



**Sabana v County Government of Kakamega County & 2 others (Employment and Labour Relations Petition E012 of 2022) [2023] KEELRC 1649 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1649 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA**

**EMPLOYMENT AND LABOUR RELATIONS PETITION E012 OF 2022**

**JW KELI, J**

**JULY 7, 2023**

**IN THE MATTER OF ENFORCEMENT AND INTERPRETATION OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ARTICLES 1,2,3,10,21,22,27,32,  
41,47,174,176,179,183 AND 198 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 34,35,40 AND  
42 OF THE COUNTY GOVERNMENTS ACT, 2012**

**AND**

**IN THE MATTER OF FAIR ADMINSTRATIVE ACT 2015**

**AND**

**IN THE MATTER OF THE EMPLOYMENT ACT 2017**

**BETWEEN**

**BEATRICE AWIMBO SABANA ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF KAKAMEGA COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**OFFICE OF THE HONOURABLE GOVERNOR KAKAMEGA  
COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**FERNANDES BARASA ..... 3<sup>RD</sup> RESPONDENT**



## JUDGMENT

1. The Petitioner was a former Executive Committee Member for Ministry of Finance, Economic Planning and ICT under the 2017 to 2022 government of Kakamega County and her services were terminated by the 3<sup>rd</sup> Respondent upon election on the 29<sup>th</sup> September 2022 following which she filed the instant Petition dated 14<sup>th</sup> November 2022 seeking the following reliefs: -
  - a. A declaration that the termination of the Petitioner's employment on 29<sup>th</sup> September 2022 was in contravention and in utter breach of Articles 10, 47, 73, 198 and 232 of the Constitution of Kenya and is thus null and void.
  - b. A declaration that the termination of the Petitioner's employment on 29<sup>th</sup> September, 2022 amounted to discrimination and unfair labour and is thus in utter breach to the Petitioner's rights.
  - c. A declaration that the termination of the Petitioner's employment on 29<sup>th</sup> September 2022 is in breach of the express provisions of Section 40 and 42 of the County Governments Act 2012 and is thus illegal, unlawful and unfair
  - d. A declaration that the actions of the 3<sup>rd</sup> Respondent in dismissing the Petitioner from her employment was malicious, discriminatory and in utter violation of Article 73 of the Constitution of Kenya , 2010 and amounts to abuse of office.
  - e. A declaration that the termination of the Petitioner's employment on 29<sup>th</sup> September, 2022 is in breach of the provisions of Section 5, 35,41 and 45 of the Employment Act, 2007 and is thus illegal, unlawful and unfair .
  - f. An order directing the Respondents to fully compensate the Petitioner for unfair and unlawful and wrongful termination of her employment with all the attendant benefits as pleaded, that is:-
    - i. Clean certificate of service
    - ii. One(1) month's salary in lieu of notice Kshs 404,250.00
    - iii. Value of the remaining contractual period(4 months) ....Kshs. 1,617,000.00
    - iv. Gratuity at 31% .....Kshs. 4,060,2827.00
    - v. 21 days of unpaid leave for the year 2021-2022 ..... Kshs.303,187.50
    - vi. Damages for unfair termination (12 months) ..... Kshs. 4,851,000.00Total..... Kshs. 11,235,724.50
  - g. An order of compensation directing the Respondents to pay to the Petitioner a sum of Kshs. 50,000,000/- or general damages as may be assessed by the Honourable Court for the blatant breach of her constitutional rights and freedom against and freedom against discrimination and fair labour practices, defamation /character assassination against her person thereby occasioning, loss of future employment opportunities and emotional distress.



- h. A declaration that the 3<sup>rd</sup> Respondent is unfit to hold public office.
  - i. Any other Order, Writs and Directions and this Honourable court considers appropriate and just to grant for the purpose of the Petitioner's constitutional rights.
  - j. Costs of this petition.
2. The Petitioner further filed supporting affidavit sworn on the 14<sup>th</sup> November 2022 together with annexures.
  3. The petition was opposed. The 1<sup>st</sup> Respondent filed replying affidavit sworn by Lawrence Angolo Omuhaka in response to the petition on the 9<sup>th</sup> February 2023 and received in court on the 10<sup>th</sup> February 2023.

#### **Written submissions**

4. The court directed that the Petition be canvassed by way of written submissions. The petitioner's written submissions drawn by Robson Harris Advocates LLP were dated 28<sup>th</sup> February 2023 and received in court on the 23<sup>rd</sup> March 2023. The Petitioner filed further submissions dated 23<sup>rd</sup> March 2023 in response to issues raised by respondents in their submissions and received in court on the 27<sup>th</sup> March 2023. The Petitioner filed authorities relied on together with the submissions. The Respondents' written submissions drawn by Lutta & Co. Advocates were dated 15<sup>th</sup> March 2023 and received in court 16<sup>th</sup> March 2023 together with the authorities relied on.

#### **Petitioner's case in summary**

##### **(The case as per supporting affidavit of the petitioner dated 14<sup>th</sup> November 2022.)**

5. The Petitioner was appointed as Executive Committee Member of the Ministry of Finance, Economic Planning and ICT for the County Government of Kakamega vide letter of appointment dated 5<sup>th</sup> October 2020 which stated the terms of salary and benefits by the former Governor Hon. Oparanya for a period of 3 years (BAS-1). That vide letter dated 29<sup>th</sup> October, 2021 the former Governor Hon. Oparanya extended her contract from 1<sup>st</sup> November 2021 to 31<sup>st</sup> August 2022 (BAS-3 letter dated 29<sup>th</sup> October 2021). That further by letter dated 7<sup>th</sup> March 2022 her contract was extended to 31<sup>st</sup> December 2022 and could have been deemed terminated on recruitment of new Executive Committee Member (ECM) in line with provisions of section 42(2) of the County Government Act which ever came first (BAS4 letter dated 7<sup>th</sup> March 2022). That she was awarded for being best performing ECM (BAS-5 evidence of the award). That a new Governor was elected on 29<sup>th</sup> August 2022 and sworn. That the County Assembly held its first sitting on the 21<sup>st</sup> September 2022, where the members were sworn in and the Speaker elected (BAS 6 -a Gazette dated 16<sup>th</sup> September 2022 of the sitting). That it was a legal position under Article 198 of *the Constitution* that while an election is being held to constitute a new County assembly the last constituted Executive Committee of the County remains competent to perform administrative functions as buttressed by section 42 of the County Government Act.
6. That after 14 days of being sworn, vide letter dated 29<sup>th</sup> September 2022, the new Governor(3<sup>rd</sup> Respondent ) terminated the employment contract of the Petitioner and 2 others without due process. (BAS-7 letter dated 29<sup>th</sup> September 2022). That at that point there was no county executive committee that had been appointed. That the Respondents published the communication vide social media (BAS-8 social blogs) that the nature of termination created speculation as her docket of finance. That the termination without reasonable explanation jeopardised her future employment and income under Article 43 of *the Constitution*. That the termination of her contract was contrary to advisory by the



