Otiende v Board of Trustees, National Social Security Fund & another (Petition E026 of 2022) [2022] KEELRC 13292 (KLR) (31 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 13292 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E026 OF 2022

K OCHARO, J

OCTOBER 31, 2022

IN THE MATTER OF ENFORCEMENT AND INTERPRETATION OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 2, 10, 20[4][A], 21[1], 22, 23, 24, 162[2][A] 258 AND 259 OF THE CONSITITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLE 201 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE NATIONAL SOCIAL SECURITY FUND ACT NO. 45 OF 2013

AND

IN THE MATTER OF PUBLIC FINANCE MANAGEMENT ACT, 2012

BETWEEN

ANTHONY OTIENDE OTIENDE ..... PETITIONER

AND

BOARD OF TRUSTEES, NATIONAL SOCIAL SECURITY FUND ..... 1ST RESPONDENT

CHIEF EXECUTIVE OFFICER/ MANAGING TRUSTEE, NSSF .... 2ND RESPONDENT

JUDGMENT

1. Through a petition dated 11th February 2022, the Petitioner has sought the following reliefs:

a. A declaration that within the intendment of Article 201 of the *Constitution* of Kenya, 2010, the Respondents have violated the *Constitution* of Kenya in its ongoing exercise of recruitment of additional 203 staff into the Fund against the legitimate expectation of the Kenya taxpayers that the resources of the National Social Security Fund shall be applied in compliance with the Fiscal Responsibility Principles.

b. A declaration that the Respondent's intended recruitment of 203 members of staff violates the *Constitution* of Kenya and Fiscal Responsibility Principles.

c. An order prohibiting the 1st and 2nd Respondents from proceeding with the intended recruitment of 203 members of staff prior to implementing the recommendations contained in the report by KPMG consultants in order to establish an optimal staffing structure in order to ensure a sustainable wage bill at the National Social Security Fund.

d. A permanent injunction stopping recruitment of 203 staff members into the Fund whereof invitation for applications closed on 17th January 2022 and that the status quo be and is hereby maintained until such a time a legitimate recruitment process will be conducted in accordance with the law.

e. An order directing the 1st and 2nd Respondents to supply the petitioner with the report of progress in implementation of the recommendations contained in the report by KPMG Consultants and/or publish the same in the leading Daily newspaper of wide consultations in Kenya for the benefit of the general public.

f. Such orders and directions as this Honourable Court may deem fit, just and appropriate to grant in the circumstances.

g. Costs of this petition.

2. It was the Petitioner's case that some time in 2021, the 1st Respondent placed an advertisement in the Daily Nation Newspaper and on all the websites and social media pages associated with the 1st and 2nd Respondents inviting interested members of the public to make applications for 203 vacant positions of employment at the National Social Security Fund.

3. The Petitioner further stated that the interested candidates were required to make their respective applications on or before 17th January 2022 to the 1st Respondent whereupon, shortlisting and interviews were to follow.

4. The petitioner alleged that prior to the decision and the advertisement for the vacancies, the Respondents using tax payer's money, commissioned KPMG, a consultancy firm to conduct a system resource and value audit of the Fund.

5. The consultancy firm, in pursuance of the contract carried out the exercise and consequently generated and delivered its findings and recommendations to the Respondents. The report revealed a lack of a well-defined recruitment strategy and manpower planning.

6. The report further

a. disclosed a protracted and obscure recruitment process marred by interference and undue influence by the top leadership and from without.

b. recommended that the solution to staff attrition lay in the leadership development programme to support succession planning initiatives to help building leadership capacity across board.

c. found that staff were not fully utilized by across the Fund, with cases of overlaps and responsibility duplication in for example property management, capital and money markets, and finance.

d. revealed bloated work force across all levels and departments.

7. The petitioner contended that the decision to advertise the vacancies was contrary to the recommendations by the consultant.

8. As per the report, any recruitment ought to have been preceded by identification of critical roles within the Fund important to the realization of the ideals for which the Fund was established. This never happened.

