point. In the zeal to overplead, the court may be overwhelmed and miss to note a critical point in the dispute buried in the numerous repetitive averments.
24. For avoidance of doubt, the court this far has answered prayers (c),(d),(g),(i),(j),(k),(l),(m) and (n) in the negative and these prayers therefore stand disallowed for the reasons stated earlier in the judgment.
25. Prayer (a)(b) and (c) concern allegations of breach of rights and fundamental freedoms as enshrined in *the Constitution*. It has been held in the now famous case of Anarita Karimi Njeri vs- Attorney General and subsequent cases on the point that to constitute a constitutional question, the petitioner must set with precision which article of *the constitution* has been violated or threatened with violation and in what manner. It is not enough to cite several provisions of *the constitution* without sufficiently demonstrating how they have been violated or threatened with violation. The issue before the court mainly concerned the disputed termination of the petitioner's service. The petitioners contended that they were hired on permanent and pensionable terms. The respondent however maintained that,



although the petitioners contracts did not have an express exit clause, they were on a fixed term of five years. The new Governor therefore expressed intention to terminate them in order to constitute a new government. In the courts view, this was an ordinary employment dispute adequately covered by the Employment Act and the petitioners did not have to invoke the Constitution to address an issue adequately covered by a statute. The petitioners did not sufficiently show or provide any evidence to show that in terminating their service, the respondent acted so egregiously that it amounted to a violation of their rights and fundamental freedoms which could only be adequately addressed by the Employment Act and had to move the Court by way of a Constitutional petition. These prayers are therefore found without merit and are hereby rejected. That having been so ordered, prayer (e) on compensation for violation of the constitution is also rejected.

26. Prayer (f), (h) and (o) are answered by the very prayer “o”. The Kitui County Assembly has oversight role over the County Executive Committee and any appointment cannot be made unless with their approval as provided under Section 45(1) of the County Government Act. The petitioners have not provided any evidence that the County Assembly has failed or omitted to exercise their statutory mandate.
27. Finally, an issue was raised by Counsel for the respondent concerning appeal to the Public Service Commission.
28. Section 86 of the Public Service Act read together with Section 77 of the County Government Act makes it an essential requirement that before a person aggrieved by a decision of the County Public Service or a person acting in accordance with the Act, moves the court, an appeal ought to be filed to the Public Service Commission and determined by the Commission. No evidence of such an appeal has been presented and a determination thereof to enable the court to be seized of jurisdiction. In that regard the court takes the view that the petition may have been prematurely filed.
29. The conclusion the court find and holds that the petition in its entirety lacked in merit and the same is hereby dismissed.
30. There will be no orders as to costs since the confusion over the status of the petitioner’s contracts was unclear to both parties.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF JULY, 2023.**

**ABUODHA J. N.**

**JUDGE**

In the presence of:-

..... for the Claimant

.....for the Respondent