Ethics and Anti-Corruption Commission dated 22<sup>nd</sup> September 2023 addressed to the Governors to ensure due process in carrying out any disciplinary action against existing staff (BAS-9).

7. The Petitioner alleged the termination was malicious, for termination was done immediately upon the Governor's assumption of office without familiarisation with the existing county executive committee and its operations, the terminations was on targeted select ECMs as opposed to all members, the termination was without justification and immediately published to 3<sup>rd</sup> parties. That the termination was illegal discriminatory and against fair labour practices. The prayers are as outlined under paragraph 1 above.

### **Respondents' case in summary**

8. As per the replying affidavit of Lawrence Angolo Omuhaka who was the 1<sup>st</sup> Respondent's County Executive Member responsible for public service and administration. The Respondents stated that upon the new Governor coming to office he wrote to the Petitioner vide letter dated 29<sup>th</sup> September 2022 informing her, her contract had been terminated in line with the provisions of Section 42(2) of the County Government Act 2012 and she was to handover her docket. That the contract was extinguished by operation of the law as the Petitioner tenure was tied to life of the previous County Government. That the letter gave one month pay in lieu of notice in line with existing public service regulations.
9. That the petitioner ought to have known the letter dated 7<sup>th</sup> March 2022 extending her contract beyond the life of the County Government was ultravires and devoid of backing of the law and hence had no legitimate expectation of extension of contract into the new government. That having sued the 2<sup>nd</sup> Respondent it was erroneous to enjoin the 3<sup>rd</sup> Respondent in the matter in his personal capacity as the 3<sup>rd</sup> Respondent is the holder of the 2<sup>nd</sup> Respondent's office and was acting in official capacity. That the petition was abuse of court process and ought to be struck out.

### **Determination**

#### **Issues for determination.**

10. The Petitioner addressed the following issues in her 2 sets of written submissions:-
  - a. Whether the petition is properly before the court
  - b. Whether the doctrine of constitutional avoidance is applicable in this case
  - c. Whether the 3<sup>rd</sup> Respondent is a proper party to this suit.
  - d. Whether the termination of the Petitioner's employment was lawful and actuated by malice
  - e. Whether the Petitioner's constitutional rights under Articles 27,41, 47 and 50 of *the Constitution* were violated.
  - f. Whether the Petitioner is entitled to remedies sought.
11. The Respondents in their submissions addressed the following issues:-
  - a. Whether the doctrine of constitutional avoidance is applicable in this case
  - b. Whether the 3<sup>rd</sup> Respondent should be struck out with costs as he cannot be sued in his personal capacity for actions committed in furtherance of his official duties



- c. Whether the Petitioner was unfairly terminated from her position of the County Executive Committee Member (CECM)?
  - d. Whether the Petitioner was entitled to remedies sought.
12. The court having perused the pleadings by the parties and their submissions was of the considered opinion that the issues placed before the court by the parties for determination of the petition were follows:-
- a. whether the doctrine of constitutional avoidance is applicable in this case
  - b. Whether the 3<sup>rd</sup> respondent is a proper party to this suit.
  - c. Whether the Petitioner was unfairly terminated from her position of the County Executive Committee Member (CECM).
  - d. Whether the Petitioner’s constitutional rights under articles 27,41, 47 and 50 of the Constitution were violated.
  - e. Whether the Petitioner was entitled to remedies sought.

**Issue a. Whether the doctrine of constitutional avoidance is applicable in this case**

13. This issue was raised to challenge the validity of the petition by the Respondents and the Petitioner responded vide her supplementary submissions.

**The Respondents’ submissions**

14. The Respondents submit that in Communications Commission of Kenya v Royal media services and 5 others (2014) e KLR the Supreme Court held as follows on the doctrine of constitutional avoidance :-“The appellants in this case are seeking to invoke the principle of avoidance also known as the constitutional voidance. The principle of avoidance entails that a court will not determine a constitutional issue when a matter may be properly decided on another basis.” That the Supreme Court quoted a South African case of S v Mhlungu 1995 (3)SA 867(CC) with approval as follows:- ‘ I would lay it down a general principle that where it is possible to decide any case civil or criminal, without reaching a constitutional issue, that course which should be followed.”
15. The Respondents submit that the doctrine of constitutional avoidance was applicable in the instance case and argued that the court had no jurisdiction to grant statutory remedies in a constitutional matters and that the petition did not raise any constitutional issue but was a simple claim for unfair termination.
16. The Respondents submit that prayer 6 of the Petition read :-
- ‘An order directing the respondents to fully compensate the petitioner for unfair and unlawful and wrongful termination of her employment with all the attendant benefits as pleaded that is .. total Kshs. 11,235,724.50” That the breakdown leading to the total amount is based on the Employment Act of 2007 and hence the petitioner was trivializing constitutional litigation by trying to enforce a statutory remedy by use of petition instead of civil claim.
17. The Respondents submit the jurisdiction of the court to determine alleged violations of the Constitution is very specific and invoked pursuant to Article 22 of the Constitution, that the remedies



that the court can grant are provided for Article 23(3) of *the Constitution* thus: ‘23(3)) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

- a. a declaration of rights;
- b. an injunction;
- c. a conservatory order;
- d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- e. an order for compensation; and
- f. an order of judicial review.