9. The recruitment is being undertaken against declared reported financial shortfalls and/or liquidity gaps.

10. That impugned recruitment exercise was commenced by the 1st and 2nd Respondents notwithstanding an already huge wage bill, which accounts for more than 50% of the total expenditure of the Fund in any financial year, consequently constraining funding to other critical programmes. The exercise should not be undertaken without first establishing an optimal staffing structure in order to ensure a sustainable wage bill at the Fund.

11. The petitioner contends that the total expenditure on wages, emoluments, compensation and salaries for public officers at the Fund is so high and the Respondents had a Constitutional and legal duty to pursue the appropriate level of expenditure in maintaining a sustainable fiscal structure at the Fund.

12. Article 201 of the *Constitution* sets out the principle of public finance guiding all aspect of public finance. The Respondent's actions were in breach of this provision.

13. According to the petitioner, the intended recruitment is unprioritized, non-cost effective, unsustainable and in all respects contravened the Constitutional requirements on prudent and responsible use of public finances and Constitutional principles namely: fiscal responsibility principles pursuant to the provisions of Article 201 [d] and [e] of the *Constitution*.

14. He asserts that unless the recruitment is stopped, the Fund's annual wage bill is likely to escalate by a further Kshs 700 million annually.

15. The petitioner alleges that the intended recruitment exercise was being undertaken without permission from the National Treasury, in accordance with the National Government Policy Statement contained in a circular dated 19th July 2021.

16. The Fund's itemized Budget Estimates for the Financial year 2021/2022 had no budgetary allocation to cater for the impugned mass recruitment of staff.

17. The intended recruitment is likely to cause wasteful expenditure of the limited budgetary allocation for resources due to: duplication of functions/roles, ghost workers, non-essential staff among others. That for example it is intended to recruit fifteen [15] financial assistants, yet there are already ten [10] personnel against the required number of nine [9].

18. Lastly, the petitioner contends that unless the petition herein is allowed there shall be a grave public interest injury suffered that will be irreparable. The Respondents have no risk to be suffered.

The Respondent's Response.

19. The Respondents opposed the petition upon basis of the grounds obtaining on the response to the petition sworn by Austin Ouko, the Acting General manager [Corporate Affairs/Corporation Secretary at the National social security Fund.

20. On 29th December 2021, the 1st Respondent placed an advertisement in the Daily Nation Newspaper advertising 188 vacant positions and inviting interested members of the public to make applications and participate in the intended recruitment with it. The closing date for the applications was set to be 17th January, 2022.

21. The Respondents argue that the decision to advertise the vacant position and seek to recruit the new employees was informed by the fact that since the year 2015 around 314 employees have exited the Fund through natural attrition and since then the 1st Respondent has not recruited and/or replaced them leading to staff shortage.

22. The Petitioner placed before this Court a schedule of all the names of the employees who exited the 1st Respondent organization between the dates stated.

23. The Respondents contended that contrary to the Petitioner's assertion, the engagement of KPMG by the 1st Respondent was not for conducting a system, resource and value audit but to carry out an organizational review with the terms of reference;

    i. To assess the current organizational structure and improve/design the operational structures in line with the NSSF Act No 45 of 2013 and corporate strategic plan 2014/2019;

    ii. Undertake a job analysis exercise with the aim of developing job specification and compensable factors, to aid in evaluating employee performance, role assignment, competence matrix and staffing level;

    iii. Conduct a person job march to the position available;

    iv. Draw up a comprehensive staff establishment;

    v. Conduct manpower planning and carry out workload analysis to determine optimal staff complement and propose optimal staff levels for various job categories within the fund in order to eliminate under-staffing and/or excess and consequently maximize employee productivity;

    vi. Prepare career progression guidelines in which the duties and responsibilities are clearly defined and designed to meet functional and organizational needs to the fund and guide employees career growth;

    vii. Review and des suitable pay structure to ensure both material and external equity and recommend remuneration for each job grade based on the current market and industry salary survey.

24. The Respondents contended that KPMG did issue their final report in accord with the stated terms of reference of the contract between it and the first Respondent; report which the first Respondent then forward to the State Corporations Advisory Committee [SCAC] for approval. The advisory body did approve the report under their letter dated 31st May 2021.

25. The Respondent asserted that prior to the stated advertisement, the 1st Respondent had identified critical roles/positions within the organization which had a deficit and which positions were well

within and in line with the approval staff establishment of 1454 staff. The letter by SCAC dated 31st May 2021 is testament.

26. The Respondents further asserted that the Petitioner's allegations concerning its financial liquidity, are allegations that are unfounded and contrary to its true financial position as can be discerned from the 1st Respondent's Annual and Financial statements for the Financial Year ended 30th June 2021, the Corporate Performance report for quarter ended 30th September 2021 and Quarterly report and Financial statements for the period ended 31st December 2021.

27. The Respondents stated that the budget for the recruitment of additional staff was part of the expenditure amounts provided for in the revised budget as approved by the National Treasury.

28. The Respondents argue that the 1st Respondent has not contravened any Constitutional requirements and/or provisions of the *Public Finance management Act* and Regulations. The funds allocated to the 1st Respondent are yet to be utilized.

29. It is argued that the Petitioner has not demonstrated how the recruitment exercise by the 1st Respondent is likely to increase the annual wage bill, and how he arrived at the estimated figure of Kshs 700,000, 000.

30. The Respondents state that the National Policy Statement that was contained in the circular dated 19th July 2021, that the petitioner places reliance on, in his petition, has since been overtaken by events as a result of circular Ref No OP/CAB.9/1A dated 7th February, 2022 that exempted state corporations whose Human Resource instruments had been approved by SCAC from the requirements of circular Ref No OP/CAB.39/4A of 28th July, 2007. Consequently, those state corporations could proceed to recruit staff in line with the approved staff establishment.

31. The recruitment process is neither illegal nor unconstitutional as the 1st Respondent obtained all the necessary approvals and budgetary allocations in pursuance to Section 11 of the *State corporations Act* Cap 446 Laws of Kenya for the recruitment exercise. Further that it is the legitimate expectation of the public that the Fund is effectively managed, and this can only be achieved through a human capital that is efficient.

The Petitioner's submissions

32. The Petitioner in his submissions heavily reiterated the factual contents of his petition, to an extent that I find it unnecessary to restate that part of his submissions. However, comfort should be taken that the same shall be considered hereinafter, in the determination section of this Judgment.

33. The petitioner identified the following issues as those that present themselves for determination in this matter, thus;

    a. Whether the Respondents subjugated Article 201[d] and [e] of the *Constitution*;

    b. Whether failure by the Respondents to consult with the Public Service Commission before the recruitment was unconstitutional;

    c. Whether the Respondents are in contravention of policy directive; and

    d. Whether the Petitioner is entitled to the reliefs sought and costs of the suit.

34. On the alleged subjugation of Article 201[d] the Petitioner submitted that the recruitment was unprioritized, non-cost effective, unsustainable and in all respect contravening the Constitutional requirements on prudent and responsible use of public finances. Further that the Constitutional

principles of fiscal responsibility as contemplated under Article 201 [a] and [e] of the *Constitution* and the provisions of the *Public Finance Management Act* 2012, were violated.

35. It was contended that the recruitment would result to wasteful expenditure of the already constrained resources due to duplication of functions and or roles, ghost workers, non-essential staff, inter alia. To bolster this point, the Petitioner points out that for instance the Respondents intend to recruit System Financial Assistants, where already there are ten [10] personnel against the required number of nine [9].

36. On the 2nd proposed issue, the petitioner contended that, it is now trite law that the Public Service Commission has the Constitutional mandate to exercise the powers and functions under Article 234 of the *Constitution* over Public service. That the State Corporations Advisory Committee under Section 27 thereof could not and had no authority to issue the approvals or recommendations alleged by the Respondents.