18. That the term ‘appropriate relief’ as defined in *Law Society of Kenya & 7 Others v Cabinet Secretary for Health & 8 Others; China Southern Co. Airline Limited (Interested Party)*(2020)e KLR does not include remedies provided under the statute:- ‘Article 23 of *the constitution* of Kenya entitled the court to grant an appropriate relief in any proceedings brought under article 22 of *the constitution*. The “Appropriate relief” as stated herein above is, a relief that is required to protect and enforce *the Constitution* and includes a declaration of rights, on interdict, a mandamus or such other relief as may be required to ensure that the right as enshrined in *the constitution* are protected and enforced.” That the court sitting as a constitutional court cannot grant prayers 3 and 5 of the petition vis (3)A declaration that the termination of the Petitioner’s employment on 29<sup>th</sup> September 2022 is in breach of the express provisions of section 40 and 42 of the *County Governments Act* 2012(5) and A declaration that the termination of the Petitioner’s employment on 29<sup>th</sup> September, 2022 is in breach of the provisions of section 5, 35,41 and 45 of the *Employment Act*, 2007 .
19. The Respondents submit that under Article 23(3(d) of *the Constitution* this court can only make a declaration of the invalidity of the statutes violating a right of bill of right and not the invalidity of actions that violate statutes to wit ‘23(3) d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;”
20. To buttress the foregoing submission that the petition was incompetent, the Respondents relied on the decision in *Sumaya Athmani Hassan v Paul Masinde Simidi & another* (2019)e KLR where the Court of Appeal addressed the issue as follows:- ‘The 1<sup>st</sup> Respondent filed a petition directly relying on the provisions of *the Constitution* for enforcement of contractual rights governed by the *Employment Act* without seeking a declaration of invalidity of the provisions of the *Employment Act* or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of *the Constitution*.

We adopt and uphold the general principle in the persuasive authority in *Barbara De Klerk* (supra) that where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on *the Constitution* without challenging the legislation in question.” That in the decision, the Court of Appeal entered judgment for the appellants who were respondents at the trial court as follows:-‘the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on *the Constitution*. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition.” The respondents submit that court should uphold the decision of the court of Appeal in *Sumaya Athmani Hassan v Paul Masinde Simidi*



& another (2019)e KLR and find this petition incompetent for seeking to enforce statutory remedies though a constitutional petition and dismiss the same.

21. The Respondents further submit that the petitioner did not raise any constitutional issue but this was a simple employment claim for unfair termination as the substratum of the petition raised issue of illegality of the termination and not violation of constitutional rights, the respondent drew attention of the court to paragraph 57 and 58 of the petition which referred to provisions of the Employment Act and to the contract. To buttress this submission the respondents relied on the decision of the Court of Appeal in *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* (2016)e KLR where the court observed:- ‘ In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance.

A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.....

The trial court was therefore right in holding that this was a simple employment matter that should have been handled as such by ELRC by way of a simple plaint or claim rather than by way of constitutional interpretation and or reference. .... In saying all these, we are not oblivious to the fact that a party is entitled to sue under the Constitution even if there is an alternative remedy, and or other mechanism for the resolution of the dispute. However, it has since emerged on the authorities that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional Litigation is not a panacea for all manner of litigation, we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.”

### **Petitioner’s submissions**

22. The Petitioner relied on same decision by the Respondent on the definition of constitutional avoidance doctrine in *Communication Commission of Kenya* case and *SV Mhlungu* case. The Petitioner further cited the case in *Billow Hussein v Attorney General & 3others* (2021)e KLR where the court made reference to the case of *Security Law Amendment case (Pet. No. 260 of 2015 C.O.R.D. v The Republic & Ors* and held : ‘the doctrine of constitutional avoidance requires courts to resolve disputes on a constitutional basis only when a remedy depends on the constitution.”
23. The Petitioner submits she sought declaration that her constitutional rights have been violated in employment context and that the court could not determine the petitioner’s prayer on damages for violation of constitutional rights other than through constitutional basis. The petitioners submits that her case was two thronged itemized as :-
- i. claim for unfair termination from employment
  - ii. a claim for violation of the petitioner’s constitutional rights during and upon termination of their employment.
24. The Petitioner submits that both claims arise from employment of the Petitioner and the Respondent and should be heard by single court with jurisdiction to determine both being this court. To buttress these submissions the Petitioner relied on the decision of the High Court in *Law Society*



of Kenya v Federation of Kenya Employers (2021) eKLR, where the court observed as follows:- ‘5. The Court is alive to the fact that both the High Court and Employment and Labour Relations Court have concurred and coordinate jurisdiction to determine violations of constitutional rights but the Employment and Labour Relations Courts jurisdiction is invoked when the dispute relates to employment and labour relations. I find from the constitutional questions and issues raised that this dispute does not relate to employment and labour relations.

25. The issue of shared jurisdiction between the High Court and Employment and Labour Relations Court has severally been raised and determined by Courts. In the case of Sollo Nzuki vs. Salaries and Remuneration Commission & 2 others (2019) eKLR, Hon. Justice Odunga faced with similar matter held that:-

“ 51. Similarly, pursuant to Article 23(3) of *the Constitution* as read with Section 12(3) of the *Employment and Labour Relations Court Act*, it is my view that the Employment and Labour Relations Court can grant reliefs in a constitutional petition. However, the jurisdiction to do so is confined to matters falling within Article 41 of *the Constitution* as read with section 12 of the *Employment and Labour Relations Court Act*. The Court cannot therefore purport to entertain petitions outside the aforesaid matters as its jurisdiction is limited only in so far as employment matter and matters related thereto are concerned. In my view the matters which fall within the ambit of Article 162(2) of *the Constitution* must be matters within the exclusive jurisdiction of the said specialised courts. However, as stated above, the Employment and Labour Relations Court may not embark on a generalized handling of Petitions but is entitled to and is jurisdictionally empowered to address such matters if they arise directly and in relation to the matters within the court’s jurisdictional competence and specialization. Accordingly, where the matters raised fall both within their jurisdiction and outside, it would be a travesty of justice for the High Court to decline jurisdiction since it would mean that in that event a litigant would be forced to institute two sets of legal proceedings. Such eventuality would do violence to the provision of Article 159 of *the Constitution*. As was held in Nairobi High Court Petition No. 613 of 2014 – Patrick Musimba vs. The National Land Commission and Others:

“...it would be ridiculous and fundamentally wrong, in our view, for any court to adopt a separationistic view or approach and insist on splitting issues between the Courts where a court is properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction is raised.” 52. The Musimba decision therefore concluded on this issue that:-