37. To buttress the foregoing submissions, counsel for the petitioner places reliance on the holding in *Consumer Federation of Kenya [COFEK] v National Social Security Fund Board of Trustees & another*, Petition E003 of 2022, thus;

> "What the Court gathers from these provisions is that because the responsibility of issues of human in State Corporations is now specifically vested in the Public Service Commission as a Constitutional imperative, the provisions of Article 234 of the *Constitution* prevail over Section 5[3], 27 or any other provisions of the *State Corporations Act*. Finally, a cursory glance of the Act reveals that it is yet to be aligned to the provisions of the *Constitution* of Kenya, 2010."

38. It was submitted that whereas various legislations establishing State corporations give power to the Boards of the corporations to appoint persons, no legislation gives them any power to establish offices in the State Corporations. As such, the only entity that is Constitutionally and legally mandated to establish offices in State corporations NSSF inclusive, is the Public Service Commission.

39. The power of the Public Service Commission to establish offices further flows from the provision of Section 27 of the *Public Service Commission Act* No 10 of 2017, and sets condition precedent for the establishment of officers in the Public Service.

40. It was further submitted that in light of the provisions of Section 26 of the above stated Act, as read together with Section 58[1], the development or review of the organizational structure of a Public Service entity such as the NSSF should be approved by the Commission before implementation. The implementation of any establishment, organizational structure or qualifications without the approval of the Public Service Commission would be unconstitutional and unlawful therefore. – *Anthony v Communications Authority of Kenya & 3 others* [Petition E161 of 2021] [2002] KEELRC 117, was cited.

41. It was argued therefore that the Respondents had no legal authority to undertake recruitment without the authority or consent of the Public Service Commission.

42. As to whether the Respondents are in contravention of policy directive, it was argued that through a circular dated 19th July 2021, the National Treasury to all accounting officers in Government Ministries, State Departments, including Parastatals and agencies [MDAS], the Government advised them not to allocate resources for new recruitment without leave of the National Treasury and freeze all unnecessary expenditure on staff emoluments. The Respondent's assertion that the circular was

overtaken by events through a circular dated 7th February 2022, has not been proved as the alleged circular has not been placed forth before the Court.

43. That the alleged availability of funds for salaries for them to be recruited, has not been proved too. According to the petitioner, there is no clear item on the 1st Respondent's financial statement for recruitment.

44. The petitioner stated that the petition is merited and should be allowed with costs. That costs are awardable in the instant petition; the petitioner's counsel cited the case of *Erick Okeyo v County Government of Kisumu & 2 others* [2014] eKLR. Further reliance was placed on South African case of *Trustee for the Time Being of the Biowatch Trust v Registrar Genetic Resources & others* [2009] ZACC 14. Counsel submitted that in the South African matter, the Court held that in a constitutional litigation between a private party and the state, it is the state to be condemned to pay costs if the private party is successful.

The Respondents' Submissions.

45. On the 25th April 2022, this Court directed that the Petitioner does file and serve a further affidavit and submissions on the petition within 15 days of the date. The Court thus slated the matter for mention for the 19th May 2022 to check compliance and for further directions. On the 19th May 2022, the Respondent's counsel informed the Court that though the Petitioner had been given timelines to file the documents referred to hereinabove, he had not. He, however, indicated that the Respondents had filed their written submissions.

46. The directions that were given on filling of written submissions, were clear, they were to be on the petition, meaning the Court was to move straight to the hearing of the petition, bypassing the application, this was informed by the fact that this Court is at all times obligated to facilitate a just, expeditious and proportionate resolution of disputes that fall under its jurisdiction.

47. I have perused the submissions filed by the Respondents. The submissions are in respect of the Notice of Motion application that was filed herein contemporaneously with the petition. They are not in regard to the petition. Consequently, for the purposes of this Judgment, they are not helpful, I proceed to do the same minus the benefit of considering the Respondents' submissions, therefore.

Analysis and determination.