“...both the High Court and the ELC Court have a concurrent and or coordinate jurisdiction and can determine constitutional matters when raised and do touch on the environment and land. Neither *the Constitution* or the ELC Act limit the High Court’s jurisdiction in this respect while a closer reading of the ELC Act reveals that the ELC Court’s jurisdiction was in 2012 limited by Parliament in so far as constitutional issues touching on land and environment are concerned



but the Court of Appeal in Mugendi expressed the view that the ELC when dealing with disputes concerning the environment and land may also deal with claims of breaches of fundamental rights touching on the subject at hand. We hold that in matters of constitution the ELC has jurisdiction not just when it involves clean and healthy environment but also land.” 53. This window, it has been held, is to empower the Employment and Labour Relations Court to fully handle employment matters that are exclusively reserved for it under Article 162(2) of *the Constitution* of Kenya 2010. This position, in my view is the true interpretation of Section 12 of the Employment and *Labour Relations Act*, Cap 234B, Laws of Kenya.”

26. The Petitioner further submits that the court has jurisdiction to hear and determine claims of violation of the constitutional rights arising from employer-employee relationship which jurisdiction has been exercised numerous times. That the relationship between the Petitioner and the Respondents was not an ordinary kind of employment but one expressly anchored under *the Constitution* at Article 179 and further guided by the provisions of the *County Governments Act*, 2012. That being a constitutional office the petition could not be avoided. That the court has jurisdiction to hear and determine the petition. That the claims before the court for unfair termination as well as violation of Petitioner’s constitutional rights and fundamental rights and relied on the decision in County Government of Garissa & another v Idris Aden Mukhtar & 2 others (2020)eKLR where the court of Appeal upheld the court’s jurisdiction to grant orders in the nature of remedies under Article 23 of *the Constitution* and stated that the doctrine of constitutional avoidance was inapplicable Decision on issue of constitutional avoidance and whether the court has jurisdiction
27. The court must first address issue of jurisdiction when challenged and on finding it lacks jurisdiction down its tools as held in landmark decision of court of Appeal by Nyarangi JA ( as he then was ) in Owners of the Motor vessel “Lilian S” -vs Caltex Oil ( Kenya ) Ltd ( 1989) where the Judge held as follows:-
- “Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis or continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction”.
28. The parties relied on same decisions on the definition of the doctrine of avoidance which the court upholds being decision in Communications Commission of Kenya v Royal Media Services and 5 others (2014) e KLR where the Supreme court held that as regards the doctrine of constitutional avoidance :- ‘ the appellants in this case are seeking to invoke the principle of avoidance also known as the constitutional avoidance. The principle of avoidance entails that a court will not determine a constitutional issue when a matter may be properly decided on another basis.’ That the Supreme Court quoted a South African case of S v Mhlungu 1995 (3)SA 867(CC) with approval as follows:- ‘ I would lay it down a general principle that where it is possible to decide any case civil of criminal, without reaching a constitutional issue , that course which should be followed.’
29. I have weighed on the submission by both parties. The Petitioner stated her employment was not ordinary as it is anchored under Article 179 of *the Constitution* which is operationalised under the



County Governments Act. The Petitioner submits that the doctrine of constitutional avoidance does not apply to her case as her case was two thronged and itemized the same as follows:-

- a. Claim for unfair termination from employment.
- b. A Claim for violation of the Petitioner’s constitutional rights during and upon termination of the employment.
  1. The Petitioner relied on the decision of court of appeal in County Government of Garissa & Another v Idris Aden Mukhtar & 2 others (2020)eKLR, where the court of Appeal upheld the court’s jurisdiction to grant orders in the nature of remedies under Article 23 of the Constitution and stated that the doctrine of constitutional avoidance was inapplicable.
  2. The Respondents’ position was that before the court was a pure employment claim. The Respondents submit that the doctrine of constitutional avoidance was applicable in the instant case and argued that the court had no jurisdiction to grant statutory remedies in constitutional matters and that the petition did not raise any constitutional issue but was a simple claim for unfair termination.
  3. The Respondents submit that prayer 6 of the petition read:-

‘An order directing the Respondents to fully compensate the Petitioner for unfair and unlawful and wrongful termination of her employment with all the attendant benefits as pleaded that is .. total Kshs. 11,235,724.50’ That the breakdown leading to the total amount is based on the Employment Act of 2007 and hence the petitioner was trivializing constitutional litigation by trying to enforce a statutory remedy by use of petition instead of civil claim.
  4. The Respondents submit the jurisdiction of the court to determine alleged violations of the Constitution is very specific and invoked pursuant to Article 22 of the Constitution, that the remedies that the court can grant are provided for under Article 23(3) of the Constitution thus: ‘23(3)) In any proceedings brought under Article 22, a court may grant appropriate relief, including—
    - a. a declaration of rights;
    - b. an injunction;
    - c. a conservatory order;
    - d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
    - e. an order for compensation; and
    - f. an order of judicial review.
  5. That the term ‘appropriate relief’ as defined in Law Society of Kenya &7 Others v Cabinet Secretary for Health & 8 Others; China Southern Co. Airline Limited (Interested Party)(2020)e KLR does not include remedies provided under the statute:- ‘Article 23 of the Constitution of Kenya entitled the court to grant an appropriate relief in any proceedings brought under Article 22 of the Constitution The . “Appropriate



relief” as stated herein above is a relief that is required to protect and enforce the Constitution and includes a declaration of rights, on interdict, a mandamus or such other relief as may be required to ensure that the right as enshrined in the Constitution are protected and enforced.”

6. That the court sitting as a constitutional court cannot grant prayers 3 and 5 of the petition vis (3)A declaration that the termination of the Petitioner’s employment on 29<sup>th</sup> September 2022 is in breach of the express provisions of Section 40 and 42 of the County Governments Act 2012(5); A declaration that the termination of the Petitioner’s employment on 29<sup>th</sup> September, 2022 is in breach of the provisions of section 5, 35,41 and 45 of the Employment Act, 2007 .
7. The Respondents submit that under Article 23(3)(d) this court can only make a declaration of the invalidity of the statutes violating a right of bill of right and not the invalidity of actions that violate statutes to wit ‘23(3) d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;”
8. To buttress the foregoing submission that the petition was incompetent the Respondents relied on the decision in Sumaya Athmani Hassan v Paul Masinde Simidi & another (2019)e KLR where the court of Appeal addressed the issue as follows:- The 1<sup>st</sup> Respondent filed a petition directly relying on the provisions of the Constitution for enforcement of contractual rights governed by the Employment Act without seeking a declaration of invalidity of the provisions of the Employment Act or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of the Constitution. We adopt and uphold the general principle in the persuasive authority in Barbara De Klerk (supra) that where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question.”That in the decision the court of Appeal entered judgment for the appellants who were respondents at the trial court as follows:-‘the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the Constitution. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition.” The Respondents submit that court should uphold the decision of the court of appeal and find the petition incompetent for seeking to enforce statutory remedies through a constitutional petition and dismiss the same. “
9. The Petitioner seeks the following reliefs:-
  - 1) A declaration that the termination of the Petitioner’s employment on 29<sup>th</sup> September 2022 was in contravention with and in utter breach of Articles 10, 47, 73, 198 and 232 of the Constitution of Kenya and is thus null and void.
  - 2) A declaration that the termination of the Petitioner’s employment on 29<sup>th</sup> September, 2022 amounted to discrimination and unfair labour and is thus in utter breach to the Petitioner’s rights.



- 3) A declaration that the termination of the Petitioner's employment on 29<sup>th</sup> September 2022 is in breach of the express provisions of section 40 and 42 of the County Governments Act 2012 and is thus illegal, unlawful and unfair
- 4) A declaration that the actions of the 3<sup>rd</sup> Respondent in dismissing the Petitioner from her employment was malicious, discriminatory and in utter violation of Article 73 of the Constitution of Kenya , 2010 and amounts to abuse of office.
- 5) A declaration that the termination of the Petitioner's employment on 29<sup>th</sup> September, 2022 is in breach of the provisions of section 5, 35,41 and 45 of the Employment Act, 2007 and is thus illegal, unlawful and unfair .
- 6) An order directing the respondents to fully compensate the petitioner for unfair and unlawful and wrongful termination of her employment with all the attendant benefits as pleaded, that is:-
  - i. Clean certificate of service
  - ii. One(1) month's salary in lieu of notice Kshs 404,250.00
  - iii. Value of the remaining contractual period(4 months) ....Kshs. 1,617,000.00
  - iv. Gratuity at 31% .....Kshs. 4,060,2827.00
  - v. 21 days of unpaid leave for the year 2021-2022 .....Kshs.303,187.50
  - vi. Damages for unfair termination (12 months) ..... Kshs. 4,851,000.00

Total..... Kshs. 11,235,724.50
- 7) An order of compensation directing the Respondents to pay to the Petitioner a sum of Kshs. 50,000,000/- or general damages as may be assessed by the Honourable Court for the blatant breach of her constitutional rights and freedom against and freedom against discrimination and fair labour practices, defamation /character assassination against her person thereby occasioning, loss of future employment opportunities and emotional distress.
- 8) A declaration that the 3<sup>rd</sup> Respondent is unfit to hold public office.
- 9) Any other Order, Writs and Directions and this Honourable court considers appropriate and just to grant for the purpose of the Petitioner's constitutional rights.
- 10) Costs of this petition.The court of Appeal in County Government of Garissa & another v Idris Aden Mukhtar & 2 others (2020)e KLR upheld the court's jurisdiction to grant orders in the nature of remedies under Article 23 of the Constitution and stated that the doctrine of constitutional avoidance was inapplicable. This would run contrary to its own earlier decision in Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another (2016)e KLR where the court observed:- ' In employment matters,



such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. *The Constitution* should not be turned into a thoroughfare for resolution of every kind of common grievance.....

A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.....

The trial court was therefore right in holding that this was a simple employment matter that should have been handled as such by ELRC by way of a simple plaint or claim rather than by way of constitutional interpretation and or reference. .... In saying all these, we are not oblivious to the fact that a party is entitled to sue under *the Constitution* even if there is an alternative remedy, and or other mechanism for the resolution of the dispute. However, it has since emerged on the authorities that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional Litigation is not a panacea for all manner of litigation, we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.”

10. The court finds there are divergent opinions on this issue of constitutional avoidance. The petitioner did plead the constitutional violations and sought compensation of Kshs. 50million for the violation bringing herself within the provisions of article 22 and 23 of *the constitution*. In the same petition the petitioner also made claims under the *Employment Act*. The court upholds the recent decision in County Government of Garissa & another v Idris Aden Mukhtar & 2 others (2020)e KLR to apply in the instant case which also relates to termination of employment of persons appointed pursuant to article 179 of *the constitution* as executive committee members to find that it has jurisdiction to hear and determine the petition.

#### **Issue b. Whether the 3<sup>rd</sup> Respondent is a proper party to this suit.**

11. The 3<sup>rd</sup> Respondent submits that he is wrongly sued in his personal capacity as the acts complained of by the Petitioner were done by him in line with his official duties under *the Constitution* and statute. That the Governor has power to appoint and terminate County Executive Committee members (CECMs) and as such the act complained of was part of his official duties under Article 179 of *the Constitution*:-“179. County Executive Committees (1) The executive authority of the county is vested in, and exercised by, a County executive committee. (2) The County executive committee consists of— (a) the County Governor and the deputy County Governor; and (b)



members appointed by the county Governor, with the approval of the assembly, from among persons who are not members of the assembly.” and sections 30 and 31 of the *County Governments Act* 2012 on functions and powers of The Governor provides:-“ 30 (2) Subject to *the Constitution*, the governor shall—; (d) appoint, with the approval of the County Assembly, the County Executive Committee in accordance with Article 179(2)(b) of *the Constitution*; 31. Powers of the governor The governor— (a) may dismiss a county executive committee member; (b) shall dismiss a county executive committee member, if required to do so by a resolution of the county assembly as provided under section 40;”

12. That the Petitioner prays for order against the 3<sup>rd</sup> Respondent being prayer 8 ‘ a declaration that the 3<sup>rd</sup> Respondent is unfit to hold public office”, that the grounds of removal and procedure for impeachment of governor is as provided of under Article 181 of *the Constitution* and this was not the proper forum as removal of governor is a separate process under section 33 (1)of the County Government Act which provides ‘ a member of the county assembly may by notice to the speaker, supported by at least a third of all the members, move a motion for the removal of the Governor under Article 181 of *the Constitution*”. That the doctrine of exhaustion prohibits such a prayer and relied on the decision in Geoffrey Muthinja & another v Emanuel Muguna Henry & 1756 Other (2015) e KLR where it was held:-‘ it is imperative that where a dispute resolution mechanisms exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked...”
13. The Respondents submit that the 3<sup>rd</sup> Respondent should be struck of the proceedings with costs as the acts complained of are properly brought against the 2<sup>nd</sup> Respondent.