48. Before I delve into considering the issues that have presented themselves as the issues for determination in the instant petition, it is imperative to state that it is now settled law that this Court has jurisdiction to entertain and determine claims of violation of fundamental rights under Articles 22 and 23 or enforcement of the *Constitution* under Article 258 of the *Constitution* as pertains to employment and labour relations matters. In the case of *Geoffrey Mworia v Water Resources Management Authority & 2 others* [2015] eKLR, the Court stated:

> "The issue as stated in the Respondents' submissions is whether the Employment and Labour Relations Court has jurisdiction to entertain and determine claims of breach of fundamental rights under Articles 22 and 23 or enforcement of the *Constitution* under Article 258 of the *Constitution* as pertains to employment and labour relations matters. The Court of Appeal has resolved the issue in the case of *Prof. Daniel W. Mugendi v Kenyatta University & 3 others* Civil Appeal No 6 of 2012. The Court stated thus:
>
> "The question now is whether the Appellant should go back and 'sever' the composite position alleging violation of his fundamental rights and breach of contract of employment.

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

49. Having stated as I have hereinabove on this Court's jurisdiction, I now turn to identify the issues that have presented themselves for determination in the petition herein; they are:

    a. Whether the petition herein meets the threshold of a properly presented petition;

    b. Whether there has been a breach of the Constitutional provisions of Article 201 of the *Constitution*;

    c. What orders can this Court give on the Petitioner's Petition herein, if any?

    d. Who should bear the costs of this suit?

Whether the Petition herein meets the threshold of a properly presented Petition.

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

> " 44. We wish to confirm the principle holding on this question in Anerita Karimi Njeru [supra]. In view of this, we find the petition before the High Court did not meet the threshold established in that case. At the very best, the Respondent should have seen the need to amend the petition to provide sufficient particulars to which the Respondent could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these short-comings, it was not enough for the superior court below to lament that the petition before it was not the epitome of precise, comprehensive, or elegant drafting without requiring remedy by the 1st Respondent."

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

> " As the parties are adversaries, it is left to each one of them to formulate his own case, subject to the basic rules of pleadings ..... for the sake of certainty and finality, each party is bound by its own pleadings and cannot be allowed to raise a different or fresh case without amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as bound by the pleadings by the parties as they are themselves. It is no part of the duty of the Court to enter, upon any inquiry into the case before it, other than to adjudicate, upon specific matters in dispute which the parties themselves have raised by way of pleadings. To do so would be to enter upon the realm of

speculation. Moreover, such event the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or a defence not made or raised by or against a party, is equivalent not to hearing him at all and thus be a denial of justice ... In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for trial by their pleadings and neither party can complain if the agenda is not strictly adhered to. In such an agenda there is no room for an item called "any other business". In the sense that points other than those raised may be raised without notice.

52. In *Korp v Holdsworth* [1876] 3 Ch.D 637 at 639, cited with approval by the Court of Appeal in the *Mumu Matemu case* [*supra*]. Jessel, M. R. said in 1876, thus;

> " The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules ..... was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

53. This Court notes that under the sub-heading of the petition, "Constitutional provisions violated" the petitioner, cites only Articles 19[3], 20[1], 24[1] and 201, of the *Constitution*. However, one sees not any explanations in the petition on how the Constitutional provisions were violated or threatened to be violated by the Respondents, save on Article 201, which the Petitioner has done under the sub-heading, "Manner of infringement." The Court further notes that in his submissions, the Petitioner has submitted on a couple of constitutional provisions and other provisions of the law, provisions which find no citation, and or explanations on how they have been violated or are threatened to be violated in the petition. Drawing support from the principle in the Mumu Matemu case [Supra], this Court shall not make it its business to consider those provisions, other than Article 201, and the manner of infringement alleged.

54. Having stated and found as I have hereinabove, it is clear therefore that save for the Article 201 of the *Constitution*, and the provisions relating to the jurisdiction of this Court, the petitioner's petition, only meets the expected threshold in regard thereto.

Whether there was violation or threatened violation of the Constitutional provisions of Article 201.