### **The Petitioner’s submissions**

14. The Petitioner submits that the issue as to whether the 3<sup>rd</sup> Respondent was a proper party was not brought up in the proceedings. That parties are bound by their pleadings and the variance of submissions with pleadings should be rejected and relied on the decision of court of Appeal in Independent Electoral and Boundaries Commission and Another v Stephen Mutinda Mule & 3 others (2014) e KLR where the court cited with approval the decision of the Cupreme Court of Nigeria in Adetoun Oladeji (NIG) Ltd Vs. Nigeria Breweries PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;

“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell J.S.C. rendering himself thus;

“ In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”



15. On same position was decision in Supreme Court of Kenya in Raila Amolo Odinga & another v IEBC & 2 Others (2017)e KLR, . The Petitioner further submits that in any event the 3<sup>rd</sup> Respondent actions as elaborated in the petition were ultravires even after warning by EACC hence the 3<sup>rd</sup> Respondent is well before the court in their personal capacity (see Miguna Miguna v Fred Matiangi , Cabinet Secretary Ministry of Interior and Coordination of National government /& 8 others (2018) e KLR

### **Decision**

16. The court finds that the 3<sup>rd</sup> Respondent is the current holder of the 2<sup>nd</sup> Respondent. The letter of termination of the petitioner’s contract of employment was by the 3<sup>rd</sup> Respondent. I find no misjoinder in the petition. The 3<sup>rd</sup> Respondent is sued as holder of the office with relation to his role and not in personal capacity. I do agree that prayer 8 is misplaced and not proper for this forum as submitted by the Respondents. I further agree that submissions are not pleadings and the issue having not been pleaded was not proper for submsions and I uphold the decision of the court of Appeal in Independent Electoral and Boundaries Commission and Another v Stephen Mutinda Mule & 3 others (2014)e KLR where the court cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) LTD Vs. NIGERIA BREWERIES PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;

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### **Issue c. Whether the Petitioner was unfairly terminated from her position of the County Executive Committee Member (CECM)?**

#### **The Petitioner’s submissions**

17. It was not in dispute that there was no procedural hearing before the issuance of letter of termination of employment to the Petitioner by the respondents. The Petitioner relied on several decisions stating that before the termination of the contract of ECM due process was to be followed. That the process of removal of the ECM was under section 31 of the [County Governments Act](#) to wit:- ‘31. Powers of the governor The governor— (a) may dismiss a county executive committee member; (b) shall dismiss a county executive committee member, if required to do so by a resolution of the county assembly as provided under section 40;’



18. The Petitioner submits that the powers of the governor have been ventilated in various court decisions. In *County Government of Nyeri & another v Cecilia Wangechi Ndungu (2015)e KLR* which was upheld at a different court of appeal decision in *County Government of Garissa & another v Idris and Mukhtar & 2 others (2020)eKLR to wit:-* '[37] In the Cecilia Wangechi Ndungu decision, the Court was at pains to show that Section 31(a) places an obligation on the Governor, to exercise his powers only when necessary or appropriate when it is for the public good, and when there are valid and compelling reasons. We are in agreement with that threshold and in our view, that threshold fetters the discretion of the Governor. He cannot be acting at his own pleasure, when he must have a reasonable ground to do so, and when he must act for the public good." The court of Appela in paragraph 35 stated, 'In our view, the direction to take in this matter lies in an interpretation of section 31(a) of CGA in a way that conforms to the spirit and letter of *the Constitution*, as all laws must be interpreted and applied in accordance with this supreme law of the land. As already stated in this judgment, the people of Kenya in their wisdom adopted a Constitution that was anchored on sovereignty of the people and supremacy of *the Constitution*. Under this Constitution, the Governor and members of executive committee of a county government are state officers, that is, persons holding state office. Their power must be exercised in accordance with *the Constitution*. Indeed, it behooves such high ranking state officers to demonstrate commitment and fidelity to *the Constitution*."
19. The Petitioner further relied on the decision by court of Appeal in *Narok County Governments & another v Richard Bwogo Birir & another (2015)e KLR* where the trial court decision was upheld and among others the petitioner relied on paragraph 46 of the decision to wit ;-'The above learning leads us to the finding that the Governor's contention that his power to dismiss can be exercised without any reasons being advanced has no basis in law. It is the reasons for dismissal that determine whether the power was exercised reasonably, and the reasons ought to be valid and compelling ."
20. The Petitioner submits that no reasons were given in the termination letter other than citing Article 179 of *the constitution* and Section 42 of the *County Governments Act*.
21. The Petitioner submits that Article 198 and section 42 of the County Government Act informed her extension of contract of 7<sup>th</sup> March 2021 by the former Governor . Article 198 provides for transition. '198. County government during transition While an election is being held to constitute a county assembly under this Chapter, the executive committee of the county, as last constituted remains competent to perform administrative functions until a new executive committee is constituted after the election"
22. Section 42 of the *County Governments Act* provides:-'42. County executive to remain in office after elections (1) When a general election is held for a county government, the outgoing county executive committee shall remain in office until a new county executive committee is constituted after the election. (2) *The constitution* of a new executive committee after an election under subsection (1) shall be finalized within twenty-one days of the swearing in of the members of the county assembly." That her extension



of contract could have been terminated upon new executive members being recruited or by effluxion of time.

23. The Petitioner submits that the termination of her contract was selective as it affected three of them leaving 8 members hence the claim that her term had lapsed could not apply. The court noted all other authorities cited by the petitioner on the unfair termination.

### **Respondents' submissions**

24. The Respondents submit that the County Executive Committee Member (CECM) term is tied to that of the appointing governor. That the Petitioner's term of office as CECM ended when the previous governor left office and in the alternative when the new governor was sworn in a Governor elect. That CECMs are Governor appointees and as such their terms run with the tenure of the appointing governor and relied on the provisions of Constitution Article 179 as follows:- '179-(2) The county executive committee consists of— (b) members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly. 7) If a vacancy arises in the office of the county governor, the members of the county executive committee appointed under clause (2)(b) cease to hold office.'
25. That under section 30 of the County Government Act 2012 on the functions of the Governor states:- in 30(2)(d) 'appoint, with the approval of the county assembly, the county executive committee in accordance with Article 179(2)(b) of *the Constitution*,'"
26. The Respondent relied on the decision in Kisumu County Public Service Board and another v Samuel Okuro & 7 others (2018)e KLR held, '[28] Further, under Article 179(7), the term of office of executive committee members appointed by the governor is tied to the term of the appointing governor such that if the governor ceases to occupy the office, the appointment of the executive committee member also ceases."
27. The Respondents submit that the term of the petitioner lapsed with the appointment of the governor and with swearing in of new governor and relied on the decision in Geoffrey Agwera Ndubi v John Obiero Nyagarama & 6 others; Bladys Bogonko Momanyi & 4 others (Interested Parties) [2020] eKLR, '52. It is the finding of court that the office of CEC member is tied in the hip to the office of the Governor. The two offices arise upon conclusion of a general election and their term is to run continuously to the next general election unless the officer is removed from office in terms of Section 39 and 40 of the *County Governments Act* 2012."
28. The Respondents submit that the terms of employment of the petitioner could not bind the current governor under the privity of contract and relied on the decision in Redington Kenya Limited v Thomas N. Nabende & another (2021)e KLR where it was stated:-'The contract of employment dated 24.11.2016 was between the Claimant and the 1<sup>st</sup> Respondent. Based on the doctrine of privity of contract, the rights and obligations under that contract would only be conferred upon the parties therein. It would be contrary to this doctrine, to impose any obligation on the 2<sup>nd</sup> Respondent, because it is a stranger to the contract."
29. The Respondents submit that the Petitioner was perpetuating an illegality knowing her term ran concurrently with the appointing governor by accepting letter of 15<sup>th</sup>



March 2022 extending her term beyond that of the governor. That the office of CECM was not a personal property of the petitioner as held by court of Appeal in Attorney General & another v Andrew Kiplimo Sang Muge & 2 others [2017] eKLR where it was stated:- ‘To begin with there is no such a thing as legitimate expectation to hold, to the end of its term, a public or elective office since a public office is not the property of the office-holder. See South African Veterinary Council V Szymanski 2003 ZASCA 11. See also Justice Kalpana H. Rawal V. Judicial Service Commission & 3 others (supra).’ In Eckerson V City of Des Moines, 137 Iowa 452, the Iowa Supreme Court emphasized that:-“Public offices are created in the interests of the general public, and not for the benefit of any individual. And no one in possession of an office has a constitutional right to remain therein for the full period of the term for which he was elected.....In the case of statutory office, the Legislature may even abolish the office, and with the taking effect of the law providing thereof, the right of the incumbent to further act ceases, instante, notwithstanding the term for which he was elected has not expired.”

## Decision

30. The Petitioner was initially appointed to the post of Executive Committee member by former Governor Kakamega County Hon. Oparanya vide letter dated 5<sup>th</sup> October 2020. On the 29<sup>th</sup> October 2021 the contract was extended by the same governor from 1<sup>st</sup> November 2021 to 31<sup>st</sup> August 2022(BAS3). In what the court finds strange the same Governor while the existing contract was still valid by more than 4 months, vide letter dated 7<sup>th</sup> March 2022 while referring to the contract expiring on the 31<sup>st</sup> August 2022 extended the said contract to 31<sup>st</sup> December 2022 on ground of ensuring smooth transition to the next government. The contract stated in part:- ‘ Please note that this contract shall be deemed to have terminated upon recruitment of new executive committee member in line with the provision of section 42(2) of the County government act 2012 or upon termination of the contract by effluxion of time.’
31. General elections were held in this country on the 9<sup>th</sup> August 2022. The Kakamega general elections were delayed and held on the 29<sup>th</sup> August 2022 with the new Governor(3<sup>rd</sup> Respondent ) being sworn in on the 15<sup>th</sup> September 2022
32. The Petitioner led evidence that after the first sitting of the County assembly she was issued with letter of termination dated 29<sup>th</sup> September 2022 of her employment as CECM of finance by the new Governor Hon. Barasa (3<sup>rd</sup> Respondent).
33. The Petitioner faulted the termination for lack of due process and for breach of her contract as there was no new executive committee member committee and her contract had not expired. Further the termination was selective with only 3 of the CECMs being terminated leaving 8 others.
34. The Respondent’s position was that the term of employment as CECM was terminated by operation of the law pursuant to Article 179(7) of *the Constitution* to wit: ‘179(7) If a vacancy arises in the office of the county governor, the members of the county executive committee appointed under clause (2)(b) cease to hold office.’ That the court of Appeal has pronounced itself on the issue in Kisumu County Public Service Board and another v Samuel Okuro & 7 others (2018)e KLR held ‘[28] Further, under Article 179(7), the term of office of executive committee members



appointed by the governor is tied to the term of the appointing governor such that if the governor ceases to occupy the office, the appointment of the executive committee member also ceases.”