55. No doubt, the *Constitution* of Kenya, 2010, brought in a new and liberal way of considering the principle of locus standi, but it must be stated that it did not diminish the legal requirement that he who asserts must prove, in any manner or at all. The petitioner in this matter was under an obligation to demonstrate on a balance of probabilities that the constitutional provisions under Article 201, were violated by the Respondents, to attract the reliefs sought in his petition.

56. Article 201 provides;

> " The following principles shall guide all aspects of public finance in the Republic-
>
> a. There shall be openness and accountability including public participation in financial matters;
>
> b. The public finance system shall promote an equitable society, and in particular-
>
> i. the burden of taxation shall be shared fairly,

ii. revenue raised nationally shall be shared equitably among national and county governments;

iii. expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;

c. the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;

d. public money shall be used in a prudent and responsible way; and

e. financial management shall be clear responsible, and fiscal reporting shall be clear.

57. The Petitioner contended specifically that the intended recruitment of staff the subject matter of this petition was an affront on the provisions of Article 201[a], [d] and [e]. That the intended recruitment is unprioritized, non-cost effective, and unsustainable.

58. The Petitioner alleged that the intended recruitment is notwithstanding that the reported financial short falls and liquidity gaps. Financial short falls and liquidity gaps of an organization such as the Fund are in my view, matters provable by documentary evidence, such as financial reports, audit reports or financial statements of accounts not with due respect, bald assertions. The Petitioner did not place any material before this court to establish the grave assertion that he was making as regards the financial position of the Fund.

59. The Respondent on the other hand, geared to disabuse the Petitioner's allegations concerning its liquidity status, tendered before this court, financial statements and report, which looked at reveal a position that is *contra* that which the Petitioner was alleging. The Petitioner did not discredit the statement and report, in any manner and or sufficiently. The position taken by the Respondents as regards the liquidity soundness of the Fund was not rebutted therefore.

60. It was the contended that recruitment of new staff by the Fund shall cause its yearly wage bill shoot up by approximately Kshs 700,000,000. I have encountered considerable difficulty in discerning how the petitioner arrived at this amount. Besides, the bare assertion that he made on the amount, he didn't proffer any explanations thereon or place forth any documents to support the figure. Consequently, this vital contention by the Petitioner remained unproven.

61. The Petitioner to further demonstrate that the constitutional principle stipulated under Article 201 of the *Constitution* were violated or threatened to be violated, held that the recruitment was unprioritized, unsustainable and non- cost effective. I get the Petitioner as contending that the intended recruitment is unnecessary in the circumstances of the matter and not driven by an assessed need by the fund. To counter this, the Respondents contended that the recruitment followed a needs assessment, and the compelling need to fill in vacant positions that had come into being by reason of natural attrition of its employees. The Respondents contended that for a long period those positions were not filled. Optimum functioning of the Fund, required optimum human capital. The Respondents tendered before this court, a comprehensive list of those employees who had ceased to be its employees in the manner above stated.

62. I note that the Petitioner didn't challenge the list in any manner or at all. I am persuaded that the intended recruitment was with a view to fill in those positions that had become vacant in the manner hereinabove stated.

63. A recruitment that is as a result of a needs assessment or Human resource forecasting by an organization should not be interfered with by a court of law, unless there is in existence a compelling and justifiable reason. The petition herein does not reveal such a reason[s] or justification.

64. By reason of the foregoing premises, I am not persuaded that the Petitioner has proved that the stipulations of Article 201 of the *Constitution* have been violated by the 1st Respondent's decision to undertake the recruitment or that the intended recruitment threatens a violation of the said provision.

Of the Reliefs

65. Having found as I have hereinabove, that the Petitioner has not proved the alleged violation or threat, I am left with no option other than to conclude that he is not entitled to any of those reliefs sought in the petition or at all. The petition lacks merit. It is hereby dismissed. Since it was presented as a public interest litigation, each party shall bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF OCTOBER, 2022

.....

OCHARO KEBIRA

JUDGE

In the presence of:

.....for the Respondent.

.....for the Petitioner.

Order

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

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