35. The court found the letter of 7<sup>th</sup> March 2022 issued by the former governor was irregular for 2 reasons. First that the extension of contract was done while there was a valid existing contract with more than 4 months to expiry. Secondly, the extension was beyond the term of the appointing governor contrary to the provisions of Article 179(7) of *the Constitution* that ‘If a vacancy arises in the office of the county governor, the members of the county executive committee appointed under clause (2)(b) cease to hold office.’” The court upholds the court of Appeal decision in *Kisumu County Public Service Board and another v Samuel Okuro & 7 others (2018)e KLR* held ‘[28] Further, under Article 179(7), the term of office of executive committee members appointed by the governor is tied to the term of the appointing governor such that if the governor ceases to occupy the office, the appointment of the executive committee member also ceases.’” The court applying the foregoing provisions of article 179(7) of *the Constitution* and decision of the Court of Appeal holds that the term of the petitioner ran concurrently with the appointing authority the former governor and her appointment was deemed to have ceased on the exit of the former governor following election and swearing in of the 3<sup>rd</sup> Respondent.
36. That brings me to whether the termination was unfair for lack of due process. The court looked into the decision relied on by the Petitioner in *In County Government of Nyeri & another v Cecilia Wangechi Ndungu (2015)e KLR* which was upheld in a different court of appeal decision in *County Government of Garissa & another v Idris and Mukhtar & 2 others (2020)e KLR* as follows:- “[37] In the Cecilia Wangechi Ndungu decision, the Court was at pains to show that Section 31(a) places an obligation on the Governor, to exercise his powers only when necessary or appropriate when it is for the public good, and when there are valid and compelling reasons. We are in agreement with that threshold and in our view, that threshold fetters the discretion of the Governor. He cannot be acting at his own pleasure, when he must have a reasonable ground to do so, and when he must act for the public good.” The court in paragraph 35 stated ‘In our view, the direction to take in this matter lies in an interpretation of section 31(a) of CGA in a way that conforms to the spirit and letter of *the Constitution*, as all laws must be interpreted and applied in accordance with this supreme law of the land. As already stated in this judgment, the people of Kenya in their wisdom adopted a Constitution that was anchored on sovereignty of the people and supremacy of *the Constitution*. Under this Constitution, the Governor and members of executive committee of a county government are state officers, that is, persons holding state office. Their power must be exercised in accordance with *the Constitution*. Indeed, it behooves such high ranking state officers to demonstrate commitment and fidelity to *the Constitution*.’” The court finds that said officers in the two decisions were in office within election and their terms were violated while the Governors who had appointed them were in office hence the decisions were not applicable to the instant case. The court agreed that due process and reasons for termination must be issued for termination of the CECM by the appointing governor as their term ought to run together. That was not to the case here. The former Governor out of mistaken duty about the future government transition irregularly extended the contract of the



Petitioner and others into the term of the new governor who had a constitutional duty to appoint his cabinet (CECMs) under Article 179 of *the Constitution*.

37. The court agreed with the petitioner that her employment was not ordinary and consequently the court finds the advisory of 22<sup>nd</sup> September 2022 by EACC was not applicable to CECMs but to employees of the Board. Indeed, the letter acknowledged that CECMs were not under the Board.
38. The court looked into the issue of discrimination. Whether or not it was true that only the petitioner and 2 others had their contracts terminated and whether that amounted to discrimination to taint the termination by the new governor. It was true the 3<sup>rd</sup> respondent did retain some of the existing CECMs. The court having stated the law on the terms of service of CECMs to be concurrent with the appointing governor finds that the act by the new governor was supported by the law. Whether or not others were terminated or served entire term was neither here nor there as the substantive claim of valid contract had failed. The court finds that there cannot be a right to property of a public office and upholds the decision in Attorney General & another v Andrew Kiplimo Sang Muge & 2 others [2017] eKLR to wit:- ‘To begin with there is no such a thing as legitimate expectation to hold, to the end of its term, a public or elective office since a public office is not the property of the office-holder. See South African Veterinary Council V Szymanski 2003 ZASCA 11. See also Justice Kalpana H. Rawal V. Judicial Service Commission & 3 others (supra).’ In Eckerson V City of Des Moines, 137 Iowa 452, the Iowa Supreme Court emphasized that: “Public offices are created in the interests of the general public, and not for the benefit of any individual. And no one in possession of an office has a constitutional right to remain therein for the full period of the term for which he was elected..... ..In the case of statutory office, the Legislature may even abolish the office, and with the taking effect of the law providing thereof, the right of the incumbent to further act ceases eo instante, notwithstanding the term for which he was elected has not expired.” The court finds that the termination of the contract of the Petitioner was within what is called by operation of the law being article 179(7) of *the Constitution* and no legitimate expectation could have accrued to the Petitioner to serve to end of her contract which was beyond the term of the appointing Governor.

Issue d. Whether the Petitioner’s constitutional rights under Articles 27,41, 47 and 50 of *the Constitution* were violated.

39. Article 27 of *the Constitution* protects everyone from discrimination. The court found that the term of employment of the petitioner, by operation of the law, ended on the exit of the appointing Governor and there was no accrued rights of legitimate expectation to serve beyond the term of the appointing governor. Consequently, the issue of discrimination could not arise. The new governor had a right to choose his new CECMs including retaining any in office he so wished.
40. On Articles 41 on fair labour practice, article 47 on fair administrative action and Article 50 on fair hearing, the court found that the employment terminated by operation of the law.



**Issue e. Whether the Petitioner was entitled to remedies sought.**

41. The letter of termination stated the petitioner was to be paid one month salary in lieu of notice. Having held the claim for unfair termination had no basis the termination being on operation of the law, the order of compensation was not merited. The court holds that all other orders sought were under the *Employment Act* and not proper for grant under a constitutional petition. The claims certificate of service, notice, gratuity were a contractual right negotiated and agreed by the employees and employer under the province of the private law. The jurisdiction of the court was not invoked for that purpose.

**Conclusion and disposition**

PARA 42.

In the upshot the court holds that the term of employment as

Kakamega County CECM Finance of the petitioner expired on the former Governor, her appointing authority, ceasing to hold office under Article 179(7) of *the Constitution* to wit:- ‘7) If a vacancy arises in the office of the county governor, the members of the county executive committee appointed under clause (2)(b) cease to hold office.’ That the claim for unfair termination and discrimination had no basis consequently. This was a normal termination with notice pay in lieu for one month. That the prayer under 63(6) were not available to be granted under the constitutional petition being contractual rights as negotiated by the parties.

PARA 43.

In conclusion the petition is held to be without merit and is dismissed in its entirety. Considering the nature of the employment and the confusion caused by outgoing governor of an extension of contract, I exercise my discretion on costs and hereby order each party to bear own costs in this petition.

44. It is so ordered

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 7<sup>TH</sup> DAY OF JULY 2023

JEMIMAH KELI

JUDGE

In The Presence of

C/A Lucy Macheso

For Petitioner: Mogo

For Respondents: Lutta

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ELRC PETITION NO.E012 OF 2022

